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Democracy and the rule of law

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Topics
Constitutional law

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Democracy and the rule of law are cornerstones of the Canadian constitution. These concepts have been appealed to by both sides in the dispute over the Harper government's plan to end the Canadian Wheat Board's monopoly, and have resulted in two conflicting court decisions. In December, a Federal Court judge said that the government's plan violated the rule of law. More recently, a judge of the Manitoba Queen's Bench held that it did not. These diametrically opposed decisions stem from different approaches to foundational concepts of democracy and the rule of law.

In October, agriculture minister Gerry Ritz introduced a bill to end CWB's monopoly over wheat and allow wheat and barley farmers to market their grain as they wish, as the Conservatives had promised to do during the 2011 election. This bill has since become law as the *Marketing Freedom for Grain Farmers Act*.

However, the old *Canadian Wheat Board Act* contained a provision (section 47.1) that said that the minister cannot introduce a bill in Parliament to add or exclude grains covered by the CWB's "single desk" monopoly unless the minister first consults with the CWB and the producers of the grain have voted in favour of the proposed exclusion or extension.

The Friends of the Canadian Wheat Board and other CWB supporters challenged the bill in the Federal Court in an application heard in Winnipeg on December 6, 2011. The next day, Mr Justice Campbell issued reasons declaring that Mr Ritz' conduct in introducing the bill was an "affront to the rule of law" because he failed to consult the CWB and gain consent of the producers before introducing the bill.

The government had argued that no consultation or consent was required because it was not adding or excluding a grain from the system but instead was repealing the entire *Canadian Wheat Board Act*. Campbell J. appeared to accept that this was technically correct, but then he

extended the meaning of section 47.1. Relying on a "contextual historical approach with respect to the unique democratic nature of the CWB", he found that the "CWB's democratic marketing practices are 'significant and fundamental' because they are long standing, and strongly supported by a large number of the some 17,000 grain producers in Western Canada". Thus he held, section 47.1 required the minister to consult and gain consent not just when proposing amendments contemplated in section 47.1 itself, but also when proposing a "change to the democratic structure of the CWB".

The second proceeding was a law suit by a group of former board members of the CWB in the Manitoba Court of Queen's Bench, seeking declarations that the legislation infringes the rule of law and the Constitution. The former board members sought an interim injunction staying the implementation of the legislation pending the outcome of their suit.

Mr Justice Perlmutter refused to grant the injunction, finding that the case did not even raise a serious issue to be tried. He first rejected the former board members' contention that the legislation breached the rule of law. The rule of law "is an overarching principle guiding the application of other rights", he wrote; "it does not establish a remedy unless one can point to the law with which the government action conflicts".

So far as section 47.1 is concerned, it applies to the addition or subtraction of particular grains, which the new legislation did not do. Thus section 47.1 does not apply, he held. Perlmutter J. did not indulge in an expansive reading of this provision based on producer democracy in the way that Campbell J. did.

Indeed, Perlmutter J. disagreed with Campbell J.'s approach to section 47.1. Campbell J. characterized it as a "manner and form" provision. Legislatures can enact requirements that must be observed when passing or amending legislation. These are known as "manner and form" provisions. However, legislatures cannot bind themselves as to the substance of future legislation. This would be contrary to the principle of parliamentary sovereignty. Here, Perlmutter J. held, "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".

Both judges appealed to fundamental concepts of democracy and the rule of law; yet the manner of their approach cannot have been more different, and they reached completely opposite conclusions. Perlmutter J.

correctly, in my view, refused to extend the reach of section 47.1, and saw that applying the consent requirement in section 47.1 to the legislation abolishing the CWB's monopoly is inconsistent with the principle of parliamentary sovereignty that underlies our democratic system of government. Preventing Parliament from passing legislation relating to the CWB without getting producer consent would make the producers sovereign over Parliament and thus over Canadian voters who elect Parliament. Interestingly, however, Perlmutter J.'s decision reads as a highly technical decision, lacking eloquent appeals to grand concepts.

Campbell J., by contrast, waxed eloquent about grand concepts of democracy and the rule of law in extending a legislative provision beyond what the provision itself said. He focussed on the democratic structure of the CWB. But his conclusion would have subjected Parliament's ability to legislate to the approval of a relatively small segment of the population, and thus would have undermined the democratic structure of Canada.

Friends of the Canadian Wheat Board v. Canada (Attorney General), 2011 FC 1432

Oberg et al. v. Canada (Attorney General), 2012 MBQB 64

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