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LEGISLATIVE SUMMARY

Bill C-18:

An Act to reorganize the Canadian Wheat Board and to make consequential and related amendments to certain Acts

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Legislative Summary of Bill C-18

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

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LEGISLATIVE SUMMARY OF BILL C-18: AN ACT TO REORGANIZE THE CANADIAN WHEAT BOARD AND TO MAKE CONSEQUENTIAL AND RELATED AMENDMENTS TO CERTAIN ACTS

1 BACKGROUND

Bill C-18, An Act to reorganize the Canadian Wheat Board and to make consequential and related amendments to certain Acts (short title: Marketing Freedom for Grain Farmers Act) was introduced and received first reading in the House of Commons on 18 October 2011. The bill received second reading and was referred to a special legislative committee on 24 October 2011. It was then studied by the House of Commons Legislative Committee on Bill C-18 from 31 October 2011 to 3 November 2011 and was reported back to the House with amendments on 4 November 2011. The bill passed third reading on 28 November 2011, and received first reading in the Senate on 29 November 2011.

1.1 PURPOSE OF THE BILL

The bill includes five Parts, which will come into force at different times, in order to transition to an open market for western Canadian wheat and barley. Part 1 amends the *Canadian Wheat Board Act* to change the governance structure of the Canadian Wheat Board (CWB, or "the Board"). This Part also allows forward contracting[1] to take place in order to permit the purchase and sale of wheat and barley on or after the day on which Part 2 comes into force (expected to be 1 August 2012). Part 2 of the bill then repeals the *Canadian Wheat Board Act* and enacts a new piece of legislation – the Canadian Wheat Board (Interim Operations) Act – that establishes a new, voluntary Canadian Wheat Board which is expected to remain in place for a maximum of five years. At the end of that five-year (or shorter) period, Parts 3 and 4 of the bill then provide for two alternatives: either the privatization or the dissolution of the new voluntary Canadian Wheat Board established by Part 2. When that privatization or dissolution takes effect, Part 5 of the bill then provides for the repeal of the Interim Operations Act created by Part 2.

According to Agriculture and Agri-Food Canada, the purpose of the bill is to:

> [Fulfill] a longstanding commitment to give Western Canadian wheat and barley growers the freedom to make their own business decisions which will result in more money at the farm gate and a stronger sector … . An open grain market will attract investment, encourage innovation, create value-added jobs, and build a stronger economy.[2]

1.2 BACKGROUND TO THE PROPOSED REFORMS

The Canadian Wheat Board currently holds a monopoly on the export, and on the interprovincial transportation, buying and selling, of wheat and wheat products in Canada. It is the single-desk selling and price-pooling marketing board for all wheat and barley production from the Prairies and the Peace River basin (referred to as

"the designated area") that is destined for export markets or for domestic human consumption. The Board is funded entirely by producers (although the government does guarantee certain liabilities of the Board) and is not a Crown corporation. It is currently governed by a 15-member board of directors, five of whom are appointed by the Governor in Council and 10 of whom are elected directly by producers.

1.2.1 History of the Canadian Wheat Board

The first iterations of a Canadian Wheat Board were created during the First World War in order to ensure stable supplies and distribution during wartime. This was viewed as a temporary measure, and was discontinued after the war. However, due to a number of factors, including the Great Depression, the collapse of international wheat prices, and the near-bankruptcy of farmer-owned wheat pools during the 1920s and 1930s, the federal government re-established the Canadian Wheat Board in 1935. During the Second World War, the CWB was changed from a voluntary marketer to a monopoly board via the *War Measures Act*. While this was initially intended to be a time-limited measure, the Board's monopoly was retained, and was eventually made permanent in 1965.

1.2.2 Role and Functions of the Canadian Wheat Board

The CWB performs two main functions on behalf of prairie grain farmers: marketing logistics and pricing options. The economic rationale for instituting mandatory participation in these Board-provided functions relies primarily on arguments related to the reduction of competition between farmers, the increased bargaining power leveraged by collective marketing, the economies of scale generated, the pooling of risk, and the maximization of collective returns through orderly marketing.

Marketing Logistics: The Board is the sole seller of wheat and barley in Western Canada, thereby making it the mandatory intermediary between farmers and buyers of grain. This does not mean, however, that wheat and barley transit through Board-owned facilities; in fact, the Board does not own any grain elevators, railways or port terminal facilities.[3] Rather, the Board acts as the sole marketing agent of wheat and barley producers. This marketing role can be broadly classified into two main functions: finding clients and delivering products to clients. Finding clients involves negotiating the terms of sale (e.g., price, quantity, grade, time of delivery, etc.) with buyers of wheat and barley. Delivering products to clients involves taking care of the grain handling and transportation logistics (which includes negotiating shipping, storage and freight arrangements with primary grain handlers, railways and port terminals).

Pricing Options: This aspect of the Board's operations consists of offering individual producers various risk/return trade-off options regarding the pricing of their product. The best-known and most often discussed pricing option is the CWB's traditional price-pooling arrangement.

In the price-pooling arrangement, revenues generated from all sales of wheat (or barley) by the CWB in a given crop year are averaged amongst all quantities shipped through the single desk, so that every wheat farmer receives the same price for his

or her grain (subject to adjustments based on the grade of wheat delivered). As a result, factors such as the time of delivery to the primary grain handler, the timing of sale to the ultimate buyer, the type of market in which the grain is sold (e.g., directly to end-users such as millers or through export brokers) or the geographic location where the grain is ultimately sold will have no influence on the price an individual farmer receives for his or her grain relative to another farmer delivering the same grade of grain in the same crop year.

The CWB began offering a number of other producer payment options over the past decade, with the aim of providing individual farmers greater flexibility in managing business risk and their operating cash flow. Depending on their aversion to risk, farmers can now choose from a number of pricing options ranging from a fixed-price contract set prior to the start of the crop year, to a price set during the course of the crop year based on daily market quotes.[4] Farmers choosing these new payment options are typically outside the traditional price-pooling arrangement, although they are still subject to the Board's single desk. However, some have criticized these pricing options as still being tied, to some extent, to the CWB pool account, and as being not completely responsive to market forces.[5]

1.2.3 PROHIBITIONS IN THE *CANADIAN WHEAT BOARD ACT*

Currently, the Board's monopoly is established through Part IV ("Regulation of Interprovincial and Export Trade in Wheat") of the Act. Section 45 creates the general prohibition that prevents producers from selling their wheat directly to a grain company, processing firm or other purchaser (which is what ensures the Board's single-desk system). Section 45 states that, "[e]xcept as permitted under the regulations," no person other than the Board shall export wheat from Canada, or transport, or agree to buy or sell, wheat from one province for delivery to another. Without these prohibitions, the Board would not hold a monopoly.

In accordance with regulations under the Act, the CWB has created some exceptions to the prohibitions. For example, there are special programs for organic farmers, for small niche, value-added processing ventures, and for producer direct sales (see below); all these programs, to varying extents, allow producers to market their own wheat, subject to certain limitations. In the case of the producer direct sale option, producers are required to pay a fee to the CWB to account for services from which the producer has theoretically benefited, such as branding, product and variety development, and advocacy on issues such as transportation, trade and biotechnology.

Part V of the Act is also relevant to the Board's monopoly status. Section 47.1 (commonly referred to as the "plebiscite requirement") was added to the Act in 1998. It states that: "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," unless the Minister has consulted with the board of directors about the exclusion, and the producers of the grain have voted in favour of the exclusion.[6]

1.3 Reports and Studies on the Transition to an Open Market

Over the past several years, a number of reports and studies have been commissioned to examine the options and mechanics of transitioning from the current CWB monopoly to a free market for western Canadian wheat and barley.

1.3.1 The Board's Six Key Requirements for a New Grain Marketing Entity

On 17 October 2011, the CWB released a backgrounder outlining six business requirements identified by CWB staff and business consultants KPMG as being critical to the success of any new grain marketing entity created if the single-desk authority is removed.[7] In an accompanying news release, the CWB expressed its concern about the short time frame being imposed for the transition process, which it feels seriously threatens this new marketing entity's ability to compete.

The six key business requirements include:

- government-provided capital (of approximately $225 million) to finance inventories and conduct business operations;
- government-guaranteed borrowing and debt-financing for at least five years;
- a risk reserve (of approximately $200 million) to replace the current government-guaranteed initial payments to producers;
- initial government ownership with an exit strategy to enable the government to eventually divest its shares in the new entity;
- regulated access to grain-handling facilities; and
- the regulatory authority for the new marketing entity to direct its grain to the port terminals of its choosing.

1.3.2 Report of the Working Group on Marketing Freedom

In July 2011, the Minister of Agriculture and Agri-Food established a Working Group on Marketing Freedom to examine the transition to a marketing choice environment. The Working Group's report was released on 22 September 2011.[8]

The Working Group's terms of reference required it to consider access to elevators, rail, ports and producer rail cars, the organization and funding of market development and research activities, delivery of the Advance Payments Program, and any other business-related transitional issues relevant to the grain-marketing system, the transportation system, or the supply chain. The Working Group was to operate under the assumptions that all grains would be removed from the monopoly by August 2012, that the marketing and transportation systems would adjust to marketing choice, and that the CWB would propose a business plan to continue as a voluntary marketing entity.

The Working Group recommended a series of transitional measures, including the following:

- With respect to access to grain elevators, rail and ports, the government should monitor anti-competitive behaviour and be ready to react with some sort of regulatory intervention should the situation merit.

- With respect to access to producer cars and short lines, the government should ensure that the right to producer cars remains in the *Canada Grain Act*, should monitor the use and availability of these cars, and should continue implementation of the Rail Service Review process. In addition, shippers themselves, and short line railways, should ask CN and CP to change their multi-car incentive rate requirements.
- A temporary five-year check-off[9] should be applied to all sales that currently go through the CWB to provide an equivalent level of funding for research, market development and technical marketing support. There should be mandatory collection of the check-off, with an optional refund. After five years, industry should have had sufficient time to develop and implement a longer-term solution.
- With respect to rail logistics, the government should ensure that performance data are collected and made available to the whole supply chain in order to identify problems and increase system efficiency. In addition, the government should conduct a Grain Logistics Study in order to facilitate greater integration across the supply chain.
- The Advance Payments Program should continue to be offered; and if a decision is made to change the administrator of the program, this should be done as quickly as possible and in such a way as to avoid disruption to farmers. The Canadian Canola Growers Association was identified as one possible administrator.[10]
- The government should communicate details of the planned transition to farmers as soon as possible in order to allow them to start forward contracting. Information sessions could be offered to explain the new system to farmers and to answer questions.
- The government should provide maximum predictability and certainty to industry in order to allow private-sector risk management tools to be implemented.
- The CWB needs to begin preparing for implementation as soon as possible, and if the CWB will not do so, the government should consider measures to facilitate the development of a business model for a voluntary CWB.

1.3.3 Task Force Report: *Marketing Choice – The Way Forward*

On 19 September 2006, the Minister established a Task Force with a mandate to address technical and transition issues related to the removal of the CWB single-desk selling authority. The Task Force released its report, entitled *Marketing Choice – The Way Forward*, on 25 October 2006.[11]

The Task Force recommended a three-phase transition to a new CWB (referred to as CWB II). The first phase would cover the legislative process from the introduction of the bill to Royal Assent, and was expected to last approximately nine months. During this period the government would announce its intention to end the single desk for the different grains and different markets at fixed dates in the future.

The second phase would cover the formation of CWB II, and would last approximately one year. During this period, the government would appoint an interim board of directors to oversee the transition, forward contracting could begin, the

monopoly on barley marketing would be eliminated approximately six months into phase 2, and shares in the new CWB II would be sold, with farmers' eligibility for shares determined by the corporation. In addition, the government would take over funding of research and market development activities for a period of three years until alternate arrangements could be put in place, and the government would take on some portion of the CWB's liabilities and accounts receivable.

The third phase would last approximately five years and would see the elimination of the monopoly on wheat marketing, continued government guarantees on borrowing (to give CWB II access to capital at low interest rates during the adjustment period), the transfer of the Advance Payments Program to another entity, and the assumption of CWB staff severance costs by the government. The Task Force recommended that, following this third transitional period, there should be no restrictions on who could own shares in CWB II, but that western Canadian grain farmers should retain majority control. Other recommendations were also made to prevent against anti-competitive behaviour by the grain handling industry, to ensure access to producer cars and terminals, and to enhance rail competition.

1.3.4 ALBERTA'S JRG CONSULTING GROUP REPORT: *CANADIAN WHEAT BOARD TRANSITION PROJECT*

Commissioned by Alberta Agriculture, Food and Rural Development, JRG Consulting Group released its report, the *Canadian Wheat Board Transition Project*, in February 2006.[12]

The report examined four possible business models for a new, deregulated CWB, as well as the transitional issues and challenges associated with each. These models are: a grain company (with physical assets); a marketing agent on behalf of producers; an export marketing agent on behalf of sellers; and a buying agent on behalf of international grain purchasers. While the report concludes that all of these business models have the potential to be viable, it considers the grain company business model to be the most sustainable.

The report envisioned a gradual transition to an open market, wherein the monopoly on barley marketing and domestic wheat marketing would be removed in year one, wheat exports to Mexico and the United States would be deregulated in year two, and, thereafter, the proportion of tradable wheat export licences issued to the CWB would be gradually reduced over a two- to five-year period.

Significant transitional issues identified with the transition to a grain company include the need for considerable capital to acquire physical assets (such capital would have to be provided either by government transfers or by levies on deliveries), and the CWB's ability to maintain a sustainable cost structure and debt load during its transformation.

The producer marketing agent business model was considered the next most sustainable option, although the report's authors felt that the sustainability of such an agency could be threatened by competition from, or a merger with, other grain companies.

1.4 CANADA'S INTERNATIONAL TRADE LAW OBLIGATIONS

Under international trade law, the Canadian Wheat Board is considered a "state trading enterprise" (STE). An STE is an enterprise that is either owned by the state, or has been granted special or exclusive privileges by the state.[13] Article XVII of the General Agreement on Tariffs and Trade (GATT 1947) outlines the responsibilities of countries that have state trading enterprises to ensure that these entities act in a way that is non-discriminatory and in accordance with commercial considerations. The 2004 World Trade Organization (WTO) agricultural negotiation framework agreement called for "elimination of trade distorting practices with respect to exporting state trading enterprises (STEs), including eliminating export subsidies provided to or by them, government financing and the underwriting of losses."

WTO negotiations during the current Doha Development Round (launched in 2001) have brought together the processes for handing issues of agricultural and non-agricultural goods. Canada has been under pressure throughout the negotiations to reduce support and protection for agricultural producers, and to reduce or eliminate the CWB's powers.

American trade officials have challenged or investigated the Canadian Wheat Board 14 times since 1990.[14] Charges against Canada have included subsidization, dumping and price discrimination (charging higher prices in some markets and using the proceeds to offset lower prices elsewhere), abuse of monopoly powers and discrimination in certain markets as a result of the CWB's status as a state-owned enterprise. However, of the challenges launched by the United States over the past two decades, none have shown that the CWB distorts international trade in wheat.[15]

WTO agreements do not currently prohibit or discourage the creation or operation of state trading enterprises (so long as they comply with WTO rules and principles), nor do other international trade agreements, such as the North American Free Trade Agreement (NAFTA). However, if the CWB's monopoly powers are eliminated, some of these agreements do contain provisions that could possibly render the reimposition of the CWB's monopoly powers at a later date more difficult. For example, Article 1110 of NAFTA (Chapter 11) precludes nationalization or expropriation of U.S. or Mexican investments unless payment of compensation is granted to the affected party. In other words, if Mexican or American investors invest in the establishment of Canadian wheat marketing businesses and these businesses are later rendered defunct by a reimposition of CWB monopoly powers, the Canadian government could potentially be subject to Chapter 11 expropriation claims by such companies. The compensation payable under successful Chapter 11 claims "shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier."[16] This includes the net profits that otherwise would have been enjoyed by the company if it were not for the government regulation.

2 DESCRIPTION AND ANALYSIS

Bill C-18 is divided into five Parts, which come into force at different times. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 PART 1 – THE PRELIMINARY PERIOD (CLAUSES 2–13)

Part 1 of the bill is entitled "Operations of the Canadian Wheat Board During Preliminary Period." It alters the governance structure of the CWB and allows forward contracting to permit producers to sell their wheat directly for the next harvest season. As there is no coming-into-force provision for Part 1, it will come into force on the date that the bill receives Royal Assent.[17] This preliminary period will last only until Part 2 comes into force (expected to be 1 August 2012).

2.1.1 GOVERNANCE OF THE CANADIAN WHEAT BOARD

Currently, under the *Canadian Wheat Board Act*, there are 15 directors on the board of directors of the CWB. Five of these directors are appointed by the Governor in Council on the recommendation of the Minister, while the other 10 directors are elected by producers (sections 3.02 and 3.09). This governance structure was instituted in 1998 when the *Canadian Wheat Board Act* was amended by Bill C-4 to provide for greater producer control and to remove the Board's status as a Crown corporation. At that time, the producer advisory committee (which used to represent producers' views to the CWB) was eliminated, as the elected directors would assume this function. Theoretically, the CWB's accountability to producers would be assured by the elected members of the board of directors.

Clause 12 of the bill is a transitional provision that provides that the 10 elected directors of the CWB will cease to hold office on the day that Part 1 comes into force. Clause 2 of the bill amends section 3.01(2) of the *Canadian Wheat Board Act* to state that the board now consists of *five* directors, including a chairperson and a president (as opposed to the previous 15). In other words, upon the coming into force of the bill, only the five directors appointed by the Governor in Council will remain, and they will comprise the entire board of directors of the CWB.

The provisions regarding the appointment of directors by the Governor in Council remain the same (sections 3.02 and 3.09 of the Act), except that references to elected directors are eliminated (clause 3). Similarly, provisions regarding the terms of office of directors, the remuneration, the chairperson, the by-laws and the president remain the same (sections 3.02(2), 3.02(3), 3.03, 3.04, 3.05, 3.09, 3.10 and 3.11 of the Act), except references to elected directors are eliminated (clause 5). The provisions that previously provided for the conduct, administration and costs of an election of directors (sections 3.06, 3.07, 3.08 and 33(1)(*a*)(i.2) of the Act) are repealed (clauses 6 and 10). However, clause 13 is a transitional provision, which clarifies that if an election has been held during the pool period in which this Part comes into force, the costs of an election of directors shall be deducted in accordance with the provisions of the Act as they existed before the coming into force of this Part.

Section 3.12(1) of the *Canadian Wheat Board Act* imposes a duty of care on directors and officers of the CWB, which means that directors and officers must conduct themselves in a certain way in order to fulfill their obligations to the Board and to avoid possible civil or criminal liability. The Act uses identical language to that found in other federal and provincial legislation that governs other types of corporations more broadly.[18] In essence, it requires directors and officers to "act honestly and in good faith with a view to the best interests of the Corporation [i.e., the CWB]; and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

This duty of care is unchanged with Bill C-18. However, clause 7 adds a new subsection 3.12(1.1) to the Act, which states that any act taken by directors or officers of the CWB "for the purpose of facilitating the implementation of Part 2 or 3 of the *Marketing Freedom for Grain Farmers Act is deemed to be* in the best interests of the Corporation" (emphasis added). The purpose of this provision appears to be to protect against any possible arguments (and, in turn, lawsuits) related to actions taken by directors to facilitate the removal of the Board's monopoly or the privatization of the corporation (or any of the other things mandated by Parts 2 and 3 of the bill) that some people may feel are not in the best interests of the CWB (and therefore not in compliance with the directors' duty of care). However, it should be noted that although this provision is likely intended to protect directors from *personal* liability for taking such actions, the corporation itself is not specifically given a mandate, during this preliminary period, to prepare for or facilitate its privatization or the removal of its single desk. This point is elaborated upon in section 2.1.2 of this legislative summary.

Similar to others Acts governing corporations more broadly, section 3.13 of the *Canadian Wheat Board Act* allows the CWB to indemnify directors or officers of the Board for any charges or expenses related to lawsuits brought against them by virtue of being a director or officer, provided they acted honestly and in good faith with a view to the best interests of the corporation. Bill C-18 adds a new section 3.13(1.1) to the Act, which allows the CWB not only to indemnify a director after the fact, but also to *advance* funds to pay for the above legal costs unless there are reasonable grounds to believe that the director did not act honestly and in good faith (clause 8 of the bill). Similar provisions providing for advance costs for directors are commonly found in other pieces of legislation governing corporations.[19]

Section 4(2) of the *Canadian Wheat Board Act* currently states that the CWB is not an agent of Her Majesty and is not a Crown corporation within the meaning of the *Financial Administration Act*. Clause 9 of the bill amends this section by adding additional language to make even more certain that the CWB would not be found to be a Crown corporation. This is necessary because of the changes to the governance structure of the CWB. According to the definitions of "Crown corporation," "parent Crown corporation," and "wholly owned directly by the Crown" in section 83, Part X, of the *Financial Administration Act*, the CWB would otherwise be found to be a Crown corporation because all of the directors will now be appointed by the Governor in Council. The addition of the language "despite Part X of the *Financial Administration Act*," then, ensures that it is understood that this section takes precedence over the provisions of the *Financial Administration Act*. Language is also added to the end of section 4(2), simply for greater certainty, to clarify that the

directors, officers, clerks and employees of the CWB are not part of the federal public administration.

2.1.2 Object and Powers of the Canadian Wheat Board

A company's objects are the purposes for which it was incorporated, and these objects limit, to a certain extent, the types of work or activities in which it can engage.[20] The object and powers of the Canadian Wheat Board are not changed during this preliminary period. The CWB's object therefore remains, as is stated in section 5 of the Act, to market "in an orderly manner, in interprovincial and export trade, grain grown in Canada." Similarly, the CWB's powers remain as they are laid out in section 6 of the current Act. Although a new object is envisaged for the CWB in section 6 of the new Act contained in Part 2 of the bill ("to market grain for the benefit of producers who choose to deal with the Corporation"), the corporation is bound to act in accordance with its current object (and not the new object) until the time that Part 2 comes into force. This will only be problematic, however, if the corporation feels that it needs to engage in activities during this preliminary period (that are more than minor or ancillary) that do not further the object of orderly marketing in order to prepare for its future status as a voluntary marketing entity. If the Board does engage in activities in furtherance of something beyond its current corporate objects, these activities (including any contracts or other dealings) could be found to be beyond the Board's authority and therefore void.

Currently, section 18(2) of the Act states that: "[e]xcept as directed by the Governor in Council, the Corporation shall not buy grain other than wheat" (as in most cases in the Act, "wheat" in this context includes "barley"). Once Part 2 of the bill comes into force, however, the CWB will, like other grain companies, be able to market other grains as well. In order to allow the CWB to prepare for this new ability, the House of Commons Legislative Committee on Bill C-18 added a new clause 9.1 to the bill, which seems to be intended to allow the CWB to begin forward contracting for other grains. This new clause adds a new section 18.1 to the *Canadian Wheat Board Act*, which states: "[d]espite subsection 18(2), the Corporation may agree to buy or sell grain if the agreement provides for purchase or sale to occur on or after the day on which Part 2" of the bill comes into force.

It should be noted, however, that such a clause may not be strictly necessary, since the prohibition in section 18(2) of the Act prevents the CWB only from *buying* these other grains, not from *agreeing to buy* (or forward contracting for) these other grains, and since the CWB already has the power to forward contract for any grain (by virtue of section 6 of the Act). In other words, although the Legislative Committee intended, with the new section 18.1, to carve out an exception to the prohibition in section 18(2), what section 18.1 purports to allow was not prohibited by section 18(2) in the first place.

One item that may be problematic, however, is that the definition of "grain" in the current *Canadian Wheat Board Act* differs from the definition in the new Act introduced by Part 2 of the bill. The implications of this are that, although the CWB has the power to forward contract for other grains (whether or not the Legislative Committee's new section 18.1 is included), this power extends only to "grain" as it is

currently defined in section 2 of the Act, i.e., wheat, oats, barley, rye, flaxseed, rapeseed and canola. Upon the coming into force of Part 2, however, the CWB will be able to buy and sell a much more comprehensive list of grains (barley, beans, buckwheat, canola, chickpeas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, solin, soybeans, sunflower seed, triticale and wheat).[21] The corporation has not, however, been given the power to forward contract for these other grains during the preliminary period.

2.1.3 The Single Desk and Forward Contracting

As explained in section 1.2.3 above, section 45 of the *Canadian Wheat Board Act* creates a series of prohibitions on the export, interprovincial transport, purchase, sale, or agreement to purchase or to sell, wheat or wheat products in Canada, except as permitted under the regulations. It is these prohibitions that, functionally, ensure the Board's single desk, since only the Board is permitted to engage in these activities.

These prohibitions remain more or less intact during the preliminary period, and so, therefore, does the single desk. Clause 11(1) of the bill, however, repeals paragraph 45(*b*) of the Act, which currently prohibits the interprovincial transportation of wheat. In practice, though, it should be noted that interprovincial transportation is already permitted in many circumstances under the regulations.[22]

Clause 11(2) of the bill, however, creates a more significant change in allowing for forward contracting to take place. If the single desk is to be removed before the next harvest, producers and grain companies must be able to prepare in advance. Part of this preparation may involve forward contracting or hedging with futures contracts (which are commonly-used risk management tools for agricultural commodities).[23] Such agreements, however, are currently prohibited for wheat and barley by paragraphs 45(*c*) and 45(*d*) of the Act. The bill adds a new subsection 45(2) to the Act immediately following the prohibitions, which states that, despite the prohibitions, a person may agree to buy or sell wheat or wheat products as long as the agreement provides for the purchase or sale to take place on or after the day on which Part 2 of the bill comes into force (expected to be 1 August 2012). When Part 2 comes into force, all of the above prohibitions will be removed, the single desk will end completely, and purchasers and sellers of wheat and barley will be free to execute any forward contracts that they entered into during the preliminary period.

2.2 Part 2 – Voluntary Pooling (Clauses 14–40)

Part 2 of the bill is entitled "Voluntary Pooling." It repeals the *Canadian Wheat Board Act*, enacts a new Act to be entitled the Canadian Wheat Board (Interim Operations) Act (referred to hereafter as "the Interim Operations Act"), and causes a number of consequential and related amendments to be made to other Acts in order to give effect to the CWB's new voluntary status. According to clause 40 of the bill, Part 2 comes into force on a date to be fixed by order of the Governor in Council (expected to be 1 August 2012).

2.2.1 Enactment of the Canadian Wheat Board (Interim Operations) Act and Repeal of the *Canadian Wheat Board Act* (Clauses 14 and 39)

Clause 39 of the bill repeals the *Canadian Wheat Board Act* (and with it, all of the amendments made to that Act by Part 1 of this bill). The CWB will not cease to exist with the repeal of that Act, however, as clause 14 of the bill causes the new Interim Operations Act to be created at the same time, and the Board is continued as a corporation under this new Act. It should be noted that the entire Interim Operations Act (including all of its sections) is created by only one clause – clause 14 of the bill. The Interim Operations Act will remain in place only until Part 5 of the bill comes into force, which is expected to be a maximum of five years from the enactment of Part 2 (in other words, 1 August 2017).

Many of the provisions included in the Interim Operations Act mirror the provisions of the *Canadian Wheat Board Act*, as amended by Part 1 of the bill, with some important differences. The most significant similarities and differences are summarized below.

Section 2 of the Interim Operations Act is the interpretation clause. Many of the definitions in this section are the same as, or very similar to, those included in the *Canadian Wheat Board Act*, with the following notable exceptions:

- The definition of “actual producer” is omitted, as there is no longer a need to distinguish between actual producers and other producers since permit books no longer exist, and since there are no longer any offences under the Act (with the result that the Board no longer has any role in issuing contravention notices to actual producers).
- The definition of “designated area” is omitted, as there are no longer any special requirements that apply only to the Prairies.
- The definition of “grain” has been omitted. Whereas previously “grain” included wheat, oats, barley, rye, flaxseed, rapeseed and canola, pursuant to section 2(2) of the Interim Operations Act, “grain” now has the same meaning as in the *Canada Grain Act*, where it is defined to include barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, solin, soybeans, sunflower seed, triticale and wheat.
- The definition of “order” is omitted, since the CWB no longer has the power to issue orders to producers or others with respect to permit books, deliveries of grain, delivery points, or any other matter.
- The definition of “permit book” is omitted, since producers are no longer required to hold permit books and the Board no longer issues them.
- The definition of “quota” is omitted, since permit books no longer exist and the Board has no role in fixing quantities of grain authorized to be delivered.

As was the case in the *Canadian Wheat Board Act*, any word or expression not defined in the Interim Operations Act has the same meaning as in the *Canada Grain Act*.

2.2.1.1 The Corporation, Its Object and Powers, and Governance (Sections 4–17)

Similar to section 3 of the *Canadian Wheat Board Act*, section 4 of the Interim Operations Act provides for the continued existence of the Canadian Wheat Board and states that its headquarters are in Winnipeg, Manitoba. Section 5 of the Interim Operations Act uses identical language to that found in section 4(2) of the *Canadian Wheat Board Act*, as amended by Part 1 of the bill (clause 9), in stating that, despite the *Financial Administration Act* (which otherwise *would* define the CWB as a Crown corporation due to its governance structure), the CWB is not a Crown corporation and its employees are not part of the federal public administration.

Section 6 lays out the new corporate object of the CWB, which is "to market grain for the benefit of producers who choose to deal with the Corporation." This is in contrast to the current object of the CWB, which is "marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada."[24] The object of a corporation is very important, particularly in the case of a corporation created by a special Act of the legislature, since the corporation is bound to act only in pursuit of its stated objects; any acts, contracts or dealings that are not in pursuit of, or reasonably incidental to the attainment of, its stated objects can be found to be unauthorized and void.[25]

Section 7 of the Act lays out the powers of the corporation. The powers of a corporation are the means by which it can carry out its corporate objects. Similar to the way in which a corporation is limited to pursuing only those purposes reasonably within, or incidental to, its corporate objects, a corporation is also limited to the powers expressly granted to it where such powers have been provided. The powers granted to the CWB in the Interim Operations Act are virtually identical to the powers it currently has, with the following notable exceptions:

- As is the case elsewhere in the Act, several minor wording changes are made in order to reflect both civil law and common law concepts. This is a continuation of the process of federal law – civil law harmonization that has been ongoing over approximately the past decade.
- The references in the current *Canadian Wheat Board Act* to the contingency fund are omitted (sections 6(1)(*c.3*), 6(2) and 6(4)), as there is a separate section of the Interim Operations Act dealing with the contingency fund (section 18).

Sections 8 through 12 of the Interim Operations Act deal with the board of directors of the corporation. All of these sections are the same as the corresponding sections in the *Canadian Wheat Board Act*, as amended by Part 1 of this bill (sections 3.01 through 3.05), including provisions providing that there shall be only five directors, and that these directors shall be appointed by the Governor in Council. Although section 9(3) of the Interim Operations Act states (as does the current Act) that the directors hold office for a maximum term of four years, up to a maximum of three terms, it should be noted that this Act is expected to remain in place for a maximum of only five years. Section 12, which provides the board of directors with the power to make by-laws with respect to the administration and management of the corporation, differs slightly from the current Act (section 3.05) in that paragraph (*b*) no longer expressly provides the board with the authority to make by-laws with respect to "any other method by which the board may demonstrate its accountability to producers."

As is the case with the *Canadian Wheat Board Act* as amended by Part 1 of this bill, there are no longer any provisions relating to an election of directors.

Sections 13 through 15 of the Interim Operations Act relate to the president of the corporation. The president is the chief executive officer of the corporation and is responsible for the direction and management of its business and its day-to-day operations (section 15(1)). The president is one of the five members of the board of directors, and is appointed by the Governor in Council on the recommendation of the Minister. The provisions relating to the president are virtually identical to those found in the *Canadian Wheat Board Act*, except that the provision providing for a transitional president has been omitted (section 3.09(3) of the *Canadian Wheat Board Act*).

Sections 16 and 17 of the Interim Operations Act relate to the directors and officers of the corporation. These provisions are virtually the same as the corresponding provisions in the *Canadian Wheat Board Act* as amended by Part 1 of this bill, including the duty of care that directors and officers are under to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (section 16(1)). Just as Part 1 of this bill (clause 7) included a deeming provision that stated that any act taken by a director or officer of the corporation for the purpose of facilitating the implementation of Parts 2 or 3 of the bill was "deemed to be in the best interests of the Corporation," similarly, in the Interim Operations Act, section 16(2) deems any act taken by a director or officer of the corporation for the purpose of facilitating the implementation of Part 3 of the bill to be in the best interests of the corporation. As explained in section 2.1.1 above, the purpose of these deeming provisions is likely to protect directors and officers from personal lawsuits alleging that they have not complied with their duty of care to the corporation in taking actions to privatize the CWB. The provision in Part 1 of the bill allowing advance costs in the case of a lawsuit against a director or an officer (clause 8) is also retained in the Interim Operations Act (section 17(2)).

2.2.1.2 The Contingency Fund (Sections 18 and 47)

Section 18 of the Interim Operations Act relates to the contingency fund. When the contingency fund was created in 1998, its purpose was, essentially, to provide a similar function for wheat purchases made under the producer payment options as the government guarantees provide for wheat purchases made under the regular pool option. Previously, in section 6(1)(*c.3*) of the *Canadian Wheat Board Act*, the corporation was provided with the power to establish a contingency fund in order to guarantee adjustments to initial payments to producers or to provide for potential losses from early payments to producers or from contracts for the purchase of wheat at a price other than the sum certain per tonne (such as cash purchases or the producer payment options). Further, the *Canadian Wheat Board Contingency Fund Regulations* provided for the specific sources of the funds from which amounts could be deducted to credit to the contingency fund (i.e., investments, the sale of grain, interest, etc.). It was not necessary that the balance of the fund be positive at any particular time (section 6(4) of the Act); the balance of the fund was not to exceed $100 million (section 2(3) of the regulations); and deductions were not allowed from amounts received by the corporation (to be credited to the contingency fund) if, as a

result of deducting those amounts and crediting them to the fund, a loss would be paid out of moneys provided by Parliament (section 2(2) of the regulations).

Section 47 of the Interim Operations Act is a transitional provision that states that the balance of the contingency fund existing under the current *Canadian Wheat Board Act* is to be credited to the contingency fund established under the Interim Operations Act. In other words, the contingency fund will be carried forward, despite the repeal of the old Act and the enactment of the Interim Operations Act. This was raised as a potential concern by some of the witnesses who appeared before the Legislative Committee on Bill C-18: they considered the contingency fund to consist of producers' money, and they questioned whether this money should be transferred to a new entity that certain producers might not want to participate in, and that would not be governed by any producer representatives.

The Interim Operations Act sets out similar provisions with respect to the contingency fund as were found in the previous Act, with the following exceptions:

- As opposed to providing the corporation with *the power to establish* a contingency fund, section 18 of the Interim Operations Act establishes the contingency fund directly.
- The contingency fund is available for a much greater range of potential uses. It is still to be used to provide for potential losses from early payments or from contracts for cash purchases or other producer payment options (section 18(1)(*b*)). However, the *Canadian Wheat Board Act* provision that the fund can be used to guarantee adjustments to initial payments is omitted (but it should be noted that the fund has not been used for this purpose in any case).[26] In its place, the Interim Operations Act includes a new provision stating that the fund is to be used to carry out the activities set out in the corporation's annual corporate plan, or, with the approval of the ministers of Agriculture and Finance, to carry out any other activity (section 18(1)(*a*)).
- The corporation is permitted to deduct an amount from any funds it receives in the course of its operations under the Act and credit that amount to the contingency fund (section 18(2)), whereas under the *Canadian Wheat Board Act*, the specific sources of those funds were set out in the regulations.
- The new Act does not specify any maximum balance that can be held in the contingency fund (although this may be laid out in future regulations made under the Interim Operations Act, as in the current regulations under the *Canadian Wheat Board Act*). However, as under the *Canadian Wheat Board Act*, the corporation is still not permitted to make a deduction from amounts received by the corporation (to be credited to the contingency fund) if, as a result, a loss would be paid out of moneys provided by Parliament (section 18(3)); and the balance of the contingency fund still need not be positive at any particular time (section 18(4)).

2.2.1.3 Corporate Duties and Powers, Financial Matters and Reporting (Sections 19–26)

Section 19 of the Interim Operations Act lays out the corporation's responsibilities for the pricing of grain, as well as for profits and losses that are not provided for elsewhere in the Act. This corresponds to section 7 of the current *Canadian Wheat Board Act*, with some important differences:

- The CWB is now permitted to sell grain acquired by it for the prices that it considers reasonable (this must be read, of course, in light of the corporate object to "market grain for the benefit of producers"), whereas previously the CWB was obligated to sell grain acquired by it for such prices as it considered reasonable, *with the object of promoting the sale of grain produced in Canada in world markets*.
- Any profits earned by the corporation from its grain operations, other than from its operations under Part 2 of the Act (operations in interprovincial and export marketing of grain) that are not provided for elsewhere in the Act are now to be credited to the contingency fund (section 19(2)). This might include such things as profits from hedging activities or interest paid on receivables. Previously, under the *Canadian Wheat Board Act* (section 7(2)), only those profits earned by the corporation from its *wheat* operations were included (other than those profits earned from the corporation's operations under Part III of the Act: Interprovincial and Export Marketing of Wheat), and such profits were to be paid into the Consolidated Revenue Fund (rather than the contingency fund).
- Any losses sustained by the corporation from its operations in the interprovincial and export marketing of grain that are not otherwise provided for under the Act are to be paid out of moneys provided by Parliament (section 19(3)). Previously, under section 7(3) of the *Canadian Wheat Board Act*, any other losses sustained by the corporation from its operations under the whole Act (that were not otherwise provided for) were also to be paid by Parliament (not just those losses resulting from the interprovincial and export marketing of wheat). In other words, under the Interim Operations Act, these other losses are no longer guaranteed by Parliament.

Section 20 of the Interim Operations Act relates to the corporation's ability to invest money. This section is virtually identical to section 8 of the *Canadian Wheat Board Act*, which allows the corporation to use its profits generated from investments either to pay the corporation's operational expenses or to be credited to the contingency fund. Losses sustained by the corporation from its investments are deemed to be operational expenses of the corporation.

Section 21 of the Interim Operations Act relates to the corporation's obligation to keep proper books and records, including requirements to have such books and records audited and certified by chartered accountants, and to report monthly and annually to the Minister with regard to the corporation's purchases and sales of grain, investments, the financial results of its operations, etc. This corresponds to section 9 of the current *Canadian Wheat Board Act*, with the following exceptions:

- Monthly reports to the Minister are no longer required to be certified by the auditors of the corporation (as is currently provided in section 9(1)(*c*) of the *Canadian Wheat Board Act*).
- The Minister is still required to provide a copy of the corporation's annual report to Parliament within 15 days of having received it (section 21(2)), but a new provision is included that allows the Minister to exclude from the report to Parliament any information whose publication the Minister believes would be detrimental to the commercial interests of the corporation (section 21(3)). This is likely included as the CWB will now be competing with private grain companies, and the public release of all of its financial and other transactions could potentially harm the CWB's competitive position.

Sections 22 through 24 of the Interim Operations Act relate to the corporation's ability to establish a pension fund, and to enter into contracts for the provision of group life and health insurance plans, for its directors, officers and employees (and their dependants). The corporation is permitted to make contributions to these plans, and these contributions are deemed to be operating expenses of the corporation. The provisions are virtually identical to those found in sections 10 through 12 of the current *Canadian Wheat Board Act*.

Section 25 of the Interim Operations Act is very similar to section 18 of the current *Canadian Wheat Board Act*. It allows the Governor in Council to issue orders to the corporation with respect to the manner in which any of its operations, powers and duties are to be performed, and it requires the directors of the corporation to implement these directions. Directors cannot be held accountable for any of the consequences arising from their implementation of the Governor in Council's orders, and compliance with these orders is deemed to be in the best interests of the corporation. These last two provisions protect the corporation and its board of directors from claims that they did not fulfill their duty of care if it turns out that the Governor in Council's directions were not, in fact, in the best interests of the corporation. Although similar to the existing provision, the proposed section 25 differs from it in omitting the prohibition that currently prevents the CWB from buying grain other than wheat unless directed to do so by the Governor in Council (found in section 18(2) of the *Canadian Wheat Board Act*). It also omits the Legislative Committee's proposed addition of a new section 18.1 to the *Canadian Wheat Board Act* (see clause 9.1 in Part 1 of this bill).

Section 26 of the Interim Operations Act relates to the annual corporate plans of the corporation, including borrowing plans and government guarantees. These provisions are virtually identical to those included in section 19 of the current *Canadian Wheat Board Act*. Those provisions were originally added to the *Canadian Wheat Board Act* when Bill C-4 amended the Act in 1998 in order to continue providing government guarantees to the CWB (as it had benefited from beforehand under other legislation by virtue of its status as a Crown corporation), even after its status as a Crown corporation was removed.

Essentially, the CWB is required to submit annual corporate plans to the Minister of Agriculture detailing all of the business and activities of the corporation, and the Minister of Agriculture must approve these plans in consultation with the Minister of Finance. The plans must include a borrowing plan indicating the amount of money that the corporation intends to borrow over the course of the crop year for the purposes of carrying out its corporate plan, and this borrowing plan must be approved by the Minister of Finance. Furthermore, the corporation is not permitted to borrow any of the money described in its borrowing plan unless the Minister of Finance has approved the timing and terms of the borrowing, *including which borrowings are to be guaranteed by the Minister of Finance*. The italicized language was not included in the corresponding section of the *Canadian Wheat Board Act* (section 19(4)), presumably because it was assumed that all such borrowing would be guaranteed by the Minister of Finance. The language of subsection (5) is also modified from the language used in the *Canadian Wheat Board Act* to reflect the fact that now, some of the borrowings of the corporation may be guaranteed by the

Minister, while other borrowings may not be. Concerns were raised about these provisions during the Legislative Committee's study of Bill C-18, as some questioned whether it would be appropriate for the CWB's borrowing to be subject to ministerial approval if that borrowing were not backed by government guarantees. Finally, as is already the case, subsection (6) allows the Minister to make loans to the CWB, or to guarantee payment to the corporation of amounts owed to it in respect of the sale of grain on credit.

Part II of the *Canadian Wheat Board Act*, which laid out requirements and conditions for producers and elevator-operators with regard to the delivery of grain, as well as provisions relating to the possession and administration of permit books, is omitted in its entirety from the Interim Operations Act.

2.2.1.4 Part 2 of the Interim Operations Act: Interprovincial and Export Marketing of Grain by the Corporation (Sections 27–40 and Section 48)

Part 2 of the Interim Operations Act is entitled "Interprovincial and Export Marketing of Grain by the Corporation" (which corresponds roughly to Part III of the current *Canadian Wheat Board Act*, entitled "Interprovincial and Export Marketing of Wheat by the Corporation").

Sections 27 through 36 of the Interim Operations Act relate to the CWB's price-pooling functions and operations.

Currently, under section 32 of the *Canadian Wheat Board Act*, the CWB is mandated to market wheat produced in the designated area in interprovincial and export trade. In order to carry this out, it is obligated to buy all wheat produced in the designated area that is offered by a producer for sale to the corporation, and to pay to the producer a specified amount per tonne of grain (the initial payment). The Governor in Council fixes, by regulation, the sum to be paid for the base grade of each type of grain (wheat, durum, malting barley and feed barley), and the CWB, with the Governor in Council's approval, sets the sum to be paid for each other grade of each type, at such an amount so as to bring the price into the proper relationship with the price set for the base grade (in other words, in accordance with the average price spread between grades). The CWB typically pays about 75% of the expected value of the grain to the producer at the time of delivery (this is referred to as the initial payment). An amount is deducted from the initial payment to pay for the costs of transport from the delivery point to port. Certificates are issued to producers indicating the number of tonnes delivered, and these certificates entitle a producer to share in the distribution of any surplus generated from the sale of wheat over the course of that pool period.

These provisions are reproduced in section 28 of the Interim Operations Act, with a few notable changes:

- Whereas before, the CWB was *mandated* to undertake the marketing of *wheat* produced in the designated area, now the CWB *may* undertake the marketing of

grain. The reference to the designated area, as elsewhere throughout this section and this Act, is deleted.

- Whereas previously, the *Canadian Wheat Board Act* stated that the corporation *shall* buy all wheat produced in the designated area (and in doing so, shall comply with the conditions laid out in the rest of section 32), section 28 of the Interim Operations Act states that *if* the corporation buys grain, it must comply with the conditions laid out in the rest of the section. In other words, the CWB is no longer *required* to buy all wheat (or grain) offered to it for sale.
- Whereas previously, the price per tonne for the base grade of each type of wheat and barley used to be set by the Governor in Council by regulation, now the price per tonne for each base grade will be set by the Minister of Agriculture, with the concurrence of the Minister of Finance.
- Whereas previously, the CWB needed the Governor in Council's approval in setting the prices per tonne to be paid for each other grade of each type of wheat and barley, now the CWB will need the Minister of Agriculture's approval (and the concurrence of the Minister of Finance).
- Throughout the rest of the section, references to "the designated area" and "permit books" are omitted.

Section 33 of the *Canadian Wheat Board Act* laid out the CWB's obligations with respect to final payments to producers (and interim payments, where warranted). Previously, once the CWB had received payment in full for all wheat sold during a pooling period, it was required to deduct specified expenses relating to that wheat (including the initial payment already paid out, the Board's operational expenses in relation to that wheat, etc.), and then to pay the remainder out to producers holding the certificates issued under section 32. Alternatively, section 33.01 allowed for a different amount to be paid to producers as early payments, instead of receiving initial and final payments. Under section 29 of the Interim Operations Act, very similar provisions are enacted, with the following exceptions:

- The word "grain" is substituted for the word "wheat."
- The CWB will no longer deduct from final payments the costs of an election of directors (since there will no longer be any elected directors).
- There will no longer be any deductions of expenses incurred by the Board for its operations in relation to the delivery of grain to elevators and rail cars, the administration of permit books, etc. (likely because Part II of the old Act has been deleted in its entirety).
- The CWB will no longer deduct research check-offs from final payments as was previously provided for in sections 33.1 to 33.5 of the *Canadian Wheat Board Act*, (as these provisions have been omitted from the Interim Operations Act). Funding for research activities will instead be provided via a deduction made by a grain elevator or grain dealer at the time of sale (see the new section 83.1 added to the *Canada Grain Act* by clause 27 of the bill).
- Where the approval of the Governor in Council was previously required for the fixing or making of certain payments (i.e., the making of interim payments, the setting of the various grade prices per tonne), the CWB must now obtain the approval of the Minister of Agriculture (and the concurrence of the Minister of Finance).

As noted above, sections 33.1 to 33.5 of the *Canadian Wheat Board Act*, which previously provided for deductions to be made from final payments in order to provide funding for plant breeding research into new and improved wheat varieties, are omitted entirely from the Interim Operations Act. In their place, new provisions are added to the *Canada Grain Act* (see clause 27, below) to provide for deductions by grain dealers and grain handlers at the time of purchase, which are intended to perform a similar function.

Sections 34 through 39 of the *Canadian Wheat Board Act* related to quality characteristics within grades, separate accounts to be maintained by the CWB, regulation-making powers pertaining to certificates and accounts, the transfer of wheat forward to subsequent pool periods, and the transfer of undistributed balances in pool accounts. These provisions remain more or less the same under the Interim Operations Act (sections 31 through 36), with the following exceptions:

- References to the Governor in Council are often replaced with references to the Minister of Agriculture, with the concurrence of the Minister of Finance.
- The word “wheat” is replaced with the word “grain.”
- A new subsection is added to the provision relating to the maintenance of separate accounts. Now, in addition to maintaining separate accounts for different pool periods, the CWB is also required to maintain separate accounts for any grain that has been designated by regulation (section 33(2)).
- Previously, where a balance remained in a pool account for six years or more, the CWB could adjust its accounts by paying its expenses of distribution, transferring the remainder to a separate account, and distributing it to those who were entitled to receive payments in respect of that grain (section 39 of the *Canadian Wheat Board Act*). Now, however, under the Interim Operations Act, the CWB is to adjust its accounts by paying its expenses of distribution and by transferring the remainder to the contingency fund (section 36). Section 48 is a transitional provision that specifies that any undistributed balance remaining in the separate account when the Interim Operations Act comes into force is to be credited to the contingency fund, and the CWB can use any portion of the undistributed balance credited to the contingency fund for any purpose that it could have under the old subsection 39(2) of the *Canadian Wheat Board Act*. This could be problematic, however, as section 39(2) does not expressly provide the CWB with the authority to use the undistributed balance for *any* identified purposes (as it relies upon the Governor in Council first *deeming* such purposes to be for the benefit of producers).[27]

Section 39.1 of the *Canadian Wheat Board Act* provided the authority for the CWB to operate its Producer Payment Options program. It stated, basically, that notwithstanding the provisions of that Act pertaining to price pooling, the corporation was permitted to enter into contracts with producers for the purchase of wheat at a price other than the amounts per tonne set out in those provisions, and on any terms and conditions that the CWB considered appropriate. This is reproduced in section 37 of the Interim Operations Act, under the heading “Other Purchases of Grain,” but additional subsections are included.

Subsection 37(2) clarifies that, pursuant to this section, the CWB can enter into contracts that provide for the pooling of grain on a basis other than that set out in sections 28 to 36. In other words, if the corporation feels that it needs additional flexibility, or could otherwise benefit, it is under no obligation to offer a pooling system as set out in sections 28 through 36 of the Act, and could instead set up a different pooling system to offer to producers, without the limitations imposed by these sections of the Act. However, it should be noted that if the CWB decides to do this, any losses (i.e., from initial payments) would likely not be covered by money provided by Parliament, and would instead have to be paid out of the contingency fund.[28]

Subsections 37(3) and 37(4) provide that any losses or gains that the corporation experiences as a result of its operations under this section are to be paid out of, or credited to, the contingency fund. The same provisions exist under the *Canadian Wheat Board Act* pursuant to section 6(1)(*c.3*)(ii) of the Act and section 2(1)(*d*) of the *Canadian Wheat Board Contingency Fund Regulations*.

Sections 38 through 40 of the Interim Operations Act lay out regulation-making powers and limitations imposed on the Governor in Council with respect to the designation of grain. These provisions correspond to sections 40 through 44 of the *Canadian Wheat Board Act*. Previously, the importance of these provisions was that a regulation made under them could bring a certain class or grade of wheat or barley under the CWB's pooling system, and provide for a separate pool for that type of grain (this is why the CWB maintains four separate pools for wheat, durum, barley and designated barley – designations were made in the regulations in respect of designated barley as well as amber durum wheat).[29] The provisions of the Interim Operations Act resemble the old provisions, with the following exceptions:

- The provision in the *Canadian Wheat Board Act* allowing the Governor in Council to pass a regulation in order to apply the provisions of Part III of the Act to wheat produced in areas of Canada outside the designated area (section 40) is omitted from the Interim Operations Act (since there will no longer be a "designated area," and the Act will no longer include specific requirements that apply only to producers in the designated area).
- The provision in the *Canadian Wheat Board Act* that functionally created four separate pools (section 42) (due to the designation of durum and designated barley) is not included in the Interim Operations Act. While the CWB may choose to operate separate pools, this arrangement does not appear to be mandated anywhere in the Interim Operations Act.

Several Parts of the *Canadian Wheat Board Act* are not reproduced in the Interim Operations Act. These include:

- Part IV of the *Canadian Wheat Board Act* (sections 45 and 46), which created the series of prohibitions and regulation-making powers that created the CWB's single desk.
- Part V of the *Canadian Wheat Board Act*. Section 47 granted a regulation-making power to the Governor in Council to extend the CWB's pooling function and single desk to oats or barley. Section 47.1 (commonly referred to as the

"plebiscite requirement") prevented the Minister from introducing a bill in Parliament to exclude any grain from the Board's single desk (or extend it to other grains) unless consultations with the board of directors had taken place and producers had voted in favour of the change.[30]

- Part VI of the *Canadian Wheat Board Act* (sections 48 through 60), which allowed the Governor in Council to establish a marketing plan for other grains if it was proposed by a significant number of producers or processors of the grain.

2.2.1.5 Part 3 of the Interim Operations Act: General and Transitional Provisions (Sections 41–48)

Section 41 of the Interim Operations Act allows the Governor in Council to make regulations for any purpose for which a regulation may be made under the Act. This replicates section 61 of the *Canadian Wheat Board Act*.

Section 42 of the Interim Operations Act, which requires the CWB to give effect to the provisions of NAFTA in carrying out its duties under the Act, is virtually identical to section 61.1 of the *Canadian Wheat Board Act*.

Sections 43 and 44 of the Interim Operations Act are virtually identical to sections 62 and 63 of the *Canadian Wheat Board Act*. These provisions allow the CWB to authorize grain handlers, shippers or other agents of the corporation (with whom the corporation has entered into an agreement) to borrow money on the security of grain delivered to that person, and, if that person defaults, requires the bank to dispose of that grain to the CWB only, and requires the CWB to accept that grain and pay specified amounts to the bank.

Sections 64 through 75 of the *Canadian Wheat Board Act*, which laid out requirements and prohibitions relating to permit books and deliveries, and laid out the provisions relating to offences, punishments and procedures for contraventions of the Act, are not included in the Interim Operations Act, as producers are no longer subject to the mandatory requirements that used to provide the basis for such offences.

Section 45 of the Interim Operations Act declares that any flour mill, feed mill, feed warehouse and seed cleaning mill is a work for the general advantage of Canada. This corresponds to section 76 of the *Canadian Wheat Board Act*, with the exception that a schedule naming each of these mills is no longer included as part of the Act. Such a declaration is necessary in order to bring these mills under federal legislative jurisdiction pursuant to section 92(10)(*c*) of the *Constitution Act*.

Section 46 is a transitional provision that provides the CWB with certain temporary powers with respect to the delivery of grain, the allocation of railway cars, and the provision of information to the corporation in order to allow the CWB to complete shipments of grain that were already sold and delivered to it under the old Act. These provisions cease to have effect three months after the Interim Operations Act comes into force. There appears to be a discrepancy between the wording of the English and French versions of section 46(1)(*a*) of the bill, however, due to a minor grammatical problem in the English version of the bill.

Sections 47 and 48 are transitional provisions relating to the contingency fund and undistributed balances in accounts. These are discussed in context above.

2.2.2 Consequential and Related Amendments (Clauses 15–38)

The consequential and related amendments contained in clauses 15 through 38 of the bill repeal the *Prairie Grain Advance Payments Act* and amend the following Acts in order to: delete references to permit books and the designated area; amend certain provisions to reflect the fact that participation in the CWB is no longer obligatory; amend other provisions to extend their application to wheat and barley (where special provisions no longer exist in the *Canadian Wheat Board Act*); and carry forward into other Acts some of the functions that will no longer take place under the *Canadian Wheat Board Act* (for example, the check-offs for research and marketing, which will now fall under the *Canada Grain Act*):

- *Advance Payments for Crops Act*;
- *Agricultural Marketing Programs Act*;
- *Agricultural Products Cooperative Marketing Act*;
- *An Act to amend the Canada Grain Act and the Agriculture and Agri-Food Administrative Monetary Penalties Act and to repeal the Grain Futures Act*;
- *Canada Grain Act*;
- *Farm Products Agencies Act*;
- *Livestock Feed Assistance Act*; and
- *Seeds Act*.

As noted above, clause 39 repeals the *Canadian Wheat Board Act*.

2.3 Parts 3, 4 and 5 – Commercialization or Dissolution of the Canadian Wheat Board (Clauses 41–64)

Part 3 of the bill (clauses 41 to 45) requires the CWB to submit an application for continuance under other federal legislation in order to transform the CWB into a regular business corporation, cooperative, or not-for-profit corporation. This application must first be submitted to the Minister within four years after Part 3 of the bill comes into force or any shorter period specified by the Minister. Once the Minister has approved the application, the CWB must then submit it to the applicable authorities in order to apply for continuance. Clause 44 provides that this Part comes into force on the day on which Part 2 comes into force (expected to be 1 August 2012), so the CWB would be obligated to submit its application for continuance to the Minister by 1 August 2016, unless the Minister specifies that it must be submitted sooner.

Part 4 of the bill (clauses 46 through 55) comes into force at Royal Assent, but its provisions *apply* only if the CWB is not continued under Part 3 within five years, or any shorter period specified by the Minister, after that Part comes into force. In the case that the CWB is not continued as a corporation under other legislation, Part 4

provides for the winding up of the corporation, the designation and conduct of the final pool periods, the distribution of assets, and the dissolution of the CWB. Clause 51 states that if any surplus remains after the payment of the debts and liabilities of the corporation and the winding-up charges, this surplus belongs to the government, and equally, if any debts and liabilities remain unsatisfied when the CWB is dissolved, these debts and liabilities will become those of the government.

Part 5 of the bill (clauses 56 to 64) repeals the Interim Operations Act (clause 64) and causes a series of other consequential amendments to other Acts. Part 5 comes into force upon Royal Assent, but its provisions *apply* only when the CWB is either continued as a corporation under Part 3 of the bill or dissolved completely under Part 4 of the bill. It amends provisions of the:

- *Access to Information Act*;
- *Canada Grain Act*;
- *Canada Transportation Act*;
- *Federal-Provincial Fiscal Arrangements Act*;
- *Payments in Lieu of Taxes Act*; and
- *Privacy Act*.

These amendments reflect the fact that the CWB will either be privatized or will no longer exist at all, and therefore will no longer have any special status or requirements under federal legislation.

3 COMMENTARY

The issues surrounding the CWB's single desk and the prohibitions preventing farmers from marketing their grain themselves have been highly contentious for a number of years. Some farmers are passionate about the maintenance of the single desk and feel that they will suffer in terms of bargaining power and net revenues if the single desk is removed. Other farmers are equally passionate about the removal of the CWB's single desk, both as a matter of principle and because they believe their revenues will increase in an open market. Countless studies and economic analyses have been undertaken over the years in an effort to support each of these positions, without any obvious dominant position emerging.

As a result, it is not surprising that in addition to the debates, media articles and protests on both sides of the issue since Bill C-18 was introduced, a series of lawsuits have also been launched.

A decision was recently released by the Federal Court in the two applications for judicial review that had been filed concerning Bill C-18: *Friends of the Canadian Wheat Board et al.* v. *Attorney General of Canada* and *The Canadian Wheat Board et al.* v. *The Minister of Agriculture.* In these cases, the applicants took the position that the Minister's decision was contrary to section 47.1 of the *Canadian Wheat Board Act*, which currently prohibits the Minister from causing "to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley

… from the provisions of Part IV" of the Act (which is the part of the Act that creates the single desk) unless the Minister has consulted with the board, and the producers of the grain have voted in favour of the exclusion. The applicants also made a number of arguments on administrative law grounds, including that the Minister breached the duty of fairness and acted contrary to the legitimate expectations of producers.

The respondents in the two cases took the position that Bill C-18 does not, strictly speaking, "exclude any kind, type, class or grade of wheat or barley … from the provisions of Part IV" of the Act but, rather, that the bill repeals the *Canadian Wheat Board Act* in its entirety and enacts a new Act, and that, as a result, the Minister's obligations in section 47.1 were not triggered. Furthermore, they argue, it is a well-established principle of law that Parliament is sovereign and is entitled to enact any legislation it sees fit to enact, and that a past Parliament cannot bind the hands of a future Parliament.

Essentially, the case turned on a question of statutory interpretation – whether section 47.1 should properly be read narrowly or broadly. Ultimately, Justice Campbell adopted the broader interpretation of the provision and decided that the procedural requirements imposed on the Minister by section 47.1 applied not only to the addition or subtraction of particular grains from the marketing regime created by the Act, but "also in respect of a change to the democratic structure of the CWB."[31] In other words, the court found that the Minister was required to consult with the board and conduct a vote of wheat and barley producers before introducing Bill C-18 in Parliament.

As a result, Justice Campbell granted the applicants' request and issued a Declaration that the Minister had failed to comply with his statutory duties and that "the Minister's conduct is an affront to the rule of law."[32]

While Justice Campbell's ruling does not, legally speaking, halt the progress of Bill C-18 through Parliament, the court declined to comment on the validity and effects of any legislation which might become law as a result.[33]

The Minister has announced that the decision will be appealed.[34]

NOTES

1. A forward contract is a contract made today for delivery of goods (or performance) at a specified time in the future. Producers of agricultural commodities commonly use forward contracting in order to guarantee themselves a buyer for the amount of product they intend to plant or expect to harvest. Because the price is agreed upon at the time the contract is made, this also protects the farmer from declines in the selling price of the agricultural product between the time the contract is signed and the time at which the product will be delivered.
2. Agriculture and Agri-Food Canada, "Marketing Freedom for Grain Farmers: Frequently Asked Questions."

3. The Board does, however, own about 3,400 hopper cars and recently announced its decision to purchase two vessels to reduce shipping costs from Thunder Bay to ocean ports.

4. Canadian Wheat Board, "Farmers: Producer Payment Options."

5. See, for example: Informa Economics, *An Open Market for CWB Grain: Final Report*, June 2008, pp. 61–67; and Kate Stiefelmeyer et al., *The Move to a Voluntary Canadian Wheat Board: What Should be Expected?*, George Morris Centre, Guelph, October 2011, pp. 17–21.

6. Section 47.1 has been interpreted in different ways by academics, courts and stakeholders. For an overview of these arguments see section 3, "Commentary," in this legislative summary.

7. Canadian Wheat Board, "CWB outlines critical business requirements for new organization," News release and backgrounder, Winnipeg, 17 October 2011.

8. *Report of the Working Group on Marketing Freedom*, Ottawa, 22 September 2011.

9. The check-off is an optional deduction from final payments to producers collected in order to fund wheat and barley research activities. The check-off is currently provided for by sections 33.1 to 33.5 of the *Canadian Wheat Board Act*. Producers who wish to opt out must do so annually in writing. For more information, see Western Grains Research Foundation, "Check-off dollars are the most important way producers can invest in their industry," June–July 2010.

10. It should be noted that this recommendation has already been implemented. On 29 September 2011, it was announced that the Advance Payments Program would be transferred to the Canadian Canola Growers Association effective 1 October 2011; see Agriculture and Agri-Food Canada, "Harper Government Ensuring Grain Farmers' Access to Advance Payments Program," News release, Ottawa, 29 September 2011.

11. Technical Task Force on Implementing Marketing Choice for Wheat and Barley, *Marketing Choice – The Way Forward*, 25 October 2006.

12. JRG Consulting Group, *Canadian Wheat Board Transition Project*, Guelph, February 2006.

13. World Trade Organization, "Technical Information on State Trading Enterprises."

14. Marc D. Froese, Table 1, "US Trade Challenges to Canadian Wheat Exports, 1990–2006," in "Trade Friction, Dispute Settlement and Structural Adjustment, Or, Why *Canada–Wheat* Doesn't Matter in North American Trade Relations," *Estey Centre Journal of International Law and Trade Policy*, Vol. 11, No. 1, 2010, p. 50; see also p. 52.

15. However, the World Trade Organization dispute settlement panel in the 2004 *Measures Relating to Exports of Wheat and Treatment of Imported Grain* case did find that certain provisions of the *Canada Grain Act*, the *Canada Grain Regulations*, and the *Canada Transportation Act* were inconsistent with Canada's GATT Article III:4 obligations (national treatment). These provisions included: restrictions on imported grain from being received into a grain handling facility without special approval of the Canadian Grain Commission; a prohibition on the mixing of imported and domestic grain in transfer elevators; and the rail revenue cap, which set a maximum annual revenue that a railway could collect from shipments of western Canadian grain to port. On 1 August 2005, Canada amended the *Canada Grain Act* and the *Canada Transportation Act* in order to bring Canada into compliance with the ruling. See World Trade Organization, "Dispute Settlement: Dispute DS276, Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain."

16. NAFTA, Chapter Eleven, "Investment," Article 1110: Expropriation and Compensation.

17. *Interpretation Act*, R.S.C., 1985, c. I-21, s. 5(4).

18. See, for example, *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 122.

19. Ibid., s. 124(2).

20. In corporate law in most jurisdictions, a corporation is created by applying for letters patent or filing articles of incorporation with the appropriate government department, but can also be created by statute. Because a corporation is an "artificial person" created by operation of law, traditionally, these incorporating documents had to lay out the objects and powers of the company. A company's objects are the purposes for which it was incorporated, and these objects limit the types of work or activities in which it can engage. While a corporation can carry out other activities, it can do so only to the extent these other activities further the objects of the corporation and are minor in relation to the activities described in the objects. While these laws have been relaxed to some extent in more modern legislation in some jurisdictions, corporations that have objects and powers in their letters patent or articles of incorporation, or in a special Act of the legislature, are still governed by them and bound to act in accordance with them. If a corporation acts in pursuit of other objects, or attempts to use powers that it has not been granted, these acts or dealings can be found *ultra vires*. See, for example, *Canadian Pacific Ltd.* v. *Telesat Canada*, 36 O.R. (2d) 229 (Ont. C.A.), paras. 13 and 20; and *Dassen Gold Resources Ltd.* v. *Royal Bank*, 23 Alberta Law Review (3d) 261, para. 247.

21. "Grain" is not specifically defined in the new Act created by Part 2 of the bill. However, section 2(2) of the new Act states that, unless it is otherwise provided, words in this Act have the same meaning as in the *Canada Grain Act*. Section 2 of the *Canada Grain Act* defines "grain" as "any seed designated by regulation as a grain," and section 5 of the *Canada Grain Regulations* designate the following seeds as grain: barley, beans, buckwheat, canola, chickpeas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, solin, soybeans, sunflower seed, triticale and wheat.

22. *Canadian Wheat Board Regulations*, C.R.C., c. 397, s. 14.1 and 16.

23. For examples of the types of contracts typically offered in grain marketing, see Viterra (Canada), "Grain Contracts."

24. *Canadian Wheat Board Act*, s. 5.

25. See note 20, above.

26. See the Regulatory Impact Analysis Statement at "Regulations Amending the Canadian Wheat Board Contingency Fund Regulations," *Canada Gazette*, Vol. 145, No. 23, 9 November 2011.

27. Section 39(2) of the *Canadian Wheat Board Act* allows any balance remaining in the separate account, other than that required for payments to producers, to be used for such purposes as the Governor in Council, on the recommendation of the CWB, may deem to be for the benefit of producers. Technically, then, section 39(2) does not allow the corporation to independently use undistributed balances for any purpose at all, since the Governor in Council must first deem something to be for the benefit of producers. As a result, there is a chance that subsection 48(2) of the Interim Operations Act may not provide the CWB with adequate authority to use those undistributed balances for anything, unless the Governor in Council has already deemed something to be for the benefit of producers.

28. Section 19(3) of the Interim Operations Act (which corresponds to section 7(3) of the *Canadian Wheat Board Act*) is the provision that states that any losses sustained by the corporation in relation to a pool period, for which no other provision is made, are to be paid out of moneys provided by Parliament. Because the Act does not otherwise provide for losses resulting from sections 28 through 36 (the pooling provisions), these would be covered by section 19(3). If the CWB decides to operate pools pursuant to section 37 on the other hand (so that it is not subject to the requirements and limitations of sections 28 through 36), subsection 37(4) provides that any losses resulting from the operation of this section are to be paid out of the contingency fund.

29. *Canadian Wheat Board Regulations*, ss. 28 and 29.

30. Section 47.1 has been interpreted in different ways. See section 3, “Commentary,” in this legislative summary.

31. *Friends of the Canadian Wheat Board et al.* v. *Attorney General of Canada*, 2011 FC 1432, para. 30.

32. Ibid., para. 4.

33. Ibid., para. 8.

34. Agriculture and Agri-Food Canada, “Harper Government to Move Forward on Changes to Canadian Wheat Board: Will Appeal Federal Court Ruling,” News release, Ottawa, 7 December 2011.