

**BILL C-46: AN ACT TO AMEND THE CANADIAN
WHEAT BOARD ACT AND CHAPTER 17 OF
THE STATUTES OF CANADA, 1998**

Mark Mahabir
Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-46

HOUSE OF COMMONS

| Bill Stage | Date |
|------------|------|
|------------|------|

First Reading: 3 March 2008

Second Reading:

Committee Report:

Report Stage:

Third Reading:

SENATE

| Bill Stage | Date |
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First Reading:

Second Reading:

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Statutes of Canada

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative history by Michel Bédard

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BILL C-46: AN ACT TO AMEND THE CANADIAN
WHEAT BOARD ACT AND CHAPTER 17 OF
THE STATUTES OF CANADA, 1998*

INTRODUCTION

On 3 March 2008, Bill C-46, An Act to amend the Canadian Wheat Board Act and chapter 17 of the Statutes of Canada, 1998, was introduced in the House of Commons by the Minister of Agriculture and Agri-Food and Minister for the Canadian Wheat Board, the Honourable Gerry Ritz. This bill specifies that the Governor in Council has the authority to amend or repeal any regulation made under section 47 of that Act concerning the interprovincial and international export marketing and trade of oats and barley by the Canadian Wheat Board. The bill also provides for an arbitration process to resolve disputes concerning commercial transactions or proposed commercial transactions relating to grain. Lastly, the Bill repeals section 25 of chapter 17 of the Statutes of Canada, 1998, *An Act to amend the Canadian Wheat Board Act and to make consequential amendments to other Acts*.

BACKGROUND

The Canadian Wheat Board (CWB or “the Board”) was created in 1935 by the *Canadian Wheat Board Act* (CWBA)⁽¹⁾ and was originally a Crown Corporation that voluntarily marketed wheat grown in the Western provinces. The CWB operated by setting, in advance of the crop season and on the basis of market factors, a sale price for wheat. Farmers could then voluntarily sell to the Board at the predetermined price. In practice, farmers sold to the CWB only when the set price was above the market price.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) *Canadian Wheat Board Act*, S.C. 1935, c. 53.

Currently, the CWB is a unique shared-governance corporation⁽²⁾ that operates a national monopoly (also known as “single desk”) in the interprovincial and export marketing of wheat⁽³⁾ and barley⁽⁴⁾ produced in Manitoba, Saskatchewan, Alberta and the Peace River District of British Columbia.⁽⁵⁾ This single desk monopoly first began during World War II⁽⁶⁾ in response to a controversial bilateral agreement by which Canada would supply the United Kingdom with wheat at a controlled price to prevent inflation and foster postwar reconstruction.⁽⁷⁾ The single desk monopoly was extended to 1957 in view of international wheat agreements to ensure an adequate global supply of wheat.⁽⁸⁾ The CWB became a permanent body in 1967 after the repeal of the provision in the CWBA requiring the Board’s review every five years.⁽⁹⁾ This single desk monopoly over wheat and barley remains in effect to this day and results from the combined application of Parts III, IV and V of the CWBA and sections 9 and 16 of the *Canadian Wheat Board Regulations* (CWBR).⁽¹⁰⁾

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- (2) See R.S.C. 1985, c. C-24, ss. 3.01–4, and the CWB’s *Annual Report 2006–07*, which states at p. 38:

[The CWB is] not a Crown corporation, nor do we have any shareholders. The board of directors consists of 15 members: 10 are farmers elected by their peers; four are leaders from the business community and are appointed by the federal government; and the chief executive officer is recommended by the board of directors and appointed by the federal government. According to the board of directors’ terms of reference, all directors are required to act in the best interests of the Corporation, in order to maximize returns to western Canadian producers.

The report is available at http://www.cwb.ca/public/en/about/investor/annual/pdf/06-07/2006-07_annual-report.pdf. Until 1998, the CWB was a Crown corporation.

- (3) This includes No.1 Canada Western Red Spring wheat and No.1 Canada Western Amber Durum wheat, see *Canadian Wheat Board Regulations*, C.R.C., c. 397, ss. 26(1), 26(2).
- (4) This includes No. 1 Canada Western and Special Select Canada Western Two-Row select barley; see *Canadian Wheat Board Regulations*, ss. 26(3), 26(4).
- (5) See the definition of “designated area” in s. 2 of the *Canadian Wheat Board Act*, which states that designated area means:
- that area comprised by the Provinces of Manitoba, Saskatchewan and Alberta, and that part of the Province of British Columbia known as the Peace River District, and any other areas that the Corporation may designate under subsection (3);
- (6) Order in Council, P.C. 7942 (12 October 1943). An Order in Council was used rather than a bill under the authority of the *War Measures Act*, S.C. 1914, c. 2.
- (7) Canada–United Kingdom Wheat Agreement, 25 July 1946. For a brief overview see, Hector MacKenzie, “The ABCs of Canada’s International Economic Relations, 1945–1951,” Foreign Affairs and International Trade Canada, http://www.dfait.gc.ca/department/history_clf1/coldwar_section08-en.asp.
- (8) See Foreign Affairs and International Trade Canada, *International Wheat Agreement*, <http://www.dfait-maeci.gc.ca/hist/dcer/details-en.asp?intRefid=10886>.
- (9) S.C. 1967-68, c. 5, ss. 3, 6.
- (10) C.R.C., c. 397.

Part III of the CWBA gives the CWB the authority to market wheat domestically for human consumption and to export wheat grown in CWB-designated areas.⁽¹¹⁾ Part IV provides that the CWB is the sole entity that may export, buy, sell or transport Canadian wheat or wheat products. This applies to wheat or wheat products situated in one province for delivery in either another province or outside of Canada. Part III and Part IV provide the CWB's single desk authority over wheat and barley. Part V of the CWBA gives the Governor in Council the power to extend or remove the CWB's single desk monopoly over wheat and barley and other grains through regulation, but the Minister must obtain the approval of both the CWB Board and of grain producers⁽¹²⁾ before introducing a bill to exclude wheat or barley (of any kind, type, class or grade), or wheat or barley produced in any specific area, or to extend the single desk monopoly to any other grain. This requirement for approval was added in 1998 by chapter 17 of the Statutes of Canada.⁽¹³⁾

Before 1998, the removal or addition of oats, barley and other grains from the single desk authority could be achieved by amendment to the CWBA through a bill tabled in Parliament or by amendments to the existing Regulations by the Governor in Council without approval of the CWB or the grain producers. For example, oats were added in 1947 by amendment to the CWBA and were removed from the single desk monopoly by amendments to section 9 of the CWBR in 1989.⁽¹⁴⁾ Lastly, section 16 of the CWBR provides for the interprovincial transportation and sale of varieties of wheat and barley that are not listed in the

(11) CWB-designated areas include Manitoba, Saskatchewan, Alberta and the Peace River District of British Columbia.

(12) The CWBA states at s. 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.

(13) S.C. 1998, c. 17, s. 25. See also Sonya Dakers, June Dewetering and Jean-Denis Fréchette, *Bill C-4, An Act to amend the Canadian Wheat Board Act and to make consequential amendments to other acts*, LS-292E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 20 November 1997, <http://lpintrabp.parl.gc.ca/lopimages2/PRBpubsArchive/ls1000/361c4-e.asp>.

(14) SOR/89-281.

Canada Grain Act⁽¹⁵⁾ as well as any wheat or barley products. Thus, this allows the sale and transport, by individual grain producers and other parties, of wheat and barley for domestic livestock feed and non-food processing (such as ethanol).

Outside of the monopoly powers found in Parts III, IV and V of the CWBA, the CWB has broad powers that include the power to buy, take delivery of, store, transfer, sell, ship or dispose of grain.⁽¹⁶⁾ The CWB may also enter into contracts or agreements for the purchase, sale, handling, storage, transportation, disposition or insurance of grain,⁽¹⁷⁾ and has the power to operate grain elevators, warehouses and mills.⁽¹⁸⁾ Lastly, the CWB has the power, subject to the approval of the Minister of Finance, to enter into commercial banking arrangements,⁽¹⁹⁾ including the issuing of debt instruments,⁽²⁰⁾ the investment of CWB moneys,⁽²¹⁾ the reduction of financial risk through financial instruments,⁽²²⁾ and the establishment of a contingency fund.⁽²³⁾

During its daily operations the Canadian Wheat Board has three broad areas of business activity relate to the single desk monopoly, price pooling, and government guarantees.⁽²⁴⁾ The single desk authority for wheat and barley allows farmers to obtain a higher return for their grain than might be obtained in the global market. Price pooling distributes market risks among all farmers by depositing all sales revenue for a given year into one account for later redistribution to each farmer. Government guarantees allow the CWB to provide initial payments to farmers before the beginning of the crop season and enable a price floor to be set for grains on the basis of their projected market value. Initial payments provide farmers with compensation at the time of delivery to the CWB rather than later at the time of sale of the grain.

(15) R.S.C., 1985, c. G-10; see Schedule 3 of the *Canada Grain Regulations*, C.R.C., c. 889.

(16) Section 6(1)(a).

(17) Section 6(1)(b).

(18) Section 6(1)(h).

(19) Section 6(1)(c).

(20) Section 6(1)(c.01).

(21) Section 6(1)(c.1).

(22) Section 6(1)(c.2).

(23) Section 6(1)(c.3).

(24) See Canadian Wheat Board, *Annual Report 2006–07*, p. 38.

The CWB also provides borrowing and credit at a rate similar to that available to other multinational corporate grain producers. Farmers may also participate in niche and premium marketing opportunities while retaining their initial payment privileges.⁽²⁵⁾

In 2007,⁽²⁶⁾ after various consultations with grain producers and a controversial plebiscite whose results showed that, overall, 48.4% of grain producers wanted a choice in marketing barley,⁽²⁷⁾ section 9 of the CWBR was amended to exclude barley from the CWB's single desk monopoly under the authority provided by the Governor in Council's regulation-making power in section 47 of the CWBA. This amendment of the Act, which reduced the scope of the monopoly, was contested by the CWB because it violated the approval process (section 47.1 of the CWBA) added in 1998, and was successfully invalidated in Federal Court.⁽²⁸⁾ At issue was whether the Governor in Council had the power to reduce the single desk monopoly of the Wheat Board by way of regulation, rather than through amendment to the Act directly. The Federal Court stated that the Governor in Council could not remove the CWB single desk authority over barley by regulation. This decision was upheld in the Federal Court of Appeal, and the Court stated that the single desk authority could be changed only by direct amendments to the Act.⁽²⁹⁾ Thus the CWB single desk authority still applies to both wheat and barley.

DESCRIPTION AND ANALYSIS

A. Amendment or Repeal of Regulation

Clause 1 of Bill C-46 amends section 47 of the CWBA by adding a subsection specifying that the Governor in Council may amend or repeal any regulation that extends the application of the CWB's single desk authority (Part III and/or Part IV) to either oats or barley, or to both oats and barley.

(25) Ibid.

(26) SOR/2007-131, <http://canadagazette.gc.ca/partII/2007/20070627/html/sor131-e.html>.

(27) For the plebiscite results, see Agriculture and Agri-Food Canada, *Backgrounder*, March 2007, http://www.agr.gc.ca/cb/ip/pdf/bk_e.pdf.

(28) *The Canadian Wheat Board v. Attorney General of Canada*, [2007] FC 807, <http://decisions.fct-cf.gc.ca/en/2007/2007fc807/2007fc807.html>. Upheld on appeal, [2008] FCA 76, <http://decisions.fca-caf.gc.ca/en/2008/2008fca76/2008fca76.html>. The removal of the Wheat Board's monopoly over wheat and barley was a part of the Conservatives' campaign platform in 2006; see <http://www.conservative.ca/media/20060113-Platform.pdf>.

(29) [2008] FCA 76 at para. 4.

B. Dispute Resolution

Clause 2 of Bill C-46 adds new section 66.1, which creates a binding arbitration process for disputes between grain elevator operators and the CWB concerning any commercial transaction or proposed commercial transaction related to grain. Arbitration may be requested by an elevator operator or producer or by a group of operators or producers. The CWB may refuse arbitration if the dispute concerns a decision that is expressly authorized by the CWBA or the CWBR. The CWB has 5 business days to accept or refuse the arbitration request. If the CWB consents to arbitration, both parties have 10 business days to select an arbitrator. If the parties cannot decide on an arbitrator, each party will select an arbitrator, and both together will select a third arbitrator; the resulting three-member panel will arbitrate the dispute. The arbitration process is governed by the *Commercial Arbitration Act*⁽³⁰⁾ and the *Commercial Arbitration Code* in the schedule to that Act. The parties may agree to supplemental rules, or the arbitrator or arbitration panel may establish supplemental rules for the arbitration process. Lastly, the costs of the arbitration process are shared equally by the CWB and the other party.

C. Repeal of Section 47.1 of the CWBA

Clause 3 of the bill repeals section 25 of a 1998 statute, *An Act to amend the Canadian Wheat Board Act and to make consequential amendments to other Acts*, which amended the CWBA to create new sections 47 and 47.1. These new sections provided for the extension of the CWBA's single desk monopoly through regulation only after the approval of the CWB and the grain producers was obtained.⁽³¹⁾ The new section 47 in the 1998 bill was never proclaimed in force, while section 47.1 came into force on 1 November 1999.⁽³²⁾ Section 47.1 required prior approval by the CWB and the grain producers by vote before the Minister could introduce a bill to exclude wheat or barley from the CWB's single desk authority (Part IV of the CWBA) or to extend the CWB's marketing and single desk authority (Part III and IV of the CWBA respectively) to any other grain. The current bill will remove this requirement for prior approval.

(30) R.S.C., 1985, c. 17 (2nd Supp.).

(31) See proposed s. 47(5) and s. 47.1.

(32) SI/99-108, 13 October 1999.

COMMENTARY

For the early part of the 20th century, wheat was Canada's primary export product and was fundamental to the economic expansion of the Western provinces. Currently, Canada ranks third in wheat production (behind the EU and the United States) and second in wheat exports (behind the United States).⁽³³⁾ Canada is second to the EU in durum wheat production, and leads the world in durum wheat exports. Barley is another significant export commodity: Canada currently ranks second in world barley production (behind the EU) and third in exports (behind Australia and the EU). At the business level, the CWB is the largest exporter of grain in the world. Thus, wheat and barley are major Canadian exports and generate significant revenues for Western grain producers.

One of the main reasons for the orderly marketing of grain through a single entity such as the CWB is the difficulty of ensuring that farmers' outlay in crop production will be in line with future market prices.⁽³⁴⁾ Another reason was that open-market selling of wheat was seen by farmers as leading to gouging by middlemen.⁽³⁵⁾ Orderly marketing gives farmers the ability to control market supply and thus stabilize market prices. Semi-orderly marketing and delivery of grain was tried in the 1920s and 1930s with voluntary cooperative wheat pools. These pools operated in a manner similar to that of the CWB, except that they were voluntary in nature. During the Great Depression, the drastic fall in the price of wheat led to the collapse of the voluntary wheat pools. A compulsory wheat board was promoted by farmers, who wanted more control over the supply of wheat in the hope that they could withstand dramatic price fluctuations by setting prices through a board.⁽³⁶⁾

Now that world grain prices are sky-rocketing as a result of increased demand (some of which is related to biofuel production), some farmers have requested greater marketing choice to obtain a higher prices for their crops.⁽³⁷⁾ Both the Western Canadian Wheat Growers

(33) See note 2, *Annual Report 2006-07*, at p. 35.

(34) For a summary of the market effects on grain production and marketing, see Robert Irwin, "Farmers and "Orderly Marketing": The Making of the Canadian Wheat Board," *Prairie Forum*, Vol. 26, Spring 2001, pp. 85-106.

(35) Ibid.

(36) See *Report of the Royal Grain Inquiry Commission*, 1938, 185 and see the view of the CWB, at <http://www.cwb.ca/public/en/hot/future/action/summaries/>.

(37) See David Streitfeld, "In Price and Supply, Wheat Is the Unstable Staple," *New York Times*, 13 February 2008.

Association and the Western Barley Growers Association are opposed to the CWB's single desk authority over barley.⁽³⁸⁾ The CWB currently allows export selling by individual farmers, but will grant export licences only for grain that farmers have sold to the CWB and then bought back. This "buy-back" regime, governed by both the CWBA and the CWBR, ensures that the exporter shares in the administrative costs of the CWB,⁽³⁹⁾ but it has been criticized by Alberta farmers as being discriminatory against Western producers.⁽⁴⁰⁾

Canada and Australia are the only two countries to have a compulsory single desk wheat board.⁽⁴¹⁾ This has led to disputes regarding their monopoly powers and their organization as a state-owned enterprise. For example, in view of the unbalanced wheat trade between Canada and the United States,⁽⁴²⁾ the United States argued at the World Trade Organization⁽⁴³⁾ pursuant to the Article XVII of the General Agreement on Tariffs and Trade, 1994⁽⁴⁴⁾ that the CWB was a state trading enterprise that acted discriminately and did not pursue commercial interests.⁽⁴⁵⁾ The WTO concluded that the CWB did not sell wheat in some markets for reasons that were non-commercial and thus was not acting discriminately. Internationally, this decision may or may not lead eventually to the CWB being considered a state trading enterprise with non-commercial political influence.

(38) See Western Barley Growers Association, WBGA – WCWG Joint Barley Position Paper, <http://www.wbga.org/au-4-07.pdf>.

(39) See the CWBA at s. 46 and the CWBR at ss. 14–14.2. See also *Murphy v. Canadian Pacific Railway*, [1958] SCR 626 at para. 22. "Buy-back" is called Producer Direct Sales by the CWB.

(40) See Farmers for Justice, <http://carol.farmersforjustice.com/in-depth.htm>.

(41) See <http://www.awb.com.au/aboutawb/>. **The Australian Wheat Board is organized as a private corporation controlled by grain growers through an elected board. See *Constitution of AWB Limited* at <http://www.awb.com.au/NR/rdonlyres/41D3B59F-F9CA-4323-AA1A-CB96E9B84CE6/0/Constitution.pdf>.** New Zealand deregulated the wheat industry and dissolved the New Zealand Wheat Board in 1987; see <http://www.maf.govt.nz/mafnet/rural-nz/sustainable-resource-use/land-management/land-use-and-community-in-southland/sthlnd3.htm>.

(42) See Won W. Koo and Ihn H. Uhm, "Trade Remedy Laws in the United States: Bilateral Grain Trade Disputes with Canada," *North Dakota Law Review*, Vol. 79, 2003, pp. 921–52. This paper provides a summary of the trade disputes between the US and the CWB.

(43) See World Trade Organization, www.wto.org.

(44) WTO, http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleXVII_1a; and see http://www.wto.org/english/docs_e/legal_e/08-17_e.htm.

(45) *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (issued 30 August 2004, adopted 27 September 2004) (complaint by the United States); and see Raj Bhala and David A. Gantz, "WTO Case Review 2004," *Arizona Journal of International and Comparative Law*, Vol. 22, 2005, pp. 99–250 (pp. 122–42).

Agriculture policy is a complex matter that involves regional and international considerations. The CWBA is only a small portion of the regime regulating grain in Canada. The liberalization of the barley industry in Canada by Bill C-46 may lead to increased opportunities for farmers. However, with increased opportunities come increased risks, and the liberalization of barley may lead to the eventual demise of the CWB and the loss of the perceived advantages it offers farmers.