“Gag Order” Silences Wheat Board, as Supreme Court Declines to Consider the Reach of the Charter

On January 21, 2009, the Supreme Court of Canada chose not to hear the Canadian Wheat Board’s (CWB) appeal of a decision on the constitutionality of a “gag order” from the federal cabinet.[1] Following its normal practice, the Supreme Court did not give reasons for dismissing the application for leave to appeal; its refusal to hear the case, however, does not necessarily mean the Court thinks the lower court rightly decided the case. [2] On October 5, 2006, the federal cabinet approved a “direction order” to the CWB, ordering it not to spend, “directly or indirectly, on advocating the retention of its monopoly powers.”[3] A majority of voting members of the CWB opposed the Conservative government’s campaign promise to end its status as a monopoly marketer of western Canadian wheat, and wished to devote Wheat Board funds to an advertising campaign opposing an end to its monopoly status.[4] The CWB challenged the cabinet directive as an infringement of freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. In 2008, the Federal Court accepted this constitutional argument and declared the “gag order” invalid.[5] The Government of Canada appealed the decision to the Federal Court of Appeal. In June 2009 it won: the court determined that the CWB, a “creature of statute,” lost any authority to spend its funds on advocacy as a result of the cabinet order. As a result, “there is no *Charter* right to protect pursuant to section 2(b).”[6] The Wheat Board decided to appeal the issue to the Supreme Court, saying that “the vital question of control of the CWB” was at stake.[7] Its appeal focused on the reach of the *Charter*: “Are statutory bodies such as the CWB entitled to seek the protection of the *Charter* where they are not part of government and are not performing a government function?”[8] The Federal Court of Appeal was clear that it was not attempting to answer the question of the reach of the *Charter*: “whether a body having some of the trappings of government, such as the Wheat Board, can seek the protection of the *Charter* … needs not be answered in the present appeal.”[9] The Supreme Court opted not to consider the appeal, so a definitive answer to this question will have to wait for another case.

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[1] Janice Tibbets and Mia Rabson, “Top Court ruling a defeat for Canadian Wheat Board” Calgary Herald (22 January 2010). [2] “Judgments in Appeal and Leave Applications” Supreme Court of Canada (21 January 2009). [3] P.C. 2006-1092 (5 October 2006). [4] Chris Younker, “The Canadian Wheat Board and Charter Applicability” *Centre for Constitutional Studies* (8 July 2009). [5] Jonathan Mariniuk, “Order for Wheat Board to remain silent ruled

unconstitutional" *Centre for Constitutional Studies* (7 July 2008). [6] *Canada (AG) v. Canadian Wheat Board*, 2009 FCA 214 at para. 59. [7] "Hot topics: Legal challenges related to CWB advocacy" *Canadian Wheat Board* (undated). [8] "Memorandum of Argument of the Applicant, Canadian Wheat Board" *Canadian Wheat Board v. Attorney General of Canada*, Supreme Court of Canada 33334 (21 September 2009) at para. 22. [9] *Supra* note 7 at para. 60.