Date: 20120618

Docket: A-470-11
A-471-11

Citation: 2012 FCA 183

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
MAINVILLE J.A.

Docket: A-470-11

BETWEEN:

ATTORNEY GENERAL OF CANADA, THE MINISTER OF AGRICULTURE AND AGRIFOOD IN HIS CAPACITY AS MINISTER RESPONSIBLE FOR THE CANADIAN WHEAT BOARD

Appellants

and

FRIENDS OF THE CANADIAN WHEAT BOARD, HAROLD BELL, DANIEL GAUTHIER, KEN ESHPETER, TERRY BOEHM, LYLE SIMONSON, LYNN JACOBSON, ROBERT HORNE, WILF HARDER, LAURENCE NICHOLSON, LARRY BOHDANOVICH, KEITH RYAN, ANDY BAKER, NORBERT VAN DEYNZE, WILLIAM ACHESON, LUC LABOSSIERE, WILLIAM NICHOLSON, RENE SAQUET, and THE CANADIAN WHEAT BOARD

Respondents

and

COUNCIL OF CANADIANS, ETC GROUP (ACTION GROUP ON EROSION, TECHNOLOGY AND CONCENTRATION), PUBLIC SERVICE ALLIANCE OF CANADA and FOOD SECURE CANADA

Interveners

Docket: A-471-11

BETWEEN:

MINISTER OF AGRICULTURE AND AGRI-FOOD IN HIS CAPACITY AS MINISTER RESPONSIBLE FOR THE CANADIAN WHEAT BOARD

Appellant

and

THE CANADIAN WHEAT BOARD
ALLEN OBERG, ROD FLAMAN, CAM GOFF, KYLE KORNEYCHUK, JOHN SANDBORN, BILL TOEWS, STEWART WELLS and BILL WOODS

Respondents

and

COUNCIL OF CANADIANS, ETC GROUP (ACTION GROUP ON EROSION, TECHNOLOGY AND CONCENTRATION), PUBLIC SERVICE ALLIANCE OF CANADA and FOOD SECURE CANADA

Interveners

Heard at Ottawa, Ontario, on May 23, 2012.

Judgment delivered at Ottawa, Ontario, on June 18, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] These appeals concern the orders of Campbell J. of the Federal Court ("Federal Court judge") dated December 7, 2011 declaring, for the reasons cited as 2011 FC 1432 ("Reasons"), that the Minister of Agriculture and Agri-Food ("Minister") failed to comply with his statutory duty pursuant to section 47.1 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24 ("*CWB Act*"), to consult with the Canadian Wheat Board ("CWB") and to obtain the consent of wheat and barley producers by means of a vote prior to introducing Bill C-18 in Parliament, which resulted in the adoption of the *Marketing Freedom for Grain Farmers Act*, S.C. 2011, c. 25.

[2] These appeals were consolidated and expedited by orders of the Chief Justice dated respectively February 14 and 17, 2012. The CWB did not participate in these appeals. The interveners were granted leave to intervene on two issues by order of this Court dated April 16, 2012. Motions to quash or, alternatively, to stay these appeals were dismissed from the bench prior to the hearing of the appeals on May 23, 2012. These reasons for judgment concern both appeals, and a copy of thereof shall be placed in each Court file as reasons therein.

[3] These appeals form part of a series of legal proceedings challenging the *Marketing Freedom for Grain Farmers Act*.

[4] The first proceedings were initiated by the Friends of the Canadian Wheat Board and a number of individual wheat and barley producers who made an application for judicial review in the Federal Court in June 2011 under Federal Court file T-1057-11. The CWB and some of its directors also made a separate application for judicial review in October 2011 under Federal Court file T-1735-11. Although the drafting was slightly different in each application, the judicial declarations sought by all applicants were essentially the same:

> a. a declaration that the Minister failed to comply with his statutory duty pursuant to section 47.1 of the *CWB Act* to consult with the CWB and to obtain the consent of wheat and barley producers by means of a vote held prior to causing to be introduced into Parliament Bill C-18; and
>
> b. a declaration that the Minister acted in breach of the legitimate expectations of the CWB and of wheat and barley producers, and contrary to the duty of procedural fairness, in causing to be introduced into Parliament this Bill

> without first consulting with the CWB and holding a vote among wheat and barley producers.

These judicial review applications were heard and decided together by the Federal Court judge, and the orders issued as a result are now the object of this appeal.

[5] Relying on the declarations of the Federal Court judge issued following these two judicial review applications, some former directors of the CWB filed a statement of claim in the Court of Queen's Bench of Manitoba seeking declarations that the *Marketing Freedom for Grain Farmers Act* is invalid and infringes the rule of law, the *Constitution Act, 1867*, and the *Constitution Act, 1982* on the ground that this new legislation results from illegal actions of the Minister.

[6] An interlocutory order was also sought within the framework of the Manitoba proceedings for the purpose of staying or suspending *nunc pro tunc* the operation and implementation of the *Marketing Freedom for Grain Farmers Act* as at the date and time of Royal Assent, pending a decision as to the validity of that legislation. Perlmutter J. refused to grant such an order for reasons dated February 24, 2012 and cited as *Oberg et al. v. Canada (Attorney General)*, 2012 MBQB 64. An appeal from that judgment to the Court of Appeal of Manitoba is pending.

[7] Also relying on the declarations of the Federal Court judge, in February 2012 a proposed class proceeding on behalf of grain producers who sold grain through the CWB was filed with the Federal Court (T-356-12) seeking (a) an order staying or suspending *nunc pro tunc* the operation and implementation of the *Marketing Freedom for Grain Farmers Act* as of the date and time of

Royal Assent; (b) a declaration that the Minister's actions in failing to consult and hold a vote of grain producers prior to introducing that legislation in Parliament infringed paragraphs 2(*b*) (freedom of thought, belief, opinion and expression) and 2(*d*) (freedom of association) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"); and (c) substantial damages against the federal Crown. These proceedings are also pending.

[8] It is thus in these highly litigious circumstances that this appeal must be decided.

The context of these proceedings

[9] The marketing of western Canadian wheat grain has had a long and tumultuous history characterized by deep tensions between proponents of open markets, of voluntary collective marketing pools, and of the CWB acting as compulsory marketing agency. For a detailed account of that history, reference may be made to F. Wilson, *A Century of Canadian Grain, Government Policy to 1951* (Western Producer Prairie Books, Saskatoon, 1978); Vernon C. Fowke, *The National Policy and the Wheat Economy* (University of Toronto Press, Toronto, 1957); Vernon C. Fowke, *Canadian Agricultural Policy, The Historical Pattern* (University of Toronto Press, 1946, reprinted 1978).

[10] The CWB was established by Parliament in 1935 by the *Act to provide for the Constitution and Powers of the Canadian Wheat Board*, 25-26 George V, c. 53. The powers and mandate of the

CWB have considerably evolved since that time through numerous legislative amendments, regulations and Orders in Council.

[11] The CWB's operations today concern principally wheat and barley produced in a "designated area" defined under subsection 2(1) of the *CWB Act* as comprising Manitoba, Saskatchewan and Alberta and that part of the Province of British Columbia known as the Peace River District.

[12] For most of its history, the operations of the CWB have been governed by four fundamental principles:

a. grain marketing monopoly: subject to certain regulatory exceptions, such as animal feed grain, Part IV of the *CWB Act* prohibits all persons other than the CWB from engaging in the sale of wheat and other designated grains that are destined for export from Canada or for consumption in Canada;

b. compulsory price pooling: grain farmers deliver their grain crop to the Board through "pools" contemplated by Part III of the *CWB Act*; under the pooling system, each producer receives an interim payment (based on estimated market returns) for the same grain delivered regardless of the time of delivery, and is entitled to receive a final payment for this grain based on the actual prices obtained throughout the pooling year by the CWB, net of deductions for related expenses;

c. federal government financial guarantees: including (i) guarantees against CWB losses from operations under Part III of the *CWB Act* in relation to any pool period, and from other operations during a crop year (subsection 7(3) of the *CWB Act*); and (ii) loan guarantees (subsection 19(5) of the *CWB Act*); and

d. federal government control: since it was first established, and until 1998, the CWB was under the control of commissioners appointed by the Governor in

> Council; it acted as an agency of the Crown and was bound by the directions given to it by the federal cabinet.

[13] The combined effect of the CWB's grain marketing monopoly and of the compulsory price pooling system is referred to, colloquially and in these reasons, as the "Single Desk".

[14] In 1998, Parliament devolved partial control of the CWB to grain producers pursuant to the *Act to amend the Canadian Wheat Board Act and to make consequential amendments to other Acts*, S. C. 1998, c. 17 ("*1998 Amendments*"). The board of directors of the CWB was then expanded to include four directors and a president appointed by the Governor in Council, and ten other directors elected by producers on the basis of geographical representation: sections 3.01, 3.02, 3.06 and 3.07 of the *CWB Act* as incorporated into that act by section 3 of the *1998 Amendments*. The CWB then ceased to be an agent of the Crown and was declared not to be a Crown corporation: subsection 4(2) of the *CWB Act* as replaced by section 4 of the *1998 Amendments*. The CWB remained subject to the directions given to it by the federal cabinet, but the directors were not accountable for any consequences arising from the implementation of such directions: section 18 of the *CWB Act* as amended by section 10 of the *1998 Amendments*.

[15] Subsection 24(1) and section 25 of the *1998 Amendments* also replaced the prior provisions of the *CWB Act* concerning the exclusion of certain kinds and grades of wheat and barley from the grain marketing monopoly. They were replaced by a new provision, section 47.1 of the *CWB Act*, requiring consultations with the CWB and a favourable vote by producers before any bill proposing

such an exclusion can be introduced in Parliament. That provision is at the heart of the present appeal, and is fully reviewed below.

[16] The controversy among western Canadian grain producers over the mandate and powers of the CWB has intensified in the past few years. Many producers have been seeking an option to sell their wheat and barley grains on the open market. This change has been strongly opposed by the proponents of the Single Desk, including many of the directors of the CWB and several grain producers. The situation was such that in 2006 the Governor in Council directed the CWB not to expend funds on advocating the retention of its monopoly powers: SOR/2006-247 (considered by this Court in *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2009 FCA 214, [2010] 3 F.C.R. 374).

[17] The current federal government also favours an open market for grains. Shortly after the last general elections for Parliament held on May 2, 2011, the Minister publicly announced that the re-elected government would move ahead swiftly to allow western grain producers to market their grain freely. In the Speech from the Throne to Parliament on June 3, 2011, the government formally announced that legislation would be introduced during the Parliamentary session in order "to ensure that western farmers have the freedom to sell wheat and barley on the open market." (Appeal Book, at p. 516).

[18] Many grain producers, including some directors of the CWB, opposed the planned legislation and publicly made known their disagreement. Although financial and economic

considerations are at the heart of this disagreement, the proponents of the Single Desk quickly focussed on the issue of consultation and consent. On the basis of their reading of section 47.1 of the *CWB Act*, they held that the Minister could not submit the proposed legislation to Parliament without the prior consent of grain producers obtained through a vote. The Minister held that he was not legally bound to hold such a vote and that he would not subject the contemplated legislation to such a plebiscite.

[19] A producer vote was nevertheless organized during the summer of 2011 under the auspices of the CWB, which seems to have then been under the control of directors opposed to the new legislation. The methods used for the organization of the plebiscite were criticised, and the legitimacy and fairness of the vote were questioned by those supporting the government initiative. The results of the vote were announced on September 12, 2011. Participation in the vote was 56%, and, of those who voted, 62% of wheat producers and 51% of barley producers opted to maintain the Single Desk, while 38% of wheat producers and 49% of barley producers opted for an open market system. The Minister declined to recognize the plebiscite as binding.

[20] On October 18, 2011, the Minister introduced into Parliament Bill C-18, which resulted in the eventual adoption of the *Marketing Freedom for Grain Farmers Act*. The Bill was debated in the House of Commons and in the Senate, and was eventually adopted by both chambers. It received Royal Assent on December 15, 2011.

The *Marketing Freedom for Grain Farmers Act*

[21] The *Marketing Freedom for Grain Farmers Act* substantially modifies the legislative environment for the marketing of western wheat and barley, but it does so in three distinct phases.

[22] During the first phase, which runs from the date of Royal Assent (October 18, 2011) to August 1, 2012, the Single Desk and most of the provisions of the *CWB Act* are maintained, subject to the following changes:

a. producers are able to forward contract wheat and barley sales for delivery after August 1, 2012: section 11 of the *Marketing Freedom for Grain Farmers Act* adding subsection 42(2) to the *CWB Act*; and

b. the control of the CWB is vested in a new board consisting of five directors appointed by the Governor in Council: sections 2 to 6, 10 and 12 of the *Marketing Freedom for Grain Farmers Act*.

[23] The second phase will comprise the five-year period from August 1, 2012 to August 1, 2017. On August 1, 2012, the *CWB Act* will be repealed: sections 39 and 40 of the *Marketing Freedom for Grain Farmers Act*. In its stead, the *Canadian Wheat Board (Interim Operations) Act* will come into force: sections 14 and 40 of the *Marketing Freedom for Grain Farmers Act* and SI/2011-120. The *Canadian Wheat Board (Interim Operations) Act* is temporary legislation which will be in full force and effect for a period of at most five years: sections 42, 45, 46, 55, 56 and 64 of the *Marketing Freedom for Grain Farmers Act*.

[24] During the five years of the second phase, the CWB will be continued under the governance of five directors appointed by the Governor in Council, thus returning the CWB to full government control: sections 8, 9, 13 and 25 of the *Canadian Wheat Board (Interim Operations) Act*. The CWB's operations will also be substantially modified. It will continue to benefit from government guarantees during the interim period: subsections 19(3), 26(5) and 26(6) of the *Canadian Wheat Board (Interim Operations) Act*; and it will still use price pooling, although these pools will no longer be compulsory for producers: sections 28, 29 and 33 of the *Canadian Wheat Board (Interim Operations) Act*. Moreover, the CWB's export and interprovincial trade monopoly will no longer exist. Consequently, wheat and barley producers will be able to sell and deliver their grains to any domestic or export buyer under a free-market principle. As a result, although the CWB will continue, it will be operating in a market environment and as a voluntary pooling marketing agency for producers who wish to continue marketing their products through it.

[25] The third phase is the period after August 1, 2017. By that date, the CWB will either be continued as a privatized corporation or dissolved. The CWB will have to submit to the Minister before August 1, 2016 an application for continuance under either of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, the *Canada Cooperatives Act*, S.C. 1998, c. 1, or the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. This application will presumably be accompanied by a new commercialization and marketing plan for its future operations. If the application is approved by the Minister, the CWB may be continued under one of these acts as a privatized entity. Failing such approval and continuation, the CWB shall be wound-up and dissolved: sections 42 and 45 to 55 of the *Marketing Freedom for Grain Farmers Act.*

The fundamental issue

[26] The fundamental issue raised by these proceedings is whether the Minister was legally bound by section 47.1 of the *CWB Act* to consult with the CWB and to obtain the favourable consent of wheat and barley grain producers through a vote prior to introducing in Parliament Bill C-18, the *Marketing Freedom for Grain Farmers Act*. There is no dispute that correctness is the standard of review upon which this issue must be decided.

[27] Section 47.1 of the *CWB Act* reads as follows:

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless	**47.1** Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :
(*a*) the Minister has consulted with the board about the exclusion or extension; and	*a*) il a consulté le conseil au sujet de la mesure;
(*b*) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.	*b*) les producteurs de ce grain ont voté — suivant les modalités fixées par le ministre — en faveur de la mesure.

[28] The appellants submit that section 47.1 applies only to situations where specified grains are to be included or excluded from Parts III or IV, but does not apply to legislative initiatives repealing the Single Desk or the *CWB Act* in its entirety, as effectuated through the *Marketing Freedom for Grain Farmers Act*. The appellants add that, in any event, section 47.1 is not a proper "manner and form" provision which imposes procedural requirements on Parliament's ability to adopt legislation, and it is thus unenforceable through the courts because of the doctrine of parliamentary sovereignty as reflected in subsection 2(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[29] On the other hand, the respondents, supported by the interveners, submit that this provision – introduced into the *CWB Act* pursuant to the 1998 legislative reforms – applies to all legislation which would result directly or indirectly in the exclusion of wheat or barley from the Single Desk, including legislative initiatives, such as the *Marketing Freedom for Grain Farmers Act*, which end the Single Desk or which repeal in its entirety the *CWB Act*.

[30] I note that, as an alternative argument, the respondents also submitted before the Federal Court that the Minister was bound by the doctrine of legitimate expectations to consult with the CWB and grain producers prior to introducing the *Marketing Freedom for Grain Farmers Act*. The Federal Court judge did not grant any relief on this basis, and the respondents have not argued this point in this appeal. Although the appellants have asked this Court to address the issue of legitimate expectations, the respondents advised us through their counsel during the oral hearing of this appeal that they no longer advance any arguments based on legitimate expectations. I have serious reservations concerning the applicability of the doctrine of legitimate expectations to Parliamentary

processes in view of the comments of Sopinka J. speaking for the Supreme Court of Canada in *Reference Re Canada Assistance Plan (B.C)*, [1991] 2 S.C.R. 525 at pp. 558 to 560. However, since this issue is not being pursued by the respondents, it need not be considered.

The reasons of the Federal Court judge

[31] The Federal Court judge declined to consider the Minister's argument that section 47.1 of the *CWB Act* did not meet the requirements of a "manner and form" provision. He was of the view that he could not decide that issue in the absence of a notice of a constitutional question challenging the constitutional validity, applicability or operability of section 47.1. Hence, he decided the judicial review applications before him on the assumption that section 47.1 was a valid "manner and form" provision: Reasons at paras. 9 and 10.

[32] The Federal Court judge seems to have implicitly recognized that, read literally, the language of section 47.1 simply contemplates situations involving the addition or subtraction of certain kinds or grades of grains from certain aspects of the CWB marketing regime. However, relying "upon a contextual historical approach with respect to the unique democratic nature of the CWB, and its importance"(Reasons at para. 27), and by "giv[ing] weight to the Council's argument that s. 47.1 applies to changing the structure of the CWB because the democratic structure is important to Canada's international trade obligations under NAFTA" (Reasons at para. 28), the Federal Court judge concluded as follows:

> [30] By construing the liberal interpretation of the [*Canadian Wheat Board*] *Act* which best ensures the attainment of its objects, I find that the *Act* was intended to require the Minister to consult and gain consent where an addition or subtraction of particular grains or types of grain from the marketing regime is contemplated, and also in respect of a change to the democratic structure of the CWB. As the Applicants argue, it is unreasonable to interpret the *Act* to conclude that while the Minister must consult and gain consent when extracting or extending a grain, she or he is not required to consult or gain consent when dismantling the CWB; the point is made as follows:
>
> > … Under the Minister's interpretation of section 47.1, farmers would be denied a vote "when it is most needed", namely, in circumstances where the CWB's exclusive marketing mandate is to be eliminated. That interpretation is not only inconsistent with the principle that the words of a statute must be placed in context, but is contrary to common sense.
> >
> > (Applicants' Memorandum of Fact and Law in T-1735-11, para. 52)
>
> [Emphasis added.]
>
> [31] Section 39 of Bill C-18 proposes to replace the whole marketing scheme of wheat in Canada by repealing the *Act* after a transition period. I find that it was Parliament's intention in introducing s. 47.1 to stop this event from occurring without the required consultation and consent.
>
> [Emphasis in original]

Analysis

[33] On the basis of a plain reading of the *CWB Act*, Perlmutter J. of the Court of Queen's Bench of Manitoba held that section 47.1 only refers to the addition or subtraction of particular grains from Parts III or IV of that act, and thus does not require the Minister to consult with the CWB or to hold a vote among grain producers prior to introducing in Parliament legislation which fundamentally changes the governance structure or mandate of the CWB, or which repeals the *CWB Act* as a whole: *Oberg et al. v. Canada (Attorney General)*, above at para. 15. The issue before this Court is

whether we should go beyond this plain reading of the provision and accept the expanded meaning given to it by the Federal Court judge so as to ensure to wheat and barley producers control over all fundamental legislative changes to the *CWB Act*.

[34] The Federal Court judge, adopting for this purpose the arguments of the respondents, was of the opinion that such an expansive meaning should be given to section 47.1 in view of (a) its legislative history; (b) the comments of the previous Minister in Parliament when the *1998 Amendments* were being considered; (c) the need to promote the democratic control of grain producers over the CWB; and (d) the importance of the CWB's democratic structure to Canada's international trade obligations under NAFTA. The interveners add in this appeal a fifth consideration, namely (e) the promotion of the ability of grain producers to act collectively in the marketing of grain taking into account their freedom of association guaranteed by paragraph 2(*d*) of the *Charter*.

[35] After carefully considering the legislative history and the context in which section 47.1 was adopted, I am of the view that none of the arguments advanced by the respondents or the interveners can sustain an interpretation that would preclude the Minister from introducing in Parliament legislation which would fundamentally modify the CWB's mandate or which would lead to the repeal of the *CWB Act*. I reach this conclusion by applying the modern approach to statutory interpretation, and after considering and discarding the arguments advanced in favour of an expansive interpretation of section 47.1.

The modern approach to statutory interpretation

[36] The modern approach to statutory interpretation has been expressed as follows by Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter *"Construction of Statutes"*); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[37] McLachlin C.J. and Major J. reiterated this approach in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the

> interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[38] Thus, under the modern contextual approach to statutory interpretation, the grammatical and ordinary sense of a provision is not necessarily determinative of its meaning. Regard must be had not only to the ordinary and natural meaning of the words, but also to the context in which they are used and the purpose of the provision considered as a whole within the legislative scheme in which it is found: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 27. The most significant element of this analysis is the determination of legislative intent: *R. v. Monney*, [1999] 1 S.C.R. 652 at para. 26.

[39] The concept of legislative intent was explained as follows by this Court in *Felipa v. Canada (Citizenship and Immigration)*, 2011 FCA 272, [2012] 1 F.C.R. 3 at para. 31, citing approvingly for this purpose Lord Nicholls in *Regina v. Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd.*, [2001] 2 A.C. 349 (H.L.) at page 396:

> Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the

> subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G* [1975] AC 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."
>
> [Emphasis added.]

[40] In ascertaining legislative intent, a court must consider the total context of the provision to be interpreted, no matter how plain the provision may seem when it is initially read in isolation. However, it must be kept in mind that a line exists between judicial interpretation and legislative drafting, and that this line is not to be crossed: *Felipa v. Canada (Citizenship and Immigration)*, above at para. 32, referring to *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 at para. 51.

Legislative History

[41] The respondents propose an analysis of the legislative history of section 47.1 of the *CWB Act* which starts and ends with the legislative reform of 1998. However, a review of the provisions which section 47.1 replaced sheds considerable light on the scope of this section.

[42] The *Act to amend The Canadian Wheat Board Act, 1935*, 11 Geo. VI, c. 15, s. 5, assented to on May 14, 1947 (the "*1947 Act*"), incorporated Part IV into the *CWB Act* concerning the

"Regulation of Interprovincial and Export Trade in Wheat". Under this Part IV, Parliament entrusted the CWB with an exclusive marketing monopoly over international and interprovincial trade in wheat. In 1994, the CWB monopoly over international trade in wheat was reduced to a monopoly over wheat exports from Canada in order to comply with and implement the Uruguay Round of Multinational Trade Negotiations concluded under the auspices of the World Trade Organization: *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, s. 48.

[43] Since its inception, this marketing monopoly has, however, been subject to regulatory exclusions of designated kinds and grades of wheat, or of wheat produced in certain parts of Canada. Such regulatory exclusions were first set out in paragraph 28(*b*) of *CWB Act* introduced into the act by the *1947 Act* (and slightly amended in 1950 by 14 Geo. VI, c. 31, s. 6). This regulatory authority to exclude designated kinds and grades of wheat was reiterated in every version of the *CWB Act* until the *1998 Amendments*. The last reiteration of the regulatory authority was set out in paragraph 46(*b*) of the *CWB Act* as it read just prior to the *1998 Amendments:*

46. The Governor in Council may make regulations	**46.** Le gouverneur en conseil peut, par règlement :
…	[…]
(*b*) to exclude any kind of wheat, or any grade thereof, or wheat produced in any area of Canada, from the provisions of this Part, either in whole or in part, or generally, or for any period;	*b*) soustraire tout type ou grade de blé, ou le blé produit dans une région donnée du Canada, à l'application de la présente partie, totalement ou partiellement, de façon générale, ou pour une période déterminée;

Thus, specific kinds or grades of wheat, or wheat produced in a particular area of Canada, could be excluded from the CWB's marketing monopoly for specific periods or generally.

[44] Likewise, in 1948, amendments to the *CWB Act* came into force for the purpose of adding a new part (now Part V) empowering the Governor in Council to extend the application of Part III (concerning the compulsory price pooling system) or of Part IV (concerning the CWB marketing monopoly over international and interprovincial trade) to oats and barley: *An Act to amend The Canadian Wheat Board Act, 1935*, 11-12 Geo. VI, c. 4, s. 5, assented to on March 24, 1948. These provisions have remained essentially the same throughout the years, and their most recent reiteration is currently set out in section 47 of the *CWB Act*, which reads as follows:

47. (1) The Governor in Council may, by regulation, extend the application of Part III or of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.	**47.** (1) Le gouverneur en conseil peut, par règlement, étendre l'application de la partie III ou de la partie IV, ou des deux, à l'avoine et à l'orge, ou à l'un des deux.
(2) Where the Governor in Council has extended the application of any Part under subsection (1), the provisions of that Part shall be deemed to be re-enacted in this Part, subject to the following:	(2) En cas d'application du paragraphe (1), les dispositions de la partie en cause sont réputées édictées de nouveau dans la présente partie, sous réserve de ce qui suit :
(*a*) the word "oats" or "barley", as the case may be, shall be substituted for the word "wheat";	*a*) le terme « avoine » ou « orge », selon le cas, est substitué au terme « blé »;
(*b*) the expression "oat products" or "barley products", as the case may be, shall be substituted for the expression "wheat products"; and	*b*) le terme « produits de l'avoine » ou « produits de l'orge », selon le cas, est substitué au terme « produits du blé »;

(*c*) [Repealed, 1995, c. 31, s. 4]	*c*) [Abrogé, 1995, ch. 31, art. 4]
(*d*) subsection 40(2) is not applicable.	*d*) le paragraphe 40(2) ne s'applique pas.
(3) An extension of the application of Part III shall come into force only at the beginning of a crop year.	(3) L'extension du champ d'application de la partie III ne peut entrer en vigueur qu'au début d'une campagne agricole.
(4) For the purposes of this section, "product", in relation to any grain referred to in subsection (1), means any substance produced by processing or manufacturing that grain, alone or together with any other material or substance, designated by the Governor in Council by regulation as a product of that grain for the purposes of this Part.	(4) Pour l'application du présent article, « produit de l'avoine » ou « produit de l'orge », selon le cas, s'entend de la substance obtenue par la transformation ou la préparation industrielle du grain en cause, seul ou mélangé à d'autres substances et que le gouverneur en conseil désigne, par règlement, comme produit de ce grain pour l'application de la présente partie.

[45] The powers of the Governor in Council under this section were found by our Court to include the authority to exclude by regulation the application of Parts III or IV of the *CWB Act* to oats and barley: *Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 67 F.T.R. 98, 107 D.L.R. (4th) 190, at paras. 35-36.

[46] The *1998 Amendments* provided for a change to section 47(1) by restricting its application to barley, and by adding a new subsection 47(5) making the adoption of the regulation contemplated by subsection 47(1) subject to prior consultation with the CWB and the favourable vote of barley

producers: section 25 of the *1998 Amendments*. However, these modifications were never proclaimed into force.

[47] The *1998 Amendments* also provided for other changes which were eventually proclaimed in force, notably: (a) the repeal of the regulatory authority under paragraph 46(*b*) of the *CWB Act* (reproduced above) to exclude a kind or grade of wheat from the CWB marketing monopoly, and (b) the introduction of section 47.1 into the *CWB Act*: subsection 24(1) and section 25 of the *1998 Amendments*. It is useful to reproduce once again section 47.1:

47.1 The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless	**47.1** Il ne peut être déposé au Parlement, à l'initiative du ministre, aucun projet de loi ayant pour effet, soit de soustraire quelque type, catégorie ou grade de blé ou d'orge, ou le blé ou l'orge produit dans telle région du Canada, à l'application de la partie IV, que ce soit totalement ou partiellement, de façon générale ou pour une période déterminée, soit d'étendre l'application des parties III et IV, ou de l'une d'elles, à un autre grain, à moins que les conditions suivantes soient réunies :
(*a*) the Minister has consulted with the board about the exclusion or extension; and	*a*) il a consulté le conseil au sujet de la mesure;
(*b*) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.	*b*) les producteurs de ce grain ont voté — suivant les modalités fixées par le ministre — en faveur de la mesure.

[48] The combined effects of sections 47 and 47.1 of *the CWB* Act are thus the following:

> (a) the Governor in Council retains unfettered regulatory discretion to extend to oats and barley the compulsory price pooling system (Part III) or the CWB marketing monopoly over interprovincial and export trade (Part IV): *Canadian Wheat Board v. Canada (Attorney General)*, 2007 FC 807, [2008] 2 F.C.R. 87 at paras. 45 and 50 (aff'd 2008 FCA 76);
>
> (b) the prior authority of the Governor in Council under paragraph 46(*b*) to exclude any kind or grade of wheat or wheat produced in any area of Canada from the CWB marketing monopoly over interprovincial and export trade under Part IV has been replaced by a requirement to proceed by legislation; in addition, the Minister may not cause any such legislation to be introduced unless he has consulted with the CWB and obtained a favourable vote from the producers;
>
> (c) the prior authority of the Governor in Council to exclude oats and barley from Parts III or IV recognized in *Saskatchewan Wheat Pool v. Canada (Attorney General)*, above has been replaced by a requirement to proceed by legislation, and the Minister may not cause any such legislation to be introduced unless he has consulted the CWB and obtained a favourable vote from oats or barley producers: *Canadian Wheat Board v. Canada (Attorney General)*, above at paras. 47, 51 and 52;
>
> (d) the extension of Part III or Part IV to other grains requires legislation, and the Minister may not cause any such legislation to be introduced unless he has consulted with the CWB and obtained a favourable vote from the producers.

[49] The purpose and scope of section 47.1 become apparent when considering it in the context of the provisions it replaces or modifies. Thus, section 47.1 largely reverts back to Parliament the prior limited regulatory authority of the Governor in Council concerning exclusions or inclusions of certain kinds or grades of grains from Part III or Part IV of the *CWB Act*. There is however nothing in section 47.1 or in the legislative history which suggests that Parliament has fettered the Minister's

authority to introduce and recommend to Parliament legislation to repeal the substantive provisions of the *CWB Act* or the act itself.

[50] I am, moreover, comforted in this view by subsection 42(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21 , which reads as follows:

42. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.	**42.** (1) Il est entendu que le Parlement peut toujours abroger ou modifier toute loi et annuler ou modifier tous pouvoirs, droits ou avantages attribués par cette loi.

Statements of the previous Minister in Parliament

[51] It is now well settled that Parliamentary debates and similar material may be considered in interpreting legislation as long as these are relevant and reliable and are not assigned undue weight: *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at p. 484, *Rizzo & Rizzo Shoes Ltd. (Re)*, above at para. 35; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at para. 17. Where this material is itself ambiguous, it should however be disregarded: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, 2006 SCC 20 at para. 39; *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, [2011] 4 F.C.R. 22 at para. 8. In any event, such material must be reviewed cautiously since "[w]hile *Hansard* may offer relevant evidence in some cases, comments of MPs or even Ministers may or may not reflect the parliamentary intention to be deduced from the words

used in the legislation": *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, [2007] 3 S.C.R. 217, 2007 SCC 42, at para. 12.

[52] At paragraphs 21 and 22 of his Reasons, the Federal Court judge used the extrinsic evidence submitted by the respondents as an aid in interpreting as he did section 47.1 of the *CWB Act*. The Federal Court judge notably used general statements made by the former Minister to the House of Commons during the debates surrounding the adoption of the *1998 Amendments* and concerning the "fundamental principle of democratic producer control", and the "authority [of farmers] to shape their marketing agency as they see fit": Reasons at para. 21. He also used a 1996 Policy Statement setting out the following (Reasons at para. 22):

> In future the Wheat Board's mandate may be adjusted, conditional upon three things: first of all, a clear recommendation to that effect by the directors of the Canadian Wheat Board; secondly, if a quality control issue is involved, the unequivocal concurrence of the Canadian Grain Commission that a change can be made safely without damaging Canada's reputation for quality and consistency; and third, if the proposed change is significant or fundamental, then an affirmative vote among farmers would need to be a prerequisite.
>
> [Emphasis added by the Federal Court judge.]

[53] Since the fundamental purpose of the *1998 Amendments* was to devolve to grain producers a limited measure of control over the board of directors of the CWB, it is not surprising that the former Minister would be promoting these amendments as favouring democratic producer control. However, this does not necessarily mean that the producers would be entitled to a veto power over all future legislative changes to the *CWB Act*.

[54] Indeed, the above quoted Policy Statement referring to a vote by producer when effecting a significant or fundamental change must be understood in the full context of the proposed legislation. Thus, in a government press release dated September 25, 1997 announcing the proposed changes, the following explanation is provided:

> The new law will put farmers in the driver's seat when it comes to any future changes in what the CWB can market.
>
> If farmers want to remove some type of grain from the CWB's current single-desk system, that can be done – subject to three conditions:
>
> (1) The directors must recommend it;
> (2) The Canadian Grain Commission must approve an "identity preservation" system to protect quality standards; and
> (3) If the proposed "exclusion" is significant, there must be a vote among farmers to approve it.
>
> (Appeal Book at p. 349) [Emphasis added.]

[55] Moreover, when seeking third reading passage of the Bill leading to the *1998 Amendments* in the House of Commons on February 17, 1998, the former Minister explained that the changes which would be subject to a vote of producers only concerned exclusions or inclusions of certain kinds or grades of grain from the CWB's marketing mandate:

> Question nine is about exclusions. Can farmers get a crop removed from the CWB's jurisdiction? The answer under Bill C-4 is yes.
>
> The new law will contain an exclusion clause to allow any kind, type, class or grade of wheat or barley to be removed in whole or in part from the CWB'S jurisdiction. To trigger it, the directors would first have to vote in favour of the idea. Second, for quality control reasons, a system would need to be in place to prevent the mixing of the excluded grain with

> CWB grain. Third, if the directors considered any proposes exclusion to be significant, a democratic producer vote would be needed to approve it.
>
> Question ten is about inclusions. Can farmers get a crop added to the CWB's jurisdiction if that is their will? The answer again under Bill C-4 is yes.
>
> As a matter of fairness and balance, just as there is an exclusion clause, there will also be an inclusion clause in the new law. The deciding factor in relation to both clauses will be the majority preference of the actual producers of the grain in question as expressed through a democratic vote of those producers. They will be in control.
>
> The existence of an inclusion clause does not in itself change the CWB's mandate. It merely sets out a clear procedure for doing so if and only if producers themselves, not politicians or lobbyists, believe such a change is in their best interests. The inclusion clause would be available only for crops that currently come within the definition of grain in the existing CWB act.
>
> (Appeal Book at p. 394) [Emphasis added.]

[56] In explaining on May 5, 1998 to the Senate Standing Committee on Agriculture and Forestry why he was proposing amendments to the draft legislation in order to remove and simplify most of its provisions relating to inclusions and exclusions, the former Minister provided the historical and contextual background to the suggested changes. Given the pertinence of this explanation for the purposes of this appeal, it is useful to quote large extracts of the former Minister's statement:

> Mr. Goodale: Senator, the clauses that relate to inclusion and exclusion could most certainly be removed. That was the essence of the proposal that I made at the end of the House of Commons debate.
>
> I will back up for a moment to explain why, as a policy matter, a procedure for inclusion or exclusion was included in the bill in the first place.
>
> Representations were made before the House of Commons Standing Committee on Agriculture and Agri-Food when it was considering the predecessor piece of legislation, Bill C-72, in the last Parliament. A number of witnesses across Western Canada argued before

that committee that if there was to be a procedure in the law for an exclusion process, then there should also be, as a matter of fairness and balance, a procedure in the law for an inclusion process. One of the rationales was simply to maintain that balance.

The other rationale was to fill an absolute void in the Canadian Wheat Board legislation as it stands at the present time. It is unclear in the present law how one goes about amending the jurisdiction of the Canadian Wheat Board.

If honourable senators think back to fairly recent experience, Mr. Mayer, when he was Minister of Agriculture, amended the jurisdiction of the Canadian Wheat Board to remove oats, and did so successfully by means of an Order in Council.

On another occasion, he attempted to adjust the mandate of the Canadian Wheat Board, in part in relation to barley, using essentially the same technique, an Order in Council. That was unsuccessful. It was challenged in the courts and struck down.

An Order in Council approach worked on one occasion but not on another. The courts drew some fine distinctions about what was and was not appropriate.

Earlier in history, there was a discussion at one time 20 years ago about whether or not rapeseed, as it was then called, should be brought under the jurisdiction of the Canadian Wheat Board. The minister of the day did not feel comfortable in dealing with that issue until the producers voted on the subject. Nothing in the law required that. However, he took the view that first and foremost, farmers needed to express themselves one way or another. As you recall, farmers voted down the idea of bringing rapeseed under the jurisdiction of the Canadian Wheat Board.

Back in the 1970s, there was a very intense discussion about domestic feed grain policy. The mandate of the Canadian Wheat Board at that time was adjusted, if memory serves me correctly, partly by legislation and partly by Order in Council to accomplish an objective. Mr. Whelan may have a more accurate recollection of the exact procedure.

I cite those four examples: the rapeseed vote; the argument about domestic feed grain; the case of oats; and the case of barley; to demonstrate that there is a bit of a dog's breakfast out there in terms of how you go about adjusting the jurisdiction of the Canadian Wheat Board. Part of the thinking behind the inclusion and exclusion clauses was to clarify the situation, not to say that it should happen this or that way, but to say that, if this is what farmers wish to happen, these are the steps to achieving the ultimate objective.

Those provisions in the proposed legislation have caused concern. Some groups and organizations think that they are preordaining a certain consequence, that to have the provisions in the law, even though they are entirely permissive and not mandatory, they are options for farmers to pursue if so desired. No one is changing the mandate of the Canadian

> Wheat Board. They are spelling out the process by which that might be accomplished if that is what farmers want.
>
> Despite all those words of comfort, there are still groups and organizations that are apprehensive. My proposed amendment at the end of the debate in the house would be to remove from the bill the detail about inclusion and exclusion. Therefore, the way one goes about changing the mandate of the Canadian Wheat Board remains unchanged.
>
> The bottom line on inclusion is that the only certain way to accomplish that would be by parliamentary legislation. In order words, if someone were to have the bright idea that something should be added to the jurisdiction of the Canadian Wheat Board, it would take an act of Parliament to accomplish that.
>
> The amendment that I propose said that, in addition to removing the detail about inclusion and exclusion, there would be one more condition attached if this idea came up, and that is farmers must be consulted in the first place by means of a vote.
>
> (Appeal Book, at pp. 405 to 407)

[57] This explanation is entirely consistent with the conclusion that section 47.1 of the *CWB Act* only concerns the exclusion of certain kinds or grades of wheat or barley from the CWB's compulsory price pooling system or marketing monopoly, or the inclusion of certain grains into that monopoly or into the compulsory price pooling system.

[58] The limited scope of section 47.1 is further evidenced by the fact that the changes under the *1998 Amendments* referred to above concerning section 47, including the addition of a subsection 47(5) which called for barley producer votes, were never proclaimed into force. That is a further indication that the government of the day did not intend to provide producers with an extensive veto power over all aspects of the *CWB Act*.

[59] After carefully reviewing the extrinsic material submitted by the respondents and used by the Federal Court judge, I have found nothing in the record which leads to the conclusion that the repeal of the Single Desk as a whole or of the *CWB Act* in its entirety were somehow made conditional to obtaining the prior consent of the CWB or of grain producers. I have found no statement confirming or implying that the intention behind the *1998 Amendments* was to restrain the Minister from proposing to Parliament legislation fundamentally modifying or repealing the *CWB Act*.

Promoting the democratic control of grain producers over the CWB

[60] The Federal Court judge also expressed approval of the idea that statutory interpretation must have regard to democratic values: Reasons at paras. 23 and 24. He accepted the respondents' argument "that the CWB's democratic marketing practices are 'significant and fundamental' because they are long standing, and strongly supported by a large number of some 17,000 grain producers in Western Canada" and that "[t]his support is worthy of respect": Reasons para. 27.

[61] I do not doubt that there are numerous democratic institutions in Canada, and that the democratic nature of such institutions deserves both respect and protection: *Qu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 399, [2002] 1 F.C. 3 at paras. 42 to 48. The issue in this case, however, is whether this value trumps the will of a democratically elected Parliament. It does not.

[62] In our system of representative democracy, which is similar in principle to that of the United Kingdom, the ultimate expression of democracy is effected through the elected members of the House of Commons and of the various provincial legislatures acting within their respective spheres of jurisdictions. Democracy in Canada rests ultimately on the participation of citizens in elections to the public institutions created under the Constitution.

[63] Of course, many Canadians have an interest in preserving the democratic character of other institutions, such as municipalities and school boards. That being said, the legislated mandates and privileges of these institutions remain subject to the ultimate control of Parliament or of the legislatures. Thus, municipalities may be reorganized, school boards abolished, Crown corporations redefined, and their privileges and authorities may wax and wane over time in accordance with the will of Parliament and of the legislatures to which they owe their existence. Save in circumstances where a constitutional constraint can be established, such legislative changes do not require the consent of the institutions affected or of their electors.

[64] The Supreme Court of Canada has held time and again that changes to the governing structures, mandates and powers of municipalities, school boards and other institutions created by legislation may be adopted without the consent of these bodies or of their electors: Thus, in *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15 at paras. 57-58, Iacobucci J., writing for a unanimous Supreme Court of Canada, held as follows:

> [57] Having found that separate school boards in Ontario have neither a right to independent taxation nor an absolute right to independent management and control,

> one can conclude that public school boards in the province also do not have such rights. Subject to s. 93 [of the *Constitution Act, 1867*], public school boards as an institution have no constitutional status.
>
> [58] Campbell J. correctly stated the law in this regard in *Ontario Public School Boards' Assn*. [*v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346], at p. 361:
>
> > Municipal governments and special purpose municipal institutions such as school boards are creatures of the provincial government. Subject to the constitutional limits in s. 93 of the Constitution Act, 1867 these institutions have no constitutional status or independent autonomy and the province has absolute and unfettered legal power to do with them as it wills.
>
> See also *Alberta Public Schools* [*Public School Boards' Assn. of Alberta v. Alberta (Attorney General),* [2000] 2 S.C.R. 409, 2000 SCC 45], at paras. 33 and 34.
>
> [Emphasis added.]

[65] Likewise, in *Baier v. Alberta*, [2007] 2 S.C.R. 673, 2007 SCC 31 at para. 39, Rothstein J. made the following comments:

> Voting and candidacy rights are explicitly protected in s. 3 of the *Charter* but only in relation to the House of Commons and provincial legislatures. The intervener Public School Boards' Association of Alberta submits that school boards as institutions of local government have constitutional status in the "conventional or quasi-constitutional sense". However, it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.

[66] In *Haig v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 995, the majority of the Supreme Court of Canada held at p. 1041 that "[a] government is under no constitutional obligation to extend [a referendum] to anyone", and that "[a] referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law" (emphasis in original).

[67] Although these cases concerned alleged constitutional privileges, the principles they expound apply as well, if not more forcefully, to alleged legislated privileges.

[68] In my view, the democratic principle favours an interpretation of section 47.1 of the *CWB Act* that preserves to the greatest extent possible the ability of the elected members of the House of Commons, including the Minister, to change that legislation as best they see fit. This is, moreover, what subsection 42(1) of the *Interpretation Act*, reproduced above, specifically requires.

Canada's international trade obligations under NAFTA

[69] The Federal Court judge also gave weight to the argument of the interveners "that section 47.1 applies to changing the structure of the CWB because the democratic structure is important to Canada's international trade obligations under NAFTA", and he further concluded that this was "an important consideration which supports the argument that Parliament's intention in s. 47.1 is not to alter this structure without consultation and consent": Reasons at para. 28.

[70] The interveners submit that the control of the CWB by grain producers has shielded Canada from anti-competitive trading complaints. They refer to a report dated April 6, 2004 of a World Trade Organization ("WTO") Panel rejecting a trade complaint against Canada's measures relating to exports of wheat and treatment of imported grains (WTO Doc WT/DS276/R), and to a report dated August 30, 2004 from the WTO Appellate Body upholding that decision (WTO Doc WT/DS276/AB/R). They rely in particular on the following extract of the Panel's report:

> 6.124 As we see it, the non-interference by the Government of Canada in the CWB's sales operations reinforces rather than weakens this conclusion. In view of the CWB's current governance structure, which gives Western Canadian producers control over the CWB, the fact that the Government of Canada does not supervise the CWB's sales operations makes it more rather than less likely that the CWB markets wheat solely in accordance with the commercial interests of the producers whose marketing agent it is.

[71] The reference to the CWB's "governance structure" pertains to the composition of the board of directors, and not to any potential producer vote under section 47.1 of the *CWB Act*. As noted by the Panel in paragraph 6.123 of its report "[a]s we have noted, the majority of the directors who serve on the CWB's Board are elected by Western Canadian wheat and barley producers and must be re-elected by those producers if they wish to serve for more than one term of office." Moreover, the Report of the WTO Appellate Body confirms (at para. 183) that the "Panel based it first finding on the fact that the majority of the CWB's Board of Directors are elected by wheat farmers and the fact that the government of Canada 'does not control, or interfere in, the day-to-day operations of the CWB'" Consequently, these reports do not deal with producer votes under section 47.1 of the *CWB Act* and are not pertinent to the interpretation of that provision.

[72] Moreover, the principal purpose of the *Marketing Freedom for Grain Farmers Act* is to allow an open and free market for grain producers by putting an end to the CWB marketing monopoly. It is hard to understand how this purpose would run afoul of NAFTA or of any other of Canada's international trade agreements.

[73] It is the interpretation of section 47.1 advanced by the respondents and the interveners which could place at risk Canada's international trade obligations. Future trade agreements, including

future WTO multilateral trade agreements, may eventually entail amendments to the *CWB Act* in order to restrict or modify the CWB marketing monopoly. As noted above, this was in fact required in 1994: *World Trade Organization Agreement Implementation Act*, s. 48. If other similar changes were required in the future in order to implement an international trade agreement, the Canadian government would be precluded from proposing these to Parliament without the consent of the grain producers should the respondents' interpretation of section 47.1 be accepted. This, I submit, favours a restrictive interpretation of section 47.1 of the *CWB Act*.

Freedom of association

[74] Although the Federal Court judge did not directly address this issue, the interveners also invoke the fundamental freedom of association guaranteed by paragraph 2(*d*) of the *Charter* as an interpretative tool. They submit that section 47.1 of the *CWB Act* should be interpreted in a manner that promotes the ability of western Canadian grain producers to act collectively in the marketing of grain and to enable the expression of a majority view on matters of fundamental concern to their livelihood. That submission is principally based on *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 ("*Dunmore*").

[75] I first note in regard to this submission that a "*Charter* values" interpretative principle is of limited application: *Bell ExpressVu Limited Partnership v. Rex*, above at paras. 62 to 66.

[76] Moreover, the principal difficulty with the respondents' submission is that it was rejected by this Court in *Archibald v. Canada*, [2000] 4 F.C. 479 (C.A.), 257 N.R. 105. In that case, certain western grain producers challenged the provisions of the *CWB Act* requiring them to pool and market their grain through the CWB on the basis, *inter alia*, that this infringed their freedom of association under paragraph 2(*d*) of the *Charter*. Relying on *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, Rothstein J. A. (as he then was) found that the activity of marketing wheat and barley interprovincially and in export trade was not protected by paragraph 2 (*d*) of the *Charter*: *Archibald v. Canada*, above at paras. 40 to 54.

[77] The respondents submit that *Dunmore* has somehow changed the approach set out in *Archibald v. Canada* as to how paragraph 2(*d*) of the *Charter* is to be used and understood. I disagree.

[78] In *Dunmore*, considering the profound connection between legislated labour relations schemes and the freedom of workers to organize for the purpose of making majority representations to their employers, the majority of the Supreme Court of Canada held that the statutory exclusion of agricultural workers from Ontario's legislated labour relations scheme violated paragraph 2(*d*) of the *Charter*. There is, however, no analogy to be drawn between the issues discussed in *Dunmore* and the issues at stake in this appeal revolving around the dismantlement of the CWB's marketing monopoly under the *Marketing Freedom for Grain Farmers Act.*

[79] As noted by Bastarache J. at para. 17 of *Dunmore*, not all activities are protected by paragraph 2(*d*) of the *Charter*. Thus, in the field of labour relations, the Supreme Court of Canada has excluded the right to strike from the scope of this paragraph: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; and *PSAC v. Canada*, [1987] 1 S.C.R. 424. In the context of agricultural marketing, the Supreme Court of Canada has also held that paragraph 2(*d*) does not entail an unrestricted right to interprovincial or export trade: *Canadian Egg Marketing Agency v. Richardson*, above. As noted by McIntyre J. in *Reference Re Public Service Employee Relations Act (Alta.)*, above at p. 405:

> …For obvious reasons, the *Charter* does not give constitutional protection to all activities performed by individuals. There is, for instance, no *Charter* protection for the ownership of property, for general commercial activity, or for a host of other lawful activities…There is simply no justification for according *Charter* protection to an activity merely because it is performed by more than one person.

[80] Simply put, paragraph 2(*d*) of the *Charter* does not extend any constitutional protection to a marketing monopoly or to a compulsory price pooling system as contemplated by the *CWB Act*. Nor does the *Marketing Freedom for Grain Farmers Act* restrict the ability of grain producers to associate for the purposes of marketing or pooling their products.

[81] Consequently, paragraph 2(*d*) of the *Charter* need not be considered as an interpretative tool for the purposes of ascertaining the scope of section 47.1 of the *CWB Act*.

The "manner and form" argument

[82] It is undisputed that one Parliament cannot bind another Parliament not to do something in the future. As noted in Hogg P., *Constitutional Law of Canada* (5th ed. Supp, vol. 1. looseleaf), at 12.3(a):

> If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues. In other words, a government while in office could frustrate in advance the policies urged by the opposition.

[83] There is also little doubt that "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle": *Reference Re Canada Assistance Plan (B.C)*, above at p. 559, and that"[a] restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself": *Ibid.* at p. 560.

[84] The respondents, however, submit that section 47.1 of the *CWB Act* creates obligations on the Minister acting in his executive capacity rather than in his parliamentary capacity. Consequently, they assert that the Minister's obligation set out in section 47.1 requiring him to consult with the CWB and to obtain an affirmative vote of grain producers prior to introducing legislation is nevertheless enforceable and binding notwithstanding these important constitutional principles.

[85] The appellants answer that only "manner and form" provisions of a constitutional nature may restrict the method by which legislation may be introduced into, and adopted by, Parliament. The appellants further argue that section 47.1 of the *CWB Act* is not such a constitutional "manner and form" provision which can impose procedural requirements on Parliament's ability to adopt legislation, and that section 47.1 is consequently unenforceable under the doctrine of parliamentary sovereignty.

[86] I have serious reservations concerning the enforceability of section 47.1 of the *CWB Act* considering the doctrine of parliamentary sovereignty, the Supreme Court of Canada's decision in *Reference Re Canada Assistance Plan (B.C)*, above, and the provisions of subsection 2(2) of the *Federal Courts Act*. A provision requiring that legislation be introduced into Parliament only insofar as an outside corporation or small outside group agrees does not appear to me to be merely a procedural requirement. The effect of such a provision is to relinquish Parliament's powers in the hands of a small group not forming part of Parliament. I seriously doubt such a provision could be used to impede the introduction of legislation in Parliament or could result in the invalidation of any subsequent legislation adopted by Parliament: *Reference Re Canada Assistance Plan (B.C.)*, above at pp. 563-64, quoting approvingly in this regard King C.J. in *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 at pp. 397-398; see also *Canada (Attorney General) v Canada (Canadian Wheat Board)*, 2008 FCA 76, 373 N.R. 385 at para. 4.

[87] I need not however finally decide this question given the conclusion reached above concerning the limited scope of section 47.1 of the *CWB Act*. As noted by J. Goldsworthy, in

Parliamentary Sovereignty, Contemporary Debates (Cambridge University Press, 2010) at p. 174, "[o]ne of the most important questions not settled by the doctrine of parliamentary sovereignty is whether, and how, Parliament can make the legal validity of future legislation depend on compliance with statutory requirements as to procedure or form." It would be inappropriate for this Court to decide such an important and far reaching constitutional question when it is not strictly necessary to do so in order to determine the outcome of this appeal.

Conclusions

[88] For the reasons set out above, I conclude that the scope of section 47.1 of the *CWB Act* does not extend to the *Marketing Freedom for Grain Farmers Act*. I would consequently allow both appeals and set aside the orders of Campbell J of the Federal Court. I would also order costs in favour of the appellants both in this Court and in the Federal Court.

"Robert M. Mainville"
J.A.

"I agree
K. Sharlow J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-470-11
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE CAMPBELL DATED DECEMBER 7, 2011.	
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA ET AL v. FRIENDS OF THE CANADIAN WHEAT BOARD ET AL.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 23, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW J.A. TRUDEL J.A.
DATED:	June 18, 2012

APPEARANCES:

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