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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

ALLEN OBERG, RON FLAMAN, CAM GOFF, KYLE KORNEYCHUK, JOHN SANDBORN, BILL TOEWS, STEWART WELLS and BILL WOODS,	)	COUNSEL:
	)	
	)	For the plaintiffs:
	)	Colin R. MacArthur, Q.C.
	)	and John B. Martens
plaintiffs,	)	
	)	For the defendant:
- and -	)	Robert MacKinnon and
	)	Joel I. Katz
ATTORNEY GENERAL OF CANADA,	)	
	)	JUDGMENT DELIVERED:
defendant.	)	February 24, 2012

PERLMUTTER J.

INTRODUCTION

[1] The plaintiffs, who are former board members of the Canadian Wheat Board ("CWB"), seek an interlocutory order staying and/or suspending *nunc pro tunc* the operation and implementation of the *Marketing Freedom for Grain Farmers Act*, S.C. 2011, c. 25 (the "New Act"), or in the alternative the operation of Parts I and II of the New Act, as at the date and time of Royal Assent, pending a decision as to the validity of the New Act.

BACKGROUND

[2] In their statement of claim, the plaintiffs claim declarations that the New Act is invalid and infringes the rule of law, the *Constitution Act*, 1867, and the *Constitution Act*, 1982. The plaintiffs rely on a decision by Campbell J. in *Friends of the Canadian Wheat Board v. Canada (Minister of Agriculture)*, 2011 FC 1432, in which the plaintiffs were also applicants. Campbell J. declared that the Minister responsible for the CWB breached his statutory duty pursuant to s. 47.1 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24 (the "CWB Act") to consult with the CWB Board and conduct a vote of wheat and barley producers as to whether they agree with removing wheat and barley from the application of Part IV of the CWB Act and eliminating the CWB's exclusive statutory marketing mandate. Further, Campbell J. declared that the Minister failed to comply with his statutory duty pursuant to s. 47.1 of the CWB Act to consult with the CWB Board and to hold a producer vote, prior to introducing Bill C-18 (which became the New Act) in Parliament.

[3] It is the plaintiffs' position that the New Act is the result of the illegal action of the Minister and the New Act is thus invalid. The plaintiffs rely on s. 52(1) of the *Constitution Act*, 1982 and the "rule of law". Section 52(1) of the *Constitution Act* provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[4] In 1998, the CWB Act was amended to provide for a 15 person board with ten board members to be elected by producers and s. 47.1 was enacted. The

plaintiffs were eight of the ten board members elected by producers. Section 47.1 of the CWB Act provides:

> **47.1** The Minister shall not cause to be introduced in Parliament a bill that would exclude any kind, type, class or grade of wheat or barley, or wheat or barley produced in any area in Canada, from the provisions of Part IV, either in whole or in part, or generally, or for any period, or that would extend the application of Part III or Part IV or both Parts III and IV to any other grain, unless
>
> (a) the Minister has consulted with the board about the exclusion or extension; and
>
> (b) the producers of the grain have voted in favour of the exclusion or extension, the voting process having been determined by the Minister.

[5] Parts III and IV of the CWB Act create a "single desk" for the interprovincial and export marketing and trade in wheat and barley. The plaintiffs were elected on the basis of their support for the single desk.

[6] As noted, the Minister introduced the Bill in Parliament, without consulting with the CWB board and without holding a producers' vote.

[7] The New Act adopts a five-part approach to the changes it makes. Part 1 came into force immediately on Royal Assent. Part 1 eliminated the ten elected directors' positions, including the plaintiffs. Part 1 also provides that a person may agree to sell or buy wheat if the agreement provides for the sale or purchase to occur on or after Part 2 of the New Act comes into force, which is scheduled for August 1, 2012 (New Act, s. 11). Part 2 will repeal the CWB Act in its entirety (New Act, s. 39). In its place, Part 2 substitutes a new regime entitled the *Canadian Wheat Board (Interim Operations) Act*. The CWB will continue to function as a grain marketing entity under Part 2, although its

mandate will rest upon voluntary transactions instead of the single desk. (New Act, s. 14) Part 2 provides a transitional period not exceeding five years. At the end of the process contemplated by the New Act, the CWB would either be continued under Part 3 of the New Act or wound up and dissolved under Part 4 of the New Act. The interim statute governs the CWB until it is continued under Part 3 or dissolved under Part 4. Once either of those results occurs, Part 5 repeals the interim statute.

THE LAW

[8] The three-stage test for granting an interlocutory injunction is undisputed. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. (*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334) These three requirements are to be considered, not as separate hurdles, but as interrelated considerations (*Apotex Fermentation Inc. et al. v. Novopharm Ltd. et al.* (1994), 95 Man.R. (2d) 241 (C.A.) at para. 14).

ANALYSIS

Serious Question

[9] The plaintiffs say that the Minister breached the constitutional principle to follow the rule of law by introducing the Bill (which became the New Act) without

following the "manner and form" requirements in s. 47.1 of the CWB Act. The plaintiffs rely on Campbell J.'s decision that s. 47.1 "contains conditions which are known in law as 'manner and form' procedural requirements" (para. 9). The plaintiffs argue that because s. 47.1 is a manner and form provision, non-compliance with s. 47.1 results in the New Act being invalid.

[10] The plaintiffs draw a comparison to *R. v. Mercure*, [1988] 1 S.C.R. 234, where there was a challenge to legislation passed in Saskatchewan in English only. In determining that Saskatchewan statutes must be enacted in both English and French, the Supreme Court of Canada relied on a manner and form provision. The Court stated that (at p. 277):

> ... A basic provision regarding the manner in which a legislature must enact laws cannot be ignored. I cannot accept that such a provision can be impliedly repealed by statutes enacted in a manner contrary to its requirements ... Since the manner and form of enactment (in English and French) was not entrenched, however, the provision may be modified or repealed, but such repeal or modification must be made in the manner and form required by law at the time of the amendment.

[11] The plaintiffs say that, by analogy, s. 47.1 could not be ignored or impliedly repealed and by not complying with s. 47.1, the New Act that was subsequently passed is invalid. The plaintiffs argued that comity dictates that this court recognize Campbell J.'s findings.

[12] It is the Attorney General's position that this motion should be dismissed on threshold considerations. The Attorney General argued that Campbell J. did not conclude that s. 47.1 is a "manner and form" requirement and that the plaintiffs are relying on *obiter* comments. Counsel for the Attorney General argued that there is not a separate rule of law constraint distinct from "manner

and form" provisions and that s. 47.1 does not meet the qualifications for a "manner and form" provision. The Attorney General says that the plaintiffs did not identify any Constitutional provision with which the New Act might be inconsistent. In addition, the Attorney General says that the plaintiffs are asking for an interlocutory declaration of invalidity, which is unavailable at law.

[13] The plaintiffs rely on s. 52(1) of the *Constitution* Act, 1982. While that provision allows the court to grant a declaration of invalidity if a statute violates the Constitution, the plaintiffs must first establish the constitutional provision or principle which the New Act violates. Section 52(1) of the *Constitution Act* is a remedy provision. It does not create a basis for granting a remedy.

[14] The plaintiffs argue that the New Act is invalid for breaching the rule of law. But, the rule of law is an overarching principle guiding the application of other rights. This principle requires everyone, including government officials, to comply with the law, including the Constitution (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 72). But, again, it does not establish a remedy unless one can point to the law with which the government action conflicts. There is no case of which I am aware where the rule of law *simpliciter* formed the basis for declaring legislation invalid. In *Mercure*, the rule of law and the *de facto* doctrine were used to keep the existing laws temporarily in effect for the minimum time necessary for the Saskatchewan statutes to be translated into French after the statutes were found to violate the *Saskatchewan Act*. Similarly, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the

Supreme Court of Canada relied on the rule to temporarily suspend a declaration of invalidity of Manitoba laws and avoid a legal vacuum after finding Manitoba's English only laws violated s. 23 of the *Manitoba Act*.

[15] The only substantive basis relied upon by the plaintiffs for declaring the New Act invalid is that it was enacted in violation of s. 47.1 of the CWB Act. However, it is my view that s. 47.1 is not addressing the revamping of the single desk. The wording of s. 47.1 refers to the addition or subtraction of particular grains or types of grains from the marketing regime established in Parts III and IV of the CWB Act. The Bill (and the New Act) does not remove a particular type of wheat or barley from the application of Part IV of the CWB Act. As such, it is my view that s. 47.1 did not apply to the Bill.

[16] While I understand that Campbell J. concluded otherwise, with respect, based on the principle of *stare decisis* I am not bound by Campbell J.'s decision.

[17] Moreover, in my view, s. 47.1 is not a manner and form provision. In *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, the Supreme Court of Canada discussed what is necessary in order to impose an effective manner and form requirement. (See also, *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004), 73 O.R. (3d) 621, para. 49.)

[18] First, the Court referred to s. 42(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

> Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

[19] Sopinka J. stated "This provision requires that federal statutes ordinarily be interpreted to accord with the doctrine of parliamentary sovereignty" (p. 562). This provision also applies to the case at bar.

[20] Sopinka J. indicated that it would have to be shown that Parliament intended, in the face of s. 42(1), to bind itself or restrict the legislative powers of those of its members who are also members of the executive (p. 562).

[21] Section 47.1 does not use language showing that Parliament intended, in the face of s. 42(1) of the *Interpretation Act*, to bind itself or restrict the legislative powers of its members with respect to revamping the single desk or repealing the CWB Act. The plaintiffs filed Hansard with comments from the Minister regarding the purpose of s. 47.1. In my view, these comments do not detract from my interpretation of s. 47.1, and, in fact, are supportive of my interpretation. The Secretary of State's explanation for what became s. 47.1 included "The outcome of [a vote among producers] would have to be in favour of the proposal **to add or exclude a grain** before the minister could take any action..." [Emphasis added] (House of Commons Debates, Vol. 135, No. 117, 1st Session, 36th Parliament, Official Report (Hansard), June 8, 1998, p. 7756).

[22] Second, the Supreme Court of Canada noted that when it has found "manner and form" restrictions, the instrument creating the restrictions has not been an ordinary statute. The Court cited as an example the *Canadian Bill of Rights* and the section at issue in *Mercure* which was of a constitutional nature. Sopinka J. stated at p. 563:

> ... It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But **where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future**. [Emphasis added]

[23] In my view, the CWB Act is not of a constitutional or quasi-constitutional nature such as the *Canadian Bill of Rights*.

[24] The Court explained the third qualification on manner and form provisions as follows (at pp. 563-64):

> ... It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia, supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):
>
> > Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. **A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure ... does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power**. [Emphasis added]

[25] In the present case, a requirement for consent from an entity that does not form part of the legislative structure (the producers) amounts to a substantive constraint on Parliament's legislative capacity and does not relate to the manner or form of its exercise.

[26] Therefore, in my view, s. 47.1 cannot be used by the plaintiffs as a basis for challenging the validity of the New Act.

[27] As indicated in *Apotex Fermentation Inc., supra*, "there will be cases where on the face of it the merits of the plaintiff's case are so wanting that the judge at the outset of the hearing will have no difficulty rejecting an application for injunction on that ground alone" (para. 14).

[28] Mr. Justice Robert J. Sharpe, *Injunctions and Specific Performance*, (Toronto: Canada Law Book, 2012), loose-leaf updated January 2012 provides:

> It is submitted, however, that the post-*Cyanamid*, *Metropolitan Stores* and *RJR – MacDonald* jurisprudence, reviewed below, demonstrates that those cases have to be read in the context of their particular facts. It seems incontrovertible that the plaintiff's chance of ultimate success is directly relevant to an assessment of the relative risks of harm. The likelihood of the plaintiff's success or failure relates both to the extent of the risk that there will be any legal harm which calls for a remedy in favour of the plaintiff, and to the extent of the risk that an injunction may prevent the defendant from pursuing a rightful course of conduct. Surely all other considerations equal, a plaintiff who has a 75% chance of success has a stronger claim to interlocutory relief than a plaintiff who only has a 25% chance of success. As it is relevant, the strength of a case should be considered, unless there is some compelling reason to disregard it. There appears to be no evidence of poor quality of decisions on the merits at the interlocutory stage. On the contrary, there is every indication that one of the virtues of the interlocutory application is that it provides a quick, inexpensive and reliable determination which usually avoids the necessity of further litigation. (2.160)
>
> The difficulty of assessing the strength of a case varies widely according to the circumstances. *Cyanamid* and *RJR – MacDonald* signal the need for caution in attaching weight to a preliminary assessment of the merits, but this is to say no more than that the risk of harming a defendant who may have a valid defence to the claim must be carefully weighed. Where the chance of accurate prediction is higher, as for example, where the result turns on the construction of a statute or the legal consequence of admitted facts, the court hearing the preliminary application is in a very good position to predict the result. ... (2.170)

[29] In the case at bar, the result turns on the construction of s. 47.1 of the CWB Act and on the legal consequence of the Minister not engaging s. 47.1 of the CWB Act prior to introducing the Bill. On the face of it, it is my view that the

merits of the plaintiffs' case are so wanting that that the application for injunctive relief ought to be rejected on this ground alone. In my view, it has not been established that there is a serious issue to be tried.

[30] However, in the event that the plaintiffs can meet the threshold of the first stage of inquiry, I move on to consider the second and third stage of the injunction test.

Irreparable Harm

[31] The second stage of the test is deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm (*RJR – MacDonald*, pp. 340-41). At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application (*RJR – MacDonald*, p. 341). "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (*RJR – MacDonald*, p. 341).

[32] At the time that *RJR – MacDonald* was decided, the Court indicated that (at p. 342):

> ... In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a

> refusal of relief, even though capable of quantification, constitutes irreparable harm.

[33] In the case at hand, the plaintiffs do not allege a breach of their *Charter* rights. While damages are now a recognized remedy under s. 24(1) of the *Charter* (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28), it is not clear that damages are recoverable for other Constitutional breaches. That being said, in my view, the evidence here does not establish irreparable harm.

[34] In the case at bar, the plaintiffs claim irreparable harm on three grounds:

i. The ability for forward contracting outside the single desk for the 2012-2013 crop year;

ii. Uncertainty and potential for contracts being overturned if the New Act is declared invalid, which the plaintiffs say was experienced in the barley market in 1993 and 2007, resulting in a disruption in the supply of Canadian wheat and barley in Canada. They say that the reputation of CWB and Canadian grain producers as a reliable supplier of high quality grain will be damaged; and

iii. The removal of the elected directors means that producers will no longer have elected directors representing their interest in the governance of the CWB.

[35] In considering irreparable harm, the focus is on any adverse effect on the applicants' own interests. It is only when considering the balance of convenience that interests outside those of the applicants are considered.

[36] Evidence of irreparable harm must be clear and not speculative (*J-Sons Inc. v. N.M. Paterson & Sons Ltd.*, 1999 CarswellMan 167 (Man. Q.B.), para. 7, aff'd [1999] M.J. No. 217 (Man. C.A.); *Bank of Montreal v. Superior Management Ltd. et al.*, 2010 MBQB 244, paras. 44, 48).

[37] In this case, the essence, historically, of the CWB as the exclusive marketing agency for western Canadian wheat and barley ought to be kept in mind. The result of the New Act is the elimination of the single desk because western Canadian wheat and barley will no longer be marketed exclusively through the CWB. Some producers, such as the plaintiffs and at least some of those that they represented when they were CWB directors, support the single desk. They have concluded that the greatest advantage of the single desk is that it generates a price premium. They also point to other financial advantages of the "pooling system". Other producers favour the option of selling their wheat and barley on the open market. The Attorney General filed evidence that the question of whether the CWB obtains a "price premium" is controversial. It is this debate that, in my view, informs the irreparable harm analysis.

[38] First, I will deal with forward contracting. The CWB sells wheat primarily to millers who in turn sell their processed product to their customers. The global market for wheat typically operates on a "forward sell" basis. That is to say, end-users purchase flour or semolina from millers two to six months before they actually require it to be delivered. When millers price flour or semolina for their customers, they seek to also price their wheat at the same time. This, in turn, means that marketers, including the CWB, "forward sell" to millers. In the result, many of the CWB sales to millers occur before the wheat crops are harvested. The period for "forward selling" of barley is longer than it is for wheat, typically six to twelve months forward.

[39] The plaintiffs say that forward contracting outside the single desk will result in lesser returns to the CWB and producers such as the plaintiffs who deal with the CWB will sustain diminished income. The Attorney General says that any claim of lost revenue is speculative.

[40] There is conflicting evidence regarding the financial benefit of the single desk. The impact on producers like the plaintiffs of eliminating the single desk such that forward contracting is permitted on the open market is unclear. Given the conflicting evidence, it is far from clear that producers' incomes will be adversely affected. There is no clear evidence that these plaintiffs are being, for example, put out of business because of the change from the single desk.

[41] Second, the plaintiffs point to 1993 and 2007 amendments that permitted producers to sell Canadian barley directly rather than through the CWB. In both situations, these amendments were overturned and the plaintiffs say that losses were incurred. The plaintiffs argue that there is the potential for the same to occur in this case if the New Act is declared invalid and there has been forward contracting on the open market.

[42] The evidence that this scenario will cause irreparable harm is not clear. The Attorney General filed evidence that in the 2007 situation, when the CWB's "monopoly" was restored, the CWB was able to offer to fulfill the sales contracts entered into by the grain companies, on terms which were profitable for the CWB. I am not satisfied that the evidence establishes a sufficient comparison

between the 1993/2007 barley situation and the facts at hand to draw the inference that the same result will occur if the New Act is declared invalid.

[43] The plaintiffs and the Attorney General each offer competing scenarios as to the impact in the market, related uncertainty, and Canada's reputation with or without the granting of an interlocutory injunction. Some of this uncertainty surrounds the risk of entering forward contracts without certainty as to whether the CWB will maintain its single desk or an open market will prevail. The plaintiffs also say that there will be uncertainty on farmers' seeding decisions. The plaintiffs filed evidence that the CWB's ability to provide a reliable supply of high quality grain is critically important to its customers and the current uncertainty and potential for contracts being overturned if the New Act is later declared invalid will result in significant disruption in the supply of Canadian wheat and barley. According to the plaintiffs, if this happens, Canada's reputation as a reliable supplier will be damaged, and this will impact them.

[44] The Attorney General tendered evidence that to avoid the risks of uncertainty from an interlocutory injunction, producers may plant crops other than wheat and barley which could compromise Canada's ability to meet customer needs. Such a scenario would negatively affect existing foreign customer relations and damage Canada's reputation as a reliable wheat and barley supplier.

[45] In my view, both scenarios offered by the parties are speculative. It is not clear that concerns about uncertainty and Canada's reputation as a supplier would be overcome with or without the issuance of an interlocutory injunction.

[46] Third, the plaintiffs argue that like in *R. v. Mercure, supra*, where there was a right to have legislation in both official languages, by analogy s. 47.1 created a right for producers to elect directors to manage the CWB affairs and to have these directors represent their interest and there was a right created for all producers (including the plaintiffs) to vote on substantial changes to the CWB Act. The plaintiffs filed evidence that farmers have come to expect that they are entitled to vote on any significant changes to the CWB's marketing mandate. By ignoring this right, Mr. MacArthur argued that the minister set in motion a result of irreparable harm. Mr. MacArthur argued that the plaintiffs lost their individual right to democracy and have been deprived of the right to be represented in the governance of the CWB. The plaintiffs claim that decisions are being made without producers' input which leads to irreparable harm.

[47] In *R. v. Mercure*, the Court described the rights at issue (at p. 268):

> ... Language rights are a well-known species of human rights and should be approached accordingly.

Also, the Court quoted (at p. 269) from *Reference re Manitoba Language Rights*:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

[48] The plaintiffs also argued that their rights are analogous to the rights at issue in *Law Society of British Columbia v. Canada (Attorney General)*, 2001 BCSC 1593, 207 D.L.R. (4th) 705, aff'd 2002 BCCA 49, 207 D.L.R. (4th) 736, the violation of which would have resulted in the "public's confidence in an independent bar [being] shaken and the lawyer-client relationship irrevocably damaged" (para. 82).

[49] In my view, non-compliance with s. 47.1 is not comparable to non-compliance with language rights or a violation of the lawyer-client relationship. The loss of language rights and the inability for a client to confide in his or her lawyer are clearly not compensable in damages. How is a loss of language rights compensable? How can the public's loss of confidence in the lawyer-client relationship be compensated? The result of the non-compliance with s. 47.1 and the enactment of the New Act is the elimination of the single desk and the elected CWB directors' positions, the majority of whom supported the single desk. As noted, the impact on producers of eliminating the single desk such that forward contracting is permitted on the open market is unclear.

[50] To the extent that producers, including the plaintiffs, are deprived of CWB elected directors, any loss is primarily limited to not having these directors represent them so as to safeguard the single desk. In my view, the result of eliminating these elected directors is akin to eliminating the single desk, which, again, has not been demonstrated as resulting in a loss.

[51] Ultimately, if it is established that the plaintiffs ought not to have been removed from office, they may be restored. There is also authority to the effect that the loss of office itself and to which the officeholder may be entitled do not constitute irreparable harm which cannot be compensated by damages (*Weatherill v. Canada (Attorney General) et al.* (1998), 143 F.T.R. 302 at para. 30 (F.C.T.D.)).

[52] Much evidence was filed as to the economics of the single desk, which underscores that however the issue of harm is framed this dispute is at its core financial. I am not satisfied that it has been demonstrated that the plaintiffs will sustain financial loss without an injunction. I have concluded that the evidence of irreparable harm is not clear. Irreparable harm is not a threshold test and as such I am proceeding to the third stage of the tripartite analysis.

Balance of Convenience

[53] The third stage of the test involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, the Court explained the relevance of the public interest at this stage of the analysis (at pp. 135-36):

> While respect for the Constitution must remain paramount, **the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration** in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they

> have found it necessary to rise above the interests of private litigants up to the level of the public interest, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute. [Emphasis added]

[54] In *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, the Court wrote (at para. 5):

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. **On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe.** An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough ... [Emphasis added]

[55] It is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament has duly enacted for the public good are inoperable in advance of complete constitutional review. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed. (*Harper*, para. 9)

[56] As noted by Counsel for the Attorney General, the Supreme Court of Canada dealt with issues of interlocutory relief in the context of challenges to the validity of legislation on four occasions and in all cases the applicants failed to establish that the balance of convenience entitled them to the relief sought (*Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124; *Manitoba (Attorney*

General) v. Metropolitan Stores Ltd., *supra*; *RJR – MacDonald Inc. v. Canada (Attorney General)*, *supra*; and *Harper v. Canada (Attorney General)*, *supra*. As noted in *Law Society of British Columbia v. Canada (Attorney General)*, *supra*, because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, interlocutory injunctions are rarely granted in constitutional cases (para. 85).

[57] In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would provide a public benefit (*Harper*, para. 9, quoting from *RJR – MacDonald*, pp. 348-49).

[58] Mr. MacArthur relies on much of the same evidence and arguments advanced as to irreparable harm when considering the balance of convenience, except the argument as to harm extends beyond the plaintiffs' own interests to harm not directly suffered by them (*RJR – MacDonald*, p. 344). The issue is how this evidence and these arguments impact the public interest. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups. (*RJR – MacDonald*, p. 344)

[59] I have considered the issue of harm beyond the plaintiffs. I have considered the public interest. For the same reasons that I am not persuaded that the plaintiffs would suffer irreparable harm if an injunction is not granted, I

am not persuaded that the harm weighs in favour of a public benefit so as to overcome the assumed benefit to the public interest.

[60] For the reasons articulated above, the evidence of irreparable harm to producers, others affected by the New Act, and the public is not clear. To the extent that forward contracting is permitted outside the single desk and the single desk and the elected CWB directors' positions were eliminated, it has not been demonstrated that the plaintiffs will sustain losses without an injunction. The evidence as to uncertainty, marketplace impact, and Canada's reputation as a reliable wheat and barley supplier is speculative. Overall, the plaintiffs' articulated concerns regarding the impact of the New Act on the public interest are at their core financial and financial loss has not been demonstrated.

[61] Further, in balancing the interests at issue, I note that Part 1 of the New Act allows forward contracting practices during the transition to open markets by establishing a preliminary period before Part 2 comes into force, in which producers, grain companies, and the CWB can make forward contracts for sales that will be permitted once Part 2 comes into force.

[62] An injunction would cause producers, grain companies, and the CWB to lose the benefit of the preliminary transition period before August 1, 2012, under Part 1 of the New Act. An injunction would require producers either to forward contract with the CWB and thus lose the options which the New Act intended to provide in the preliminary transition period or wait until the litigation is resolved to enter into contracts and thus lose the benefit of forward contracting, which

the New Act intended to preserve. This result weighs against the plaintiffs' position.

[63] The plaintiffs argued that s. 47.1 was also enacted in the public interest. The plaintiffs say that by not complying with the manner and form requirements of s. 47.1, the minister breached the rule of law which is an affront to society and undermines the Constitution. Mr. MacArthur argued that public officials are expected to adhere to the rule of law and that by not doing so, the message is that anybody can disregard the law. The plaintiffs argued that the public interest weighs in favour of maintaining the constitutional integrity of the rule of law rather than legislation that affects only a portion of the public.

[64] No doubt in every case where an applicant seeks to suspend legislation, the public's concern that rights are allegedly being infringed arises. This is addressed by balancing on the one hand the benefit flowing from the impugned law and on the other hand the rights that the law is alleged to infringe. As discussed under "irreparable harm" above, I am not convinced that the rights at issue here are the same as, say, language rights.

[65] To overcome the assumed benefit to the public interest from the continued application of the New Act, the plaintiffs must demonstrate that the suspension of the New Act would provide a public benefit. For example, in *Law Society of British Columbia*, which dealt with the application of *Proceeds of Crime (Money Laundering) Regulations* to lawyers, in considering the balance of convenience, the court referred to expert opinions (para. 95). In *Federation of*

Law Societies of Canada v. Canada (Attorney General) (2002), 207 D.L.R. (4th) 740 (Ont. Sup. Ct.), which also dealt with this issue, detailed evidence was filed as to the respects in which lawyers, clients, and the public would be injured if the legislation's application to legal counsel was ultimately found to be unconstitutional (paras. 46, 47). In the present case, it has not been demonstrated through the evidence that the impact on the public interest of the minister's non-compliance with s. 47.1 is any different than the Courts' concerns generally about the rights that a challenged law allegedly infringe. I am not satisfied that the value of complying with s. 47.1 is akin to the value of the incidents of the lawyer-client professional relationship discussed in *Federation of Law Societies of Canada* (para. 51) and in *Law Society of British Columbia.*

[66] In the course of argument, I raised with counsel whether it would be more appropriate for this motion to be before the Federal Court. Mr. MacArthur thought not, but invited a preliminary ruling on this issue if it remained a concern to the Court. Counsel for the Attorney General indicated that the Court ought to decide the interlocutory injunction. I agreed. However, quite apart from the issue of forum, I have considered in the balance of convenience the jurisdictional limitation of an interlocutory injunction. This issue arises, regardless of the pending Federal Court proceedings.

[67] An injunction would be limited to Manitoba. Producers in Manitoba, who would have no choice whether to forward contract with non-CWB buyers, would be treated differently than their counterparts in other provinces. As such,

staying the operation of the New Act would have the undesirable effect of creating disparities between provinces. In fact, this disparity between provinces would in itself mean that there is no single desk. So, an injunction granted by this court will not have the effect the plaintiffs desire.

[68] The plaintiffs argued that when considering the balance of convenience the *status quo* as it stood prior to Royal Assent being given to the New Act favours the plaintiffs. Sharpe deals with the issue of *status quo* as follows:

> This phrase is frequently used to describe the purpose of an interlocutory injunction although it adds little or nothing to the analysis and, in fact, may produce a possible source of confusion. Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial. In many ways, *status quo* is an inappropriate, and potentially misleading, description of this principle. It has been described by the Supreme Court of Canada as being "of limited value in private law cases" and as having "no merit" in constitutional cases... The proper application of the *status quo* factor, then, merely rephrases the basic question the plaintiff must answer: does the situation meet the basic test for interim relief? (2.550)

(See also, *RJR – MacDonald* at p. 347)

[69] In the case at bar, to the extent that *status quo* is relevant, as I explained, an injunction granted by this court will not maintain the *status quo*.

[70] The plaintiffs say that the New Act relates to the approximately 70,000 producers and others in the industry. The plaintiffs argue that the usual concern for the public good does not weigh heavy, and, therefore, this case ought to be treated more as one of "exemption" rather than "suspension" of legislation.

[71] Historically, in cases of this sort an applicant either seeks to enjoin enforcement of the impugned legislative provisions in all respects until the

question of their validity has been finally determined or to enjoin enforcement of the impugned provisions with respect to the specific litigants who request the granting of a stay. In the first alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type are referred to as suspension cases. In the second alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. (*Metropolitan Stores*, pp. 134-35)

[72] The impact of the public interest in exemption cases is treated differently by the Court. In *Metropolitan Stores*, the Supreme Court of Canada explained (at p. 147):

> ... It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public ...
>
> On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. ...

[73] In the case at bar, the plaintiffs argued that the threshold applicable to exemption cases ought to apply because the plaintiffs say the New Act is limited to the 70,000 producers involved and how they conduct their business. Counsel for the Attorney General argued that the plaintiffs are not seeking an exemption as against them as eight individuals. Quite correctly, in my view, Counsel for the Attorney General noted that the plaintiffs do not represent all producers, and

there are producers who oppose the plaintiffs' position. Moreover, the New Act does not just affect producers, but millers, elevator operators, and others.

[74] As noted in *Metropolitan Stores*, "the question...arises whether it is equitable and just to deprive the public, **or important sectors thereof**, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration" (p. 135) [emphasis added]. In this case, suspending the New Act would affect all producers and others, some of whom may not share the plaintiffs' view. For the reasons discussed in the balance of convenience above, the equities of depriving this important sector of the public from the New Act weigh against treating this motion as an exemption.

[75] Second, if the relief sought by the plaintiffs was granted, the New Act would no longer apply to anybody in Manitoba. A case is not one of exemption simply because a relatively small and defined portion of the Canadian population is affected. In *RJR – MacDonald*, two tobacco companies sought an exemption from regulations published under the *Tobacco Products Control Act* that required new labelling on tobacco products. The Supreme Court of Canada concluded that "since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a 'suspension case'" (p. 351). Certainly, where, like in present case, the whole industry would be exempt from the New Act, the motion is also really in the nature of a suspension case.

[76] The case at bar may be contrasted with the exemption of lawyers from money laundering legislation in *Law Society of British Columbia v. Canada (Attorney General)*. In *Law Society of British Columbia*, the legislation would "remain applicable to all the other persons and entities enumerated in the legislation" (para. 101) and "[b]y exempting lawyers from the Regulations, the Act remains intact and applicable to all other persons and entities described in the Act and the Regulations" (para. 103). In the case at bar, with the New Act being stayed, there would be nobody in Manitoba to whom the New Act would still apply. The New Act would not remain "intact".

[77] Third, in *Law Society of British Columbia*, the Court found that the "interlocutory relief would only minimally infringe the legislative intent of Parliament..." (para. 101) and the "exemption of lawyers from the effect of the legislation would not undermine the legislative scheme" (para. 105). In the case at bar, the entire legislative intent of parliament would be defeated and the legislative scheme would be undermined.

[78] As such, it is my view that the present case ought not to be treated as one of exemption.

[79] I have determined that the public interest arising from the continued application of the New Act is not displaced. Applying *RJR – MacDonald* and *Harper*, I take as a given at this stage that the elimination of the single desk and the positions of the elected directors will serve a valid public purpose. Weighing these factors against not undertaking the consultation and vote under s. 47.1

and the ensuing results, I conclude that the balance of convenience favours not granting an injunction.

CONCLUSION

[80] I have concluded that the plaintiffs have not demonstrated that there is a serious question to be tried and would dismiss their motion for interlocutory injunctive relief on this basis. If this conclusion is incorrect, I have determined that the plaintiffs' case is weak and assumed there is a serious issue to be tried.

[81] Weighing the criteria set out in *RJR – MacDonald* as interrelated considerations, I find that the plaintiffs have not met the test to grant an interlocutory injunction. The issue of irreparable harm and balance of convenience do not militate in favour of the remedy sought by the plaintiffs. The weakness of the plaintiffs' case reduces the risk that there will be any harm which calls for a remedy and increases the risk that an injunction may prevent the enforcement of valid legislation. As such, even if there is a serious issue to be tried, the weakness of the plaintiffs' case also militates against the granting of an interlocutory injunction.

[82] In the event that irreparable harm ought to have been assumed given the alleged violation of the Constitution, I have independently considered this matter with such an assumption. Assuming irreparable harm by the plaintiffs if an injunction is not granted, for the reasons set out in the balance of convenience analysis, I am satisfied that the public interest in maintaining the New Act in place pending complete review outweighs the detriment to the plaintiffs and

others caused by the New Act. The plaintiffs have not demonstrated that suspending the New Act would provide a public benefit. In my view, the assumed benefit to the public interest from the continued application of the New Act has not been overcome.

[83] I therefore conclude that an interlocutory injunction staying or suspending the operation and implementation of the New Act or Parts I and II of the New Act ought not to be granted.

[84] Accordingly, I am dismissing the plaintiffs' motion.

J.