

# FROM THE LAND THAT BROUGHT YOU WILLIAM SHATNER: A WARP SPEED OVERVIEW OF CANADIAN AGRICULTURAL LAW AND HISTORY

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## I. PREAMBLE

Many Americans consider Canada the place whence bitterly cold air flows (“Canadian clipper”); where they speak English with a vaguely midland American accent (and some even speak French); where spelling adds “u” to neighbour or labour or reverses some letters as in “centre:” where “chesterfield” means couch (not cigarettes), “taps” means faucets, and “blinds” means shades;

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where lieutenant is pronounced “left-tenant” not “loo-tenant” where they play hockey (and win with an overtime goal). Astonishing to many is the fact that the southernmost point of Canada lies at 41°N. That is further south than the parallel that marks the northern border of California as well the border between New York and Pennsylvania, namely 42°N.<sup>1</sup> Many Canadians have sought or found fame and fortune in Hollywood: Raymond Massey, Glenn Ford, Leslie Nielsen, the father and son Donald and Kiefer Sutherland, Dan Aykroyd, and now Cory Monteith from the cast of “Glee.”<sup>2</sup> Perhaps it is time for the agricultural readers to get better acquainted with what Jon Stewart once called our “gay neighbor to the north.”<sup>3</sup>

Understanding is a combination of context, knowledge, and insight. Accordingly this paper will commence with brief review of basic facts, history, and politics—then proceed into agricultural topics such as seed regulation, genetically engineered crops, the marketing boards, and the Canadian Wheat Board. The subject matter is extensive but the article space is limited. Consequently this paper will give an abbreviated review of the agricultural dimensions, primarily from a federal perspective.

Canada, the second largest country in the world by area, has a per capita Gross Domestic Product (GDP) of \$43,450 versus the United States’ per capita GDP of \$47,920.<sup>4</sup> The GDP is \$1478 billion compared with the United States’ GDP of \$14,840 billion.<sup>5</sup> Canada exports approximately 1.9 million barrels of oil per day, putting it ninth in terms of world oil exporters.<sup>6</sup> Canada is actually the largest foreign supplier of oil to the United States—one ranking above Saudi Arabia—at 2626 thousand barrels per day or approximately 21% of total United States oil imports versus approximately 9% of total United States oil imports from Saudi Arabia.<sup>7</sup> Canada’s oil reserves are third to Saudi Arabia and Vene-

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1. Pelee Island, Lake Erie is Canada’s southernmost point at 41° 46’ 00” N, while the northern boundary of California is at 42° N.

2. *Raymond Massey*, INTERNET MOVIE DATABASE, <http://www.imdb.com/name/nm0557339/> (last visited Oct. 19, 2011); *15 Most Powerful Canadians in Hollywood*, ACE SHOWBIZ, <http://www.aceshowbiz.com/news/view/00004879.html> (last visited Oct. 18, 2011).

3. *The Daily Show with Jon Stewart: Out of the Closet*, (Comedy Central television broadcast July 24, 2002), available at <http://www.thedailyshow.com/watch/wed-july-24-2002/oot-of-the-closet>.

4. *The World in 2010, Countries: The World in Figures*, ECONOMIST, Nov. 13, 2009, at 108.

5. *Id.*

6. Cent. Intelligence Agency, *North America: Canada*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (last updated Sept. 26, 2011) [hereinafter CIA, *Canada*].

7. *U.S. Imports by Country of Origin*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/dnav/pet\\_move\\_impceg\\_a2\\_nus\\_ep00\\_im0\\_mbbldpd\\_a.htm](http://www.eia.gov/dnav/pet_move_impceg_a2_nus_ep00_im0_mbbldpd_a.htm) (last updated July 28, 2011); see also

zuela.<sup>8</sup> Only 2.2% of the Canadian GDP comes from agriculture.<sup>9</sup> Depending on who you ask (and when), some 80 to 90% of the population of approximately thirty-four million (the United States has 313 million) is located in urban environments between 100 and 124 miles of the United States border.<sup>10</sup> Life expectancy is seventy-eight for males and eighty-four for females.<sup>11</sup> Some 75% of Canadian exports are to the United States.<sup>12</sup> Colloquially put, Canada is a big oil producing country that is thinly populated, intensely urban, democratic, rooted primarily in British political institutions, affluent, and—in the latter part of the twentieth century—“socialist” by American standards.

## II. POLITICAL HISTORY

From 1689 to 1815, North America was the site of numerous wars that had global reach and proxy players: the French versus the English, the Spanish versus the English, and the Iroquois versus the Algonquians.<sup>13</sup> The unexpected results were the destruction of the military capabilities on the native tribes, the French colonies coming under British control (Detroit was a French outpost), and the loss of the numerical bulk of the British colonies.<sup>14</sup> In 1773, the British held the boundaries of Québec as the British lands south of Hudson’s Bay, east of the Mississippi, and north of the Ohio.<sup>15</sup> Québec and Nova Scotia were the other North American colonies not counting the “American Thirteen.”<sup>16</sup>

Wars cost money. The thirteen colonies were obstreperous about paying taxes to the British Empire. The rebellion (revolution?), according to John Adams, had a third of the population as “patriots,” a third as neutral, and a third as

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*Tarred with the Same Brush*, ECONOMIST, Aug. 5, 2010, available at <http://www7.economist.com/node/16743977>.

8. Cent. Intelligence Agency, *Country Comparison: Oil-Proved Reserves*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2178rank.html> (last visited Oct. 19, 2011).

9. CIA, *Canada*, *supra* note 6.

10. *Canada*, ENCYCLOPEDIA OF THE NATIONS, <http://www.nationsencyclopedia.com/economies/Americas/Canada.html> (last visited Oct. 18, 2011); CIA, *Canada*, *supra* note 7; Cent. Intelligence Agency, *North America: United States*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Oct. 6, 2011); see Nat. Geographic Soc’y, *Vital Statistics, Population Density*, EARTH PULSE, <http://earthpulse.nationalgeographic.com/earthpulse/earthpulse-map> (last visited Oct. 19, 2011) (map illustrating population density).

11. CIA, *Canada*, *supra* note 6.

12. *Id.*

13. ROBERT BOTHWELL, PENGUIN HISTORY OF CANADA 63 (2006).

14. *Id.*

15. *Id.* at 100.

16. *Id.*

loyal to the British Crown.<sup>17</sup> Québec and Nova Scotia were invited to the “Continental Congress,” but in modern slang were “no-shows.”<sup>18</sup> There was a migration from the “rebel” colonies into the northern loyal colonies, the eponymous “loyalists.”<sup>19</sup> Prior to the war of 1812, 60% of immigrants to “Canada” were Americans.<sup>20</sup> In addition, slaves under British protection fled the American colonies and went to Nova Scotia—although this is not to suggest Nova Scotia was a site of racial harmony, only that slavery was illegal.<sup>21</sup> In the meantime—in 1778—Captain Cook sailed Nootka Sound on Vancouver Island,<sup>22</sup> setting the way for the British colonies of Victoria and Vancouver and the province later known as British Columbia. Over this period, Québec split into Upper Canada (English—Protestant/Anglican [in American lexicon Episcopalian]) and Lower Canada (French—Roman Catholic).<sup>23</sup> The “Upper” and “Lower” prefixes were fixed by their geographic location in relation to the headwaters of the St. Lawrence River.<sup>24</sup> Upper Canada is now known as Ontario and Lower Canada as Québec—a change effected by the British North American Act of 1867.<sup>25</sup>

During the war of 1812, the Americans burned down Queenston, Ontario; the British in turn burned down Buffalo, New York.<sup>26</sup> The Americans burned down York (today’s Toronto);<sup>27</sup> the British in turn burned down Washington D.C.<sup>28</sup> The War ended by the Treaty of Ghent, signed in Belgium on Christmas 1814, on the terms of the *status quo ante bellum*.<sup>29</sup> It was a war that “changed no boundaries, brought no reparations, [and] avenged no wrongs.”<sup>30</sup>

While the United States went through the agony of the Civil War, the Canadian politicians negotiated the unification of the British colonies—today’s Ontario, Québec, Nova Scotia, and New Brunswick. Keenly aware of the U.S.

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17. *Id.* at 100–01.

18. *Id.* at 101.

19. UNITED EMPIRE LOYALISTS ASS’N OF CAN., <http://www.uelac.org/> (last visited Oct. 18, 2011) (technically, “loyalists” were United Empire Loyalists (UEL)).

20. BOTHWELL, *supra* note 13, at 135.

21. *Id.* at 110.

22. *Id.* at 116.

23. CANADIAN CONSTITUTIONAL LAW 75 (Joel Bakan et al. eds., 3d ed. 2003).

24. BOTHWELL, *supra* note 13, at 129.

25. Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. II, § 6 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

26. BOTHWELL, *supra* note 13, at 144.

27. *Id.*

28. *The British Burn Washington, D.C., 1814*, EYEWITNESS TO HISTORY.COM, <http://eyewitnesshistory.com/washingtonsack.htm> (last visited Oct. 19, 2011).

29. BOTHWELL, *supra* note 13, at 146.

30. DESMOND MORTON, A SHORT HISTORY OF CANADA 39 (McClelland & Stewart, 6th ed., 2006).

Civil War, the Canadian Constitution of 1867—the aforementioned British North America Act—deliberately vested power in the federal government.<sup>31</sup> Section 91 listed federal heads of power, Section 92 provincial heads of power, and anything not mentioned fell to the federal government.<sup>32</sup> Under Section 91, the federal government could declare works federal undertakings and criminal law was a federal matter.<sup>33</sup> Under Section 92, property and civil rights fell to the provinces<sup>34</sup>—a means to protect the Roman Catholic French.<sup>35</sup> The history and ethos of Canada at the time was captured by the preamble to Section 91, which held the federal government could make laws for the “Peace, Order and good Government of Canada” (POGG).<sup>36</sup> How tellingly different is that to “life, liberty and the pursuit of happiness?”<sup>37</sup>

Subsequently, the courts shifted that balance of power from the federal government to the provinces leaving Canada quite a balkanized confederation.<sup>38</sup> Interestingly, United States courts did the opposite—a constitution based on state rights had power judicially shifted to the federal government.<sup>39</sup>

Queen Victoria chose Ottawa as the capitol instead of the anticipated Kingston, Ontario.<sup>40</sup> The Red River Colony eventually became Manitoba and joined Canada in 1870.<sup>41</sup> A transcontinental railway was undertaken to extend Canada to the West Coast, with British Columbia joining Canada in 1871.<sup>42</sup> In

31. Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. II, § 6 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.); MORTON, *supra* note 30, at 92-93.

32. Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. II, §§ 91–92 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

33. *Id.* § 91.

34. *Id.* § 92.

35. See BOTHWELL, *supra* note 13, at 212–13 (explaining that the confederation benefited French Canadians because they would be the undisputed majority in Québec).

36. Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. II, § 92 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

37. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Canadian Constitution, however, “is as prosaic as any municipal charter.” BARRY L. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS: THE FUNCTION AND SCOPE OF JUDICIAL REVIEW* 4 (3d ed. 1988).

38. See Alan C. Cairns, *The Judicial Committee and Its Critics*, 4 CANADIAN J. POL. SCI. 301, 313 (1971) (“[T]here can be no doubt that [Lord] Watson and [Lord] Haldane [of the Privy Council] consciously fostered the provinces in Canadian federalism, and by so doing helped to transform the highly centralized structure originally created in 1867.”).

39. U.S. CONST. amend. X.

40. MORTON, *supra* note 30, at 58.

41. Manitoba Act, 1870, 33 Vict., c. 3 (Can.).

42. See BOTHWELL, *supra* note 13, at 217–18. The railroad was completed by 1885. MORTON, *supra* note 30, at 127.

1880, Britain transferred title to the Arctic to Canada.<sup>43</sup> In 1905, the Northwest territories were carved into the prairie provinces of Alberta and Saskatchewan.<sup>44</sup>

The Treaty of 1818 fixed the United States-Canadian boundary at the forty-ninth parallel from Minnesota to the Rockies.<sup>45</sup> The Oregon Treaty of 1846 continued the boundary on the forty-ninth parallel, with Vancouver Island staying British.<sup>46</sup> The so-called Pig War of 1859 in the San Juan Islands ended with a treaty in 1871.<sup>47</sup> The trend continued.

The Klondike Gold Rush in 1896 made a long simmering border dispute over the Alaskan boundary acute.<sup>48</sup> Britain had no desire to aggravate the United States, let alone fight a war over it—the exhausting South African Boer War was barely over.<sup>49</sup> In contrast, Teddy Roosevelt was imperialistic.<sup>50</sup> In 1903, on the arbitration board, the feckless British sided with the partisan American members against the partisan Canadian members—thus providing a majority decision.<sup>51</sup> The boundary was set on American terms and now forms the Alaskan pan-handle; Canada lost its sea access for the Yukon (and perhaps the opportunity to make Sarah Palin a Canuck).<sup>52</sup>

Canada was active in the Boer War, World War I, World War II (which for Canadians commenced in September 1939 with the invasion of Poland, unlike the Americans, who came into the war with the surprise attack on Pearl Harbor on December 7, 1941), Korea, and now Afghanistan.<sup>53</sup> Although many recall D-Day from the movies and think of Utah, Omaha, or maybe the British Gold beach; the Canadian army took on Juno beach.<sup>54</sup> At the end of the Second World War, Canada had the third largest navy in the world.<sup>55</sup> Some 1.1 million Canadians were in uniform out of a population then of about 11.5 million.<sup>56</sup>

43. BOTHWELL, *supra* note 13, at 217.

44. Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.).

45. Convention with Great Britain, U.S.-U.K., art. II, Oct. 20, 1818, 8 Stat. 248.

46. Treaty with Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-U.K., art. I-II, June 15, 1846, 9 Stat. 869.

47. Treaty between the United States and Great Britain: Claims, Fisheries, Navigation of the Saint Lawrence, U.S.-U.K., May 8–July 4, 1871, 17 Stat. 863.

48. MORTON, *supra* note 30, at 154.

49. *Id.*

50. *Id.*

51. *Id.* at 154–55.

52. *Id.*

53. Sydney F. Wise, *Canada and War: 1600-2000*, in CANADIAN MILITARY HISTORY SINCE THE 17TH CENTURY 21 (Yves Tremblay ed., 2000), available at [http://www.cmp-cpm.forces.gc.ca/dhh-dhp/his/docs/cmhc\\_2000.pdf](http://www.cmp-cpm.forces.gc.ca/dhh-dhp/his/docs/cmhc_2000.pdf).

54. Storming the Enemy Beaches (Canadian Broadcasting Corp., radio broadcast June 6, 1944), available at [http://archives.cbs.ca/war\\_conflict/second\\_world\\_war/clips/7869/](http://archives.cbs.ca/war_conflict/second_world_war/clips/7869/).

55. BOTHWELL, *supra* note 13, at 357.

56. *Id.*

Three final acts marked Canada as an independent nation. The Statute of Westminster 1931 held that British Statutes no longer applied in Canada.<sup>57</sup> In 1949, appeals to the British Privy Council were abolished.<sup>58</sup> Thus, the Supreme Court of Canada court ceased being the penultimate appeal court and was now the court of last resort.<sup>59</sup>

The third act caused a paradigm legal shift in 1982 when Britain “repatriated” Canada’s constitution<sup>60</sup> and Canada enacted its Constitution and Charter of Rights of Freedoms.<sup>61</sup> It echoed the American Bill of Rights.<sup>62</sup> With the Charter came the “Americanization” of some elements of Canadian law—particularly criminal with Miranda-like rights<sup>63</sup> and the heretofore unheard of exclusion of evidence for police transgressions.<sup>64</sup>

A segue is necessary for some Canadian lexicon. The “East” means Ontario and Québec. The “Maritimes” captures Newfoundland, Nova Scotia, New Brunswick, and Prince Edward Island. The “West” encompasses Manitoba, Saskatchewan, and Alberta. British Columbia is a stand-alone. The “North” or “Arctic” now involves the three territories: Yukon, North West, and Nunavut.

### III. SOCIAL HISTORY

The country slowly lost its Loyalist ethos with waves of non-British immigration from 1896 to 1911—“stout, hardy peasants in sheepskin coats”<sup>65</sup>—and continuing unimpeded after the Second World War.<sup>66</sup> Immigrants shifted from coming from Europe to coming from South Asia, East Asia, Africa, the Caribbean, and Latin America during the 1960s and beyond.<sup>67</sup> It was at this time, in contra-distinction to the United States “melting pot,” that Canada adopted multiculturalism.<sup>68</sup>

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57. Statute of Westminster, 1931, 22 & 23 Geo. V., c. 4 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 27 (Can.).

58. Act to Amend the Supreme Court, S.C. 1949, c. 37 (2d Sess.) (Can.).

59. CANADIAN CONSTITUTIONAL LAW, *supra* note 23, at 6.

60. Canada Act, 1982, c. 11 (U.K.), *reprinted in* R.S.C. 1985, app. II, c. 44 (Can.).

61. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

62. *Compare id.*, with U.S. CONST. amend. I-X.

63. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 10 (U.K.).

64. *Id.* 24(2).

65. MORTON, *supra* note 30, at 148.

66. *See id.*

67. BOTHWELL, *supra* note 13, at 503.

68. *Id.* at 504.

The welfare state is generally considered to encompass 1950 to 1980—in the 1960s, Canada went from what many would call a small “c” conservative state into one large “L” liberal state, with the public sector becoming a larger part of the economy.<sup>69</sup> In European terms, Canada was a social-democrat and economically and socially dirigisme, with the Canada Pension Plan, the Canada Assistance Plan, and universal medicare as mileposts.<sup>70</sup> The era of Prime Minister Trudeau in the late 1960s and 1970s also saw the slashing of Canada’s military strength and capabilities.<sup>71</sup> The youth espoused anti-Americanism—nurtured by draft dodgers and émigré academics.<sup>72</sup>

The British conquest of New France brought Lower Canada (Québec) into the British Empire under the terms of the Treaty of Paris in 1763.<sup>73</sup> The British mandate allowed the French culture, religion, and language to survive. So today, Québec is a civil code jurisdiction (akin to Louisiana) while the rest of the country is common law. In the 1960s and 1970s, Canada adopted and prosecuted biculturalism and bilingualism at the federal level to better respect the duality of English and French.<sup>74</sup> A separatist movement gained force in Québec (again in the 1960s) and survives today at the Party Québécois provincially and the Bloc Québécois federally.<sup>75</sup>

In 1854, Upper Canada had free trade with the United States under the Reciprocity Treaty, which the United States terminated after the Civil War in 1866.<sup>76</sup> In 1988, however, a free trade agreement was finally signed (again) with the United States.<sup>77</sup> In 1994 came the North American Free Trade Agreement.<sup>78</sup>

The Parliamentary system is the system of government. Like the United States, it has two houses, the House of Commons and Senate. Simply put, the country is divided into ridings (or “congressional districts”), each riding represents a seat in the House of Commons. The party with the most seats forms the

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69. ALVIN FINKEL, *SOCIAL POLICY AND PRACTICE IN CANADA* 149 (2006).

70. MORTON, *supra* note 30, at 148.

71. *Id.* at 303; J.L. GRANASTEIN, *WHO KILLED THE CANADIAN MILITARY?* 97–124 (2004).

72. MORTON, *supra* note 30, at 303.

73. Treaty of Paris, Fr.-Port.-Spain-U.K., Feb. 20, 1763, *available at* [http://avalon.law.yale.edu/18th\\_century/paris763.asp](http://avalon.law.yale.edu/18th_century/paris763.asp).

74. MORTON, *supra* note 30, at 305–06.

75. See Kenyon Wallace, *Québec Sovereignty Movement Anything but Dead*, *THESTAR.COM*, May 5, 2011, [www.thestar.com/news/canada/politics/article/986582-quebec--sovereignty-movement-anything-but-dead](http://www.thestar.com/news/canada/politics/article/986582-quebec--sovereignty-movement-anything-but-dead).

76. See Reciprocity Treaty of 1854, U.S.-U.K., June 5, 1854, S.C. 1854, 18 Vict. c. 1, *available at Canadian Federation, LIBRARY & ARCHIVES CANADA*, <http://www.collectionscanada.ca/confederation/023001-7101-e.html>.

77. Free Trade Agreement, U.S.-Can., Mar. 1988, 27 I.L.M. 281.

78. North American Free Trade Agreement, U.S.-Can.-Mex., Mar. 1993, 32 I.L.M. 289.



government. If the party has the majority of the seats, it forms a majority government; otherwise it is a minority government. The leader of the governing party is the Prime Minister, and generally chooses his cabinet from the other elected members of his party. The second largest party by seats in the House forms the official opposition. The opposition chooses “shadow” cabinet members to criticize their counter-parts and act as a government-in-waiting.

The Senate is appointed in Canada with lifetime sinecures, and the number of seats is not fixed like the United States, with its two per state, but the objective is the same: regional representation. The House of Commons is the democratic representation.

The speaker of the Commons, although elected under a party affiliation, is a neutral party voted by the House under an open (non-party line) vote. This reflects the situation with the British Parliament in 1867. Alternatively, the United States’ speaker’s roots are in the British Parliamentary system of 1770s, wherein the speaker was partisan.

The Queen is the official head of government, and her representative is the Governor General. The Governor General’s overall role is figurative, although profound constitutional power is vested in the position.

Provincially, essentially the same regime exists, except that power flows through the Lieutenant Governor, there is only one house, the Legislature, and the head of a province is a “premier”—equivalent to a State Governor in the United States. One can say Canada was founded as a non-revolutionary society based on ideas of hierarchy, deference to authority, and respect for tradition.<sup>79</sup>

#### IV. AGRICULTURE: GENERAL

The Canadian constitution does not define agriculture.<sup>80</sup> An accepted judicial definition holds:

No doubt, the term “Agriculture” must be given as wide a meaning as the word will naturally convey. It would, no doubt, cover practical husbandry and tillage, the growing of crops, the planting and care of fruit trees, the rearing of domestic ani-

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79. See generally MICHEL DUCHARME, *LE CONCEPT DE LIBERTÉ AU CANADA À L’ÉPOQUE DES RÉVOLUTIONS ATLANTIQUES* (2010) (describing history of Québec and competing definitions of liberty).

80. See Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. II, § 92 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.) (outlining no definition of agriculture). The Constitution of Canada is not a single document, but an amalgamation of several documents: including the Constitution of Canada, 1982 as consisting of the Canada Act 1982 (including the Constitution Act, 1982), all acts and orders referred to in the schedule (including the Constitution Act, 1867, formerly the British North America Act), and any amendments to these documents. Constitution Act, 1982 *being*, Schedule B to the Canada Act, 1982, c. 11, § 52(2) (U.K.).

mals, the sciences applied to or bearing upon these subjects and perhaps the disposition of the products by the producer; but I do not think it would apply to these products when they have left his hands and become articles of ordinary merchandise.<sup>81</sup>

The constitution does mention the word “agriculture,” however, and the matter is assigned to both the Federal Parliament and Provincial Legislatures—although it does so through two discrete channels.<sup>82</sup> One is found in Section 95, which concurrently empowers federal and provincial legislators to make “[l]aws in relation to [a]griculture.”<sup>83</sup> Canadian courts have interpreted this phrase in a narrow fashion, largely restricting its ambit to regulating activities that occur within the farm-gate, but broader interpretations of its reach also have been recognized.<sup>84</sup> The interesting dimension of Section 95 is that it allows both levels of government to legislate in the area of agriculture, but gives the Federal Parliament paramountcy if the two levels try to legislate on the same matter.<sup>85</sup>

Beyond the farm-gate, Canadian courts tend to look to other provisions of the Canadian constitution to ground legislation affecting agriculture and agricultural products. The traditional divisions assigned to the Federal Parliament in Section 91 do battle with those assigned to Provincial Legislatures in Section 92, such that much of the farming laws pertain to buying.<sup>86</sup> Owning and financing agriculture fall under the provincial power relating to the regulation of “property and civil rights,”<sup>87</sup> while an important part of marketing regulation, national agricultural standard setting, and international agriculture trade falls to the Federal Parliament under its power over “trade and commerce.”<sup>88</sup>

The legal issues that challenge the Canadian farmer will likely resonate with the American farmer: business organization of the farm—family corporations and inter-generational transfers—farm financing, employment law (migrant labor), environmental liability, land-use (airport zoning, oil and gas leases, hydro easements, environmental preserves), divorce, income tax treatment, succession planning, right to farm, and land use restrictions (agricultural reserves, ecological

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81. *R. v. Manitoba Grain Co.*, [1922] 32 Man. R. 52, para. 43 (Can. Man.).

82. Constitution Act, 1867, 30 & 31 Victoria, c. 3, (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

83. *Id.* at art. IV, § 95.

84. DONALD BUCKINGHAM ET AL., HALSBURY’S LAWS OF CANADA: AGRICULTURE/ALTERNATIVE DISPUTE RESOLUTION 134 (2009).

85. Constitution Act, 1867, 30 & 31 Victoria, c. 3, art. VI § 95 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.).

86. *Id.* §§ 91, 92.

87. *Id.* § 92.

88. *Id.* § 91.

reserves). Beyond farm operation financings, there are the various provincial and federal farm support programs that seem to be in a constant state of flux.<sup>89</sup>

The federal government, commencing in 1885, established research stations or experimental farms across the country.<sup>90</sup> In 1909, the station at Indian Head, Saskatchewan bred the high gluten, high yielding, rust resistant strain of wheat—known as Marquis—that transformed the prairies.<sup>91</sup>

Yes, grains and livestock are a large part of the Canadian output, but so are wines (some 30,000 acres, mostly in the interior of British Columbia and the Niagara Region).<sup>92</sup> In 2006 there were 229,000 farms in Canada covering an area of 67,600,000 hectares (about 167,000,000 acres).<sup>93</sup> The average farm was 728 acres, with Western farms being significantly larger, and Eastern farms being significantly smaller.<sup>94</sup> The trend is towards larger farms with older farmers.<sup>95</sup> While Canada is the second largest country in the world, given its geography and climate, only approximately 7% of its land is cultivated,<sup>96</sup> and urban encroachment will likely decrease that percentage.

While its proportion has dropped slightly since 2001, Canada is still a field-crop growing country—with 39.8% of all Canadian farms classified as field crop farms.<sup>97</sup> The leading field crop is spring wheat, followed by hay.<sup>98</sup> Cano-

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89. See Farm Credit Canada Act, S.C. 1993, c. 14 (provides business and financial services to farming operations); Farm Debt Mediation Act, S.C. 1997, c. 21 (Can.) (providing for mediation between insolvent farmers and their creditors); Farm Income Protection Act, S.C. 1991, c. 22 (Can.) (authorizing net income stabilization account program, gross revenue insurance, revenue insurance, and crop insurance); Prairie Farm Rehabilitation Act, R.S.C. 1985, P-17 (authorizing expenditures for drought and soil drifting areas); Agricultural and Rural Development Act (ARDA), R.S.C. 1985, c. A-3 (authorizing projects in economic development and conservation in rural areas); Advance Payments for Crops Act, R.S.C. 1985, c. C-49 (to facilitate producer organizations in making advance payments for crops); Prairie Grain Advance Payments Act, R.S.C. 1985, c. P-18 (giving Boards authority to make advance payments for prairie grain); see also Donald E. Buckingham & Ken Norman, *Agriculture and Law*, in *LAW AGRICULTURE AND THE FARM CRISIS* 4–9 (Donald E. Buckingham & Ken Norman eds., 1992); Sam McCullough, *The Legal Structure of Farm Safety Net Programs*, in *LAW AGRICULTURE AND THE FARM CRISIS*, at 47–62; Donald H. Layh, *Legislative Options to Manage the Farm Debt Crisis*, in *LAW AGRICULTURE AND THE FARM CRISIS*, at 77–96.

90. Experimental Farm Stations Act, 1885, S.C. 49 Vict. c. 23 (U.K.), reprinted in R.S.C. 1985, c. E-16 (Can.).

91. MARJORIE L. BENSON, *AGRICULTURAL LAW IN CANADA 1867–1995: WITH PARTICULAR REFERENCE TO SASKATCHEWAN* 30–31 (1996).

92. *Snapshot of Canadian Agriculture*, STATISTICS CAN., <http://www.statcan.gc.ca/cara2006/articles/snapshot-portrait-eng.htm> (last modified Oct. 5, 2009).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

la—a Canadian bred edible rapeseed oil—is third and is grown on 12.4 million acres in Western Canada.<sup>99</sup> Aside from field crops, the next most common farm is a beef farm—accounting for 26.6% of all farms.<sup>100</sup> Two farm types have had increases in proportion as well as number: “all other animal production” farms and “fruit and vegetable” farms.<sup>101</sup> Blueberries represent some 46% of fruits on about 130,000 acres.<sup>102</sup> Greenhouses used to produce vegetables (113.8 million square feet) exceed that used to produce flowers (99.9 million square feet).<sup>103</sup> Potatoes are grown on 401,583 acres—a third of which are in the Maritime Provinces.<sup>104</sup> Finally, 1.5% of farms are certified organic with another 5.2% claiming organic processes but not registered.<sup>105</sup>

#### *A. Crop Seed Registration: Conventional*

The Seeds Act determines whether or not a seed from scheduled crops can be sold in Canada and fixes the standards for seed companies in packaging and labeling.<sup>106</sup> The definition of “sell” is all encompassing.<sup>107</sup> Virtually all of the regulatory strictures are found in Seeds Regulations.<sup>108</sup>

The purpose of the Act and Regulations is to govern the testing, inspection, quality, and sale of seeds.<sup>109</sup> No one can sell or dispose of seeds for consideration unless the seed is registered—at which point it is called a “variety.”<sup>110</sup> The Seeds Regulations also define “seed” to include derivation through biotechnology.<sup>111</sup> The mechanics of the registration system are set out in the Seeds

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Seeds Act, R.S.C. 1985, c. S-8; see also Stan Benda, *The Sui Generis System for Plants in Canada: Quirks and Quarks of Seeds, Suckers, Splicing, and Brown Bagging for the Novice*, 20 CANADIAN INTELL. PROP. REV. 323, 329–30 (2003).

107. Seeds Act, R.S.C. 1985, c. S-8, § 2 (“‘sell’ includes agree to sell, or offer, keep, expose, transmit, send, convey or deliver for sale, or agree to exchange or to dispose of to any person in any manner for a consideration.”).

108. Seeds Regulations, C.R.C., c. 1400, § 2(2) (Can.).

109. Seeds Act, R.S.C. 1985, c. S-8 (Can.).

110. *Id.* § 3(1)(b); Seeds Regulations, C.R.C., c. 1400, § 2(1) (Can.).

111. Seeds Regulations, C.R.C., c. 1400, § 2(1) (Can.) (“Seed” includes “seed derived through biotechnology . . . [which] means the application of science and engineering to the direct or indirect use of living organisms or parts or products of living organisms in their natural or modified forms.”).

Regulations. Within those chapters are provisions idiosyncratic to certain seed types (e.g., field crops), seed standards, accredited graders, and seed testing.<sup>112</sup>

The touchstones of registration are *merit* and *identification*.<sup>113</sup> Merit requires “that the variety is equal or superior to appropriate reference varieties with regard to any singular characteristic . . . that renders the variety beneficial for a particular use in a specific area of Canada.”<sup>114</sup> This entails documentation including: a description of pedigree, its origin, methods of development, experiment results, a sample of the seed, details about any sale of the seed overseas, prescribed methods for testing, and laboratory standards.<sup>115</sup> This often requires ten or more years of breeding and the production of attendant records.<sup>116</sup>

The pivot of the regime is the recommending committees as their recommendations are determinative for registration.<sup>117</sup> These bodies—approximately twenty-two—are ministerially designated and have the necessary expertise to test the variety for merit.<sup>118</sup> Amongst other things, the committees also formulate testing procedures that are appropriate for their crops—including a mechanism for verification of trials and validation of data.<sup>119</sup> They regularly review testing procedures to ensure that they reflect acceptable scientific practices, and they ensure that reference varieties are current and fairly represent the requirements of Canadian agriculture.<sup>120</sup> The recommending committees conduct the growing or experimental trials on the proposed variety. At least two years of trials are required as a prerequisite for subsequent regulation.<sup>121</sup>

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112. See generally Seeds Act, R.S.C. 1985, c. S-8 (Can.) (Seed Standards, § 6; Seed Testing, § 11; Graders, §§13.1-2; Field Crops, § 23; Forage Crops, § 25; Lawn Grass and Turf Grass, § 27; Vegetables, § 30).

113. Seeds Regulations, C.R.C., c. 1400, § 65.1 (Can.).

114. *Id.* § 63.

115. *Id.* § 67 (Can.); CANADIAN FOOD INSPECTION AGENCY, CANADIAN METHODS AND PROCEDURES FOR TESTING SEED (2009) (The Canadian Methods and Procedures for Testing Seed provides the “recognized standard methods” required for carrying out “officially recognized tests” as defined in Section 2 of the 1996 Seeds Regulations); CANADIAN FOOD INSPECTION AGENCY, SEED LABORATORY ACCREDITATION AND AUDIT PROTOCOL (2006) (The Laboratory Accreditation and Audit Protocol (LAAP) has been developed to assess specific test competence in the scientific disciplines of chemistry, biology and microbiology. The Seed LAAP is an elaboration of the Canadian Food Inspection Agency’s LAAP to make it specific to the Canadian seed testing program)

116. See generally Seeds Regulations, C.R.C., c. 1400, § 67 (Can.).

117. *Id.* § 67(1)(c).

118. *Id.* § 65.1(1)(a).

119. *Id.* § 68.

120. *Id.* § 65.1(3); *Procedures for the Registration of Crop Varieties in Canada*, CANADIAN FOOD INSPECTION AGENCY, § 9 (July 8, 2009), available at <http://www.inspection.gc.ca/english/plaveg/variety/proced/regproe.shtml>.

121. T. Demeke et al., *Adventitious Presence of GMOs: Scientific Overview for Canadian Grains*, 86 CAN. J. OF PLANT SCI. 1, 3 (2005).

The registration committees have sub-committees, generally along three themes: disease resistance, agronomy, and quality.<sup>122</sup> A report is made to the main committee, and a plenary vote is taken.<sup>123</sup> The applicant then files this report with its submission.<sup>124</sup> That report cannot be more than two years old or, in the case of a forage variety, not more than four years old.<sup>125</sup> In addition, the Registrar has wide latitude to ask for anything else to determine the merit and identity of the variety.<sup>126</sup> There is also a continuing obligation of disclosure, before and after registration.<sup>127</sup>

Registration can be absolute or conditional. Conditional registration may be divided into three categories: interim, regional, and contract. Interim registration is granted if the seed has merit but further evaluation is still required because of insufficient data—in which case a registration may be granted for between one and five years.<sup>128</sup> Regional registration is granted if the variety might be problematic—if it has disease susceptibility in certain regions or might be confused with other varieties.<sup>129</sup> Contract registration imposes restrictions on a variety due to its biotechnology (biochemical or biophysical characteristics) that can make that variety confusing or threatening to similar varieties.<sup>130</sup> Contract registration is only an option, however, where the candidate variety may pose a threat to the industry.<sup>131</sup>

Variety registration solely grants permission to sell the seed, granting no other property rights.<sup>132</sup> For intellectual property rights, the registered variety must be now registered pursuant to the Plant Breeders Rights Act (PBR),<sup>133</sup> which is the domestic manifestation of the International Convention for the Protection of New Varieties of Plants (UPOV).<sup>134</sup> Under Section 4 of the PBR, the

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122. See Seeds Regulations, C.R.C., c. 1400, § 68 (Can.).

123. See *id.* §§ 73–74.

124. See *id.* § 67.

125. *Id.* § 67(1)(a)(vi) (Can.).

126. *Id.* § 67(2).

127. See *id.* § 67.

128. *Id.* § 68(2)(a).

129. *Id.* § 68(2)(b).

130. *Id.* § 68(2)(c).

131. *Id.*

132. Seeds Act, R.S.C. 1985, c. S-8, § 3 (Can.).

133. Plant Breeders Rights Act, S.C. 1990, c. 20 (Can.).

134. International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, 815 U.N.T.S. 89, available at <http://www.upov.int/en/publications/conventions/1961/content.htm>; see also Natalie Derzko, *Plant Breeders Rights in Canada and Abroad: What Are These Rights and How Much Must Society Pay for Them*, 39 MCGILL L.J. 144 (1994) (describing PBR as implementing legislation of UPOV).

touchstones for plant registration are *distinct, uniform, and stable*.<sup>135</sup> Once registered, the variety is known as a “denomination.”<sup>136</sup> The UPOV system has been revised three times—in 1972, 1978, and 1991—each time strengthening the rights of the breeder.<sup>137</sup> Canada ratified the 1978 version and the United States ratified the 1991 edition. It is worth noting in Canada, you can patent the gene but not the plant, while in the United States you can patent the plant containing the gene.<sup>138</sup> Yet, the practical outcomes are the same: you can enforce your intellectual property rights.

### B. *Crop Seed Registration: Plants with Novel Traits (PNTs)*

Canada does not regulate genetically modified plants. Rather, they regulate the product—the phenotype—not the genotype or process or production method that triggers regulatory scrutiny.

The principles of Canadian biotechnology policy include: using existing laws to avoid duplication, developing clear guidelines for evaluating biotechnology products, and providing a sound scientific knowledge base on which to assess risk.<sup>139</sup> This science based risk management approach is consistent with the Organisation for Economic Co-Operation and Development (OECD) Blue Book.<sup>140</sup> In addition, the Canadian Food Inspection Agency’s (CFIA) operating principles include: focusing on the product traits, establishing safety levels and standards for each product based on best scientific data, and dealing with safety in the milieu of probability and magnitude of any adverse effects, rather than the absence of risk.<sup>141</sup>

The Plant with Novel Trait (PNT) issue arose in Canada in the early 1990s when regulators faced the conundrum of the same trait herbicide-tolerant

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135. Plant Breeders’ Rights Act, S.C. 1990, c. 20, § 4 (Can.).

136. *Id.*

137. Additional Act of November 10, Amending the International Convention for the Protection of New Varieties of Plants, Nov. 10, 1972, *available at* <http://www.upov.int/en/publications/conventions/1961/act1972.htm>; International Convention for the Protection of New Varieties of Plants, Oct. 23, 1978, 33 U.S.T. 2703, *available at* <http://www.upov.int/en/publications/conventions/1978/content.htm>; International Convention for the Protection of New Varieties of Plants, March 19, 1991, *available at* <http://www.upov.int/en/publications/conventions/1991/act1991.htm>.

138. *Compare* Monsanto Canada Inc. v. Schmeiser, [2004] 1 S.C.R. 902 (Can.), *with* Diamond v. Chakrabarty, 447 U.S. 303, 311 (1980).

139. Michael J. Prince, *Canadian Food Inspection Agency: Modernizing Science-Based Regulation*, in *RISKY BUSINESS: CANADA’S CHANGING SCIENCE-BASED POLICY AND REGULATORY REGIME* 220–21 (G. Bruce Doern & Tem Reed eds., 2000).

140. ORG. FOR ECON. CO-OPERATION & DEV., *RECOMBINANT DNA SAFETY CONSIDERATIONS* 42 (1986).

141. Prince, *supra* note 139, at 220–21.

canola that was created by different breeding methods—mutagenic and rDNA.<sup>142</sup> The resulting policy decision held that the potential threat to the environment from the plant traits arose irrespective of the breeding technique that introduced those traits.<sup>143</sup> Henceforth the regulatory focus would be on the “novel” trait, and not on the breeding technique that begot or introduced that novel trait.<sup>144</sup> Breeding techniques include rDNA, mutagenesis, somaclonal variation, chromosome doubling, protoplast fusion, inter species crosses, embryo rescue, and the dilemma of cisgenes and gene silencing.<sup>145</sup>

CFIA seeks to determine if a risk assessment is necessary.<sup>146</sup> Familiarity, the first threshold, encompasses experience with and provenance of the plant.<sup>147</sup> If the species has a history of safe usage, the trait is similar to one already approved, and the trait is derived by a technique that has been traditionally considered safe, then a plant is familiar.<sup>148</sup> If the species is not familiar, a full safety assessment is required.<sup>149</sup> If it is familiar, however, CIFA determines if the plant is substantially equivalent to an approved product, which entails both the genomics/proteomics and the effect on the environment.<sup>150</sup> If both familiar and substantially equivalent, then the CFIA assessment ceases.<sup>151</sup> If not, the portion not substantially equivalent undergoes further risk assessment.<sup>152</sup> The crux of PNT is that due to the novel trait from the introduced gene(s), that element of the plant is *not substantially equivalent* to their progenitors:

. . . based on *valid scientific rationale* . . . in terms of its specific use and safety both for the environment and for human health, to any characteristic of a distinct, stable population of cultivated seed of the same species in Canada, having regard to weediness potential, gene flow, plant pest potential, impact on non-target organisms and impact on biodiversity.<sup>153</sup>

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142. Stephen Yarrow, *Environmental Assessment of the Products of Plant Biotechnology in Canada*, in *FOOD OF THE FUTURE? COMPARING CONVENTIONAL, ORGANIC, AND GENETICALLY MODIFIED FOOD CROPS: UNDERSTANDING AND MANAGING THE RISKS* 101–02 (Patricia Gallagher & Laurie Wood eds., 2001).

143. *Id.* at 102.

144. *Id.*

145. Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22,984, 22,985–86 (May 19, 1992).

146. Prince, *supra* note 139, at 220.

147. *Id.* at 221.

148. Pearl Reimer & Bryan Schwartz, *Biotechnology: A Canadian Perspective*, 1 ASPER REV. OF INT’L BUS. & TRADE L. 91, 99 (2001).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Seeds Regulations, C.R.C., c. 1400, § 107 (Can.) (emphasis added).



This regulation suggests that a plant contains a novel trait if the trait is either not present in plants of the same species already existing as stable or in cultivated populations in Canada, or is present but at a level significantly outside the range of traits in stable, cultivated populations of that plant in Canada.<sup>154</sup>

Unfortunately, a PNT does need regulatory authorization for confined or unconfined releases.<sup>155</sup> Extensive data required for justifying such authorization includes, among other things, all details about the donor organism, breeding method, trait, test results, foreign filings, protocols, weediness, outcrossing potential, ecology, potential interactions with other organisms, and impact on biodiversity.<sup>156</sup>

For an unconfined release, data must be submitted describing potential interactions of the seed—or plants derived from the seed—with other life forms and an evaluation of the potential risk of harm posed to the environment, including the risk of harm posed to human health, as a result of those interactions.<sup>157</sup> The requirements are that the PNT: (a) does not become a weed in its own right, (b) will not become a pest (e.g., mutate, or spread virus resistance), (c) will not pose an impact on non-target species, and (d) will not negatively impact biodiversity (both natural and agricultural environments).<sup>158</sup> Thereafter, the Minister either refuses or grants the authority, if necessary with conditions.<sup>159</sup> The conditions may include buffer zones or mixing the variety in a particular ratio with a similar variety without the trait.<sup>160</sup> These conditions hopefully prevent either the seed from spreading (if an open-pollinated plant) or fend off evolutionary changes that will overcome the trait.

This is a science based regime—like the United States and unlike the European Union (which employs a socio-economic based regime). On average, the regulatory hurdles take three to seven years, depending on the degree of novelty of the proposed trait.<sup>161</sup> The late American political scientist Aaron Wildavsky from Berkeley gave some “food for thought” on such biotechnology regulation.

. . . [T]he rival sides avoid following strict implications of their arguments. Thus those who believe in the monstrous potential of biotechnology, disasters so bad that no good from the same technology could possibly overcome it, should be arguing not for stronger regulation but rather for prohibition of biotechnological research

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154. *See id.*

155. *Id.*

156. *Id.* at § 110.

157. *Id.* at § 110(3).

158. Yarrow, *supra* note 142, at 102.

159. Seeds Regulations, C.R.C., c. 1400 § 111 (Can.).

160. Reimer & Schwartz, *supra* note 148, at 99.

161. Peter W. B. Phillips, *Agriculture: Farmers, Agrifood Industry, Scientists, Consumers*, 30 CAN.-U.S. L.J. 273, 284 (2004).

and its application. And those who argue that biotech lead to results no different from those spontaneously occurring in nature or practiced for centuries by breeder and hybridizers, so that the wondrous good it will do is bound to vastly exceed the damage it causes, should really not accept existing regulation but rather argue for its abolition.<sup>162</sup>

### *C. PNTs & Food*

Having regulatory approval of a genetically modified (GM) crop does not mean one has approval for a GM food. One requires a permit for GM corn, and another authorization for GM cornflakes. Under the Food and Drug Act Regulations, Health Canada continues with “novel food,” a concept that engages the concept of “major change.”<sup>163</sup> A major change means the food is outside its natural limits as to composition, metabolization, and safety.<sup>164</sup> A food is novel if it has no history of safe use or if it has had a major change making it exhibit new characteristics, characteristics falling outside of the anticipated range, or failing to exhibit old characteristics.<sup>165</sup>

The effect of these regulations is, first, to exclude GM foods which are safely used in other countries or in Canada in a similar crop; and secondly, to exclude any minor food-processing changes—although most processed food contains GM (e.g., corn fructose, canola oil, soy protein).<sup>166</sup> True novelty, however, and not GM per se, triggers these provisions.<sup>167</sup> Regulators review field trials related to nutrition, toxicity, and allergenicity.<sup>168</sup>

The regulations go on to say a novel food cannot be sold until the regulator is notified, is provided prescribed data (nature of the trait, previous use, safety history), and issues an approval.<sup>169</sup> These provisions also speak to the parameters of not only what is approved, but what might attract labeling, to wit: major

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162. AARON WILDAVSKY, L. & ECON. WORKSHOP SERIES, WS 1989-90-(3), GOLDILOCKS IS WRONG: IN REGULATION OF BIOTECHNOLOGY ONLY THE EXTREMES CAN BE CORRECT 1–2 (1989).

163. Food and Drug Regulations, C.R.C., c. 870, § B28.001 (Can.), available at <http://www.canlii.org/en/ca/laws/regu/crc-c-870/latest/crc-c-870.html>.

164. *Id.*

165. *Id.*

166. *See id.*

167. *Id.*

168. *Id.* at §§ B.28.001–.003.

169. Food and Drug Regulations, C.R.C., c. 870, §§ B28.002–003, available at <http://www.canlii.org/en/ca/laws/regu/crc-c-870/latest/crc-c-870.html>.

compositional changes or health threats.<sup>170</sup> The safety of a plant species as a food crop is established through familiarity and a record of use.<sup>171</sup>

#### D. Animals

Animal issues are covered under three federal acts: the Animal Pedigree Act,<sup>172</sup> the Health of Animals Act,<sup>173</sup> and the federal Criminal Code.<sup>174</sup> The key act for breeding is the Animal Pedigree Act.<sup>175</sup> Under it, persons are authorized to form associations for the recognition and registration of pure-bred animals.<sup>176</sup> The condition precedent is a foundation stock for the breed.<sup>177</sup> Only one breed association per distinct or evolving breed may be incorporated.<sup>178</sup>

This Act also allows the registration of semen from registered animals and embryos (typically frozen).<sup>179</sup> The Health of Animals Regulation addresses the technical use of animal germplasm<sup>180</sup> and the licensing and processes followed by the obtuse nomenclature of a “semen production centre.”<sup>181</sup>

Game animal farming has attracted some provincial regulation concerning the licensing of farms, acquisition, care, raising, slaughter, and sale of game animals.<sup>182</sup> Game generally means fallow deer, bison, and reindeer.<sup>183</sup> The Health of Animals Regulations address game animal carcass importation.<sup>184</sup>

It is worth noting that there are only two major meat packing companies in Canada, presenting anti-competition issues for producers.<sup>185</sup>

Provincial legislation addresses branding, stray animals.<sup>186</sup> The premise of branding, either traditional or ear tag branding, is primarily used to create a

170. *Id.* at § B.28.002(c).

171. See EUFEMIO T. RASCO, JR., *THE UNFOLDING GENE REVOLUTION: IDEOLOGY, SCIENCE, AND REGULATION OF PLANT BIOTECHNOLOGY* 178 (2008).

172. Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.) (Can.).

173. Health of Animals Act, S.C. 1990, c. 21 (Can.).

174. Criminal Code, 1985 R.S.C., c. 46 (Can.).

175. See Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.) (Can.).

176. *Id.* at § 3.

177. *Id.* at § 28.

178. *Id.* at § 5(2).

179. *Id.* at § 33(2).

180. Health of Animals Regulations, C.R.C., c. 296 § 11 (Can.).

181. *Id.* at §§ 115–119.

182. Livestock Industry Diversification Act, R.S.A. 2000, c. L-17 (Can. Alta.); Game Farm Act, R.S.B.C. 1996, c. 168 (Can. B.C.).

183. Game Farm Act, R.S.B.C. 1996, c. 168, § 1 (Can. B.C.).

184. Health of Animal Regulations, C.R.C., c. 246, § 49 (Can.).

185. ANDREW SCHMITZ ET AL., *AGRICULTURE POLICY, AGRIBUSINESS, AND RENT SEEKING BEHAVIOUR* 26 (2d ed. 2010).

presumption of ownership.<sup>187</sup> There is, however, a secondary trend of farm to fork traceability in the context of food safety.<sup>188</sup>

In that vein, the federal Health of Animal Regulations address such regulatory subject matter as: the importation of animals, animal products, and by-products;<sup>189</sup> the mandatory identification of all bovine, ovine and bison that leave their farms of origin;<sup>190</sup> the exportation of animals, animal products, and the products of rendering plants;<sup>191</sup> the eradication of disease;<sup>192</sup> veterinary biologics;<sup>193</sup> the transportation of animals;<sup>194</sup> and food for ruminants.<sup>195</sup>

Ruminants and food introduce the segue of bovine spongiform encephalopathy (BSE), also known as “mad cow disease.” BSE probably entered North America during the 1980s when both Canada and the United States imported a tiny number of cattle from the United Kingdom—only 168 animals in the Canadian case.<sup>196</sup> Imports from the United Kingdom into Canada ended in 1989.<sup>197</sup> Then, in 1997, Canada introduced preemptive feed bans on the recommendation of the World Health Organization.<sup>198</sup>

From 2003 to the present, the surveillance program for BSE has detected ten cases of domestic BSE out of over 200,000 tests focused on high risk animals.<sup>199</sup> Nation-wide reporting of BSE suspects is encouraged through a reim-

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186. See, e.g., Livestock Identification Act, R.S.O. 1990, c. L.21 (Can. Que.); The Livestock Identification and Commerce Act, S.A. 2006, c. L-16.2 (Can. Alta.); The Livestock Identification Act, R.S.B.C. 1996, c. 271 (Can. B.C.); Animal Identification Act, R.S.S. 1978, c. A-201 (Supp.) (Can. Sask.); Stray Animals Act, R.S.S. 1978 c. S-60 (Can. Sask.), Stray Animals Act, R.S.A. 1990, c. S-23 (Can. Alta.).

187. Livestock Identification Act, R.S.O. 1990, § 2 (Can.); The Livestock Identification and Commerce Act, S.A. 2006, c. L-16.2, § 3 (Can.); The Livestock Identification Act, R.S.B.C. 1996, c. 271, §§ 2, 8 (Can.); Animal Identification Act, R.S.S. 1978 (Supp.), c. A-201, § 15 (Can.).

188. Health of Animal Regulations, C.R.C., c. 246, § 175 (Can.).

189. *Id.* at §§ 7–53.

190. *Id.* at § 175.

191. *Id.* at §§ 69–71.

192. *Id.* at §§ 73–90.

193. *Id.* at §§ 120–135.1.

194. *Id.* at §§ 136–159.

195. *Id.* at § 161–171.2.

196. *Overview of Canada's BSE Safeguards*, CAN. FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/animal/disemala/bseesb/bseesbfs2e.shtml> (last modified July 30, 2005).

197. *Id.*

198. Health of Animals Regulations, C.R.C., c. 246, §§ 6.1, 53, 164, 165 (Can.) (Relating to Specified Risk Material, Importation of Animal By-Products, Animal Pathogens & Other Things, Food for Ruminants, and Rendering Plants respectively).

199. *BSE Enhanced Surveillance Program*, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/animal/disemala/bseesb/surv/surve.shtml#num> (last modified Sept. 9, 2011).

bursement program for producers and veterinarians.<sup>200</sup> Sometimes, however, politicians do not facilitate legislative objectives. For example, upon the discovery of a BSE cow in Alberta, the then Premier of Alberta, Ralph Klein, opined “I guess any self-respecting rancher would have shot, shovelled [sic] and shut up.”<sup>201</sup>

Effective June 29, 2005, it is illegal to load and transport downer cattle in Canada.<sup>202</sup> Furthermore, since 2003, Canada requires the removal of all Specified Risk Material (SRM) from the food supply.<sup>203</sup> SRM are tissues that most likely contain the BSE agent if a cow were infected.<sup>204</sup> For cattle over the age of thirty months, those tissues include the skull, brain, spinal cord, and a portion of the small intestine.<sup>205</sup> It is noteworthy that most cattle in Canada are processed between eighteen and twenty-two months old—well before the disease manifests sufficiently to be transmissible in any mode.<sup>206</sup>

It is important to note that, since the BSE Crisis, the Health of Animals Act and Regulations require mandatory identification tracked through a national agency to maintain traceability.<sup>207</sup> Producers, transporters, and processors who fail to maintain such traceability can face administrative and criminal sanctions.<sup>208</sup>

### E. *Inputs*

There are a string of acts through which the Canadian Government regulates agricultural inputs. The Feeds Act prescribes standards for the importation, manufacture and sale of feed, exempting unmixed Canadian grown grain.<sup>209</sup>

Administered by Health Canada, the Pest Control Products Act prohibits the import, manufacture, and sale of any unregistered control product.<sup>210</sup> It also

200. See Compensation for Destroyed Animals Regulations, SOR/2000-233, § 3 (Can.).

201. Tim Cook, *Shoot, Shovel, and Shut-Up*, CANADIAN PRESS, Sept. 17, 2003, <http://healthcoalition.ca/archive/sss.pdf>.

202. Health of Animals Regulations, C.R.C., c. 246, § 138 (Can.).

203. *Food Directorate Policy on Specified Risk Material (SRM) in the Food Supply*, HEALTH CAN. (July 22, 2003), [http://www.hc-sc.gc.ca/fn-an/securit/animal/bse-esb/policy\\_srm-politique\\_mrs-eng.php](http://www.hc-sc.gc.ca/fn-an/securit/animal/bse-esb/policy_srm-politique_mrs-eng.php).

204. Health of Animals Regulations, C.R.C., c. 246, § 6.1 (Can.).

205. Food and Drug Regulations, C.R.C., c. 870, § B.01.047 (Can.).

206. *Overview of Canada's BSE Safeguards*, *supra* note 196.

207. Health of Animals Act, S.C. 1990, c. 21, § 64(1)(y) (Can.); Health of Animals Regulations, C.R.C., c. 296, §§ 172–189 (Can.).

208. Health of Animals Regulations, C.R.C., c. 246, §§ 172–189 (Can.); Agriculture and Agri-Food Administrative Monetary Penalties Act, S.C. 1995, c. 40, § 4(1)(3).

209. Feeds Act, R.S.C. 1985, c. F-9, § 3 (Can.).

210. Pest Control Products Act, S.C. 2002, c. 28, § 6(1) (Can.).

prescribes standards, storage, display, and use strictures,<sup>211</sup> along with regulatory approvals and scientific assessments.<sup>212</sup> The Act also establishes a reevaluation process.<sup>213</sup> The responsibilities of this Act are performed by the Pest Management Regulatory Agency.<sup>214</sup> In addition, there are provisions for generic manufacturers and brand data protection.<sup>215</sup> The provinces exercise their constitutional domain through the handling, storage and use of pesticides.<sup>216</sup> The Pesticide Residue Compensation Act provides compensation to farmers suffering damage from using an authorized pest control product.<sup>217</sup>

Regarding pesticides, there is a brewing political imbroglio. The urban cognoscenti have successfully lobbied—as the fields of dandelions and weeds that now carpet many public parks attest—municipalities to ban pesticides, especially weed killers.<sup>218</sup> The Supreme Court of Canada has held that these municipalities have the legislative power to enact these bans under public welfare and safety.<sup>219</sup> These bans have the rhetorically innocent label of “cosmetic” bans on pesticides.<sup>220</sup> These contests may be a microcosm of the science based risk-probability versus values based perception regulation played out between North America and Europe. The ongoing movement to ban pesticides outright, however, would wreak havoc on farm productivity and food prices.<sup>221</sup>

The Fertilizers Act captures all fertilizers imported, manufactured and sold in Canada.<sup>222</sup> Fertilizers must meet human, animal, plant, and environment safety strictures.<sup>223</sup> There is also a pre-market comprehensive assessment.<sup>224</sup>

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211. *Id.* at § 6(5).

212. *Id.* at § 7(3)(7); *see also* *Pest Management Regulatory Agency*, HEALTH CAN., <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/pmra-arla/index-eng.php> (last updated Jan. 1, 2009).

213. *Pest Control Products Act*, S.C. 2002, c. 28, § 16 (Can.).

214. *Pest Management Regulatory Agency*, *supra* note 212.

215. *Pest Control Products Act*, S.C. 2002, c. 28, § 66 (Can.). *See Ministerial Agreement for Data Protection Under the Pest Control Products Act*, HEALTH CAN., <http://www.hc-sc.gc.ca/cps-spc/legislation/acts-lois/pest/pcpa-agreement-entente-lpa-eng.php> (last modified June 21, 2010) (for the agreement).

216. *Pesticides and Fertilizers Control Act*, C.C.S.M. c. P40 (Can. Man.); *Pesticides Act*, R.S.O. 1990, c. P.11 (Can. Ont.); *Pest Control Act*, R.S.S. 1978, c. P-7 (Can. Sask.).

217. *Pesticide Residue Compensation Act*, R.S.C. 1985, c. P-10 (Can.).

218. *See* Mike Christie, *Private Property Pesticide By-Laws in Canada*, HEALTHY OTTAWA, <http://www.flora.org/healthyottawa/BylawList.pdf> (last updated Dec. 31, 2010).

219. *See generally* 114957 *Canada Ltée v. Hudson*, [2001] 2 S.C.R. 241 (Can.).

220. Peter MacLeod, *Agriculture Braced for ‘Cosmetic’ Pesticide Ban Fallout*, BETTER FARMING, Apr. 21, 2008, <http://www.betterfarming.com/online-news/agriculture-braced-%E2%80%9999-pesticide-ban-fallout-406>.

221. *See id.*

222. *Fertilizers Act*, R.S.C. 1985, c. F-10 (Can.).

223. *Fertilizers Regulations*, C.R.C., c. 666, § 23.3 (Can.).

224. *Fertilizers Act*, R.S.C. 1985, c. F-18, § 3 (Can.).

The CFIA's pre-market assessment consists of a detailed, science-based evaluation of product safety information, efficacy, and labelling [sic]. To assess a product, the Agency requires that supporting information, which varies in scope depending on the nature of the product, is submitted. The basic supporting information includes the product label, the manufacturing method, and a complete list of ingredients and source materials. For certain products, additional information such as a detailed description of the physical and chemical properties of each ingredient, results of analytical tests that show freedom from biological and chemical contaminants, a toxicological data package derived from either laboratory studies or scientific publications, or data supporting product efficacy may be required.<sup>225</sup>

#### F. Standards

Canadian agricultural products are subject to grading, standards, and inspection rules. The core acts are the Meat Inspection Act,<sup>226</sup> the Canada Grain Act (for field crops),<sup>227</sup> and the Canada Agricultural Products Act.<sup>228</sup> Also pertinent are the Consumer Packaging and Labelling Act<sup>229</sup> and the Food and Drugs Act.<sup>230</sup> Each establish a net for interprovincial or export agricultural products.<sup>231</sup> This net includes grade and grade names which are the intellectual property of the Federal government.<sup>232</sup> There are inspection rights and licensing requirements.<sup>233</sup> The Canada Agricultural Products Act applies to livestock and poultry products, fresh fruit, vegetables, honey, maple products, and processed foods.<sup>234</sup>

Of special import is the Canadian Grain Commission. Its mandate includes setting grain grades and quality standards, testing quality for milling and baking, inspecting, grading, weighing and certifying grain quality through the elevator system, and licensing grain dealers.<sup>235</sup>

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225. *CFIA Regulatory Oversight—Ensuring the Safety and Efficacy of Fertilizers and Supplements in Canada*, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/english/plaveg/fereng/ferengfse.shtml> (last updated Aug. 24, 2007).

226. Meat Inspection Act, R.S.C. 1985, c. 25 (Can. 1st Supp.).

227. Canada Grain Act, R.S.C. 1985, c. G-10.

228. Canada Agricultural Products Act, R.S.C. 1985, c. 20 (4th Supp.).

229. Consumer Packaging and Labeling Act, R.S.C. 1985, c. C-38 (Can.).

230. Food and Drugs Act, R.S.C. 1985, c. F-27 (Can.).

231. Meat Inspection Act, R.S.C. 1985, c. 25, §§ 7, 8 (Can.); Canada Grain Act, R.S.C. 1985, c. G-10, §§ 27(1), (2); Canada Agricultural Products Act, R.S.C. 1985, c. 20, § 17(a).

232. *See, e.g.*, Canada Agricultural Products Act, R.S.C. 1985, c. 20, § 15 (4th Supp.) (“Every agricultural product legend and every grade name is a national trade-mark and the exclusive property in the trade-mark and . . . are hereby vested in Her Majesty in right of Canada.”).

233. *Id.* at § 32.

234. *Id.* at § 2.

235. Canada Grain Act, R.S.C. 1985, c. G-10, §§ 13, 14.

Another organization that helps support agriculture is the Prairie Farm Rehabilitation Administration.<sup>236</sup> Its objective is the rehabilitation of drought and soil drifting areas in the West.<sup>237</sup> It does this in part through the encouragement of soil and water conservation, and promoting better farm practices concerning tree culture, water supply, and land utilization.<sup>238</sup>

### G. Organic Processes

There are approximately 3500 certified organic farms in Canada, comprising 1.5% of all Canadian farms.<sup>239</sup> Canadian sales equal about \$2.6 billion (United States currency) or 2% of total retail food sales.<sup>240</sup> Canada, however, imports about 90% of its organic products.<sup>241</sup>

As with other things Canadian, there is a provincial and federal facet. British Columbia and Québec have provincial organic legislation and Manitoba has legislation on labeling.<sup>242</sup> Intra-provincial trade need not be certified organic under the federal system.

The crux of the federal system is the Organic Products Regulations under the Canada Agricultural Products Act that came into force on June 30, 2009.<sup>243</sup> There is a federal organic logo for products certified as meeting the National Organic Standards.<sup>244</sup> The Canadian regime is a “positive” system, all is forbidden except that which is allowed.<sup>245</sup> In contrast the American system is a “negative” system: all is permitted except that which is forbidden.<sup>246</sup> Consequently,

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236. Prairie Farm Rehabilitation Act, R.S.C. 1985, c. P-17.

237. *Id.*

238. *Id.* at § 4.

239. *Snapshot of Canadian Agriculture*, *supra* note 92.

240. USDA, FOREIGN AGRIC. SERV., GAIN REP. NO. CA7004, CANADA ORGANIC PRODUCTS ORGANIC REGULATIONS 3 (2007).

241. *Id.* at 2.

242. Agri-Food Choice and Quality Act, S.B.C., c. 20 (Can. B.C.); Act Respecting Reserved Designations and Added-Value Claims, S.Q., c. A20.02, § 63 (Can. Que.); The Organic Products Act, S.M. 2007, c. 15 (Can. Man.).

243. Organic Products Regulations, 2009, SOR/2009-176 (Can.).

244. STANDARDS COUNCIL OF CAN., CAN/CGSB 32.310, CANADIAN ORGANIC PRODUCTION SYSTEMS GENERAL PRINCIPALS AND MANAGEMENT STANDARDS (2006); STANDARDS COUNCIL OF CAN., CAN/CGSB 32.311, ORGANIC PRODUCTION SYSTEMS PERMITTED SUBSTANCES LIST (2006).

245. A. Bryan Endres, Presentation at the American Agricultural Law Association Symposium: Equivalency, Imports and International Organic Standards (Oct. 24, 2008).

246. *Id.* (citing Caren Wilcox & Matthew Holmes, Equivalency, Presentation at All Things Organic, April 29, 2008, Chicago, IL).



despite philosophical similarities, authorized organic processes and inputs differ between Canada and the United States—and the European Union.<sup>247</sup>

#### H. *Agricultural Support Mechanisms: General*

From before the Great Depression to the present day, the Canadian Government and a number of provincial governments passed a plethora of debt relief legislation for farmers—some of which did or did not pass constitutional muster.<sup>248</sup> Today, there are numerous federal programs, which comprise a dynamic system of government support. For example:

*AgriInvest* is a savings account for producers, supported by governments, which provides coverage for small income declines and allows for investments that help mitigate risks or improve market income.<sup>249</sup>

*AgriStability* provides support when a producer experiences larger farm income losses. The program covers declines of more than 15% in a producer's average income from previous years.<sup>250</sup>

*AgriInsurance* is an existing program which includes insurance against production losses for specified perils (weather, pests, disease) and is being expanded to include more commodities.<sup>251</sup>

*Advance Payments Program* (APP) is a financial loan guarantee program that gives producers easier access to credit through cash advances.<sup>252</sup>

*Canadian Agricultural Adaptation Program* (CAAP) is a five-year (2009–2014), \$163 million program with the objective of facilitating the agriculture, agri-food, and agri-based products sector's ability to seize opportunities, to respond to new and emerging issues, . . . and remain competitive.<sup>253</sup>

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247. The classic example is sodium nitrate or Chilean nitrate—prohibited in both Canada and the European Union for organic agriculture. *Id.*

248. Farm Credit Canada Act, S.C. 1993, c. 14 (Can.); Farm Debt Mediation Act, S.C. 1997, c. 21 (Can.); Farm Improvement Loans Act, R.S.C. 1985, c. F-3 (Can.) (repealed S.C. 2009, c. 15, § 14 (Can.)); Farm Income Protection Act, S.C. 1991, c. 22 (Can.); *see also* BENSON, *supra* note 91, at 22–27.

249. *The Business Risk Management Suite*, AGRIC. & AGRI-FOOD CAN., <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1200408916804&lang=eng> (last updated Oct. 20, 2010).

250. *Id.*

251. *Id.*

252. *Advance Payments Program*, AGRIC. & AGRI-FOOD CAN., <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1290176119212&lang=eng> (last updated Jan. 4, 2011).

253. *Canadian Agricultural Adaptation Program (CAAP) – National Application Guide*, AGRIC. & AGRI-FOOD CAN., <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1295015433660&lang=eng&src=hp> (last updated Jan. 14, 2011).

The Canadian Agricultural Loans Act (CALA) program is a financial loan guarantee program that gives farmers easier access to credit. Farmers can use these loans to establish, improve, and develop farms; while Agricultural co-operatives may also access loans to process, distribute, or market products.<sup>254</sup>

Canadian support for grain farmers is less than that for the supply management sector (discussed below).<sup>255</sup> The United States' support of grain farmers is much higher than in Canada, while the European Union's support is higher still.<sup>256</sup> Canadian programs tend to be *ad hoc* because they are often crisis driven as well as complicated by shared jurisdiction.<sup>257</sup>

### I. Agricultural Support Mechanisms: Canadian Wheat Board

The Canadian Wheat Board (CWB) merits special attention given its unique place in Canadian Agricultural Law. The Board is a public export marketing agency for cereal grains produced by western farmers, which operates as a monopoly seller of Canadian wheat, durum, and (until recently) barley for human consumption and feed wheat for export.<sup>258</sup> In World Trade Organization lexicon, the Board is known as a STE—a State Trading Enterprise.<sup>259</sup> The CWB exported about 18.8 million metric tons of wheat, durum, and barley during the 2009–10 crop year. Board net revenue, returned directly to farmers, is estimated at about \$4.8 billion.<sup>260</sup>

During World War I, Britain demanded that Canada sell all its surplus wheat to Britain.<sup>261</sup> In response, Canada established the Board of Grain Supervisors, which commandeered the surplus wheat and paid a uniform price through-

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254. Canadian Agricultural Loans Act Program, AGRIC. & AGRI-FOOD CAN., <http://www.4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1288035482429&lang=eng&src=hp> (last updated Jan. 13, 2011).

255. SCHMITZ ET AL., *supra* note 185, at 26.

256. *Id.* at 26–27.

257. *Id.* at 190; *see also* GRACE SKOGSTAD, INTERNATIONALIZATION AND CANADIAN AGRICULTURE: POLICY AND GOVERNING PARADIGMS 71–106 (2008) (describing the farm income safety net in Canada).

258. ANDREW SCHMITZ & HARTLEY FURTAN, THE CANADIAN WHEAT BOARD: MARKETING IN THE NEW MILLENNIUM 3 (2000).

259. *Id.* at 4. Other examples of STEs include the U.S. Commodity Credit Corporation, the Australian Wheat Board, the former New Zealand Dairy Board (as amalgamated the Fonterra Group), and importers such as the Japan Food Agency and the China National Cereals, Oil & Foodstuffs Import & Export Corporation. ORG. FOR ECON. CO-OPERATION & DEV., STATE TRADING ENTERPRISES IN AGRICULTURE 17–18 (2001).

260. CWB Exports at 10-Year High as 2009-10 Crop Year Closes, Can. Wheat Bd. (July 30, 2010), [http://www.cwb.ca/public/en/newsroom/releases/2010/news\\_release.jsp?news=073010.jsp](http://www.cwb.ca/public/en/newsroom/releases/2010/news_release.jsp?news=073010.jsp).

261. BENSON, *supra* note 91, at 34.

out Canada by grade before sale to Britain.<sup>262</sup> It became colloquially known as the “Wheat Board.”<sup>263</sup>

After the First War, the government tried to retire the Board but farmers wanted the guaranteed price.<sup>264</sup> Under the influence of Aaron Sapiro, an organizer of marketing co-operatives in California, the prairie farmers post War and pre-depression developed the system now known as “pools.”<sup>265</sup> Essentially farmers would commit their crops to a pooling cooperative for so many years and the pool would pay half the anticipated rates on delivery and the rest on sale.<sup>266</sup> By the Great Depression, the Pools captured half of the wheat grown on the prairies.<sup>267</sup> In 1929, however, the price of wheat dropped to 30 cents a bushel from a post-war high of \$2.85.<sup>268</sup> The pools and farmers were devastated.

The Canadian Government reacted in 1935 by passing the Canadian Wheat Board Act—making participation by farmers voluntary.<sup>269</sup> Depending on the year, the Board or Government set the price and farmers decided whether or not to commit their crop.<sup>270</sup> The Stamp and Turgeon royal commissions determined that the Board was not necessary and the problem was one of over-supply.<sup>271</sup> Politics decided otherwise. The Board’s jurisdiction during the Second War World was extended by steps under the War Measures Act.<sup>272</sup>

[B]y 1945, the Wheat Board was not only the monopoly seller of all wheat, oats, barley and flax grown west of the Lakehead [Lake Superior] in Canada, but also controlled the movement of that grain from the farm to the country elevator, as well as its movement by rail, its storage at terminals, and its loading into waiting ships. The Board administered the government pricing system for these grains and paid subsidies as the government directed.<sup>273</sup>

In short, western farmers had to sell their wheat, oats, and barley through the Board for the next few decades.<sup>274</sup> The next major evolutionary step occurred in 1999:

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262. *Id.*  
263. *Id.*  
264. *Id.* at 35–36.  
265. *Id.*  
266. *Id.* at 36.  
267. *Id.*  
268. *Id.* at 38.  
269. Canadian Wheat Board Act, S.C. 1935, c. 53 (Can.); BENSON, *supra* note 91, at 39.  
270. BENSON, *supra* note 91, at 39.  
271. *Id.* at 39–40.  
272. War Measures Act, S.C. 1914 (2d. Sess.) c. 2 (Can.). This act remained on the books and used for war measures during the Second World War. War Measures Act, R.S.C. 1927, c. 206.  
273. BENSON, *supra* note 91, at 41.  
274. *Id.*

In 1998, one of the most significant changes in the history of the CWB occurred. Amendments to The Canadian Wheat Board Act passed control of the organization to farmers themselves. A 15-member board of directors, dominated by 10 elected farmers, took over governance of the CWB in 1999, replacing the former federal government commissioners.<sup>275</sup>

The Wheat Board was a source of friction with the United States in the 1990s—in part due to weather conditions in the United States resulting in massive imports of Canadian feed wheat.<sup>276</sup> Nonetheless, there were three Government Accountability Office reports on the Wheat Board.<sup>277</sup> The final report, suggests that the change in the governance of the Board—which included greater farmer control—made the Board as an STE more trade compliant.<sup>278</sup>

With the election of a Conservative government in the twenty-first century, the ideologies and approaches first voiced by Royal Commissions in the 1930s of the twentieth century came back. The Conservative government wanted to dismantle the Wheat Board and its monopsony in the prairies.<sup>279</sup> With conservatives being a minority in the current government, however, it unlikely at this time that the Board will be disbanded at this time.<sup>280</sup>

#### *J. Agricultural Support Mechanisms: Marketing Boards*

Historically, marketing boards purchase or sell products from the farm gate and from inter-provincial trade begetting constitutional issues. The issue—which haunted the sector for a considerable amount of time<sup>281</sup>—was resolved by the Federal government delegating administrative (not legislative) power to the province in the early 1950s, under which both levels of government reach a pow-

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275. *History of the CWB*, CANADIAN WHEAT BOARD, <http://www.cwb.ca/public/en/about/cwbfacts/> (last visited Oct. 19, 2011).

276. SCHMITZ & FURTON, *supra* note 258, at 111.

277. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSIAD-92-129, CANADA AND AUSTRALIA RELY HEAVILY ON WHEAT BOARDS TO MARKET GRAIN (1992); U.S. GOV'T ACCOUNTABILITY OFFICE GAO/NSAID-96-94, CANADA, AUSTRALIA, AND NEW ZEALAND: POTENTIAL ABILITY OF AGRICULTURAL STATE TRADING ENTERPRISES TO DISTORT TRADE (1996); U.S. GOV'T ACCOUNTABILITY OFFICE GAO, U.S. AGRICULTURAL TRADE: CANADIAN WHEAT ISSUES (1998).

278. U.S. GOV'T ACCOUNTABILITY OFFICE GAO, U.S. AGRICULTURAL TRADE: CANADIAN WHEAT ISSUES 35 (1998).

279. MARC. D. FROESE, CANADA AT THE WTO, TRADE LITIGATION AND THE FUTURE OF PUBLIC POLICY 58 (2010).

280. *See* SKOGSTAD, *supra* note 257, at 107–40 (discussing how economic globalization is affecting the Canadian debate over the merits of the Wheat Board's monopoly).

281. *See generally* Nova Scotia v. Canada, [1951] S.C.R. 31 (Can.) (provincial governments cannot delegate its legislative authority); Prince Edward Island v. H.B. Willis Inc., [1952] 2 S.C.R. 392 (Can.) (administrative inter-delegation is constitutional).

er sharing agreement—similar to a contract between sovereign powers.<sup>282</sup> Nonetheless, legal skirmishes continued into the 1970s.<sup>283</sup> The Supreme Court of Canada's decision in the 1978 "Egg Reference" put to rest any challenges by setting the constitutional template for agricultural marketing schemes collaboratively crafted by Canada's federal government and the provinces.<sup>284</sup>

State ordered monopolies originally were created for dairy, eggs and poultry due to the unacceptable burdens of providing subsidies.<sup>285</sup> By the early 1970s, the system turned into a quagmire:

Increased production capacity and surplus product led to severe interprovincial tensions. The "chicken and egg wars" began when Quebec's Egg Marketing Board established quotas for individual egg producers and set the retail price for these eggs. The Ontario Egg marketing Board, seeking access to the large Montreal market, shipped eggs into Quebec without respecting the Quebec price levels. When Quebec police seized the eggs, Ontario retaliated by creating a Chicken Board and refusing entry of Quebec fowl. In the West, British Columbia seized Manitoba eggs for the same reason. Manitoba responded by creating a marketing plan for eggs that set the price for all eggs sold in Manitoba, regardless of the province of origin.<sup>286</sup>

In 2005, the Canadian Supreme Court had to say again that a marketing board diktat on quota was applicable to the producer's total production—regardless of the intention to market the product intraprovincially, extraprovincially, or both.<sup>287</sup>

The core character of the provincial legislative component of the federal-provincial chicken marketing scheme is not to set quotas or fix prices for exported goods or to attempt to regulate interprovincial or export trade. As in the *Egg Reference*, its purpose is to establish rules that allow for the organization of the production and marketing of chicken within Quebec and to control chicken production to fulfill provincial commitments under a cooperative federal-provincial

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282. Agricultural Products Marketing Act, S.C. 1949 (1st Sess.) c. 16 (codified at R.S.C. 1985, c. A-6) (Can.); SCHMITZ ET AL., *supra* note 185, at 182.

283. See generally *Brant Dairy Co. v. Milk Commission of Ontario*, [1973] S.C.R. 131 (Can.) (upholding validity of the Milk Act, which requires selling and buying milk to and from the Ontario Milk Marketing Board); *Campbell Soup Co. Ltd. v. Farm Products Marketing Boards*, [1975] 10 O.R. 2d 405 (Can.) (finding producing and processing chickens for frozen dinners not within the Ontario Chicken Producers Marketing Board's reach).

284. Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 (Can.) ("Egg Reference Case" upholding validity of egg marketing scheme).

285. BENSON, *supra* note 91, at 53.

286. *Id.* at 55. Legislation was referred to courts to determine constitutionality and was found unconstitutional. *Manitoba v. Manitoba Egg & Poultry Producers*, [1971] S.C.R. 689 (Can.).

287. *Andre Pelland v. Québec*, [2005] 1 S.C.R. 292 (Can.).

agreement. Any impact of this legislation on extraprovincial trade is incidental.<sup>288</sup>

Marketing boards were established to provide farmers a collective voice to sell their commodities.<sup>289</sup> Farmers are the elected members of the respective provincial boards.<sup>290</sup> There are (a) supply management (quota) marketing boards, (b) negotiating boards, and (c) price setting boards.<sup>291</sup>

In Ontario the key legislation is the Farm Products Marketing Act.<sup>292</sup> What was formerly the Ontario Wheat Producers' Marketing Board, the Ontario Corn Producers' Association, and the Ontario Soybean Growers amalgamated to become the Grain Farmers of Ontario.<sup>293</sup>

Supply management or quota boards deal with milk, cream, eggs, and chicken through regulating quantities.<sup>294</sup> While the quotas *cannot* be used as property and thus pledged as security, they are valuable and *their proceeds* can be the subject of a security interest.<sup>295</sup> Negotiating boards regulate commodities such as grapes and vegetables for processing.<sup>296</sup> Price setting boards set the price payable to the producer.<sup>297</sup> In Ontario, these include such crops as asparagus, greenhouse vegetables, beans, and tender fruit.<sup>298</sup>

The milk regime is illustrative.<sup>299</sup> The Canadian Dairy Commission Act has a multi-party committee that regulates the Canadian milk market.<sup>300</sup> The Commission authorizes the provincial marketing boards to regulate the market by

288. *Id.* at para. 37.

289. Ministry of Agric., Food & Rural Affairs, *Agricultural Marketing Boards in Ontario*, GOV'T ONT., [http://www.omafra.gov.on.ca/english/farmproducts/factsheets/ag\\_market.htm](http://www.omafra.gov.on.ca/english/farmproducts/factsheets/ag_market.htm) (last visited Oct. 19, 2011) [hereinafter *Agric. Marketing Boards*].

290. *Id.*

291. *Id.*

292. *See generally* Farm Products Marketing Act, R.S.O. 1990, c. F-9 (Can.).

293. *GFO's Origins*, GRAIN FARMERS ONT., <http://www.gfo.ca/aboutUsMain/GFOsOrigins.aspx> (last visited Oct. 19, 2011).

294. SCHMITZ ET AL., *supra* note 185, at 181.

295. *Bedesky v. Ontario*, [1976] 58 D.L.R. 3d 484 (Can. Ont. Div. Ct.), *aff'd*, 10 O.R. 2d 105 (Can. Ont. C.A.). In Ontario, the quota is worth approximately \$27,000 per dairy cow. John Ivison, *We Stand Alone Because of Cheese*, NAT'L POST, Jan. 18, 2011, available at <http://www.canada-europe.org/en/pdf/We%20Stand%20Alone,%20Because%20of%20Cheese%20-%202021%20January%202011.pdf>.

296. *Agric. Marketing Boards*, *supra* note 289.

297. Robert A. Wilson, *Orderly Marketing of Ag. Products in Ontario, Canada*, AGRIC. L. UPDATE, July 2001, at 6.

298. *Agric. Marketing Boards*, *supra* note 289.

299. *See* ROBERT S. FULLER & DONALD E. BUCKINGHAM, *AGRICULTURAL LAW IN CANADA* 168-72 (1999); *see also* SCHMITZ ET AL., *supra* note 185, at 181.

300. Canadian Milk Commission Act, R.S.C. 1985, c. C-15, § 12 (Can.).

issuing and administering quotas.<sup>301</sup> The provincial quota is then fixed and allotted to each dairy farmer in that province (specific quota) for industrial milk.<sup>302</sup> Depending on the province, the quotas can be for each type or one global quota.<sup>303</sup>

Why have these systems? The Canadian Dairy Commission Act states in Section 8:

The objects of the Commission are to provide efficient producers of milk and cream with the opportunity of obtaining a fair return for their labour and investment and to provide consumers of dairy products with a continuous and adequate supply of dairy products of high quality.<sup>304</sup>

Evidently, the entire rubric of marketing boards attracts ideological contests: laissez faire free markets versus *dirigisme* command markets. Those discussions, however, are outside the compass of this paper. Nonetheless, it is fair to say Canadian food is cheap; it is also fair to say it is not as cheap when compared to American food. Whether such a comparison is logically fair or nefariously misleading remains open to argument.

It is also clear that beef and pork producers do not have the same support regime and with recent record high grain prices, suffered proportionality. The profitability of the sector was impacted not only by the price of feed, but the BSE crisis, pressure by United States interest groups to close the border, and Country of Origin Labeling (COOL)—necessitating a packing plant to segregate the livestock from feedlot to abattoir.<sup>305</sup> Yet, what is undisputable is that from 1950 until approximately 1994—when the leitmotif of marketing boards came into the focus of the World Trade Organization (WTO)—the Canadian supply side agricultural products system “blossomed.”<sup>306</sup>

#### K. World Trade Organization

Initially, the General Agreement on Tariffs and Trade (GATT) focused on manufactured products, because that reflected the state of the global economy. Agriculture, however, received different treatment. In 1955, at the insistence of the United States and mirroring the position of most signatories at the time—including Europe and Japan—there was no move to reduce tariffs or barriers for

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301. *Id.* at § 9.1.

302. *Id.*

303. FULLER & BUCKINGHAM, *supra* note 299, at 169.

304. Canadian Milk Commission Act, R.S.C. 1985, c. C-15, § 8 (Can.).

305. SCHMITZ ET AL., *supra* note 185, at 177.

306. FULLER & BUCKINGHAM, *supra* note 299, at 16 (describing this as the “golden age” of supply management).

agriculture.<sup>307</sup> There were three key exemptions: export subsidies could be used as long as one did not capture more than an “equitable share” of the market, countries could enact tariffs on imports causing “domestic injury,” and GATT rules could be suspended if necessary to preserve health, safety, conservation, and national security.<sup>308</sup> Over time this begot Western Europe’s CAP (the European Common Market at the time), further encouraged the U.S. farm subsidy system, and necessitated the reactions by other agricultural producers including Canada.<sup>309</sup>

This regime carried on until 1986, when subsidies were highest and agricultural prices at their then lowest. This was also the time of the Uruguay Round, whose agenda items were: agriculture, intellectual property, services, investments, and dispute resolution.<sup>310</sup> The meetings broke into three camps: the United States, the European Community (now the European Union), and the Cairns group (agriculture-exporting nations, including Australia, Canada, and Brazil).<sup>311</sup> The United States and the Cairns group wanted open agricultural trade while the European Community was hesitant.<sup>312</sup> Final agreement was reached in 1993 (in the Blair House Agreement).<sup>313</sup> The agreement had three prongs: market access, export subsidies, and internal support.<sup>314</sup> Countries had to convert trade barriers into tariffs (in a process known as “tariffication”).<sup>315</sup> Export subsidies were cut.<sup>316</sup> Internal support was bifurcated into green and amber policies.<sup>317</sup> The so-called green policies—research, inspection, and conservation—were allowed since they did not encourage production.<sup>318</sup> Amber policies (which encouraged production or distorted trade) had to be reduced.<sup>319</sup> Marketing (quota) boards fall under amber policies.<sup>320</sup>

The United States challenged Canada’s Wheat Board.<sup>321</sup> Without exploring every nook of the labyrinth of the WTO process, pleadings, panel and appellate decisions, one can legitimately say that the finding found Canada’s Wheat

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307. MICHAEL R. REED, INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS 86 (2001).  
308. *Id.*  
309. *Id.*  
310. *Id.*  
311. *Id.* at 87–88.  
312. *Id.* at 87.  
313. *Id.*  
314. *Id.*  
315. *Id.*  
316. *Id.*  
317. *Id.*  
318. *Id.*  
319. *Id.* at 89.  
320. FULLER & BUCKINGHAM, *supra* note 299, at 172.  
321. FROESE, *supra* note 279, at 64–65, 69.



Board an STE that acted as a commercial entity seeking commercial rates as directed by its farmer directors, and was not market distorting or otherwise contrary to WTO principles.<sup>322</sup>

An agriculture international trade lawyer once told the writer that “we are all duplicitous bastards” when it comes to trade. U.S. supply management of dairy, sugar, peanuts and tobacco, the E.U.’s CAP, and Canada’s quota marketing boards might all be proof of that crude statement.<sup>323</sup> Verisimilitude becomes veracity with OECD reports.<sup>324</sup> Canada has shifted its farm support policies discussed above under “general” to be seemingly trade compliant. Compared to 1986–88, from 2007–09 Canada’s annual monetary value of gross transfer from consumers and taxpayers to agricultural producers as a percentage fell to 17%, which is below the OECD average of 22%.<sup>325</sup> In all other measurements Canada’s transfer payments by whatever name fell during the comparison periods.

The Trans-Pacific Partnership, also known as the Trans-Pacific Strategic Economic Partnership Agreement or TPP agreement is a multilateral free trade agreement that aims to integrate the economies of the Asia-Pacific region.<sup>326</sup> Canada wants in, or at least its meat and grain exporters do.<sup>327</sup> Yet—suggesting that, as a trade good, milk faces issues in Canada—some 7500 dairy farmers in Québec and 5000 in Ontario disagree and the dairy marketing boards also disagree.<sup>328</sup> Canadians pay twice the world price per hundredweight for milk farm-gate prices: \$16.40 in the United States, \$19.19 in the European Union, \$14.49 in New Zealand and \$29.87 in Canada (all prices in United States dollars).<sup>329</sup> Why? It is argued that because Québec and Ontario hold the majority of the population, they therefore hold the majority of seats in Parliament.

## V. THE FUTURE

For most of the eighteenth and nineteenth centuries, the countries held enmity towards each other. The national cultures are very different. But agricul-

322. *Id.* at 68.

323. SCHMITZ ET AL., *supra* note 185, at 5.

324. ORG. FOR ECON. CO-OPERATION & DEV., *AGRICULTURAL POLICIES IN OECD COUNTRIES AT A GLANCE* (4th ed. 2010).

325. *Id.* at 48.

326. The present parties are: Brunei, Chile, New Zealand, Singapore, Australia, Malaysia, Peru, United States, and Vietnam. Press Release, Office of the Press Secretary, The White House, Trans-Pacific Partnership: Progress Toward a Regional Agreement (Nov. 13, 2010).

327. Laura Payton, *Supply Management Hurting Major Trans-Pacific Trade Opportunity: Experts*, EMBASSY MAGAZINE, Jan. 6, 2010, <http://www.embassymag.ca/page/view/transpacific-01-06-2010>.

328. Ivison, *supra* note 295.

329. *Id.*

ture on the North American continent exhibits practices not delineated by the border, not the least of which is a science based approach.

The latest Canadian federal agricultural policy known as “Growing Forward” has three strategic objectives for the agriculture sector: a competitive and innovative sector, a sector that contributes to society’s priorities, and a sector proactive in managing risks.<sup>330</sup> Some call these objectives. Some call them hackneyed nostrums. Perhaps the major unarticulated “going” forward objective will have Canada deal with the supply side management regime sooner not later.<sup>331</sup>

Regardless, some trends are obvious and shared: larger farms, more use of technology, reliance on better varieties/breeding, reduction in trade distorting agricultural “subsidies,” disabusing urban perceptions about food production and processing, and grappling with the creep of values based versus science based regulation both domestically and internationally. Food safety, in particular, has become a focal point on both sides of the border. So maybe we are not that different after all—even if your roots are in rebellion and ours in obedience. Or as someone once put it: “A Canadian is sort of like an American, but without the gun.”<sup>332</sup>

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330. *Growing Forward Agricultural Policy Framework*, AGRIC. & AGRI-FOOD CAN., <http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?=120033947015&lang=eng> (last visited Oct. 19, 2011).

331. Ivison, *supra* note 295.

332. *Canada Quotes—Famous Canadian Quotes, Quotations, Sayings*, ALL GREAT QUOTES, [http://www.allgreatquotes.com/canada\\_quotes.shtml](http://www.allgreatquotes.com/canada_quotes.shtml) (last visited Oct. 19, 2011).