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The Canadian Wheat Board, Socio-economic Vulnerability and the Neo-liberal State

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Abstract

The Canadian Prairies is one of the world's largest breadbaskets. But its location in the centre of the country, far from world markets, increases farmers' vulnerability to the middle-men who ship, handle and market their grain. To protect them, the federal government set up the Canadian Wheat Board in 1935 and gave it monopoly marketing powers in 1943. However, these monopoly powers came increasingly under attack as a market-driven, neo-liberal agenda of free trade, small government, privatization and deregulation gained a hold in the 1980s in Canada, as elsewhere. In 2011, Canada's Conservative-led government adopted the controversial *Marketing Freedom for Grain Farmers Act* ending the Board's monopoly powers. This legislation is controversial not so much for what it does as for how it was done.

This paper explores the possible effects of this on Prairie grain farmers. It compares the functioning of an 'open' (or private) market with the CWB's 'controlled' market; it describes the neo-liberal challenges to the CWB's monopoly since the 1980s; and it questions the promise of 'marketing freedom' under the new *Act*. It concludes with a consideration of several over-arching concerns, including the state of parliamentary democracy and the rule of law in Canada.

Key words

Canadian Wheat Board; grain marketing; neo-liberalism; farmer vulnerability

Resumen

Las praderas de Canadá son uno de los graneros más grandes del mundo. Pero su ubicación en el centro del país, lejos de los mercados mundiales, aumenta la

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This paper is a substantially revised version of an earlier paper, entitled "State Trading Enterprises: The curious story of the Canadian Wheat Board", presented at the XIIth Congress of Agrarian Law, Slovak University of Agriculture, Nitra, Slovakia, June 2012.

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vulnerabilidad de los agricultores frente a los intermediarios, que transportan, manejan y comercian con su grano. Para protegerlos, el gobierno federal creó en 1935 el Canadian Wheat Board (CWB) (Junta Canadiense del Cereal), y le otorgó el monopolio del comercio en 1943. Sin embargo, este poder se vio atacado por el avance de la agenda neoliberal de libre mercado, pequeño gobierno, privatización y desregulación que fue ganando fuerza en los años 80 en Canadá y el resto del mundo. En 2011, el gobierno conservador de Canadá adoptó la controvertida *Marketing Freedom for Grain Farmers Act (Ley de libre comercio para los productores de cereales)*, que acabó con el monopolio de la junta. Esta legislación es controvertida, no tanto por lo que hace, sino por cómo se hizo.

Este artículo explora los posibles efectos de esta ley sobre los productores de cereales de la pradera. Compara el funcionamiento de un mercado "abierto" (o privado) con el mercado "controlado" por la CWB; describe los desafíos neoliberales frente al monopolio de la CWB desde la década de 1980; y cuestiona la promesa de la "libertad de mercado" bajo la nueva ley. Concluye con la consideración de diversas preocupaciones globales, incluyendo el estado de la democracia parlamentaria y el estado de Derecho en Canadá.

Palabras clave

Junta Canadiense del Cereal; mercado del cereal; neo-liberalismo; vulnerabilidad de los agricultores

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1. Introduction

The neo-liberal, or market-based, approach to governance promoted by international lending institutions, conservative think-tanks, right-wing politicians and others since at least the 1980s has as its hallmark withdrawal of the public sector from the provisions of services coupled with deregulation of the private sector activities which take its place. This is affecting the vulnerable in a wide variety of spheres, including Canadian Prairie grain farmers who, for reasons of climate and geography, are at the mercy of shippers, handlers and marketers of grain.

This paper looks at how previous Canadian governments helped to redress this socio-economic power imbalance by creating a government-run marketing agency, the Canadian Wheat Board (CWB), in 1935 and giving it monopoly powers in 1943. However, these monopoly powers came increasingly under question as the market-driven neo-liberal agenda of free trade, small government, privatisation, and deregulation gained a hold in the 1980s both internationally and in Canada. Controversial legislation, the *Marketing Freedom for Grain Farmers Act*, ending the Board's monopoly powers has now been adopted and put in force, having survived a number of court challenges in the process.

What might be the effect of this on Prairie grain farmers? And will it affect all farmers equally, or are some more vulnerable than others?

2. The issue

Canadian Prairie grain farmers are economically vulnerable for two main reasons. One is climatic, as the Prairie breadbasket[1] is located at the northern limits of cultivable land, where the winters are long and hard and the summer growing seasons correspondingly short and intense. There is only one crop per year, much of which comes on the market at the same time: the result is a buyers' market. The second, and more important, reason for farmer vulnerability is geographic, as the Prairies are an agricultural enclave located in the middle of North America and far from both domestic and world markets. "Among world grain producers, Canada alone has such natural barriers between its grain growing lands and the oceans which give access to the world market" (Estey Commission 1998, p. 7).[2] Their land-locked position means that farmers were, and still are, vulnerable to monopolistic behaviour by middlemen – grain storage and handlers (country or "line" elevators,[3] and port or "terminal" elevators), shippers (railroads,[4] ships), and marketers (grain merchants, grain exchanges) – who might act separately or might act in combination to limit competition. The federal government, which has primary constitutional responsibility in the area, early responded to a number of specific complaints about the handling and shipping of grain (e.g. unfair grading practices, high shipping rates), but shied away from becoming directly involved in the marketing of Prairie grains until forced to do so.

[1] Western Canada (the three Prairie provinces of Manitoba, Saskatchewan and Alberta, plus the Peace River district of British Columbia) produces about 95% of Canada's wheat and barley (Parkinson 2005, p. 1).

[2] The Estey Commission (1998, p. 6-7) described the barriers as follows: "The grain-growing region is separated from the Pacific Ocean by the Cordilleran Highland [i.e. the Rocky Mountains], a mountainous region about 400 miles [645 km] wide, penetrated by treacherous narrow passes. Severe winter conditions reduce the capacity of the route to export through Vancouver. On the eastern side, the barrier is a 600-mile [965 km] wide belt of Precambrian rock, the Canadian Shield. The way through to the Atlantic, the St. Lawrence Seaway, is icebound for three to four months of the year.".

[3] These vertical structures, an American invention, were first introduced on the Prairies around 1880; their larger capacity and mechanized loading system [the actual elevator] made them more efficient than the more labour-intensive "flat" warehouses, which they rapidly replaced (McMordie 1988, p. 921).

[4] Prairie attitude to the railroads was such that "[i]n time the CPR [Canada's first transcontinental railroad] was blamed for almost every catastrophe on the plains. The story about the settler whose crop was flattened by hail and then devoured by grasshoppers, shaking his fist at heaven and crying, 'God damn the CPR!' was not too far-fetched" (Black 1997, p. 5, citing Berton 1971, p. 255)

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For much of its early history, therefore, Prairie grain was marketed solely by private traders on the open market (Millar Commission 1908, Fowke 1948). This trade was dominated by the major grain merchants, who controlled both buying and selling of Prairie grain through their ownership of country and port elevators and their control of the Winnipeg Grain Exchange. The smaller farm operations (about half of the total) had no choice but to sell directly to country elevators at harvest time as they needed the money to repay operating loans (the cost of seed, etc.), did not have enough on-farm storage capacity to allow them to sell more slowly, and did not produce enough to be able to transport their grain directly to port elevators (in "producer cars"). They were thus the most vulnerable and received the lowest price (the "street price") for their crop. Larger operations had the choice of selling their grain for a higher price by railcar loads ready for transport to port elevators (the "track price") or selling it for a still higher price at the port ready for shipping (the "spot price") (Irwin 2001, p. 91-92).

Trading grain is risky, as commodity prices can be volatile. Buyers try to limit the risks of lower than anticipated resale prices by purchasing at the lowest price possible so as to increase the differential (the "spread") between purchase price and anticipated sale price. And they can further limit (or "hedge") the risk of a drop in prices by locking in a resale price as soon as possible; this is done through a "futures contract" with the next buyer, who agrees to buy the grain on a given future date for an agreed price. The terms of these contracts were standardized and the contracts themselves became objects of trade, to be bought and sold on grain exchanges such as the Winnipeg Grain Exchange.[5] Purchasers were sometimes end-users (millers, brewers, etc.), sometimes grain merchants further hedging their risks,[6] and sometimes simply outsiders speculating on the rise or fall of grain prices (e.g. Santos 2010). The Winnipeg Grain Exchange, "one of the great futures markets of the world", was the central institution, both functionally and symbolically, of the open market system: "To the supporters of the open market system it stood as the symbol of all the virtues of free enterprise. To the grower it epitomized the hazards to which a freely moving price system may condemn a group of highly competitive producers in the marketing of their product" (Britnell and Fowke 1949, p. 628).

Farmers regarded the open market system as the "disorderly marketing" of grain and its functioning during and between the two World Wars supported this opinion (e.g. Ankli 1982). In World War I, massive crop failures in 1916 led the Allies to centralize grain purchasing, and showed how an organized, deep-pocketed player could create panic in the major grain exchanges by "cornering the market" in grain futures. Trading in futures was therefore suspended on the Winnipeg Grain Exchange – as elsewhere[7] – in 1917 and not resumed until 1919. However, the volatility of the futures market was still such that trading was immediately re-suspended and the first "Canadian Wheat Board", modelled on Australia's wartime example, was set up and given monopoly power to market the 1919 crop.[8]

Farmers were initially leery of the Board, but campaigned vigorously for its reinstatement after it was disbanded in 1920, especially when prices dropped

[5] The Winnipeg Grain Exchange was established in 1887 (as the Winnipeg Grain and Produce Exchange), and futures trading was introduced in 1904 (Santos 2010, p. 105).

[6] Banks were heavily involved in financing the grain trade (planting, harvesting, storage, and transport), and required grain traders to hedge their positions as a condition of obtaining loans (Santos 2010, p. 105-106).

[7] Reactions of the major grain-producing countries varied from country to country. Canada's response was to create a "Board of Grain Supervisors" with monopoly power over pricing, distribution between domestic and foreign markets, and sale to the Allies. Its operations ended with the 1918 crop year (Santos 2010, p. 106-109).

[8] It was the chartered banks, which financed most operations, that insisted on continued government control. On the first CWB generally, see Britnell and Fowke (1949, p. 629-630), Menzies (1949, p. 30-48), Irwin (2001, p. 97-98), Santos (2010, p. 108-109).

sharply following the return to open marketing.[9] The high point of the reinstatement campaign came in 1922, when Board proponents succeeded in getting the necessary legislative framework in place. But it proved impossible to find anyone to head the Board and proponents of orderly marketing therefore turned their full attention to cooperative marketing as an alternative solution. Producer-organized wheat pools, modelled on California's wartime example,[10] were set up first in Alberta (1923) and then in Saskatchewan and Manitoba (1924) (the "Pools"). The three Pools marketed the wheat through a single central selling agency (the "Canadian Co-operative Wheat Producers, Ltd"), which favoured direct selling to overseas purchasers rather than through middlemen on the Winnipeg Grain Exchange. For many, the Pools' appeal was thus one of "collective freedom", the idea that farmers "as a group, rather than the grain barons of Winnipeg, could control their destiny" (Levine 1987, p. 57).[11] The Pools were initially successful, marketing over half of Prairie wheat during the 1920s when wheat prices first rose and then remained relatively stable. But this success could not be maintained when prices began their drastic decline in 1929. Government bailouts (including putting the Pools under what was tantamount to receivership) were ultimately unsuccessful, and in 1935 the federal government again turned to the idea of a government-sponsored marketing board as a way to tide the market over a difficult period.

A second "Canadian Wheat Board" was thus set up in 1935 and it remained in place up to the present. However, the Board fared no better in competition with private traders than the Pools had, and on 27 September 1943 the government discontinued private trading in wheat on the Winnipeg Grain Exchange and gave monopoly marketing powers over it to the Board.[12] The Board's mandate, originally limited to wheat, was extended to the other main crops (oats and barley – "coarse grains") in 1949, and its term, originally renewable every five years, was made permanent in 1967 (Dakers, Fréchette 1998). This second CWB remained as the sole marketing authority[13] for Prairie grains for almost 70 years.[14]

The CWB's main function – like that of its predecessors, the first Wheat Board and the Pools – was to ensure an "orderly marketing" of Prairie grain by matching supply with demand throughout the crop year (and thus changing the emphasis from a buyer's to a seller's market).[15] It did so by applying two main principles. The first was price pooling under which farmers received a fixed initial payment (about 75% of the expected average resale price for the crop year) at the time of delivery and a final payment of their share of the actual average resale price throughout the

[9] Part of the price drop is explained by the onset of a generalized depression in the early 1920s. On the debate between those favouring an open market under the aegis of the Winnipeg Grain Exchange and those favouring an orderly market under the aegis of a centralized selling body, see generally Earl (1992).

[10] For more on the California model, see Larson and Erdman (1962); see also generally Macpherson (1986).

[11] In principle the Pools operated outside the Grain Exchange, but this did not always prove possible, particularly as the Pools began to purchase futures to keep the price of grain above their initial payment (Irwin 2001, p. 99). On the interrelationship between the Pools and the Exchange, see particularly Levine (1987), see also Patton (1937, p. 218-224).

[12] The specific catalyst for this change was the wartime need to control rapidly rising wheat prices, on the one hand, and to honour Canada's food supply commitments to the Allies effectively and efficiently, on the other (Ankli 1982, p. 277-278).

[13] As a federally created body, the Board's jurisdiction was limited, for constitutional reasons, to international and inter-provincial marketing of grain; but intra-provincial marketing was virtually non-existent for practical reasons.

[14] Prairie grains coming under the CWB's jurisdiction only ever included the historically important wheat, barley and oats. More recently introduced crops, notably canola, were not brought under Board control. See the discussion preceding note 26.

[15] The term "orderly marketing" is used but not defined in the Board's legislation. It has been described as "an attempt to move the flow of wheat into consumption in accordance with consumptive demands, and to bring about a stabilized market throughout the year in place of fluctuating markets with high prices at one time and low prices at another" (president of Manitoba Pool Elevator 1937, quoted in Levine 1987, p. 53, see also Irwin 2001, p. 96-97).

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crop year),[16] so that all farmers received the same price for their grade of grain regardless of when it was actually sold during the year. The second principle was exclusivity of marketing powers (i.e. the Board's marketing monopoly), which became known as "single desk selling" because all grain farmers had to sell to the Board[17] and all grain purchasers had to buy from the Board. It is single desk selling, in particular, that attracted the ire of neo-liberals.

3. The event

The main event in the push to end the Wheat Board's marketing monopoly was the adoption in 2011 of the *Marketing Freedom for Grain Farmers Act*, but this was preceded by several neo-liberal-inspired preliminary skirmishes. Some came from outside Canada, and included a number of challenges, all unsuccessful, by Canada's trading partners (particularly the United States) to CWB operations as constituting trade-distorting practice in violation of Canada's treaty obligations under various free trade agreements (e.g. Mayes 2002, Furtan and van Melle 2004, p. 317-318, Goodloe 2004, Charlebois and Langenbacher 2007, p. 8, Tamini *et al.* 2010, p. 42-43). Others came from within Canada, and included an attempt to deregulate Canadian barley exports to the United States so as to enable the creation of a free trade-style "continental barley market". The catalyst for this was an increasing spread between American and Canadian feed prices, and farmer pressure led the then Progressive-Conservative government[18] to adopt a regulation, effective 1 August 1993, ending the CWB's monopoly control over barley exports to the U.S. This was immediately challenged by the Saskatchewan Wheat Pool (by that time Canada's largest grain elevator company) and a short six weeks later, on 10 September, the regulation was struck down as being outside the powers of government under the Act (*Saskatchewan Wheat Pool* 1993).[19] The result of the short-lived deregulation was "a 40-day selling bonanza" (Carter and Loyns 1998, p. 82-83),[20] and its early end sparked the rise of a civil disobedience protest movement, "Farmers for Justice", who sought and got media attention by trucking ("running") wheat and barley across the border without a CWB export permit; this led to criminal charges and, in at least one case, a six-month jail term (*R. v. McMechan* 1996).[21] Disaffected farmers also mounted a constitutional challenge to the monopoly (*Archibald et al. v. Canada* 1997) on the grounds that it violated several of their rights under the *Canadian Charter of Rights and Freedoms*.

[16] The initial payment was guaranteed by the federal government; and Board deducted its administrative expenses from the final payment (which inexplicably raised the ire of some neo-liberal opponents in the present debate).

[17] And the Board had a concomitant obligation to buy from the farmer: *Canadian Wheat Board Act*, s. 32(1)(a).

[18] Political leanings also played a part, as the Canadian Prime Minister at the time, Brian Mulroney – who had close ties to U.S. President Ronald Reagan and British Prime Minister Margaret Thatcher, in power at the same time – was a staunch supporter of free trade and Canadian signatory of both the Canada-US Free Trade Agreement (CUSTA, 1987) and the Canada-US-Mexico North America Free Trade Agreement (NAFTA 1992; in force 1994).

[19] The Court held that the *Canadian Wheat Board Act* did not authorize a partial deregulation of grain (i.e. to the U.S. but not elsewhere): this could only be done by legislation. The Conservative government appealed this decision, but the appeal was dropped by the Liberals who formed the government after the general election of October 1993.

[20] Although the authors accept that the selling bonanza was not entirely due to deregulation, as serious flooding in the mid-west US had distorted the entire U.S. feed market for several weeks. For a more pessimistic view of the long-term effect of a continental barley market on Canadian farmers, see Gray *et al*. (1993).

[21] There were reportedly over 100 such cases of civil disobedience (Black 1997, p. 18). They were tried by summary conviction and the usual penalty was payment of a fine. McMechan (described by some as a "modern-day martyr") and other convicted protesters were recently ceremoniously pardoned in a government ceremony to mark the coming into force of the legislation ending of the CWB's monopoly (Payton 2012).

Although unsuccessful, the case is credited with bringing the debate over the Board's status as a single desk seller squarely into the legal arena.[22]

The Liberal federal government responded to these concerns in 1998 by reforming the legislation to give farmers a stronger voice in the Wheat Board's operation in two major ways.[23] One was to change the composition of the Board of Directors by adding ten farmer-elected members ("farmers elected by their peers") to the existing five government-appointed members. The other was to change the procedure for including or excluding particular grains from the CWB's mandate by requiring that the change be done by legislation rather than by simple regulation; and – more importantly in the present context – before introducing the requisite legislation, the Minister of Agriculture must have consulted with the CWB directors, on the one hand, and the producers of the grain in question must have voted in favour of the extension or exclusion in a referendum, on the other. These requirements were the focus of recent government attacks. [24]

In 2007, after its election as a minority government in 2006 and after holding a "controversial plebiscite" (Government of Manitoba 2007, Parliamentary Information and Research Service 2008, p. 5) of barley farmers, the neo-liberal Conservative federal government tried to exclude barley from the Board's mandate by regulation, not legislation, on the grounds that the *Interpretation Act* authorized the government to repeal existing regulations (i.e. the previously enacted regulation to include barley in the Board's mandate) by regulation, and that this narrow regulatory power co-existed with the wider legislative power. However, the CWB challenged this regulation before the Federal Court, which rejected the government's argument and declared the regulation invalid both at trial and on appeal (*Canada (Wheat Board)* 2007).[25] The government responded by tabling legislation (Bill C-46, 3 March 2008) asserting its authority to exclude barley by regulation and doing away with the requirement for prior approval of the CWB and producers affected (Parliamentary Information and Research Service 2008).[26] However, this legislation "died on the order paper", in Canadian parliamentary parlance, when Parliament was dissolved and an election called in the fall of 2008.

The 2008 election again resulted in a minority Conservative government, and the Conservatives had to wait until the election of 2011 gave them the necessary majority to get legislation ending the CWB's single desk powers, the *Marketing Freedom for Grain Farmers Act*, through Parliament successfully.

[22] *Archibald* was brought by 22 individual plaintiffs plus the Alberta Barley Commission and the Western Barley Growers Association. Both the trial and appeal courts held that the legislation did not limit the applicants' rights (to equality, association and mobility) and that, in any event, the limitations would have been upheld under s. 1 of the *Charter* as constituting reasonable limits in a free and democratic society. In this regard, the courts noted that the argued "deleterious effects" on the appellants' rights "were outweighed by the salutary effects of the orderly marketing of wheat and barley under the CWB" (appeal, paras. 99 and 100).

[23] These reforms were based on 1996 recommendations of a nine-member Western Grain Marketing Panel which the then Liberal government appointed to look at all aspects of Canadian grain marketing, including the role of the Canadian Wheat Board, together with 1990 recommendations of a Review Panel set up by the CWB. On the 1990 report, or "Steers Report" (Canadian Wheat Board 1990), see Skogstad (2005, p. 538) and Oleson (2002); the 1996 report no longer seems generally available.

[24] See the discussion the text following note 33.

[25] Two actions were in fact brought, one by the Canadian Wheat Board and the other by a non-governmental group, the "Friends of the Canadian Wheat Board". The two actions were consolidated, with Manitoba and Saskatchewan intervening on behalf of the CWB and Alberta on behalf of the federal government. The trial decision was handed down on 31 July 2007 and that of the Court of Appeal on 26 February 2008.

[26] The legislation was tabled almost immediately following the Court of Appeal decision, on 3 March 2008. Parliament was dissolved on 7 September; and the election held on 14 October. Bill C-46 would also have imposed binding arbitration for commercial disputes between the CWB and grain producers and/or elevator operators, a disposition arguably contrary to s. 96 of the Constitution as constituting an ouster of the jurisdiction of the courts.

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4. The indignation

My indignation is not particularly directed at the actual ending of the CWB's monopoly marketing powers, as its role is perhaps not as central as it once was. Wheat now represents less than 40% of total Prairie farm income rather than the almost 80% it did in 1950, as it has been replaced to a certain extent by other crops – canola, feed barley and pulse (e.g. peas, lentils) – introduced in the 1960s and 1970s to diversify farm production. Farmers chose to leave the marketing of these crops outside the CWB (e.g. Ewins 1996); they are thus sold on the open market, apparently without difficulty, and this supports the suggestion that farmers need not rely on the CWB (Furtan 2005, p. 96-97, 99). As well, younger farmers are reputedly better educated than their parents and grandparents, with more business savvy; and internet access makes them better informed. All of this may possibly be true.

My indignation is directed rather at the manner in which the monopoly was ended, and this indignation can be subsumed under three main headings: opposition silencing, voter suppression, and misleading advertising.

Opposition silencing runs like a thread through many of the actions of the government, and two early examples from October 2006 (i.e. shortly after the Conservatives were first elected) were directed at silencing the Board itself. The first was the issuance of a "Direction Order" to the Canadian Wheat Board on 5 October 2006 that it "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 that it "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" (Direction Order 2006).[27] The apparent catalyst for what has become known as the "gag order" (e.g. Dickerson 2010) was to prevent the CWB from campaigning in the up-coming barley plebiscite – while the government is said to have spent $Can 1.2M advocating the end of the CWB monopoly during the campaign (Forsey and Enoch 2011). The Board's challenge of the Order was successful at trial, but overturned on appeal (*Canada (Wheat Board)* 2008). The trial judge, Hughes J., accepted that the Direction Order might have been appropriate if it addressed a reasonable concern that government funds were at risk, but its real purpose was "silencing the Wheat Board in respect of any promotion of a 'single desk' policy that it might do" (trial, paras. 39 and 46). In his view,

> Where a statute has delegated powers to another body … , the exercise of that power by the delegate must be in accordance with the purposes and objects of the Act *notwithstanding any apparent broad or unrestricted nature* of the delegated authority.
>
> …
>
> This is particularly so where the order, although apparently directed to one purpose, is really directed to a different purpose not within the scope of the enabling statute, properly construed. (trial, paras. 47 and 48)

The Court of Appeal, on the other hand, held that the "plain purpose" of the Order was to ensure that the Board not use its funds to advocate a mandate at odds with government policy, and this purpose was within the scope of the government's very broad delegated authority; moreover, compliance with a Direction Order was "deemed" by the *Act* to be in the best interest of the Board, so that spending funds to advocate in favour of the monopoly was deemed to be no longer in the Board's best interest (paras. 45-57). The second example of Board silencing was the dismissal of its long-standing President, a staunch supporter of the monopoly, for

[27] The Order was enacted under s. 18 of *CWB Act* which provided that the Governor-in-Council [i.e. Cabinet] may, by order, direct the CWB with respect to "the manner in which any of its operations, powers and duties under the Act shall be conducted, exercised or performed".

refusing to advocate the government's position (as, in his view, he was answerable to the Board of Directors, not the government) (Financial Post 2006). The dismissal was clearly within the government's purview, as the president's term of office was "during pleasure" (*CWB Act*, s. 3.09(1)), but the Canadian tradition is that the senior administrative appointments are non political and do not change with each change of government.[28]

Opposition silencing also occurred during the actual enactment of the legislation ending the Board's monopoly, as the government's invocation of closure both in the House of Commons and the Senate (Galloway 2011, Ward 2011) restricted parliamentary debate on the measure and silenced the voices of the members of the opposition.

Voter suppression is a form of opposition silencing, and signs of this appear both in the elections for farmer-directors and during the plebiscites. Elections for farmer-directors were held once every two years, each time for five of the 10 elected directors. The 2006 and 2008 elections, which were hotly contested, are of most interest.[29] Government actions concern changes to voter eligibility, on the one hand, and elimination of third-party spending caps, on the other. As for voter eligibility, the first action of the government was to change the way voter lists were drawn up. This was done administratively, through the issuance of "Decisions" by the Minister in both 2006 and 2008 requiring persons who would previously have been automatically included on the lists to prove their entitlement to vote.[30] The Minister described this as ensuring the integrity of the voters list while opponents saw it as a ploy to suppress votes. "Friends of the Canadian Wheat Board", which took over the fight from the now silenced Board of Directors, challenged the 2008 Decision before the Federal Court, but the Court held both at trial and on appeal that the Minister acted within his authority (*Friends of the CWB* 2010) even though it was accepted on appeal that there was "no doubt" that the directive "changed the dynamics of the election" as it "resulted the disenfranchisement of some 16,577 producers with the following effect. Of the producers who automatically received a ballot, 49.9% responded. With respect to the 16,577 producers who had to apply for a ballot, only 1,618 ballots were cast, showing then a turnout of less than 10%".[31] A second way in which the government tried to limit voter eligibility was to restrict the right to vote for CWB directors to larger grain producers. This could not be done administratively, but rather required legislation. A first attempt in 2008 (Bill C-57, 27 May 2008) would have limited voting rights to those producing "at least 120 tonnes of grain in either of the two previous completed crop years"; however, this bill died on the order paper when the 2008 federal general election was called. A second, less restrictive, attempt in 2010 (Bill C-27, 14 May 2010) – which did not proceed past first reading – would have put the limit at 40 tonnes.

These measures designed to restrict voter eligibility were accompanied by measures eliminating third-party spending caps. On 4 September 2008[32] the government adopted a regulation eliminating a $10,000 spending cap previously placed on third-party interveners in director elections, while retaining a $15,000 spending cap on individual candidates (*Regulation* 2008). This change benefited the producer associations representing the large grain producers, who were supportive

[28] The dismissal was obviously linked to the CWB's challenge to the Direction Order (*Canada (Wheat Board)* 2008 (trial, para. 9, points 8-11); the Board challenged this action as part of the case, but this challenge was declared moot when the matter came to trial (trial, para.13f).
[29] The 2010 election seems to have been a pro forma event generating little interest (e.g. Haney 2010).
[30] The Decisions were adopted pursuant to s. 3.07 of Act which required the Board to "take any measures that the Minister may determine for the proper conduct and supervision of the election of directors", and were communicated in ministerial letter.
[31] Para. 30 *per* Letourneau J.A., speaking for the Court. The 2006 Decision, issued in the middle of the campaign, is said to have affected almost 40% of those automatically included on the producer voting list up to then (Forsey and Enoch 2011, p. 3).
[32] That is, three days before the general election was called (see note 26 above), which the government was not expected to win.

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of ending the CWB's marketing monopoly, and exacerbated the spending imbalance between the two sides (those for and against the monopoly) created by the "gag order".

Voter suppression also occurred in the context of producer plebiscites. Each side accused the other of committing a number of procedural improprieties in the barley plebiscite of 2007, but it is the government's decision to introduce legislation (Bill C-18, 18 October 2011) ending the Board's marketing monopoly without holding a plebiscite that is most striking: holding no vote at all is the ultimate form of voter suppression.[33] As we have seen, the legislative reform of 1998 responded to farmer pressure for a larger say in marketing decisions by requiring their collective consent to the introduction of legislation including or excluding grain from the Board's mandate. This was found in section 47.1 of the Act, which reads as follows (emphasis added):

> **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 [marketing monopoly], either in whole or in part, or generally, or for any period, or that would *extend* the application of Part III [compulsory pooling] 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.

The failure to follow this statutory requirement led to several court challenges. The best known is an application by the Friends of the Canadian Wheat Board to the Federal Court for a declaration that the Minister had violated the rule of law in introducing the legislation without the requisite producer consultation (*Friends of the CWB* 2011 ["rule of law" case]). The trial judge, Campbell J., rejected the government's narrow reading of the provision – that consultation was required only as to including or excluding particular grains from the Board's mandate, but not as to dismantling of the Board itself – and granted the requested declaration that the Minister's conduct was "an affront to the rule of law", which rule he identified as "a fundamental constitutional imperative" (para. 3 and 4). In so holding, Campbell J. quoted extensively from an Alberta Court of Appeal decision, *Reece v. Edmonton (City)*, which he described as a "most recent reminder of the rule of law":

> The starting point is this. The greatest achievement through the centuries in the evolution of democratic government has been constitutionalism and the rule of law. The rule *of* law is not the rule *by* laws where citizens are bound to comply with the laws but government is not. … Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. … *When government does not comply with the law, this is not merely non-compliance with a particular law, it is an affront to the rule of law itself …*" (para. 3, emphasis added by Campbell J.)

However, Mainville J.A., speaking for the Court of Appeal, accepted the Minister's narrow reading of section 47.1 after canvassing its legislative history, including parliamentary statements; and while he acknowledged the importance of the democratic values reflected in the plebiscite requirement, he held that it could not trump the will of a democratically elected Parliament.[34] Other court challenges included an application to the Manitoba Court of Queen's Bench by eight of ten former directors of the CWB (*Oberg* 2012, filed after Campbell J.'s judgment but

[33] The Minister's position was that the 2011 general election had been consultation enough, and no further consultation was necessary.

[34] The technical legal issue in the case was whether the plebiscite requirement was a "manner and form" provision imposing enforceable procedural requirements on Parliament notwithstanding the general principle of Parliamentary sovereignty (see *Friends of the CWB* 2011, Fed. C.A. at paras. 82-87). The C.A. held it was not such a provision.

before the appeal judgment in the rule of law case) for an order granting an interlocutory injunction staying the entry in force of the *Marketing Freedom for Grain Farmers Act* pending a final decision in the rule of law case.[35] However, the trial judge in *Oberg*, Perlmutter J., was of the view that notwithstanding the decision of Campbell J., the plaintiffs failed to meet the threshold requirement of showing there was a serious issue to be tried:

> 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 (para. 29, emphasis added).[36]

Other challenges include two class actions, one announced on 9 February 2012 by a leading torts class action lawyer and seeking payment of $15.4B for CWB assets (bought with farmer money) when it is dismantled (Canadian Press 2012), and the other announced on 15 February 2012 by the Friends of the CWB seeking to restore the single desk monopoly and claiming damages (of $2B for money lost since the new legislation came into force and additional damages of $17.5B if it is impossible to reinstate the single desk) for violation of the farmers' constitutional right to freedom of association (Canadian Wheat Board Class Action nd).[37] Neither of these actions seems to be particularly active at the present time. The battle now appears to have been lost.

Finally, I am most indignant about the way the legislative change was presented to farmers, which smacks of misleading advertising. The change was advertised as ending the coercive powers of the CWB and giving farmers the freedom to chose when and to whom they will sell their grain. This is symbolized by the reform legislation's title, *Marketing Freedom for Grain Farmers Act*. Who could possibly not be for freedom of choice and against coercion? Why should farmers not be able to choose between marketing their grain to private grain dealers on the "open market" and marketing it to a publicly owned body, the CWB, in a "controlled market"? The attraction of freedom to choose is illustrated by the (contested) results of the government-run 2007 barley plebiscite:

2007 Barley Plebiscite Results

	MB	SK	AB	BC	Overall
Retain single desk	50.6	45.1	21.4	42.3	37.8
Prefer option to market to CWB or other buyer of my choice	34.6	42.1	63.4	49.4	48.4
CWB should have no role in marketing barley	14.8	12.8	15.2	8.3	13.8

Source: Agriculture and Agri-Food Canada 2007

Freedom of choice was the most popular option, receiving 48.4% of the votes cast (and 63.4% in Alberta), but more farmers favoured the CWB monopoly (37.8%) than a solely private market (a mere 13.8%). How would farmers have voted if they had been asked to make the stark choice between the CWB's controlled market and the private sector's open market? How would the farmer's who chose the freedom of choice option have voted if there could be no freedom of choice? The overall results in the barley plebiscite suggest (but do not prove) that more would have voted for marketing through the CWB than through the private sector,

[35] In a similar vein, the then Leader of the Opposition formally requested the Governor General to delay assenting to the legislation (Taber 2011) but this request was refused. The legislation received Royal Assent on 15 December 2011, for entry into force on 1 August 2012.
[36] The plaintiffs were said to be appealing the *Oberg* decision, but there was no point in doing so after the Federal Court of Appeal's decision in the rule of law case.
[37] Statement of claim filed 15 February 2012 (*Dennis* 2012). This claim would seem to be precluded by the same grounds as the decision in *Archibald* (see note 22).

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and this is borne out by the (contested) results of the CWB-run 2011 legislation plebiscite, which posed the starker question:

2011 Legislation Plebiscite Results

	Wheat	Barley	Overall
Market all through CWB single desk system	61.8%	51.1%	59.1%
Market all through open-market system	38.2%	48.9%	40.9%

Source: Dales 2011

The legislative title – *Marketing Freedom for Grain Farmers Act* – promises farmers the freedom to choose between a controlled and an open market: that is to say, a "dual market". However, both economic theory and historical experience point to the vulnerability of price pooling when competing with an open, or private, market. Economic theory explains that the averaging of prices practiced by a pooling agency means that pool price changes always lag behind market price changes, and farmers behave opportunistically in deciding where to deliver their grain: in times of rising prices, pool prices will be lower than the market price and farmers will prefer to sell on the open market; but in times of falling prices, pool prices will be higher than the market price, farmers will choose to sell to the pool, and the pooling agency will suffer substantial losses if the market price falls below the amount of the initial payment (Fulton and Vercammen 1996, Fulton 2006).

> [D]ual marketing will not provide farmers with a choice. We believe a pooling system cannot effectively operate alongside a cash market system. Instead, attempts to introduce a dual marketing system will either lead to very small volumes being pooled or to substantial losses in the pool. As a consequence we do not think farmers will have the choice of selling either on a pooling basis or on a cash market basis. The pooling option will disappear and only the open market option will exist. (Fulton and Vercammen 1996, p. 1)

In other words, economic theory suggests that price pooling is sustainable only when the selling agency has monopoly powers. And economic theory is borne out by historical experience, as illustrated by the difficulties faced by voluntary pooling in the volatile economic period between the two World Wars, when both the Wheat Pools and the voluntary Canadian Wheat Board found it difficult if not impossible to navigate between the Scylla of setting the initial payment too high and being unable to repay its financial backers and the Charybdis of setting it too low and not attracting grain deliveries. Patton (1937, p. 222) describes the Pool experience:

> Under such conditions what at the time may have appeared to be a reasonably conservative initial payment may prove to be in excess of the eventually realized net average return. If, on the other hand, the initial schedule is set at such level as to guard against such contingency, it is almost bound to be so small as to penalize unduly contracting pool members and to preclude deliveries on a voluntary basis.

And Gislason (1959, p. 585-586) makes substantially the same point about the voluntary CWB:

> When the price of wheat on the Winnipeg Grain Exchange was higher than the minimum price for wheat delivered to the Wheat Board, the wheat producers sold most of their wheat to the private elevator companies. When the price on the open market was lower, the farmers delivered most of their wheat to the Wheat Board.[38]

In sum, the government presented its *Marketing Freedom for Grain Farmers Act* as freeing farmers from the obligation to market their grain solely through the CWB and giving them the freedom to choose between the Board's pooling approach and the open market's individualist approach. But the economics are such that the possibility of making this choice will not last: the pooling option will not survive,

[38] A document prepared under the auspices of the Canadian government is even more categorical: "In practice, farmers sold to the CWB *only* when the set price was above the market price" (Parliamentary Information and Research Service 2008, p. 1, emphasis added).

and the open market system will be the only marketing option available. As Fulton and Vercammen put it (1996, p. 1), the choice between a controlled and an open market "is not one that farmers can make each day independently of what other farmers do" but rather "one that western farmers must make as a group".[39] The government did not make this clear to farmers, and the CWB was prevented from spending the money to do so.

5. Conclusions

This consideration of Canadian Prairie grain marketing and deregulation of the Canadian Wheat Board raises three overarching concerns. One is whether the now fully government-controlled CWB will be viable in the long-term (e.g. Fulton 2011, Appendix). Perhaps it will continue to exist as a player in the open market. The government has not treated it particularly generously – allowing the Board only one year to make the transition from its monopoly position to that of one of many participants in a highly competitive open market, giving it only five years at best to prove itself on the open market prior to privatization, and providing it with very limited financial assistance during this period.[40] The revamped Board is doing its best. Firstly, its announced goal is to pool a third of Prairie grains (Nickel 2012) and, to this end, is offering producers a range of contract options, both cash and pool (including ordinary and "futures choice" pools), for a wide variety of grains, with varying delivery dates, pricing options, opt-out possibilities and so on (CWB 2013b). However, agricultural commodity prices are volatile and, as we have seen, pools are particularly vulnerable to this volatility. Will the revamped CWB be more successful than its predecessors in dealing with this volatility either during the probationary period or subsequently? It is attempting to convince farmers to pool in a time of rising prices by offering a variety of pools with flexible pricing and opt-out possibilities, and it will be interesting to see to what extent this affects the integrity of pooling in practice. But the CWB has not yet indicated how it will protect itself from the danger of financial loss from paying farmers too high an initial payment in times of falling prices. Will it simply absorb the loss? Or will it require farmers to repay the over-payment? Or will it, as seems likely, follow the example of the privatized Australian Wheat Board in requiring farmers to purchase insurance against various commercial risks including the risk of having to repay the Board part of its initial payment (a risk which materialized for the 2010-2011 pool) (AWB 2012), thereby increasing the administrative costs paid by farmers? Secondly, the revamped Board has entered into delivery agreements with all major grain storage and handling companies (CWB News 2012). But these companies are also the major grain merchants and hence the CWB's direct competitors, with most to gain from the CWB's failure to succeed: one wonders how favourable the terms of these delivery agreements will be over time. Finally, the revamped Board has begun to plan for privatization at the end of the five-year probationary period, if not sooner, and is offering farmers a potential ownership share for grain delivered ($5.00 for every tonne delivered under a 2013-2014 contract, for example) (CWB 2013a). However, other attempts at providing ongoing farmer-ownership or control after privatization – the Saskatchewan Wheat Pool and the Australian Wheat Board being the two best-known examples[41] – have ultimately failed, and it is difficult to see how the CWB will be an exception.

[39] It is also a choice "that must be adhered to for a substantial period of time", because of the costs of replacing one system by the other (Fulton and Vercammen 1996 1).

[40] This contrasts both to the more generous treatment of Australian Wheat Board on deregulation (Boaitey 2013) and to the identified needs of the CWB (CBC News 2011).

[41] The Saskatchewan Wheat Pool became a publicly traded company in 1996, with voting shares being retained by farmers and non-voting shares trading on the Toronto Stock Exchange (so that it retained farmer management but was under investor ownership); farmer management proved unsuccessful and the Pool turned to a private-sector CEO; it merged with the other Prairie Pools in 2007 and (under the name Viterra) was bought by an international commodity conglomerate (Swiss-based American-owned Glencore) in 2012 – with Viterra's CEO said to have received some $37.5 million as a result (Silcoff

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Another overarching concern is how Canadian Prairie grain farmers will fare in a private market (e.g. Fulton 2011, Nickel 2011). As we have seen, Prairie grain farmers advocated the creation and supported the continued existence of the Canadian Wheat Board for so long because of the vulnerability they felt when marketing their grain through the private sector. The degree of private sector concentration is now such that they should feel equally, if not more, vulnerable today. They are vulnerable in three main areas. A first is the area of grain handling and purchasing, as the end of the Wheat Board's monopoly means the major grain handlers will become the major purchasers of Prairie grain. The co-operatively owned Pools which previously handled much of Prairie grain have all been privatized and a small number of very large international conglomerates dominate the grain trade today (Fulton 2011, p. 7-8). Some of these conglomerates are Canadian-based (e.g. Richardson, Agrium), but most are foreign-owned; most specialize in the agricultural sector, but some deal with a wide range of commodities (notably the "vast, tentacular Glencore" (*The Economist* 2013a) which acquired Viterra, the corporate persona of the privatized Pools, in 2012 in anticipation of the end of the CWB's monopoly).[42] Private sector companies are of necessity profit-driven, and grain handlers seek to maximize their profits both by reducing expenses, such as through closing the less profitable small-town grain elevators and consolidating delivery points to fewer, larger elevators, and by increasing profits, such as through maximizing the spread between their purchase price (the money paid to farmers) and sale price (the money received from buyers): as one blogger colourfully put it, "the money that the CWB used to send back to farmers to put in their jean pockets" now ends up in "the vest pockets of the grain traders" as profit (Gruending 2012, response to comment; see also e.g. Waldie 2012b).

A second area of farmer vulnerability is in regard to grain shipping. There are two rail lines in Canada with the capabilities of getting grain to market, the Canadian Pacific (CP) and the Canadian National (CN), and the distance separating them is such that there is no real competition between them. The CP has always been privately owned, but the CN was government-owned until it was privatized in 1995; both rail lines now have American investment funds as major shareholders; and the operations of both have been (CN) or are in the process of being (CP) radically restructured to reduce costs (fewer but longer trains, fewer workers, fewer branch lines, fewer freight cars – including producer cars, etc.) (e.g. *The Economist* 2013b).[43] Investors are happy, but workers and many shippers are less so (e.g. Agricultural Producers Association of Saskatchewan 2010). The recently adopted *Fair Rail Freight Service Act*, providing for arbitration[44] if the parties cannot agree over a contract of services, is contested by the railways and accepted by shippers as better-than-nothing at best (e.g. Alberta Agriculture and Rural Development 2013, Dawson 2013, Wilson 2013). And what about increasing revenue? The rates railways may charge for shipping Prairie grain have been regulated in one form or another since 1897,[45] with the present system being an annually adjustable

2012). As for the Australian Wheat Board, it was deregulated for the (small) domestic market in 1989, and became a farmer-owned private company (AWB Limited) in 1999; it was acquired by a larger international grain company (Canadian-based Agrium) in 2010, two years after Australia's (large) export market was deregulated in 2008, and was taken over by the largest international grain company (US-based Cargill) in 2011 (Boaitey 2013).

[42] See note 41. The firm is even more vast and tentacular after Glencore merged with mining and mineral conglomerate, Xstrata, in May 2013 to form GlencoreXstrata (2013).

[43] Both railways hired the same CEO for this – first CN, then CP following a "brutal putsch" (McClearn 2013) led by CP's largest shareholder, a New York-based hedge fund, in 2012.

[44] Note that the government would also have required arbitration rather than litigation to resolve disputes between elevator operators and/or producers and the CWB (Bill C-46), a requirement open to question under s. 96 of the Constitution: see note 26 above)

[45] Under the "Crow's Nest Pass Agreement" of 1897, the CPR agreed to fixed freight rates "in perpetuity" on eastbound grain, in return for a federal construction subsidy of a rail line giving it access to a rich mineral area in southern British Columbia. These rates (with some changes) were extended to the CNR in 1925, and to westbound shipments in 1927 and northbound in 1931 (Anderson 1991, p. 31). Over

"revenue cap" imposed on railway earnings from Prairie grain.[46] But the revenue cap is increasingly contested (e.g. Frontier Centre for Public Policy 2012, Dawson 2011), and some analysts predict rate increases of anywhere between 25-50% if it is removed (Sorensen 2011, CWB Alliance 2012).[47] The CWB was in a position to provide grain farmers with a measure of protection against monopolistic behaviour by the railways, notably in regard to railcar allocation and freight rates, but this protection is now lost (Fulton 2011, p. 11-14, 19-20).

And a third area of vulnerability is the operation of the grain exchanges. The Winnipeg Grain Exchange (renamed the "Winnipeg Commodity Exchange" in 1972) became a wholly owned subsidiary of U.S.-based conglomerate InterContinental Exchange (ICE) in 2007 (and was renamed "ICE Futures Canada" the following year). The parent ICE was established in 2000 as an electronic exchange dealing mainly in energy products; it has since branched out into financial and agricultural products, and the Winnipeg exchange is but one of its recent acquisitions. Consolidation of exchanges is thus one issue. Another is the length of the trading day, as electronic trading does not have the same physical constraints as the more traditional 'open-cry' trading. Last year ICE triggered a controversial movement favouring non-stop electronic trading for up to 22-hour days; this was popular with hedge funds and high-frequency traders, but farm groups complained that it would increase price volatility as traders would not have the necessary down-time to assess key price data issued at fixed times each day (Waldie 2012a, Polansek 2013); some reduction did occur, and at the time of writing ICE Futures Canada makes trading available for 18 continuous hours (from 19:00 to 13:15 the next day). This seemingly minor issue is important to Prairie farmers because some futures contracts allow farmers to lock in their price after delivery at a later date of their choosing: long trading hours, price volatility and slow internet connections increases the uncertainty of this choice. Price volatility is also said to result from the increased participation since the mid-2000s of the "deep-pocketed" pension and index funds, such as the Ontario Teachers' Pension Plan, in the agricultural commodity markets to diversify their investment portfolios and improve returns. This is said to have contributed to market turmoil in 2008 (which U.S. farmers, despite their long experience selling on the open market, likened to playing the "blackjack tables in Las Vegas") and 2012 (Stewart and Waldie 2008, p. 4, DuPaul 2013a, p. 3). These deep-pocketed investors are reportedly leaving the market and prices falling accordingly, but how far and for how long is another question (DuPaul 2013b). As one observer suggests, the commodity exchanges are a better investment than the commodities they sell: "these exchanges thrive on volatility – whether it is a buying frenzy or a selling frenzy" (Berman 2008).

Vulnerability, therefore, of Prairie grain farmers to grain handlers and traders, transporters and commodity exchanges. But some farmers are more vulnerable than others (Fulton 2011, p. 19, Pitts 2011). Particularly vulnerable are: older farmers who lack the expertise, particularly computer skills and affordable internet access, to be able to market their grain effectively; smaller farmers who do not have the necessary bargaining power and resources to be able to strike the best deals; farmers located in remote areas, too far from American markets to be able to truck grain there and far from the main rail lines (and thus dependent on branch lines at risk of closing); and farmers whose delivery point is serviced by only one

time, these rates were not enough to cover railway costs and the system has been gradually changed in the railways' favour.

[46] Excess revenues have, since 2000, been invested in the Western Grain Research Fund's endowment fund. Some $3.5M was paid in for each of the crop years 2005-06 and 2006-07, and an astonishing $66.6M for 2007-2008; the payments for other crop years have been much more modest (Western Grains Research Foundation nd).

[47] "Without the single desk CWB, freight rates will move closer to American levels. 'The first sign of this was the recent effective takeover of CP Rail by New York based Pershing Square Capital Management based on their expectations of increasing revenue from the company', explained Gehl" (CWB Alliance 2012).

grain elevator company. Many of these farmers are expected to cease farming, and their farms will be either consolidated into larger operations or abandoned.

A final overarching concern is the state of parliamentary democracy and the rule of law in Canada. This is a question of growing concern here as elsewhere, and talk of a "democratic deficit" or even an "elected dictatorship" is increasingly found not only in the media (e.g. Russell 2011, Hill 2012) but also in academic publications (e.g. Smith 1971, Savoie 1999, Bakvis 2001, Malloy 2004, White 2008, Aucoin et al. 2011). This is a large topic, too large to be discussed in detail, but the procedure to deregulate the Wheat Board illustrates some aspects of it. The Prime Minister was clearly a strong proponent of ending the Wheat Board monopoly – as doing so fits his neo-liberal political philosophy and is popular with his southern Alberta political base[48] – and the Westminster model of parliamentary government[49] gives him a good deal of the independent power necessary to do so. This model accepts that the executive, notably the Prime Minister, retains the right to exercise a number of the "prerogative powers" exercised by the Crown prior to the advent of democracy.[50] Chief amongst these, in the present context, is the power of appointment, which runs like a thread through all branches of government.

As for the executive, the Prime Minister selects the Ministers responsible for the various government departments (e.g. Agriculture and Agri-foods Canada) and these Ministers together make up the Cabinet, the executive committee of Parliament:[51] the Ministers are thus beholden to him for their position and the current Prime Minister is known for keeping them on tight rein. This helps explain why the Minister of Agriculture was willing to issue ministerial Decisions changing the way voter lists were drawn up in the midst of elections of CWB farmer-directors.[52] It also helps to explain the various Cabinet documents limiting the ability of the CWB to protect its monopoly position, notably the 2006 Direction Order prohibiting the spending of funds to advocate for it (the "gag order") and the 2008 Regulation eliminating the third-party spending cap in farmer-director elections.[53] Moreover, the Prime Minister controls the appointment of the Deputy Ministers (i.e. the top civil servants responsible for each government department), as well as other senior administrators such as the President of the Canadian Wheat Board. This control over the composition of the executive and senior civil servants means that the Prime Minister faces little, if any, opposition to the implementation of his policies. And the dismissal of the CWB President who opposed his policies[54] illustrates the dangers of opposition.

As for the legislature, the Prime Minister appoints the chairs of the Standing Committees charged with examining proposed legislation in detail, thereby guarding a measure of control over the committee process.[55] He maintains

[48] The current Prime Minister was elected in an Alberta constituency, and Alberta is the most neo-liberal province in Canada. Its farmers are more opposed to the Wheat Board monopoly than those of Saskatchewan and Manitoba.

[49] Under a Westminster-style of government, the executive and the legislature are fused, in that the members of the executive (the Prime Minister and other members of Cabinet) are themselves elected members of Parliament, each representing their own riding as MPs, as well as being Ministers responsible for different departments.

[50] "Crown prerogative is a holdover from the days before the Glorious Revolution of 1688 and represents the monarchial power not stripped from the Crown" (Banfield and Flynn 2015, p. 137, see also Lagassé 2012).

[51] Formally, the Prime Minister recommends his choices to the Governor-General, who makes the formal appointment; Cabinet is thus technically the "Governor-General-in-Council".

[52] See text at note 30.

[53] See text at note 27 and following note 32. Other examples include Cabinet's willingness in 2006 to deregulate the CWB's monopoly power by regulation, when legislation was clearly required: see text preceding note 25.

[54] See text at note 28.

[55] Committee membership reflects House of Commons membership, so that when the government is in minority in the House, it is also in minority on the Committees. When the current government was in minority from 2006 to 2011, one way it controlled the committee process was by issuing a manual for its MPs "on how to stonewall troublesome parliamentary committees", which White (2008, p. 11) cites as

discipline over the rank-and-file members of his party (the "backbenchers") in the elected lower chamber (the House of Commons) partially through the carrot of Cabinet appointments and Committee chairmanships and partially the stick of expulsion from the party caucus for opposing his views. And he appoints the members of the non-elected upper chamber (the Senate), which further tightens his control over the legislative process.[56] This helps explain the easy passage the *Marketing Freedom for Grain Farmers Act* had through Parliament.

As for the judiciary, finally, the most important courts in Canada (the "superior courts of general jurisdiction") are staffed by federally appointed judges. These include the trial and appeal level courts in each province as well as the Supreme Court of Canada. The Prime Minister selects the Supreme Court judges as well as the Chief Justices and Associate Chief Justices of the provinces (e.g. Prime Minister of Canada 2013) while the Minister of Justice selects the rest. The current Prime Minister is said to favour a "workmanlike" bench, one that will "do little to inspire and promote the development of law" (Fine 2013). With two notable exceptions, this describes the approach taken by the judges in the decisions relating to deregulation of the Canadian Wheat Board's monopoly. [57]

As a leading constitutionalist has put it (Leclair 2013), "In reality, in the eyes of the Harper government, our institutions do not merit any intelligent reflection whatsoever. They are useful only to the extent that they serve the interests of the party. From the point of view of democracy, federalism and the rule of law, this is tragic". He was speaking of the government's treatment of the institutions of the Supreme Court of Canada and the Senate. However, his observations about democracy and the rule of law apply with equal force to its treatment of other institutions, such as the Canadian Wheat Board.

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an example of "the oftentimes cavalier, pernicious attitudes exhibited by governments towards Parliament".

[56] In principle, Senators hold office until the age of 75, which means that each new Prime Minister faces a legacy of past appointments by other Prime Ministers, perhaps from a different party. However, Harper has been in office long enough to make enough appointments to ensure control of the Senate. He favours patronage appointments to party loyalists.

[57] The exceptions are two trial-level judgment, one by Hughes, J. in the "gag order" case (see text following note 27) and the other by Campbell, J. in the "rule of law" case (see text preceding note 34). In contrast, Mainville, J.A. – who wrote the appeal-level judgment in the "rule of law" case – is now said to be being positioned by the Prime Minister to be eligible to fill an up-coming vacancy on the Supreme Court of Canada (Fine 2014).

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