The Canadian Wheat Board and Charter Applicability

Last month the Federal Court of Appeal reinstated a gag order placed by the Government of Canada on the Canadian Wheat Board. The gag order had been lifted by a Federal Court judge a year before.[1] On appeal, the court found that there was no *Canadian Charter of Rights and Freedoms* infringement on free speech (section 2(b)), since "the Wheat Board is a creature of statute and as such, it has no powers, rights and duties save those bestowed on it by the Act."[2]

Parliament established the Canadian Wheat Board in 1919. During the Second World War, it was made the "monopoly marketer" of Western Canadian wheat: the only buyer farmers were allowed to sell their wheat to. Today the Board acts as a producer-marketing monopoly on all non-feed wheat and barley produced on the prairies.[3] The Board only controls the sale of wheat in Western Canada, not in Central or Eastern Canada, so it has become an increasingly problematic institution. In 2006 the Conservative Party made a campaign pledge to dismantle the Board, and they have been attempting to do so ever since.[4] Their latest attempt failed when the Federal Court ruled that dismantling the Canadian Wheat Board requires a vote of Parliament, not just a cabinet order.[5] The dispute over freedom of expression highlights a division on the Board, where ten of the fifteen seats are elected by prairie farmers and the rest are appointed by the federal cabinet.[6] The Board is divided over whether it should retain its monopoly over Western wheat and barley. Currently, eight of the ten farmer-elected positions support the monopoly, while the government appointees are all under direction to dissolve the monopoly.[7] Industry representatives were also divided on the ruling. Kevin Bender, president of the Western Canadian Wheat Growers Association said, "[W]e don't feel that the wheat board is justified in promoting the monopoly and basically spending the dollars of farmers who don't want to deal with them, but have no choice."[8]Stewart Wells, president of the National Farmers Union took the opposite view, stating that "because the wheat board is controlled by elected farmers, this is a gag order on farmers in Western Canada and it's an absolute insult."[9] The Federal Court of Appeal's decision means that the Board will not be able to advocate for its existing legal monopoly – a position that the government and some farmers do not agree with – using public funds. Individual members of the Board are free to use their own funds to advocate their personal views.[10] Section 32 of the *Charter* states that the *Charter* applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament," and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." In brief, the *Charter*applies to government and not individuals. In practice, though, the Supreme Court of Canada has made fine distinctions based upon the amount of control the government exercises over an institution. For example, in *Kwantlen Faculty Assn. v. Douglas College*, [11] community colleges were held to be subject to the *Charter*. However, in *Harrison v. University of British Columbia*,[12] universities were not held to be subject to the *Charter* as they

exercise a greater degree of independence from the government. In the Canadian Wheat Board case, the fact that two thirds of Board members are elected by farmers (and only one third appointed by the government) may determine whether the *Charter* applies to the Board and whether the gag order stands, if the case is appealed to the Supreme Court of Canada. The Board will meet later this month to decide if it wishes to pursue an appeal.[13]

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[1] *Canadian Wheat Board v. Canada (AG)*, 2008 FC 769. [2] Lisa Arrowsmith, "Wheat Board directors to consider Supreme Court appeal on gag order" *Macleans* (28 June 2009); *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24. *Canada (AG) v. Canadian Wheat Board*, 2009 FCA 214 at para. 59. [3] "About Us - History" *Canadian Wheat Board*. [4] "Court overturns wheat board ruling" *Winnipeg Free Press* (26 June 2009). [5] *Ibid*.; *Canada (Wheat Board) v. Canada (AG)*, 2007 FC 807. [6] *Supra* note 1 at para. 31. [7] Art Macklin, "Why workers everywhere should support the Canadian Wheat Board" *National Union of Public and General Employees* (11 May 2006); "Strahl fires president of Canadian Wheat Board" *CTV.ca* (19 December 2006). [8] Arrowsmith, *supra* note 2. [9] *Ibid.* [10] 2009 FCA 214 at para. 52. [11] [1990] 3 S.C.R. 451. [12] [1990] 3 S.C.R. 570. [13] Arrowsmith, *supra* note 2.