Order for Wheat Board to remain silent ruled unconstitutional

Canada's Federal Court has struck down directives that prohibited the Canadian Wheat Board ("Wheat Board") from spending money advocating the continuation of its monopoly on selling western Canadian grains.[1] The Advocacy/Spending Direction ("Direction") dated October 5, 2006 was ruled *ultra vires*, meaning the order was found to violate the right to freedom of expression protected by s. 2(b) of the *Charter of Rights and Freedoms*.[2]

Standing

The first issue Justice Hughes of the Federal Court answered was one of standing, or "whether the Wheat Board is an entity that can seek the protection of the *Charter*."[3] Notably, this case is the first to examine whether or not an entity "with some of the trappings of government" can seek the protection of the *Charter*.[4] Here, the court decided that the Wheat Board has sufficient independence from government for it to seek the protection of the *Charter*. Although the *Canadian Wheat Board Act* provides that the Canadian Wheat Board shall comply with the directions given to it from the government,[5] the *Act* also provides that the Wheat Board is not a Crown corporation or agent of Her Majesty. [6] Additionally, two-thirds of its Directors are elected by farmers; the other third is appointed by government. As Justice Hughes stated:

"…an entity other than that which is not strictly the government or one of its agencies, can be said to be government if certain factors such as degree of control, are evident. It must be therefore equally true that an entity that is not clearly the government or one of its agency that is subject to government control over what would otherwise be independent action, must be in those circumstances, able to invoke the Charter."

Freedom of Expression

The second issue is whether or not the Direction violates the Board's 2(b) *Charter* right to freedom of expression. The Direction, given on recommendation from the Minister of Agriculture, states that the Wheat Board

(a) "…shall not expend funds, directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research; and
(b) "…shall not provide any funds to any other person or entity to enable them to

advocate retention of the monopoly powers of The Canadian Wheat Board.

From this, the court decided that the Direction undoubtedly restricted the expression of "advocacy against government policy respecting the Wheat Board."[7] Also, the Direction could not be saved by section 1 of the *Charter*. Under section 1, government may infringe upon a *Charter* right provided it passes the "*Oakes* test."[8] Under the first part of the *Oakes* test, government action must have a pressing and substantial objective. Here, the court found that the purpose of the legislation was to prevent the expression of advocating its monopoly powers, while the substance of the Direction was purely economic ("shall not expend funds"). As such, there was no pressing or substantial *economic* objective – such as a shortfall of government funds – for the Direction.[9] Since the Direction's true objective was to restrain the Wheat Board from promoting its monopoly, it fails the second part of the *Oakes* test, which requires the rights violation to be rationally connected to the policy's objective.[10] It is not. Thus, the Direction is invalid and of no force or effect.

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[1] *Canadian Wheat Board v. Attorney General (Canada),* 2008 FC 769.
[2] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b).
[3] *Supra* note 1 at para. 53.
[4] *Supra* note 1 at para. 57.
[5] S. C. 1998, c. 17, s. 3.12(2).
[6] *Ibid*. at s. 4(2).
[7] *Supra* note 1 at para. 55.
[8] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[9] *Supra* note 1 at paras. 45-50.
[10] *Supra* note 1 at para. 60.