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TRADE LAW MEMORANDUM

THE WHEAT BOARD LITIGATION

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IMPLICATIONS OF THE U.S. CHALLENGES

The current U.S. trade actions against the Canadian Wheat Board (“CWB”) have implications, not only for the Board’s exports to the U.S., but for the operation of other federal and provincial Crown Corporations and state enterprises in Canada as well. This note discusses some of these.

COMMERCE DEPARTMENT INVESTIGATIONS

The American trade actions are on parallel tracks. The first track consists of investigations by the U.S. Commerce Department into a petition filed in September 2002 by the North Dakota Wheat Commission and U.S. wheat growers, alleging that Canadian exports of durum and spring wheat are both subsidized and dumped.

This spring the Commerce Department issued preliminary determinations in each of these investigations. The first found subsidies on Canadian wheat that were estimated at close

to 4 percent of the export price. The second found dumping margins of between 6 and 8 percent of the export price. Final determinations by Commerce in these investigations are expected by mid-July. Pending the final outcome, the provisional duties have been imposed and are now covered by bonds posted by Canadian exporters.

Assuming the final determinations confirm Commerce's earlier decision (which is a virtual certainty), the next stage will be a hearing by the U.S. International Trade Commission in September to determine whether Canadian exports "cause or threaten to cause" material injury to U.S. durum and spring wheat production.

The spectre of final duty liability has reduced the volumes of Canadian exports to the United States. This has meant a corresponding market share gain for U.S. grain growers and the reaping of important advantages well before the investigation is over. That is a typical pattern in these kinds of trade actions.

STATE-TO-STATE DISPUTE AT THE WORLD TRADE ORGANIZATION ("WTO")

The second track is at the WTO, where the U.S. government has asked for a dispute settlement panel to hear arguments that Canada, through the actions of the CWB, is not complying with WTO obligations respecting monopolies and state enterprises.

A three-person WTO panel has been appointed and each side is now preparing arguments. The hearing will be later this fall and a decision is expected early in 2004. While Canada has some good defensive arguments, an American win at the WTO, even though the case only concerns the CWB, could have important implications for other Canadian Crown corporations, federal and provincial, that exercise monopoly or quasi-monopoly powers in other fields.

U.S. STRATEGY

A noteworthy aspect of this case is that the U.S. government has taken this dispute to the WTO for State-to-State adjudication, in tandem with the Commerce Department dumping and subsidy investigations. We suspect that it reflects a broader U.S. strategy aimed at curbing powers of state trading enterprizes in other parts of the world. The outcome of the WTO case, therefore, has implications for the operations of these entities elsewhere, well beyond the Canadian Wheat Board.

STATE TRADING ENTERPRIZES UNDER THE GATT

At the WTO the U. S. will argue that the Canadian Government is contravening obligations under Article XVII of the General Agreement on Tariffs and Trade (the “GATT”), which is part of the larger 1994 WTO Agreement. Article XVII of the GATT is the provision that allows countries to establish and maintain state enterprizes as monopolies or quasi-monopolies under international trade law.

Article XVII contains two subsidiary obligations. First, it requires governments to ensure these entities act in a manner “consistent with” general GATT principles of non-discriminatory treatment in their purchases and sales of imports or exports. Second, it requires that state enterprizes make their purchases and sales “solely in accordance with commercial considerations”.

The U.S. will be alleging that Canada has transgressed these GATT requirements by granting the Wheat Board the exclusive privilege to purchase Canadian wheat for export

at set prices with the exclusive authority to sell Canadian wheat in foreign markets. It will claim the Wheat Board is violating Article XVII obligations by discriminating against U.S. grain in its purchases and in its export sales and by not otherwise acting in accordance with commercial considerations in selling Canadian wheat in the U.S. and elsewhere.

The U.S. will also argue that Canadian government is breaching Article XVII by providing financial guarantees and other backstopping for the CWB, claiming that this goes beyond the permitted scope of that provision.

It is not clear how the Canada and the CWB, in exercising legitimate monopoly rights under the GATT, offend Article XVII or engage in acts inconsistent with Canada's fundamental right to maintain such entities. Article XVII explicitly sanctions monopolies and that would seem to carry with it the corollary right to clothe monopolies with exclusive rights of buying and selling. As well, the wording of Article XVII is not clear as to how it applies to export sales of monopoly goods.

SOME BROADER IMPLICATIONS

Because there is little GATT or WTO jurisprudence on the operation of state trading enterprises and monopolies under Article XVII, this case should break new ground and provide important guidelines on the scope of that Article. Whichever way it goes, the outcome could affect a broad swath of public sector activity.

The case should also be watched because of its implications for the commercial activities of other Canadian and provincial Crown corporations, foreign and domestic. Should the panel side with the U.S. and apply restrictions to the operations of the CWB under GATT

Article XVII, it could mean that other government-controlled corporations will come under future WTO scrutiny. This could also have a bearing on the application of comparable state enterprize provisions in the North American Free Trade Agreement.

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