CITATION: CANADA (WHEAT BOARD) *v.* CANADA (ATTORNEY GENERAL), 2009 FCA 214, [2010] 3 F.C.R. 374 A-446-08

Attorney General of Canada (*Appellant*)

v.

The Canadian Wheat Board (*Respondent*)

INDEXED AS: CANADA (WHEAT BOARD) v. CANADA (ATTORNEY GENERAL) (F.C.A.)

Federal Court of Appeal, Noël, Evans and Layden-Stevenson JJ.A.—Ottawa, June 10 and 23, 2009.

Agriculture — Appeal from Federal Court decision declaring Canadian Wheat Board Direction Order, prohibiting Canadian Wheat Board from expending funds on advocating retention of monopoly powers, ultra vires Canadian Wheat Board Act — Direction Order issued pursuant to Act, s. 18(1) — Federal Court erring to extent holding authority conferred to Governor in Council under Act, s. 18(1) aimed at protecting government funds — Plain purpose of Direction Order to ensure Wheat Board no longer advocating mandate conflicting with government policy using funds made available to it under Act — Act, s. 18(1) very broad, intended to provide Governor in Council with authority to direct Wheat Board on any matter of governance if disagreement with board of directors arising — Direction Order also coming within ambit of Act, s. 18(1), consistent with Act read as whole — Furthermore, in accordance with Act, s. 18(1.2), compliance with direction "deemed" by Act to be in Wheat Board's best interest — Thus following that after Direction Order issued, spending producer funds to advocate Wheat Board's monopoly no longer in Board's best interest for purposes of Act — Therefore, Federal Court wrong in holding Direction Order not falling within ambit of Act, s. 18(1) — Appeal allowed.

Constitutional Law — Charter of Rights — Fundamental Freedoms — Federal Court finding Canadian Wheat Board Direction Order, prohibiting Canadian Wheat Board from expending funds on advocating retention of monopoly powers, violating freedom of expression — Wheat Board creature of statute, thus having no powers, rights, duties except those conferred thereon by Canadian Wheat Board Act — Since as result of Direction Order, Wheat Board having no authority under Act to use producer funds to advocate against government policy, no Charter, s. 2(b) right to protect.

This was an appeal from a Federal Court decision allowing an application for judicial review by the Canadian Wheat Board. The Federal Court declared that the *Canadian Wheat Board Direction Order* (Direction Order), issued by the Governor in Council pursuant to subsection 18(1) of the *Canadian Wheat Board Act*, was *ultra vires* the Act, that it violated the guarantee of freedom of expression under the *Canadian Charter of Rights and Freedoms* and that it was not justified under section 1 thereof. The Direction Order was declared of no force and effect. It had been issued as a result of a disagreement between the federal government and the respondent as to the respondent's future role, specifically whether it should retain its statutory monopoly. The

government's policy is to give producers a choice to market grain through the respondent or through other means. The Direction Order prohibits the respondent from expending funds on advocating the retention of its monopoly powers.

The respondent is a marketing agency created by the Act and has been granted marketing and regulatory powers to market grain for producers. It has control in particular over the interprovincial and export trade of all wheat and barley in Canada. In 1998, the Act was amended with the result that the respondent ceased to be an agency of the Crown. A board of directors was also established. The statutory authority of the Governor in Council to issue directions pursuant to subsection 18(1) of the Act was maintained by the 1998 amendments. Several subsections (subsections 3.12(2), 18(1.1), 18(1.2)) which deal with the obligation of the directors and officers of the Wheat Board to comply with directions were added.

The issue was whether the Federal Court erred in its conclusions regarding the Direction Order.

Held, the appeal should be allowed.

Regarding the *vires* issue, it had to be determined whether the Direction Order was authorized by the power delegated to the Governor in Council pursuant to subsection 18(1) of the Act. The Federal Court conducted its analysis on the basis that the authority for issuing directions is aimed at protecting government funds but did not explain why it did so. On a plain reading, subsection 18(1) is not restricted to the protection of funds. On its face, the power to direct extends to the full range of activity which the Act authorizes the Wheat Board to conduct. The Federal Court erred to the extent that it was of the view that the authority so conferred was aimed at protecting government funds. The plain purpose of the Direction Order, when read together with the Regulatory Impact Analysis Statement, which accompanied the Direction Order, is to ensure that the Wheat Board no longer advocates a mandate that is at odds with government policy using funds made available to it under the Act. Nowhere was it made to appear that the purpose was to protect funds.

Subsection 18(1) of the Act is very broad and authorizes the government, through the Governor in Council, to direct the Wheat Board regarding the full range of activity conducted thereby. Subsection 18(1.2) was added to provide that compliance with a direction is "deemed" to be in the interest of the Wheat Board. Subsection 18(1) was clearly intended to provide the Governor in Council with the authority to direct the Wheat Board on any matter of governance in the event of a disagreement with the board of directors.

The Direction Order came within the ambit of subsection 18(1). Its purpose is to prevent the Wheat Board from expending funds accruing to it under the Act to advocate retention of its monopoly powers or to provide such funds to other persons to enable them to do so. Individual directors and staff of the Wheat Board remain free to advocate the view of their choice without financial support from the Wheat Board. The Direction Order also appeared to be consistent with the Act read as a whole. The Wheat Board has the authority to deduct certain corporate expenses set out in subsection 33(1) of the Act. None of the expenses listed pertain to advocacy on matters of public policy. Such advocacy could only come within its corporate objects by virtue of the general power set out in paragraph 6(*k*) of the Act empowering the Wheat Board "to do all such acts and things as may be necessary or incidental to carrying on its operations". Even if the Wheat Board had a right of advocacy on matters of public policy using producer funds, it was subject to the authority set out in subsection 18(1). Beyond the unlimited scope of the power to direct and its mandatory nature, in accordance with subsection 18(1.2) of the Act, compliance with a direction is "deemed" by the Act to be in the best interest of the Wheat Board. It follows that, after the Direction Order was issued, spending producer funds to advocate a monopoly was no longer in the best interest of the Wheat Board for purposes of the Act. Therefore, the Direction Order came within the ambit of subsection 18(1) and the Federal Court erred in holding otherwise.

The same reasoning disposed of the Charter issue. The Wheat Board is a creature of statute and as such, it has no powers, rights and duties except those conferred on it by the Act. Since as a result of the Direction Order, the Wheat Board has no authority under the Act to use producer funds to advocate against government policy,

there was no Charter right to protect pursuant to paragraph 2(*b*). Therefore, the question of whether a body having some of the trappings of government such as the Wheat Board can seek the protection of the Charter did not need to be answered in this case. However, the Federal Court's reasoning on this point should not be taken as having been endorsed.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2(*b*).

Canadian Wheat Board Act, R.S.C., 1985, c. C-24, ss. 3.02(1) (as enacted by S.C. 1998, c. 17, s. 3), 3.12(2) (as enacted *idem*), 4(2) (as am. *idem*, s. 4), 5 (as am. *idem*, s. 28(E)), 6(1)(*c*) (as am. *idem*, s. 6), (*d*) (as am. *idem*, ss. 6, 28(E)), (*k*) (as am. *idem*, s. 6), 9(1)(*b*) (as am. *idem*, s. 28(E)), 18(1) (as am. *idem*), (1.1) (as enacted *idem*, s. 10), (1.2) (as enacted *idem*), 33(1) (as am. *idem*, s. 19), 47.1 (as enacted *idem*, s. 25).

Canadian Wheat Board Direction Order, SOR/2006-247.

CASES CITED

CONSIDERED:

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, (1997), 152 D.L.R. (4th) 577, 47 C.R.R. (2d) 1.

REFERRED TO:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106, (1983), 143 D.L.R. (3d) 577, 46 N.R. 91; *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1, 33 N.R. 304; *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, (1994), 111 D.L.R. (4th) 385, 54 C.P.R. (3d) 114; *Friesen v. Canada*, [1995] 3 S.C.R. 103, 127 D.L.R. (4th) 193, [1995] 2 C.T.C. 369; *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293, 243 N.R. 170 (F.C.A.); *Jafari v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 595, (1995), 125 D.L.R. (4th) 141, 30 Imm. L.R. (2d) 139 (C.A.).

AUTHORS CITED

Regulatory Impact Analysis Statement, SOR/2006-247, *C. Gaz.* 2006.II.1546.

APPEAL from a Federal Court decision (2008 FC 769, [2009] 2 F.C.R. 347, 174 C.R.R. (2d) 85, 335 F.T.R. 76) declaring that the *Canadian Wheat Board Direction Order* was *ultra vires* the *Canadian Wheat Board Act*, violated the guarantee of freedom of expression under the *Canadian Charter of Rights and Freedoms* and was not justified under section 1 thereof. Appeal allowed.

APPEARANCES

Stephen F. Vincent and *Ryan Rempel* for appellant.

J. L. McDougall, Q.C., *Matthew Fleming* and *James E. McLandress* for respondent.

SOLICITORS OF RECORD

Hill Dewar Vincent, Winnipeg, for appellant.

Fraser Milner Casgrain LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

NOËL J.A.:

[1] This is an appeal from a decision [2008 FC 769, [2009] 2 F.C.R. 347] of Justice Hughes (the Federal Court Judge), wherein he allowed an application for judicial review by the Canadian Wheat Board (the Wheat Board or the respondent) and declared that: Order in Council P.C. 2006-1092 dated October 5, 2006 (the Direction Order) [*Canadian Wheat Board Direction Order*, SOR/2006-247] issued by the Governor in Council pursuant to subsection 18(1) [as am. by S.C. 1998, c. 17, s. 28(E)] of the *Canadian Wheat Board Act*, R.S.C., 1985, c. C-24 (the Act) was *ultra vires* the Act; violated the guarantee of freedom of expression under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter); and that there was no justification for the violation of that guarantee, and was therefore of no force and effect.

[2] The Direction Order was issued as a result of a disagreement between the federal government (the government) and the Wheat Board as to the Board's future role, specifically whether it should retain its statutory monopoly. The policy of the government is to give producers, who are divided on the issue, a choice to market grain through the Wheat Board or through other means. The Wheat Board, on the other hand, wishes to retain its monopoly powers.

BACKGROUND

[3] The Direction Order prohibits the Wheat Board from expending funds on advocating the retention of its monopoly powers. It reads:

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture and Agri-Food, pursuant to subsection 18(1) of the *Canadian Wheat Board Act*, hereby directs The Canadian Wheat Board to conduct its operation under the Act in the following manner:
>
> (*a*) it shall not expend funds, directly or indirectly, on advocating the retention of its monopoly powers, including the expenditure of funds for advertising, publishing or market research; and
>
> (*b*) it shall not provide funds to any other person or entity to enable them to advocate the retention of the

monopoly powers of The Canadian Wheat Board. [Footnote omitted.]

[4] The Wheat Board maintains that this Direction Order was issued without authority and is therefore illegal. The provisions of the Act, which are directly relevant to the authority of the Governor in Council to issue directions and the obligation of the directors and officers of the Wheat Board to comply with such directions, are as follows [ss. 3.12(2) (as enacted by S.C. 1998, c. 17, s. 3), 18(1.1) (as enacted *idem*, s. 10), (1.2) (as enacted *idem*)]:

3.12 (1) . . .

(2) The directors and officers of the Corporation shall comply with this Act, the regulations, the by-laws of the Corporation and any directions given to the Corporation under this Act.

. . .

18. (1) The Governor in Council may, by order, direct the Corporation with respect to the manner in which any of its operations, powers and duties under this Act shall be conducted, exercised or performed.

(1.1) The directors shall cause the directions to be implemented and, in so far as they act in accordance with section 3.12, they are not accountable for any consequences arising from the implementation of the directions.

(1.2) Compliance by the Corporation with directions is deemed to be in the best interests of the Corporation.

[5] The Regulatory Impact Analysis Statement (RIAS) which accompanied the issuance of the Direction Order is also relevant [*C. Gaz.* 2006.II.1546]:

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Order.*)

. . .

A commitment was made during the 2006 federal election campaign to give western Canadian wheat and barley producers the option of participating voluntarily in the CWB. The CWB has taken a public position opposing marketing choice. It is important that the CWB, as a shared-governance entity, not undermine government policy objectives. This Governor in Council order directing the CWB not to spend money on advocacy activity will ensure that the CWB carries out its operations and duties in a manner which is not inconsistent with the federal government's policy objectives. Direction Orders of this type may be made pursuant to the authority found in section 18 of the CWB Act.

Alternatives

The alternative would be to allow the CWB to spend funds towards advocating publicly against the policy goal of the federal government to give western grain producers the freedom to make their own marketing and transportation decisions, and to allow them to participate voluntarily in the CWB.

Benefits and Costs

As the funds available to the CWB are the funds of producers, some of whom favour marketing choice, those funds should not be used for a campaign which is aimed at preserving the monopoly. Producers who are in

favour of marketing choice will support action to protect producers' funds from being used to advocate for retention of the monopoly. Producers who support the continuation of the monopoly and the CWB can be expected to oppose the Direction Order. The Direction Order will ensure that the Canadian values of conducting votes that are fair and democratic and that provide equal opportunity to all positions are respected by the CWB during the consultation process for determining the future direction of the CWB.

The Direction Order does not prevent the CWB from spending funds to carry out its object of marketing grain in an orderly manner nor does it infringe on the rights of individual directors or CWB staff to make statements in public in their own name and without financial support from the CWB. It would, however, prohibit the spending of funds by the CWB for the purpose of advocating the retention or its monopoly powers and would prohibit the CWB from funding third parties for that purpose.

[6] It is useful to briefly consider the mandate of the Wheat Board, its operations and the circumstances which led to the present dispute.

[7] The Wheat Board is a marketing agency created by the Act which has been granted marketing and regulatory powers to market grain for producers. Based in Winnipeg, it has approximately 460 employees and represents approximately 75 000 grain producers (Measner affidavit, appeal book, Vol. I, page 76, paragraph 26). Pursuant to the object set out in section 5 [as am. by S.C. 1998, c. 17, s. 28(E)] of the Act, the Wheat Board has control over the interprovincial and export trade of all wheat and barley in Canada, as well as control over the interprovincial and export of wheat and barley produced in the "designated area" (Martin affidavit, appeal book, Vol. III, page 870, paragraph 10). The "designated area" consists of the provinces of Manitoba, Saskatchewan and Alberta, and that part of British Columbia known as the Peace River District.

[8] The Wheat Board pays producers an initial price set by regulation on delivery and may make adjustment payments, with the approval of the Governor in Council, as the crop production for that year is sold. The government is required to guarantee certain funds during certain periods. At the end of a crop year, or "pooling period", the total receipts from selling the grain in the pool, less expenses of the Wheat Board associated with its operations attributable to that grain, are remitted to the producers. The Wheat Board determines what expenses are charged to the pool accounts and paid for by producers (reasons, paragraph 36, Martin affidavit, appeal book, Vol. III, page 874, paragraph 17).

[9] Under the scheme, no one may move wheat and barley destined for domestic human consumption from one province to another, or for export, without the approval of the Wheat Board (Martin affidavit, appeal book, Vol. III, page 874, paragraph 18). These prohibitions combined with the Wheat Board's obligation to market grain under Part III have historically been described as the "single desk" (Ritter affidavit, appeal book, Vol. V, page 1778, paragraph 10).

[10] The Act was amended in 1998 with the result that the Wheat Board ceased to be an agency of the Crown (the 1998 amendments). In particular, subsection 4(2) [as am. *idem*, s. 4] of the Act now expressly provides that the Wheat Board is not an agent of the Crown or a Crown corporation. Pursuant to section 47.1 [as enacted *idem*, s. 25] the designated Minister under the Act (the Minister) must consult with the board of directors and conduct a producer vote prior to the introduction of legislation to amend the application of Parts III or IV of the Act to particular grains.

[11] The 1998 amendments also provided for the establishment of a 15-member board of directors. Ten of the directors are elected directly by producers, four are appointed by the Governor in Council on the recommendation of the Minister and the remaining director, the President and Chief Executive Officer of the Wheat Board, is appointed by the Governor in Council, following prior consultation with the board of directors (reasons, paragraphs 31 and 36). As a result, the majority of the directors are elected by producers.

[12] At the same time, the statutory authority of the Governor in Council to issue directions pursuant to subsection 18(1) was maintained by the 1998 amendments and subsections 3.12(2), 18(1.1), 18(1.2) were added (these are reproduced at the beginning of these reasons).

[13] The Federal Court Judge describes the disagreement between the government and the directors of the Wheat Board as follows (paragraph 44):

> . . . whether the Wheat Board should retain its monopoly powers, that is, operate as a "single desk," a view taken by a majority of the board of directors of the Wheat Board, or whether there should be an open market or some form of dual marketing as an intermediate position.

[14] The position of the government was stated in a letter dated April 11, 2006, sent to the President of the Wheat Board (reasons, paragraph 44):

> The new Conservative government has been clear on its intent to allow for voluntary participation in the Canadian Wheat Board. Once implemented, this policy will allow farmers the freedom to make their own marketing and transportation decisions. As the Minister responsible for the Board's conduct, I would appreciate the co-operation of the Board's management and directors in complying with this new direction, the policy of the Government of Canada.
>
> I would note that all communication and promotional material issued on behalf of the Board should clearly reflect Government policy. In addition, it is inappropriate for an agency of the Government to spend producers' money on activities that could be regarded as partisan in nature. The recent advertising campaign encouraging producers to write the Minister could be regarded as a political activity.
>
> I look forward to working with you and the Board in a transition plan to ensure a strong marketing option for farmers who choose to make use of the Canadian Wheat Board.

[15] There followed a series of letters in which the Wheat Board declined to "reflect Government policy" (reasons, paragraph 45) and the matter culminated with the issuance of the Direction Order on October 5, 2006.

THE FEDERAL COURT DECISION

[16] The Federal Court Judge noted that a determination as to the true nature of the Wheat Board was essential to the resolution of the application, particularly since the 1998 amendments (reasons, paragraph 27).

[17] After reviewing the 1998 amendments (reasons, paragraphs 30, 31 and 33), the Federal Court Judge noted that the previous Crown Corporation was replaced by a new Corporation, with a board of 15 directors charged with the task of directing and managing the affairs of the Corporation, but

who are nonetheless obliged to follow directions given by the government of the day. This is clear from the addition of subsections 18(1.1) and (1.2) by the 1998 amendments. The Federal Court Judge also noted earlier in his reasons that subsection 3.12(2) requires the directors and officers to comply with any direction given under the Act (reasons, paragraphs 32 and 35).

[18] In describing its operations, the Federal Court Judge explained that the Wheat Board receives, handles and sells grain, and distributes the proceeds, after deductions to the producers. The government is required to guarantee certain funds during certain periods, it gets paid out once most money is received from the sales, and will suffer liability only if there is a shortfall. Thus, the producers provide the stock-in-trade of the Wheat Board and the government guarantees funding (reasons, paragraph 36).

[19] The Federal Court Judge understood the Attorney General to argue "that the government has financial exposure under the Act and is therefore entitled to protect its financial interests by way of direction" (reasons, paragraph 38). He acknowledged that it would be prudent to make an appropriate direction if there is a genuine concern with the preservation of funds or the reduction of risk of loss (*idem*).

[20] According to the Federal Court Judge, the Direction Order was couched in terms of expenditure of funds. However, nowhere in the record was there any evidence that genuine consideration was given to the nature or extent of the funds that were in issue or at risk (reasons, paragraph 43).

[21] The Federal Court Judge went on to find that despite its apparent purpose, the Direction Order was primarily intended to silence the Wheat Board "in respect of any promotion of a 'single desk' policy that it might do" (reasons, paragraph 46). He further noted that an order that is "apparently directed to one purpose, [but] is really directed to a different purpose [is] not within the scope of the enabling statute, properly construed" (reasons, paragraph 48).

[22] The Federal Court Judge insisted that it may be appropriate for a direction to be issued to constrain or direct the expenditure of funds where it is demonstrated that there is a real concern that the obligation of Parliament to make good upon a significant shortfall of money is likely to occur. However, no such situation had been shown to exist on the record before him (reasons, paragraph 49). According to the Federal Court Judge, the true purpose was to silence the Wheat Board, and this purpose is not authorized. He therefore concluded that the Direction Order was *ultra vires* and of no effect (reasons, paragraph 50).

[23] Although this conclusion was dispositive of the issue before him, the Federal Court Judge went on to consider whether the Direction Order was also in breach of the Charter. The issue in this case was whether the Wheat Board is an entity that can seek the protection of the Charter, thereby allowing it to invoke the right of freedom of expression provided by paragraph 2(*b*) (reasons, paragraphs 53 and 54).

[24] According to the Federal Court Judge, the purpose and effect of the Direction Order was to restrict a particular form of expression, namely advocacy against government policy respecting the Wheat Board. If the Wheat Board were an entity entitled to invoke the Charter, the Direction Order

would be invalid for that reason (reasons, paragraph 55).

[25] The Federal Court Judge then quoted a passage from the decision of the Supreme Court in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 (*Godbout*), at paragraph 47, which held that certain entities, although not strictly speaking "governmental" could be held to be accountable under the Charter. He said (reasons, paragraph 58):

> What the Supreme Court is recognizing is that an entity other than that which is not strictly the government or one of its agencies, can be said to be the government if certain factors such as degree of control, are evident. It must therefore be equally true that an entity that is not clearly the government or one of its agencies that is subject to government control over what would otherwise be independent action, must be in those circumstances, able to invoke the Charter.

[26] Applying this reasoning, the Federal Court Judge held that the Wheat Board, as constituted since the 1998 amendments, is not government and as such, can claim Charter protection. Since the Direction Order is not authorized under the Act and impinges on freedom of expression, he held that it violates paragraph 2(*b*) of the Charter (reasons, paragraph 59).

[27] Finally, the Federal Court Judge held that the Direction Order is not saved under section 1 of the Charter (reasons, paragraph 60).

ISSUES RAISED ON APPEAL

[28] The appellant contends that the reasoning of the Federal Court Judge on both the *vires* and the Charter issue is fundamentally flawed. With respect to the *vires* issue, the appellant contends that the Federal Court Judge further erred by conducting his analysis on the basis that the authority provided under subsection 18(1) is limited to the protection of government funds and in holding that the Direction Order was issued for an improper purpose.

[29] In this respect, the appellant acknowledges that the purpose of the Direction Order was to prevent the Wheat Board from spending the money of producers to promote a "single desk" policy. However, the appellant submits that this comes within the authority conferred on the Governor in Council by subsection 18(1) of the Act and within the scheme of the Act as a whole. According to the appellant, the Federal Court Judge in his lengthy reasons did not confront the broad grant of authority conferred by that provision and explain why the Direction Order was not authorized.

[30] The appellant asserts that it never took the position before the Federal Court Judge that the Direction Order was issued for the purpose of protecting government funds. The appellant argues that the Federal Court Judge's conclusion that the "true" purpose of the Direction Order was concealed is without foundation. In this respect, the appellant stands by the contents of the RIAS.

[31] With respect to the Charter issue, the appellant contends that the Federal Court Judge erred both in failing to undertake the analysis required by the case law in order to determine if the Wheat Board is part of the government and in concluding that the Wheat Board, a creature of statute and subject to substantial control, is somehow to be treated as having Charter rights exercisable against government.

[32] The respondent for its part takes the position that the Federal Court Judge came to the proper conclusion on both the *vires* and the Charter issues. In asserting this position, it essentially stands by the reasons of the Federal Court Judge.

[33] With respect to the *vires* issue, the respondent supports the Federal Court Judge's finding that despite being presented as a measure directed towards control of funds, the Direction Order was "motivated principally to silencing the Wheat Board in respect of any promotion of a 'single desk' policy that it might do" (memorandum of the respondent, paragraph 35).

[34] According to the respondent, the Federal Court Judge proceeded on proper principle when he held that the use of subsection 18(1) to restrain expenditures might, in certain circumstances, be appropriate and accord with the purpose and object of the Act (*idem*, paragraph 41). However, the Federal Court Judge properly restrained the exercise of discretion by the Governor in Council given that it acted "with an improper intention in mind" (*idem*, paragraph 62). "Shortly put, if a power granted for a certain purpose is used for another, the power has not been validly exercised" (*idem*, paragraph 63).

[35] With respect to the Charter issue, the respondent contends that the Federal Court Judge correctly held, for the reasons that he gave, that the Wheat Board is entitled to Charter protection and that the Direction Order breaches the Wheat Board's right to free expression and cannot be justified under section 1 of the Charter.

ANALYSIS

[36] Turning first to the *vires* issue, the Court must determine on a standard of correctness whether the Direction Order was authorized by the power delegated to the Governor in Council pursuant to subsection 18(1) of the Act (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, paragraph 59).

[37] It is well-settled law that when exercising a legislative power given to it by statute, the Governor in Council must stay within the boundary of the enabling statute, both as to empowerment and purpose. The Governor in Council is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of an absence of good faith (*Thorne's Hardware Ltd. et al. v. The Queen et al.*, [1983] 1 S.C.R. 106, page 111; *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, page 752).

[38] The Federal Court Judge in this case conducted his analysis on the basis that subsection 18(1) provides authority for constraining or directing the expenditure of funds and found, as a fact, that the appellant had failed to show that the Governor in Council had a genuine concern relating to the protection of government funds. He said in this regard (reasons, paragraph 49):

> . . . it may well be appropriate for a direction to be issued to constrain or direct the expenditure of funds for a proper purpose where it has been demonstrated that there is a real concern that the obligation of Parliament to make good upon a significant shortfall of money is likely to occur. No such situation has been demonstrated on the evidence in the record.

[39] Earlier on, he expressed the same view in the following terms (reasons, paragraph 43):

The Direction is couched in terms of expenditure of funds. However nowhere in the record is there any evidence that genuine consideration was given to the nature or extent of funds that were in issue or at risk.

[40] In the end, the Federal Court Judge found: "that the Direction is motivated principally by silencing the Wheat Board in respect of any promotion of a 'single desk' policy that it might do" (reasons, paragraph 46).

[41] The appellant does not take issue with this last conclusion. He acknowledges that the purpose of the Direction Order is to prevent the Wheat Board from using producer funds to advocate a "single desk" policy. However, the appellant takes issue with the premise upon which the Federal Court Judge conducted his analysis and the suggestion (reasons, paragraph 48) that this purpose was hidden under the guise of a financial concern.

[42] The Federal Court Judge does not explain why he conducted his analysis on the basis that the authority for issuing directions is aimed at protecting government funds. On a plain reading, subsection 18(1) is not restricted to the protection of funds. While certain actions, such as those with financial implications that could affect the government are explicitly subject to government approval (see for instance paragraph 6(1)(*c*) [as am. by S.C. 1998, c. 17, s. 6], 6(1)(*d*) [as am. *idem*, ss. 6, 28(E)] or 9(1)(*b*) [as am. *idem*, s. 28(E)]), subsection 18(1) is not so limited. This provision allows the Governor in Council to issue directions "with respect to the manner in which any of its operations, powers and duties . . . shall be conducted, exercised or performed." On its face, the power to direct extends to the full range of activity which the Act authorizes the Wheat Board to conduct. To the extent that the Federal Court Judge was of the view that the authority so conferred is aimed at protecting government funds, he erred.

[43] The Federal Court Judge also appears to have understood that the Direction Order was intended to protect government funds (reasons, paragraph 38). However, counsel for the appellant did not recall taking this position before the Federal Court Judge and counsel for the respondent was unable to point to anything on the record indicating that such a position had been taken.

[44] The purpose of the Direction Order is apparent from its wording and is further set out in the RIAS which accompanied its issuance. The use of the RIAS in ascertaining the purpose of delegated legislation is well established (*R.I.R.* — *MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, pages 352–353; *Friesen v. Canada*, [1995] 3 S.C.R. 103, paragraph 63; *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293 (F.C.A.), paragraph 10).

[45] The plain purpose of the Direction Order, when read together with the RIAS, is to ensure that the Wheat Board no longer advocates a mandate that is at odds with government policy using funds made available to it under the Act. Nowhere is it made to appear that the purpose is to protect funds. The suggestion by the Federal Court Judge that the true purpose of the Direction Order was concealed under the guise of a non-existent financial purpose is, with respect, misconceived.

[46] The first step in a *vires* analysis is to identify the scope and purpose of the statutory authority pursuant to which the impugned order was made. This requires that subsection 18(1) be considered in the context of the Act read as a whole. The second step is to ask whether the grant of statutory authority permits this particular delegated legislation (*Jafari v. Canada (Minister of Employment and*

Immigration), [1995] 2 F.C. 595 (C.A.), page 602).

[47] Turning to the first step, subsection 18(1) is very broad. As noted, it authorizes the government, through the auspices of the Governor in Council, to direct the Wheat Board with respect to the full range of activity conducted by the Wheat Board.

[48] Counsel for the respondent argued that the 1998 amendments implicitly limit the broad grant of authority set out in subsection 18(1). He referred in particular to the fact that the Wheat Board ceased to be an agent of the Crown or a Crown Corporation (subsection 4(2)), that the majority of the directors was henceforth elected by producers (subsection 3.02(1) [as enacted *idem*, s. 3]), and that the Minister responsible for the Wheat Board was bound by statute to consult with the board of directors and conduct a producer vote before introducing legislation affecting the monopoly created under the Act (section 47.1).

[49] These changes do point to an increased role for the board of directors. However, when these amendments were brought, subsection 18(1) was not only preserved but strengthened. Beyond subsection 3.12(2) which sets out the directors' duty to comply with any direction given pursuant to subsection 18(1), subsection 18(1.2) was added to provide that compliance with a direction is "deemed" to be in the best interest of the Wheat Board. At the same time, the directors were relieved from liability which could arise from such compliance (subsection 18(1.1)).

[50] When regard is had to the 1998 amendments as a whole and the fact that since that time, the majority of the directors are elected by producers, it becomes clear that subsection 18(1) was intended to provide the Governor in Council with the authority to direct the Wheat Board on any matter of governance in the event of a disagreement with the board of directors. By requiring that this authority be exercised formally and in public, by Order in Council, Parliament ensured that the government would be accountable politically for the use made of that authority. The repository of the power and the mode of its exercise reinforce the broad scope of the authority set out in subsection 18(1) and Parliament's intent that the government should retain the ultimate power to decide in the event of a disagreement.

[51] I should add that given the importance of the 1998 amendments, the fact that the power to direct has never been used over the Wheat Board's objection and that directions have been resorted to sparingly (21 times over the last 45 years) (Measner affidavit, appeal book, Vol. I, page 74, paragraph 17) is of no significance for the purpose of this proceeding.

[52] The second question is whether the Direction Order comes within the ambit of subsection 18(1). This requires an identification of the purpose of the Direction Order. As noted, the purpose can be gleaned from the Direction Order itself as well as the RIAS: the Wheat Board is directed not to expend funds accruing to it under the Act to advocate retention of its monopoly powers or to provide such funds to other persons to enable them to do so (see paragraph 3 of these reasons). The Direction Order being limited to the use of funds, individual directors and staff of the Wheat Board remain free to advocate the view of their choice without financial support from the Wheat Board (RIAS, above, at paragraph 5 of these reasons).

[53] The Direction Order also appears to be consistent with the Act read as a whole. Pursuant to

section 5, the Wheat Board's mandate is to market, in interprovincial and export trade, grain grown in Canada. To carry out this mandate, the Wheat Board is given extraordinary powers over grain producers, including the requirement that producers sell their wheat and barley to the Wheat Board, and the authority to deduct corporate expenses before remitting proceeds to the producers. The authority to deduct corporate expenses from the pools is set out in subsection 33(1) [as am. *idem*, s. 19] of the Act. None of the expenses listed pertain to advocacy by the Wheat Board on matters of public policy.

[54] If advocacy by the Wheat Board on matters of public policy using producer funds is within its corporate objects, it could only be by virtue of the general power set out in paragraph 6(*k*) [as am. *idem*, s. 6], which empowers the Wheat Board "generally to do all such acts and things as may be necessary or incidental to carrying on its operations under [the] Act."

[55] However, even if such a right exists, it is subject to the authority set out in subsection 18(1). I note in this respect that beyond the unlimited scope of the power to direct and its mandatory nature, compliance with a direction is "deemed" by the Act to be in the best interest of the Wheat Board (subsection 18(1.2)).

[56] It follows that, after the Direction Order was issued, spending producer funds to advocate a "single desk" was no longer in the best interest of the Wheat Board for purposes of the Act. If *intra vires*, the spending restriction embodied in the Direction Order has the same effect as if it was written in the Act itself. That is the inescapable effect of subsection 18(1.2).

[57] I therefore conclude that the Direction Order comes within the ambit of subsection 18(1) and that the Federal Court Judge erred in holding otherwise.

[58] The same reasoning disposes of the Charter issue. The conclusion reached by the Federal Court Judge on this aspect of the case is that the Wheat Board is entitled under the Act to use producer funds to advocate its own view and that preventing the Wheat Board from exercising that right, as the Direction Order purports to do, infringes on the Wheat Board's freedom of expression as guaranteed by paragraph 2(*b*) of the Charter (reasons, paragraph 59).

[59] The Wheat Board is a creature of statute and as such, it has no powers, rights and duties save those bestowed on it by the Act. Since I have found that as a result of the Direction Order the Wheat Board has no authority under the Act to use producer funds to advocate against government policy, there is no Charter right to protect pursuant to paragraph 2(*b*). In this respect, counsel for the respondent acknowledged that his case was premised on the assumption that the Act does permit the expenditure of funds for advocating a "single desk".

[60] The question whether a body having some of the trappings of government, such as the Wheat Board, can seek the protection of the Charter therefore needs not be answered in the present appeal. However, the Court should not be taken as endorsing the reasoning of the Federal Court Judge on this point.

[61] For these reasons, I would allow the appeal with costs, set aside the decision of the Federal Court Judge and giving the judgment which he ought to have given, I would dismiss the application

for judicial review with costs.

EVANS J.A.: I agree.

LAYDEN-STEVENSON J.A.: I agree.