

New Marketing Freedom for Grain Farmers

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On October 18, 2011, Bill C-18, An Act to reorganize the Canadian Wheat Board and to make consequential and related amendments to certain Acts, had its first reading in Parliament.

This Bill, which would establish the Marketing Freedom for Grain Farmers Act, effectively abolishes the Canadian Wheat Board's ("CWB") monopoly on the marketing of wheat and barley for human consumption and makes participation in the CWB voluntary. The Bill is most telling for what it does not address - the actual tools for the new CWB to play any meaningful role in the market.

The new legislation is divided into 5 parts. The following is a summary of the highlights of the new legislation.

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Part 1 - Operations of the CWB during Preliminary Period

Part 1 changes the governance structure and makes other changes for the preparation of the implementation of the balance of the new legislation. Particularly:

- There will no longer be elected directors. The board will now consist of a president and 4 other directors appointed by the Governor in Council on recommendation of the Minister;
- The CWB will no longer be an agent of the Crown or a Crown corporation, and as such, directors, officers and employees are no longer part of the federal public administration;

- The CWB's monopoly is lifted. Other persons or entities will be able to transport interprovincially wheat owned by a person other than the CWB;
- A person may buy or sell wheat if the agreement provides for the transaction to occur on or after the day on which Part 2 (i.e. the voluntary pooling provisions) of the new legislation come into force.

Commentary: The removal of elected directors, whose status was viewed by its supporters as central to making the CWB more responsive to farmers, may ultimately prove to be one of the single most significant aspects of the Bill. Presumably the new board members will be persons who share the government's view of the CWB and are unlikely to be motivated to take the kind of significant action which the CWB will require in order to make itself relevant to producers in the future.

Part 2 - Voluntary Pooling

Part 2 of the new legislation continues the CWB and charges it with the marketing of grain through voluntary pooling. The salient features of the new pooling scheme include:

- The CWB will be continued as a corporation and headquartered in Winnipeg, Manitoba. The CWB's objective is to market grain for the benefit of producers who choose to deal with the CWB;
- The CWB may undertake the marketing of grain in interprovincial and export trade and may buy grain from a producer. The CWB is no longer required to buy all wheat from designated areas;
- Like the former legislation, the CWB must pay a sum certain per tonne basis in storage. The producer will receive a certificate indicating the number of tonnes purchased and delivered and the grade of grain. The certificate entitles the holder to share in the equitable distribution of any surplus arising from the operations of the CWB with regard to the grain sold and delivered to the CWB during the pool period;
- Like the cash purchase provisions of the former legislation, the new legislation gives the CWB the ability to also enter into an individual contract with a producer for the purchase and delivery of grain;
- Most notably, the CWB is no longer the only entity which may export, transport, sell or buy wheat. The prohibition against operating an elevator has also been lifted.

Commentary: The Bill does not provide any tools for the "new" CWB to be able to take delivery of grain at a port or other location. As the CWB has no infra-structure to actually receive and hold grain, it will be forced to enter into handling agreements with the mainline grain companies who in fact do own and operate the infrastructure that is required to participate in the grain trade. In order for the new CWB to play any role in marketing grain, most believe it will have to acquire such infrastructure. It is difficult to see from whom it could acquire such facilities.

Some believe that there may be an opportunity for the new CWB to play a role as a broker of grain moving into the United States. The CWB could act on behalf of producers who were prepared to use producer cars to deliver grain into the continental United States as such movement could be made directly from farm to end buyer. However, it is difficult to see how

that role could be effectively handled by the CWB where port access was required.

As long as producers remain able to obtain railcars from the Canada Grain Commission or the railways, there will be a potential market for the "broker" type of services which the CWB could offer. Increasingly buyers of grain want to have traceability and identity preservation of the crops they buy. Producer cars are a simple way to provide this. There will likely continue to exist an opportunity for those farmers who produce high quality grain to find niche markets, and as a result, the board may remain relevant.

It is certainly possible that new multi-national entrants to the market will come to Canada. Whether they come to build infrastructure or to merely source grain to move by producer car remains to be seen. However, the entry of new players is also likely to lead to the increasing marginalization of the new CWB.

Recent Developments: An action has been commenced by the CWB and by the "Friends of the CWB" to challenge the power of the federal government to abolish the monopoly powers of the CWB without a properly conducted plebiscite. Those who challenge the legality of the Bill invoke section 47.1 of the present CWB Act:

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

(a) the Minister has consulted with the board about the exclusion or extension; and

(b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.

Certain parties have sought intervener status in this case. Their application will be heard on December 6, 2011.

It is not possible to predict the outcome of this challenge. However, a successful challenge would likely only delay the changes which the federal government is determined to implement.

Parts 3 & 4 - Commercialization of the Canadian Wheat Board and Dissolution of the Canadian Wheat Board

Part 3 provides for the potential continuation of the CWB under other federal legislation. Within 4 years of coming into force, the CWB will be required to apply for continuance under one of the following acts: Canada Business Corporations Act, Canada Cooperatives Act or

Canada Not-for-profit Corporations Act. The CWB may not apply, however, for continuance in another jurisdiction.

Part 4 provides that if the CWB is not continued as required in Part 3 within 5 years, a final pool period may be designated for the purposes of winding up the CWB. Any surplus or debts following the winding up of the CWB will be those of Her Majesty in right of Canada. The CWB will then be dissolved on a date fixed by order.

Commentary: Given the approach taken by the federal government to "commercialize" the CWB it is very difficult to see how the new CWB has a future. It may be that in Manitoba a provincially based "Manitoba Wheat Board" could arise, but from a constitutional perspective, and given the approach the courts have typically taken when asked to consider the legalistic basis for the old CWB monopoly, it is not clear if there is any basis by which a provincial board could be made compulsory. A provincial government could, however, address the needs of a new board to own and operate its own infra-structure, at least on a north-south basis.

Part 5 - Repeal of the CWB (Interim Operations) Act

Part 5 of the new legislation simply makes consequential changes to other pieces of legislation which reference the former legislation

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