ARTICULATING THE REALM OF THE POSSIBLE: TWO FARM MARKETING BOARDS AND THE LEGAL ADMINISTRATIVE FIELD

by

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ABSTRACT

This thesis suggests that it is impossible to consider any administrative agency in the abstract without losing important elements of the nature of the legal environment within which the agency operates. There is a large gap between the theories of formal administrative law and the experience of practice in particular administrative settings. Drawing upon the work of sociologist Pierre Bourdieu, the thesis develops the concept of the legal administrative field as a means to approach this issue. The use of Bourdieu's concepts of field, habitus and capital help to articulate and give a theoretical structure to a process and series of practices that are otherwise hard to identify or study.

Two Alberta farm marketing boards, and certain specific legal issues faced by each board, are examined in detail and analyzed in terms of the concept of the legal administrative field. It is shown that for each board, the realm of what was 'legally possible' shifted despite the fact that there were no changes in the formal administrative law and that legal practice in these fields involves far more than the application of the principles of formal administrative law. The intersection of the principles and habitus of formal administrative law, the structure provided by the legislative and regulatory framework, and the respective capital and habitus of all the individuals, agents and agencies within the field all interact and these complex interactions are what structure the legal administrative fields and shape the shifts which occur within them. In the struggles of interpretation which occur in these fields an attempt to make a clear demarcation between the practice of law by lawyers and the administration of the system by administrators is inadequate; it simplifies and renders invisible much of the complex series of interactions in which the legal practitioner is a participant and which create the field in which he or she practices.

The conclusion is that the heuristic value of the legal administrative field in relation to the legal issues faced by the two marketing boards, and in relation to legal practice in the farm marketing area has been established and that this concept provides a useful perspective and a valuable supplement to a more traditional approach.

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Chapter One

The Concept of the Legal Administrative Field

Introduction

In its simplest form my thesis is that each administrative agency operates within a legal administrative field, the shifting parameters of which determine what is or is not 'legally' possible at a particular point in time in relation to a particular issue. The parameters of this legal administrative field are determined by a complex group of constantly shifting elements of which the constituting statute and regulations and the general principles of formal administrative law form important,[1] but not necessarily decisive, parts. Issues arise within this field and are resolved by the agency and the participants all of whom are part of and influence and are influenced in greater or lessor degree by the elements which constitute the legal administrative field. As a result of the interaction of these various participants and elements, the law concerning what is possible within the legal administrative field may change over time without any obvious change in the formal elements of the law. It is therefore not possible to consider any administrative agency in the abstract without losing important elements of the legal administrative field within which that agency functions.

In this thesis I want to examine in considerable detail two Alberta farm marketing boards, the Alberta Pork Producers Development Corporation and the Alberta Chicken Producers and certain specific issues faced by each board, in order to illustrate the operation of the concept of the legal administrative field. I want to attempt to make visible some parts of the legal administrative field which would remain invisible if considered from the

[1]For a definition of what I mean by 'formal administrative law' see the section of this chapter commencing on page 8.

standpoint of formal administrative law. I suggest that this approach is valuable for a number of reasons: it emphasizes that the 'legal field' in which any particular agency operates is created and influenced by factors which go far beyond those normally considered as purely 'legal' and that these complex and shifting factors may create significant changes in the 'legal field' without any obvious changes in the formal law which applies;[2] it attempts to bridge a perceived gap between the theory of administrative law as it is set out in judicial decisions, texts and articles and the practice of administrative law in particular contexts; it tries to partially address a methodological problem which creates an over-emphasis in administrative law literature on 'formal law' and formal legal and administrative proceedings and a corresponding failure to emphasize and examine the importance and the role of 'informal law' and informal contacts between participants; it emphasizes that the distinction between 'law' and 'administration' is extremely difficult to apply in specific situations - law is created, practiced, and interpreted by more than courts, legislators, and lawyers; it illustrates that law acts not only to restrain administrative power but also to enable it and to insulate it from review; and it points out the difficulty of maintaining dichotomous either/or positions in respect to issues such as judicial review. This approach is not proposed as a replacement for formal administrative law; I also do not propose the farm marketing boards that I examine as paradigm agencies. However, I do suggest that each of these points is important and has significant implications for the study and practice of administrative law and I suggest that the concept of the legal administrative field is one way of attempting reconcile some of the gap between the theory and practice of administrative law.

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[2]Therefore, I use the term "legal administrative field" rather than referring to an exclusively "legal field" to highlight the distinction that I draw between the approach that I am advocating, and the approach employed in formal administrative law. The source and definition of the term "legal administrative field" is developed below beginning at page 20.

Outline of the Thesis

In the balance of this chapter, I propose to examine in greater detail each of the issues set out above and why I suggest that they are significant. I will begin with a discussion of the 'gap' between the practice of administrative law and the manner in which administrative law is treated in most texts and articles. This will be followed by a critique of what I term 'formal administrative law' and the perspective that views 'law' as something external to the operations of agencies. I will then discuss the concept of the 'legal administrative field' and why I suggest that it is a useful tool of analysis for considering administrative law in a broader pluralistic context. This will involve a consideration of the work of the French sociologist Pierre Bourdieu from whose work I take the concept of the 'field'. Finally, I will discuss a methodological problem which makes it easier to concentrate on formal law rather than informal law and how a shift from an external viewpoint to a more internal one may address some, but not all, of this problem.

In the second chapter I will examine in some detail the statute under which the two marketing boards are created and I will provide an overview of the regulations of each board. This is an important starting point because it outlines the legal framework which forms part of the parameters of legal administrative fields for each board and it gives a sense of some of the legal relationship between important agencies within the field. While this review will provide an introduction to the marketing legislation and to the Plans and Regulations under which each board is created and operates, it will also point out how little can be determined concerning the agencies or their legal administrative fields simply by a review of the Act and the regulations.

The third chapter will look at some of the significant political, economic, and historical factors which impact on agricultural marketing and which have a major influence on the shape of the legal administrative fields in question. The nature of the farm income problem

will be discussed and the history of the development of marketing boards as one response to this problem will be reviewed. This review will end in the 1960s at the point where the Alberta Pork Producers Development Corporation and the Alberta Chicken Producers were first established.

The fourth chapter will provide a brief history in an Alberta context of the development of each marketing board and will discuss some of the significant economic and political constraints which limit the very broad powers apparently conferred under the Act and regulations. It will also provide a brief overview of the operations of each board. The chapter will close with a discussion of the political field in Alberta in relation to farm marketing. This chapter and chapter 3 provide some sense of important features of each legal administrative field that are normally invisible to an approach which focuses on formal administrative law. They also provide the context in which to examine specific legal issues dealt with by each board.

Chapter 5 will look at some specific legal issues faced by each marketing board and how these issues were resolved. The issues selected will be major legal issues faced by each board which involved significant legal input over an extended period of time. This detailed examination of specific issues will illustrate the operation of the legal administrative fields in question and serve to develop the points made in chapter 1.

Chapter 6 will analyze the detailed issues discussed in chapter 5 in terms of the concept of the legal administrative field. It will show how this concept provides a better means of analyzing those aspects of the shifts in the field which are not considered by an approach using formal administrative law. The value of the legal administrative field, and its related terms, habitus and capital, in looking at the shifting relations between various agents within the field will be established. The analysis will show how for each marketing board the legal administrative field, and the realm of what was legally possible for the marketing

board within that field, shifted despite the fact that there were no changes in the formal administrative law.

Chapter 7 will shift the perspective to a more clearly internal perspective, that of a lawyer retained for these marketing boards. Certain limitations of the study will be noted as will the importance of certain features of the legal administrative field: the role of individuals and their complex habitus and ideologies; the importance of informal communications; and the role of interpretation within the field. This discussion will focus on the role of some of these factors in creating the gap between practice and formal administrative law. An extension of Bourdieu's concept of legal habitus will be presented as one way of dealing with this gap. The chapter and the thesis will conclude with an argument for the value of the legal administrative field and of detailed case studies such as those of these two marketing boards in dealing with the issues identified in chapter 1.

The Gap Between Theory and Practice in Administrative Law

My starting point is a perception grounded in my own experience that the subject matter of the bulk of administrative law as reflected in texts, in periodicals, and in the courts does not reflect a large part of the daily experience of many administrative lawyers.[3] There is a large portion of the practice of administrative law which is essentially invisible. Others have also made this observation: it has been illustrated by Graham Steele describing the perspective of an administrative lawyer in private practice;[4] by H.A. Arthurs describing an historical perspective of administrative law in nineteenth century England and advocating a

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[3]I have practiced in the Province of Alberta since my admission to the Bar in 1978. A significant portion of that practice has been in the area of administrative law both on behalf of administrative agencies and professional associations and on behalf of individuals dealing with other administrative agencies. Throughout this period I have acted on behalf of a number of agricultural product marketing boards and commissions including the two boards which I am discussing in this thesis.

[4]G. Steele, "Private Lawyers, Public Law: Administrative Law in the Making" (1992) 35 Canadian Public Administration 1 [hereinafter "Steele"].

pluralistic as opposed to centralist view of the law;[5] by H.N. Janisch describing the role of various agencies;[6] by Robert Reid in various discussions concerning the relation between judicial review and the activities of agencies;[7] by Jerry Mashaw in describing the activities of various agencies in the United States;[8] and by various studies in political science, sociology and public administration.[9] However, these articles do not reflect approaches which are common in the bulk of the administrative law literature which concentrates on the judicial review of administrative actions.

This concentration on the courts and litigation leaves a gap between the theory and practice of administrative law that is apparent to both practitioners and to those teaching administrative law.[10] One of the best and most comprehensive statements concerning this gap from the point of view of a practitioner is by Peter Hutt, an American administrative lawyer quoted in an article by Peter Strauss:

> Over 90 percent of his practice ... is entirely informal, occurring outside hearings of any character. Litigation is avoided where it can be, and what the administrative law teacher must do is bring students to understand the variety of ways in which this can be done. The ideal course, working from the bottom up rather than the top

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[5]H.W. Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) [hereinafter *Without the Law*].

[6]H.N. Janisch, "Independence of Administrative Tribunals: In Praise of Structural Heretics" (1988) 1 C.J.A.L.P. 1.

[7]The Hon. Robert F. Reid, "Judicial Review: A Poor Way to Run a Railroad" L.S.U.C. [1992] *Administrative Law: Principles, Practice and Pluralism* 455; and "Hot Buttons" in P. Anisman and R. Reid eds., *Administrative Law: Issues and Practice* (Toronto: Carswell, 1995) See also various editorials in *Reid's Administrative Law* (Toronto: Carswell, various dates).

[8]J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983) [hereinafter Mashaw, *Bureaucratic Justice*]; J.L. Mashaw & D.L. Harfst, "Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance" (1990) 57 University of Chicago Law Review 443.

[9]See e.g. K. Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992); R. Melnick, "Administrative Law and Bureaucratic Reality" (1992) 44 Administrative Law Review 245; G Skogstad, "The Farm Products Marketing Agencies Act: A Case Study of Agricultural Policy" (1980) 6 *Canadian Public Policy* 89-100; R. Harris and S. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies* (New York: Oxford University Press, 1989); R. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Massachusetts: Harvard University Press, 1991).

[10]Steele, *supra* note 4; J. Law, "Tensions within the Traditional Model of Control of Government" (1992) 6 C.J.A.L.P. 13 [hereinafter "Law"]; D. Townsend, "The Growing Irrelevance of Judicial Review: Administrative Law and the Entrepreneurial Culture" (1992) 6 C.J.A.L.P. 79 [hereinafter "Townsend"]; N. Lyon, "Reforming Administrative Law" (1989) 2 C.J.A.L.P. 315 [hereinafter "Lyon"].

> down, would begin with a sense of the history and mission of the agency with which one is concerned, a history which often predetermines both procedure and substance. A look at the statute will provide a sense of how to use it, of what procedures and choices it opens. Much the larger proportion of the impact of any given statute can be inferred from the regulatory mechanism it establishes. Then one may consider what the style of the given regulation is (hard-line enforcement or softer); what the agency's budget is and how the agency is treated by its appropriation committee; what the political atmosphere is and the attitude of important congressmen; what relationships exist between the agency and other federal agencies; what procedures it employs; who its personnel are and what their attitudes are; how competitors use or manipulate the statute for their own purposes; what the role of chance is in shaping the agency's agenda; what the general competence is of the staff being dealt with. One must know not only how to get meetings with agency officials but also what the publicity requirements are going to be of meeting with officials at varying levels; one must know what policy is likely to be driving the agency, for that will drive the procedures that the agency chooses. And then there is the need to become thoroughly familiar with the mass of detail that bears on the particular issues to be presented for decision. Only then does one come to the point of exposure to public materials or public processes.[11]

While portions of this quotation are more directly applicable to the specifics of Mr. Hutt's practice before American Federal Administrative Agencies, the emphasis on the informal nature of most contacts, the importance of political influence and policies, the importance of the agency personnel, their attitudes and the ability to meet with them, the importance of the history and context in which the agency operates, and the amount of legal practice which occurs before any public materials or court or hearing processes of any kind are invoked, are all vital matters in understanding how a particular agency operates within its particular legal administrative field. Yet most of these considerations are absent from consideration in formal administrative law.

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[11]P. Strauss, "Teaching Administrative Law: The Wonder of the Unknown" (1983) 33 J.Leg.Ed. 1 at 8 quoted in W. Gellhorn *et al., Administrative Law: Cases and Comments*, 8th ed. (Mineola, New York: Foundation Press, Inc., 1987) [hereinafter "Gellhorn *et al.*"] at 2. Gellhorn *et al.*, in general, and the Strauss article, in particular, respond to the position expressed by Hutt and provide a defence and a rationale in respect to the manner in which administrative law is taught which will be discussed later in this chapter.

The Formal Approach to Administrative Law: A Critique

When I refer to the formal approach to administrative law, I mean an approach which concentrates on the control of administrative action by judicial review or through legislative restrictions. The object of study is primarily judicial decisions which review the actions of agencies. The statutes and regulations by which a particular agency is constituted are studied primarily in relation to either the courts' interpretation of particular provisions of a constituting statute or, in a more general sense, in relation to the principles which should be followed in the legislation establishing an agency and limiting its operations.

Administrative law is perceived as a means to structure and control administrative discretion, which traditionally has been viewed by lawyers with suspicion, on behalf of individuals who must deal with these agencies and who must be protected from them.[12] This control over discretion is usually considered in relation to judicial review, the development of rules to control administrative action, or the importing of judicial values and procedures to administrative proceedings by either the courts or the legislature. The paradigmatic expression of this point of view is judicial review - the control of administrative action by the judiciary.

This discussion is not an attempt to define 'administrative law', although what I refer to as formal administrative law conforms fairly closely to the traditional model of administrative

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[12]This generally negative attitude to regulation is not restricted to law. The pervasiveness of regulation and administration has long been a theme of sociologists, critical theorists and other social philosophers. Weber's iron cage of bureaucracy; Adorno's administered world; Foucault's pastoral power and disciplinary norms; and Habermas's colonization of the life-world are only a few of the more prominent examples. In each case, the image evoked is negative: regulation and administration are perceived as invasive, restrictive, confining, and a threat to individual freedom or autonomy although the authors cited would differ substantially in the degree to which they would accept the concept that autonomous individuals exist.

law as it is reflected in most texts.[13] The traditional model of administrative law establishes a model of the state as a unified entity which has clearly defined structures and which must be restrained from infringing on individual autonomy and private rights by the courts through the Rule of Law. John Law describes this model as follows:

> Succinctly put, the traditional model is that of common law, judicial review, by the superior courts over the actions of the administration, undertaken to protect the individual, in his realm of private autonomy, from unwarranted, excessive, and unlawful government interference. With its hierarchical structure, i.e., review of *inferior* tribunals by *superior* courts, it symbolizes the domination of the former by the latter and it implicitly accords less value to administrative decisions. [14]

Most approaches to administrative law are grounded in this model and focus on judicial review whether from a positive or negative point of view. Law discusses the concept of two approaches to administrative law, "red light theories" and "green light theories", and he notes that underlying these "loose classifications" is a theory of the state or government.[15] Those who have a negative view of government emphasize the role of the Rule of Law in maintaining individual autonomy through the courts restricting unwarranted government interference with the liberty of the individual. They see the

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[13]The question: "what is administrative law?" is one often heard by both practitioners and scholars yet there is no single clear or generally accepted definition. As Gellhorn *et al.*, *supra* note 11 at 2 point out: "'Administrative Law' means different things to different people." Both the existence and the scope of a coherent theory of administrative law remain contentious issues. I do not propose to revisit this much debated area. Standard texts cited in the bibliography such as: Wade; Craig; Jones and DeVillars; Evans, Janisch and Mullan; and Dussault and Bourgeat, each provide definitions. For useful American definitions see Gellhorn *et al.* at 1-3; K.C. Davis and R.J. Pierce, Jr., *Administrative Law Treatise* 3rd ed., 3 vols. (Boston: Little Brown and Company, 1994); and R. Stewart "The Reformation of American Administrative Law" (1975) 88 Harvard Law Review 1667 at 1669-1670. For some interesting discussions on the issue see the following articles cited in the bibliography: Law; Lyon; Townsend; J. Mashaw, "Imagining the Past; Remembering the Future," 1991 Duke L.J. 711; and P. Bryden, "Canadian Administrative Law in Transition: 1963 - 1988" (1988) 23 U.B.C. L. Rev. 147 and "Canadian Administrative Law: Where We've Been" (1991) 16 Queen's Law Journal 7.

[14]Law, *supra* note 10 at 18. Perhaps the classic modern articulation of this perspective appears in W. Wade and C. Forsyth, *Administrative Law* 7th ed. (Oxford: Clarendon Press, 1994) [hereinafter "Wade"]: "The essence of administrative law lies in judge-made doctrines which apply across the board and which therefore set legal standards for public authorities generally." (Wade at 6).

[15]Law at 18-20. As Law notes, the concept of red light theories and green light theories is taken from C. Harlow and R. Rawlings, *Law and Administration*, (London: Weidenfield and Nicolson, 1984) [hereinafter "Harlow and Rawlings"] at 12 & 33 where this point is developed at greater length.

growth of the administrative state as threat to individual liberty and are particularly concerned that all administrative agencies be subject to control by the courts.[16] Those who see a greater scope for progressive action in legislation and political action have a more positive view of administrative agencies. They tend to see the courts as a conservative institution, devoted to upholding the status quo. They place their faith in democratic political action and in expert tribunals in fields such as labor law which they feel have a better understanding of the complexities of the field and the dynamics of the parties involved.[17] Yet even these critics of judicial review focus most of their attention on the effect of judicial review on agencies. Although the conclusion is different, the focus remains on the courts and the viewpoint is external.

Even many positions which oppose judicial intervention and champion the position of agencies tend to concentrate their discussion on the relationship between the courts and administrative agencies or to view the control of administrative discretion from the point of view of a detached third party. For example, while Mashaw does concentrate on the

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[16]Dicey is of course the automatic starting point in any such discussion, but similar positions can be found in any number of judicial pronouncements, both in and out of court. Holloway quotes both Lord Hewart from *The New Despotism* and the former Chief Justice of Ontario, Sir William Mulock, in terms which would surpass even Dicey. (I. Holloway, ""A Sacred Right": Judicial Review of Administrative Action as a Cultural Phenomenon" (1993) 22 Manitoba Law Journal 28 at 28-31 [hereinafter "Holloway, "A Sacred Right"] and "The Transformation of Canadian Administrative Law" (1992) 6 C.J.A.L.P. 295 at 296-297. Such major reports on administrative law as the Frank's Report in Britain and the McRuer Report in Ontario reflect this view as well. For a useful review of some of the major reports or studies on administrative law see M. Priest, "Structure and Accountability of Administrative Agencies" L.S.U.C. [1992] *Administrative Law: Principles, Practice and Pluralism* 11 [hereinafter "Priest"] and R. Macauley, *Practice and Procedure Before Administrative Tribunals* Vols. 1 & 2 (Toronto: Carswell, 1991) [hereinafter "Macauley"].

[17]See e.g. A. Hutchinson and P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) [hereinafter "Hutchinson and Monahan"]; J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Canadian Bar Review 307; A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1988) 48 Modern Law Review 293 and "Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 University of Toronto Law Journal 374; H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall Law Journal 43. In the American context, see Mashaw, *Bureaucratic Justice*, *supra* note 8. In the British context, see Harlow and Rawlings *supra* note 15 and I. Harden, and N. Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (London: Hutchinson Education, 1986) [hereinafter *The Noble Lie*].

agency itself and while he is critical of the value of judicial review, his primary concern in respect to reform is still developing controls over the bureaucracy to protect individuals. Even the practitioner based comments of Steele and Hutt cited above,[18] take the viewpoint of a lawyer dealing with agencies on behalf of private clients and are therefore essentially an external perspective.

This external perspective is not surprising in light of the prevailing view in formal administrative law that law is something separate and distinct from administration. John Law places the traditional model clearly within the scope of red light theories and sees its underlying theory as one of limited government whose roots lie in "the ideology of 19th century laissez faire liberalism". He suggests that while the traditional model has undergone refinement and development, its essential and fundamental form has remained intact despite the growth of the size and scope of government. He suggests that this is not surprising considering the ideology of judges and lawyers.[19] He sees this process as continuing in law schools which treat "administrative law as the study of judicial review." He quotes Noel Lyon in "Reforming Administrative Law": "[t]oo much of present legal education encourages the belief that administrative law is a process whereby superior courts bring statutory authorities to heel."[20]

The almost exclusive focus on judicial review in formal administrative law creates a number of problems. Only a very small and perhaps almost statistically insignificant number of decisions made by administrative agencies are actually ever subject to judicial

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[18]Supra notes 4 and 11.

[19]In his discussion of the ideology of judges and lawyers, Law quotes the Law Reform Commission of Canada, Harlow and Rawlings and J.A.G. Griffiths. A similar point on the ideology of the judiciary in favour of intervention by the courts is made by Holloway who points out that this approach has historical antecedents which pre-date Dicey by centuries (Holloway, "A Sacred Right"). Bryden *supra* note 13 refers to "the tenacity of Dicey's grip on the Canadian judicial imagination" although, like Holloway, he does not feel that the system of judicial review is necessarily wrong.

[20]Lyon *supra* note 10 at 20. Once again a classic expression of this position can be found in Wade which states that all the "detailed law" about the "composition and structure" of administrative agencies is "though clearly related to administrative law, ... beyond the true scope of the subject." (Wade at 5).

review. Of those cases, the majority are generated by a limited number of agencies most of which have proceedings that in some manner or another perform adjudicative functions and which employ some form of hearing procedure.[21] The vast majority of agencies generate very few cases which are heard by the courts. In addition, most legal studies which have been done of particular agencies have concentrated at the federal level or have been very general in scope. There have been relatively few case studies of particular provincial agencies which perform less adjudicative functions and which do not generate significant numbers of cases. Yet huge amounts of administrative law are generated by these agencies within their fields of practice and their impact is felt at every level of society.[22]

In accordance with the focus on judicial review, the legal literature on administrative law contains very little discussion of the implementation and operation of particular agencies. Where there is discussion of particular agencies most of the discussion centres on federal tribunals or on independent regulatory agencies or on those tribunals, such as labour relations boards, which most closely resemble the courts. Yet, I would suggest that a great deal of law is generated internally by a variety of agencies many of whom do not conform closely to the judicial model and whose hybrid nature makes the application of the

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[21]Perhaps the most obvious examples are labour tribunals, human rights tribunals, immigration tribunals, planning tribunals, securities commission hearings, professional discipline tribunals and a limited number of regulatory agencies such as the CRTC, the National Energy Board or public utilities boards which hold regular hearings.

[22]It is trite, but nonetheless accurate, to suggest that there is virtually no aspect of life in our society which is not subject to regulation directly or indirectly from before birth to after death. The pervasiveness of regulation and administration has long been a theme of sociologists, critical theorists and other social philosophers (see e.g. the works of the authors cited in note 12).This fact is also recognized in the various studies which have been done on administrative law. (See Priest and MacAuley *supra* note 16 for a review of the bulk of these studies).

A negative view of this development forms part of the basis for those judges and legal theorists who uphold the Rule of Law as the bulwark of protection for the individual in a world overrun by regulation. The fact that no aspect of life is untouched by regulation has been recognized in a less critical manner by the Supreme Court of Canada in a number of recent judgments (See e.g. *Nfld. Telephone v. Nfld. (Public Utilities Bd.,* [1992] 1 S.C.R. 623 at 634-635) and in comments from various members of the Court.(See *infra* notes 29, 30, and 31).

traditional model difficult. Much of the practice of administrative law takes place within this internal context, far from the courts or the legislatures. And numerous studies recognize that the most important controls are internal self-controls generated within the agency since the vast majority of administrative decisions will never be subject to review.[23]

The study of the operations and internal practices of administrative agencies which make by far the bulk of the legal decisions in our society are left outside the discipline to the sociologists, the political scientists and the students of public management. There is limited awareness within the legal community of this work outside the discipline and only a very limited Canadian legal literature which incorporates such work.[24] Yet from my standpoint as a practitioner, particularly one who has acted on behalf of agencies, it is in the internal operations and practices of particular agencies and not in formal proceedings or court challenges, that the bulk of administrative law takes place. In these areas historical, political, institutional, economic, social, cultural and personal factors considered relevant by sociologists, political scientists, or students of public management but ignored

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[23]See Harlow and Rawlings, Gellhorn *et al.*, Mashaw, Hawkins and Melnick. See also comments by Arthurs and Macauley and D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986).

[24]There have been changes in this traditional approach. The Council of Canadian Administrative Tribunals (CCAT) was established in 1985-86 and its conferences and the volumes of the Canadian Journal of Administrative Law & Practice include a significantly higher proportion of articles and comments which reflect the agency point of view and which do not come exclusively from a formal legal or judicial perspective. The 1992 Special Lectures of the Law Society of Upper Canada *Administrative Law: Principles, Practice and Pluralism* contain a number of very valuable articles dealing with agency perspectives and a conception of administrative law which extends beyond judicial review. Indeed the very title of the lecture series with its reference to pluralism suggests a broader definition of administrative law. These forums together with such special editions on administrative law as 16 Queen's L.J., 40 U.T.L.J. and 6 C.J.A.L.P. provide a useful perspective and some degree of interaction between lawyers and administrators which may assist in providing a degree of translation between "lawyers values" and "administrative values," a concern which has not really changed since the terms were used by John Willis over 25 years ago. However, despite these developments, the bulk of administrative law remains focused on judicial review.

While I am aware that the American literature on administrative rule-making, regulation and the legal aspects of bureaucracy is more extensive, those American administrative law texts that I have examined continue to display a primary concern with the role of the courts (Gellhorn *et al*, Davis and Pierce, Edley, Aman and Schwartz) For more general references to regulation and administration refer to the works cited in the bibliography by: Rose-Ackerman, Sunstein, Breyer, Breyer and Stewart, Mashaw, Melnick and Stewart.

in formal administrative law, are relevant and important factors in determining how legal issues are resolved. I hope to illustrate this point and draw on some of the insights developed in one of these fields, that of sociology, in my discussion of the legal administrative field within which the two Alberta farm marketing boards operate.

This critique of formal administrative law is not an attempt to debate the merits of judicial review or the role of the Rule of Law. I do not propose to engage in another study of whether judicial review is a "good" or a "bad" idea and I am not suggesting that judicial review is unimportant or that it should not be studied. There are several reasons for this. First, the issue has been debated to death and is reviewed endlessly in the legal literature - it is no exaggeration to say that the bulk of administrative law literature deals with some aspect of judicial review.[25] In fact, a narrow definition of administrative law would be virtually co-extensive with the study of judicial review.[26] Second, judicial review is not going away; the Rule of Law is specifically referred to in the Charter[27] and despite many detailed and convincing criticisms of Dicey's original formulation[28] it remains widely accepted, if somewhat difficult to define. Recent statements by Justices Lamer,[29] La Forest,[30] and McLachlin[31] all support a role for the judiciary in upholding the Rule of Law.

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[25]The examples to illustrate this point are far too numerous to mention. Some examples would include: any of the administrative law texts cited; the articles by Holloway, Bryden, MacLauchlin, Stewart Edley, and Aman; the attacks on judicial review by Petter and Hutchinson, Hutchinson, Bakan and Harden and Lewis.

[26]Note that many criticisms of the teaching of administrative law make exactly this point. See Lyon and Townsend *supra* note 10; Law is less critical but makes a similar point. See the discussion above in the text accompanying and following this note.

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

[28]See e.g. A. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall Law Journal 43; A, Petter and A. Hutchinson, "Private Rights and Public Wrongs: The Liberal Lie of the Charter" (1988) 38 University of Toronto Law Journal 278; P. Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 L.Q.R. 105; and *The Noble Lie.*

[29]"Administrative Tribunals - Future Prospects and Possibilities" (1991) 5 C.J.A.L.P. 107 at 115.

[30]"The Courts and Administrative Tribunals: Standards of Judicial Review of Administrative Action" [1992] L.S.U.C. 1 at 2. Note that La Forest, J. is more explicit about the limitations of judicial review and the need to face administrative justice primarily at the agency level.

[31]"Rules and Discretion in the Governance of Canada" (1992) 56 Sask. Law Review 167. This entire article deals with the rule of law and its relation to the control of discretion. While Justice McLachlin

Similar support can be found in judicial decisions at all levels and in the political rhetoric of all major parties. While there are swings between periods of greater or lesser judicial intervention,[32] the courts have consistently resisted attempts to exclude their power to intervene and despite considerable academic literature decrying the effect of the courts,[33] I do not believe that either the public or politicians are in favor of abolishing judicial review.[34] In general, the courts enjoy a greater degree of public trust and are accorded a greater degree of legitimacy than either administrative agencies or politicians.

A third reason for not taking a position "for" or "against" judicial review is that I consider either/or dichotomies to be an inappropriate method of dealing with the complexity, diversity, and size of the administrative law domain. Attempts to fit one model, or one answer, to all agencies or even to all issues within the context of a particular agency are extremely difficult and in my opinion of questionable value. All conclusions concerning judicial review start from some underlying assumptions, often unacknowledged, about the nature of the state, the individual and the role of the courts. Most of these assumptions start with generalizations that do not accord with the complexities of actual agencies and the contexts in which they operate. A single answer for or against judicial review does not address the concerns faced by administrative agencies or by those dealing with them.

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rejects the "either/or fallacy" of the rule of law or administrative discretion which she sees reflected in Dicey's model, she firmly supports a modified form of the rule of law as fundamental to protecting the values of Canadian society. She provides an extended list of the values reflected in and protected by the modified form of the rule of law.

[32]For a discussion of these shifting periods of intervention see: Stewart, Aman, Sunstein and Edley in the US; Bryden, MacLauchlin, and Holloway in Canada; and Harlow and Rawlings and Craig for England. Both Holloway "A Sacred Right", in the Canadian context, and *Without the Law*, in the context of the history of the 19th century in England, suggest a growing judicialization and an aggressive campaign by the courts to expand their prerogatives.

[33]Petter and Hutchinson; Hutchinson and Monahan; Bakan; *The Noble Lie;* Arthurs; Mashaw, *Bureaucratic Justice*; Melnick. See generally *supra* notes 17 and 28.

[34]See Holloway, "A Sacred Right" on this point: judicial review is what the public wants. See also Bryden, "Canadian Administrative Law in Transition: 1963 - 1988" (1988) 23 U.B.C. L. Rev. 147 and "Canadian Administrative Law: Where We've Been" (1991) 16 Queen's Law Journal 7 for a discussion of this point and for a generally favourable assessment of the system of judicial review which has developed.

In regard to my own position, my experience, and in all likelihood my professional training and socialization as a lawyer, makes me doubt that judicial review is always antagonistic to agencies or that legal values expressed in the rule of law have no place in an administrative milieu.[35] While I am not certain that I could go so far as the historian E.P. Thompson in referring to the rule of law as an "unqualified human good,"[36] I believe that the potential for judicial review can provide a counterbalance to flagrant misuse of authority and can create a degree of sensitivity on the part of the tribunal or agency to issues of fairness and natural justice.[37] There are times when a review by a court which has no direct involvement in the matter in issue may seem preferable to one or more of the parties to a dispute rather than what they perceive as a clearly partisan review by an administrative appellate tribunal whose legitimacy and expertise they do not accept. The availability of judicial review, even if the possibility of success may not be high can have a positive effect on the behaviour of both participants to a proceeding and the agency itself.[38]

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[35]See McLachlin, J.'s article *supra* note 31 for a useful list of these values by a current member of the Supreme Court of Canada.

[36]E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, (Harmondsworth: Penguin, 1975) at 266 [hereinafter *Whigs and Hunters*]. This statement has engendered considerable debate particularly since it comes from an avowedly Marxist historian. It has been cited and supported by those who defend some form of the liberal ideal and has been criticized by those who feel it ignores the structural and ideological support that liberalism in general and the rule of law in particular provide to the dominant groups in society and the degree to which it is part of a system of domination. It is also challenged, directly or implicitly by those who reject all forms of enlightenment humanism be they liberal or Marxist. (see e.g. the works by Foucault, Luhmann and Bourdieu; various secondary sociological and philosophical sources are also cited in the bibliography).

[37]This is not to suggest that most agencies are not themselves concerned with these issues; in my experience those I have acted for have been aware of and concerned with the need for fairness. But I have also seen instances, acting both for agencies and for individuals, where the prospect of a judicial challenge increased the degree of sensitivity to these points and where judicial decisions provided some guidance as to what procedures might be appropriate in particular contexts.

[38]I am aware of how problematic and context dependent this position is. I am not dismissing criticisms of the legal system and am not advocating its neutrality or suggesting that its underlying assumptions are not problematic. I am simply not certain that it is clear that the abolition of judicial review is a better alternative. I am less confident than many opponents of judicial review concerning either the expertise of some tribunals or the ability of the political process to redress problems. In Alberta there has been only one change of government since 1935 - the degree to which the political process operates as a check on executive power in such circumstances is extremely limited.

In addition, while I share the concerns of many 'green light' theorists, I think that suggestions that judicial review is always an unjustified interference with the operation of agencies fail to give sufficient weight to the degree to which courts support the authority of administrative agencies. Notwithstanding the tension between judicial attitudes and the needs of administration and notwithstanding the various swings in the degree of judicial intervention sanctioned by the courts,[39] judicial deference to agencies is very real and the majority of legal challenges to agency actions fail.[40] Although a court challenge requires resources and time from the agency and the potential for such challenges may inhibit agency initiatives,[41] when the agency is successful, the legitimacy of its actions and its mandate are enhanced by being confirmed by the courts. As well, the concept of judicial deference when set out in a decision relating to a particular agency can place significant areas of the agency's activities outside the scope of judicial review for any subsequent challenges. Accordingly, the results of judicial review can be to enhance the agency's authority and legitimacy.

This positive aspect of judicial review, from the agency perspective, is important in another sense. The general focus of administrative law is not only external to the agency but it also focuses on relations between the agency and members of the public. The perspective taken is usually that of an individual or group dealing with the agency. Less emphasized are the relationships between the agency and other arms of the government; yet these relationships can be a major focus of agency attention and resources and they often have a far more significant impact on agency policy and practice than judicial review or formal legislation or regulation. Once again, this is an area which is evident in practice

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[39]*Supra* note 32.

[40]See Harlow and Rawlings; P. McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949 - 1992" (1993)" 27 Canadian Journal of Political Science 523.

[41]See Mashaw, *Bureaucratic Justice* and Melnick on this point. For a Canadian comment from an agency perspective, see D. Cohen, "Procedural Fairness and Incentive Programs: Reflections on the Environmental Choice Program" (1993) 31 Alberta Law Review 544 and "Regulating Regulators: The Legal Environment of the State" (1990) 40 U.T. L.J. 213.

but which is only infrequently reflected in administrative law literature. The impact of judicial review which defines the agency's sphere of activity can be significant in relationships within the area of government administration. On occasion, a favorable court decision can help to insulate an agency from attempts by its supervising, appointing or funding bodies to restrict or define its powers. In inter-agency relations, an agency may have more confidence in having a court define its authority than in relying on a supervising agency and conflicts in interpretation between levels of agencies may result in court action. In some circumstances, the agency may regard court action as a means of preserving its independence. Once again, the attitude to judicial review will depend on the perspective taken, the matter in issue, and the context in which the issue arises.

Therefore while I have serious concerns about the degree to which formal administrative law leaves a gap between the theory and practice of administrative law and renders much of the law practiced in specific contexts invisible, I recognize that it serves an important role. Some general principles which apply across agencies and which reflect generally accepted standards of administrative conduct are essential. While it may be difficult to provide a fully coherent and complete theory of administrative law, I believe that there does exist a considerable degree of consensus on a number of principles of administrative law although their application in specific circumstances may be less clear. I do not disagree with the viewpoint that by and large the courts in Canada have reached a pragmatic and workable accommodation with the administered state and I accept that this is a fluid developing process which needs to be monitored, studied and debated.[42] In so far as the academy is concerned, I recognize that no administrative law course could cover all the diverse and complex factors within which each agency operates; to do so would be

[42]For articulations of this viewpoint, see Bryden, *supra* note 34; J. Mashaw "Imagining the Past; Remembering the Future" 1991 Duke L.J. 711; Macauley, *supra* note 16.

impossible. The attempt would also be counter-productive by burying students and professors in a mass of detail which most of them would never require.[43]

My concern, therefore, is not to replace the teaching or study of formal administrative law, but to suggest that the perspectives and approaches that it represents can be usefully supplemented by an awareness of and sensitivity to the importance of the varying legal administrative fields within which different agencies operate. While approaches which emphasize formal administrative law, judicial review and the rule of law are valuable and deal with important issues, they reflect an emphasis on what Arthurs terms a "legal centralist" as opposed to a "legal pluralist" viewpoint.[44] I want to suggest the concept of

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[43]This is the point made by Gellhorn *et al.* in response to the criticism by Hutt. See *supra* notes 10 and 11 and accompanying text.

[44]Arthurs, *Without the Law.* Arthurs defines legal centralism as follows:

> The basic paradigm, the central assumption, the crucial structure that dominates the way most lawyers, judges, law professors - even most people - think about law is this: law is formal; it exists as a thing apart from society, politics, or economics; law has the capacity to achieve, and does achieve, results by encouraging or discouraging behaviour, by attaching specified consequences to behaviour that facilitate it, deter it or undo its harmful effects; law is made and administered by the state; and access to law is provided in courts by legal professionals - lawyers and judges - who invoke a body of authoritative learning in order to argue and decide cases.... Each step in this analysis, which crudely approximates the way most of us think about law, rests on the assumption that law lies at the centre of events. Law is neutral - unsullied by close identification with contending interests or classes or political philosophies - yet it engages the power and prestige of the state. Law commands, people obey, and the course of future events is fixed. Law is knowledge, and that knowledge is disseminated by those who understand it best to those who understand it least. Not without reason has this paradigm of law been identified as "legal centralism." *Without the Law* 1-2.

Legal pluralism is defined as:

> Thus, social scientists have not hesitated to propose new definitions of law which at least link it to other apparently similar phenomena. For example, it has been proposed that law consists 'primarily of rules by which persons in society order their conduct, and only secondarily of "norms for decision" developed by courts and of legislation enacted by the state.' Some of these rules are found in statute books and law reports, to be sure, but others are often unwritten yet well-understood codes defining standards of behaviour in industrial enterprises and business transactions, among neighbours, and within universities, churches or public bureaucracies. If this is what law is, it follows that it must be closely intertwined with the purposes of both the state and the groups or institutions that produce or consume it. Thus, we can no longer ignore its economic function, its political content, or its social effects. Nor can we fail to address the ongoing processes by which different manifestations of law come into existence, shape and are given shape by events, and interact with each other. And finally, we must accept that law is much more diverse in its content, causes, and effects than our original paradigm [legal centralism] proposed. This new way of looking at law we may therefore call "legal pluralism." *Without the Law* 2-3.

the legal administrative field as one means of taking a more legal pluralist approach and to defend the value of this approach. I also suggest that it is a sensitivity to this legal administrative field, whether conscious or unconscious, that constitutes one of the major differences between administrative law as it is practiced within a particular legal administrative field, and the more general, formal and external approaches found in texts, administrative law courses, and the courts. In the more formal approach much of the legal administrative field is invisible. While the field may not be clearly 'visible' in practice, the practitioner and all those within the field must respond to and operate within its effects; this is one of the sources of the distinction between 'theory' and 'practice' which I have noted and critiqued. I intend to illustrate this point in my examination of certain legal issues which arose in the legal administrative fields in which the two farm marketing boards operated.

The Legal Administrative Field: An Expanded Approach to Administrative Law

My thesis is that each agency operates within a field of law some of which is general in nature and some of which is specific to that agency. Formal administrative law provides important tools to analyze and, in some cases, control an agency's activities and may be important in examining the formal structures and procedures created for the agency. As such it is an important element in examining an agency's 'legal field'. But an understanding of the practice and legal environment of particular administrative agencies requires far more. Concentrating on formal administrative law misses a vital and nearly invisible part of administrative law: the informal and internal law developed and applied within the agency and in relation to its supervisory bodies. It also ignores the historical, political, economic, and social factors which also shape the legal administrative field within which the agency and those who deal with it function. I choose the term "legal administrative field" rather than simply referring to a legal field because I want to emphasize the position that in

regard to particular agencies, the law is formed, shaped and practiced within a field that is shaped by factors which extend far beyond those recognized by formal administrative law.

There is a great deal of law created and applied "without the law."[45] In looking at the field of law and administration within which a particular agency exists and operates, an expanded and practice oriented perspective on 'administrative law' is necessary to appreciate the complexity or, to use Arthur's term, the 'plurality' of the various elements which make up a particular legal administrative field. This expanded perspective on administrative law relates to what the law is, to who creates and applies it, and to what is or is not possible within the field of legal relations in which the agency is situated. It involves going beyond a formalist approach to what the law consists of and questions the boundaries that such a formalist approach draws between law and administration and between law and other disciplines such as sociology, political science, economics and public management.

Any attempt to establish clear boundaries dividing law and administration or lawyers and administrators depends upon the questionable assumption that either set of terms are unitary entities which reflect a common coherent viewpoint practiced by identifiable individuals which can be contrasted to the opposing position practiced by other individuals. While there is some value to such distinctions at a general level, they break

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[45]This term is taken from *Without the Law*, Arthur's book on the development of administrative law in England. This book develops the point that the development of administrative law in England has a longer history than is usually assumed and that much of the law created and administered owed very little to the courts.
The point that in many contexts law is not central to the maintenance of social order is also made by Robert C. Ellickson in *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Massachusetts: Harvard University Press, 1991) which is a study of how neighbors in Shasta County, California, resolve various disputes relating from straying cattle. The central finding of the study was that in this case parties would generally resolve their disputes in a cooperative fashion without any regard for the laws that would apply to those disputes. Recourse to the law was available but was seen as an unacceptable way for neighbors to resolve disputes. The book then discusses the implications of these findings in relation to law, economics, sociology and game theory with particular reference to how standard approaches such as the Coase theorem in law and economics must be modified to account for these findings.

down in practice in particular concrete situations. Administrators make, interpret and implement law and lawyers are intimately involved in administration: drafting, interpreting, implementing, defending, creating and revising administrative procedures and policies. Particular agencies perform a complex mixture of executive, administrative, judicial and legislative functions. This situation is not a new development.

In *Without the Law* H.A. Arthurs points out that administrative law in England has a far longer history than is generally accepted in traditional histories on the development of administrative law in England and that many of the commissioners and civil servants dealing with the commissions and other agencies he describes were lawyers and that the practice of many private lawyers revolved around these commissions and agencies. Much of this work was accomplished without any reference to the courts. The history and practice of administrative law did not begin with the administrative reforms of the 1860's and 1870's and it did not centre on the role of the courts; in a sense administrative law was not created by the courts, it was colonized by them. Arthurs points out that the historical evidence does not support either the demonic view of administrators or the benign neutral and protective view of the courts propounded by Dicey and he challenges Dicey's assumptions and his historical images concerning the role of the courts in the control of administration and the protection of individual liberty.[46] Arthurs suggests that his historical study undercuts some of the assumptions which form the root of legal centralism, and he

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[46]*Without the Law*. Arthurs points out that some of the growth in administrative systems were a response to the institutional and personal weaknesses of lawyers and judges in the nineteenth century:

> After all, we have seen in our historical evidence lawyers and judges who did not hesitate to subvert the laws for personal gain or from class bias, and administrators whose moral presence and humane concerns were exemplary. We have heard of regular courts whose procedures had atrophied, whose costs were bloated, whose capacity to deliver justice or defend liberty had virtually ceased to exist. And alongside these we have glimpsed communal institutions and administrative bodies that offered most Englishmen the only justice they would ever receive. *Without the Law* 212.

For less historical, but equally devastating critiques of Dicey, see Arthur's "Rethinking Administrative Law: A Slightly Dicey Business." and Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" *supra* note 28. Other critiques are listed in the same note.

advocates a pluralistic, context sensitive approach which draws on approaches and knowledge drawn from other disciplines. Arthurs does not reject the importance of law or the need for norms of conduct in administration but he argues that it should not automatically be assumed that legal centralist values and judicial intervention are always appropriate in all circumstances.

The position taken by Arthurs is similar in many respects to the position that I am advocating. A basic theme of my thesis is that any general comprehensive theory of formal administrative law involves a degree of abstraction that becomes difficult to apply given the myriad of administrative agencies and the diversity and complexity of the issues and interests with which they deal. There is no single approach or theory which can be applied in all circumstances and with respect to all agencies. An approach which is successful in particular context may not work in another situation even where that second situation apparently shares many of the same characteristics; generalizations can be useful but they can also be dangerous. As well, a particular form of administrative action, or the control thereof, may generate unanticipated and even paradoxical results. At best what can be hoped for is a constructive dialogue between the values and knowledge reflected in a formal legal approach and the values knowledge and needs reflected in a particular administrative agency; a dialogue sensitive to the imperatives and values which shape both of these discourses in a particular, situated context. That this notion is incapable of complete realization is evident; that it has no value as a goal is not. I want to suggest and defend the concept of the legal administrative field as one means of developing these concerns.

The Legal Administrative Field and the Work of Pierre Bourdieu

At this point I want to review the source of and to clarify what I mean by my use of the term "legal administrative field." I take the term 'field' from the work of the French

sociologist, Pierre Bourdieu.[47] This concept is part of Bourdieu's attempt to go beyond an opposition that he sees in traditional sociology between either a 'subjectivist' position or an 'objectivist' position.[48] Bourdieu suggests that neither of these positions adequately reflect social life which must be understood both in relation to objective material, social and cultural structures and to the constituting practices and experiences of individuals and groups. Bourdieu also seeks to overcome an opposition between "a theoretical knowledge of the social world as constructed by outside observers and the knowledge used by those who have a practical mastery of their world."[49] These are ambitious goals and there is considerable academic debate on the degree to which Bourdieu's work successfully

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[47]Bourdieu is perhaps the pre-eminent sociologist in France. His work has been extensively translated into English. Many of his major works in translation are listed in the bibliography together with a number of secondary sources.

This is not to suggest that Bourdieu is the either the first or the only scholar to use the term 'field.' However, it is his approach that I draw upon. For a discussion of somewhat similar uses of the terms 'force-field' and 'constellation' by Benjamin and Adorno see: M. Jay, *Adorno* (Cambridge, Massachusetts: Harvard University Press, 1984) at 14-15 and *Force Fields: Between Intellectual History and Cultural Critique* (New York: Routledge, 1993) at 1-3; R. Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity* (Cambridge, Massachusetts: MIT Press, 1992) at 9.

[48]"Speaking in very general terms, social science, in anthropology as in sociology or history, oscillates between two apparently incompatible points of view, two apparently irreconcilable perspectives: objectivism and subjectivism, or, if you prefer, physicalism and psychologism (which can take on diverse colourings, phenomenological, semiological, etc.). On the one hand, it can 'treat social phenomena as things', in accordance with the old Durkheimian maxim, and thus leave out everything that they owe to the fact that they are objects of cognition - or of miscognition - in social existence. On the other hand, it can reduce the social world to the representations that agents make of it, the task of social science then consisting in producing an 'account of the accounts' produced by social subjects." P. Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford: Stanford University Press, 1990) 124 [hereinafter *In Other Words*].

Another form of stating this issue is the relation between 'structure' and 'agency'. At issue is the degree to which effects which are observed are the result of the actions and decisions of individual agents or the result of particular social structures which condition and determine the actions of particular agents as well as collective social bodies. This has been and continues to be recognized as a central problem in sociology. It is a central issue in the works of sociologists such as: M. Weber, A. Giddens, J. Habermas, Z. Bauman, F. Crespi, J. Alexander, C. Lemert which are cited in the bibliography. See also: A. Giddens & J. Turner eds. *Social Theory Today* (Stanford: Stanford University Press, 1987) and B. Turner ed., *The Blackwell Companion to Social Theory* (Oxford: Blackwell, 1996). Other important attempts to theorize alternatives to the subject/object distinction have been made by feminists like Sandra Harding and Donna Haraway.

[49]C. Calhoun, E. LiPuma and M. Postone eds. *Bourdieu: Critical Perspectives* (Chicago: University of Chicago Press, 1993) at 3 [hereinafter *Bourdieu: Critical Perspectives*]. In terms of this thesis, this opposition could be framed in terms of the opposition that I have described between a formal legal centralist approach to administrative law and an approach oriented to the practice in a particular area or agency.

achieves the desired transcendence of oppositions.[50] In his attempt to achieve these objectives, Bourdieu makes extensive use of three concepts: "habitus", "capital" and "field".

"Habitus" is an old term used by Aristotle and the scholastic philosophers but Bourdieu uses it in a specific way to develop a theory of practice which tries to move beyond either objectivism or subjectivism. Bourdieu defines habitus as "a set of dispositions which incline agents to act and react in certain ways. The dispositions generate practices, perceptions and attitudes which are "regular' without being consciously co-ordinated or governed by any 'rule.'"[51] The dispositions which make up the habitus are:

1. inculcated through a gradual process of inculcation;
2. structured in the sense that they reflect the social conditions within which they were acquired;
3. durable in the sense that they endure through the life history of the individual and operate in a way that is pre-conscious and therefore not easily subject to reflection and modification;
4. generative and transposable in the sense that they can generate practices in social fields other than those in which they were originally acquired.[52]

For Bourdieu, the habitus provides individuals with a sense of how to act and to respond to events in their daily lives. It 'orients' their actions and tendencies but does not strictly determine them. He often describes this as a 'feel for the game', a sense of what is appropriate in circumstances and what is not, a 'practical sense'.[53] This concept provides a

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[50]See e.g. *Bourdieu: Critical Perspectives*; D. Robbins, *The Work of Pierre Bourdieu: Recognizing Society* (Boulder: Westview Press, 1991). A detailed critique is provided in J. Alexander, *Fin de Siècle Social Theory* (London: Verso, 1995) and F. Crespi, *Social Action & Power* (Oxford: Blackwell, 1992) at 30-35 discusses the attempts of both Bourdieu and Giddens to transcend this opposition.

[51]P. Bourdieu, *Language and Symbolic Power* (Cambridge, Massachusetts: Harvard University Press, 1991) Editor's Introduction at 12. [hereinafter *Language and Symbolic Power*].

[52]*Ibid.*, 12-13. For a more detailed discussion see P. Bourdieu, *The Logic of Practice* (Stanford: Stanford University Press, 1990) [hereinafter *The Logic of Practice*].

[53]Once again I find these metaphors suggestive for the sense that I want to convey of the experiences of legal practitioners within a particular legal administrative field.

basis to explain why individuals respond in regular, if not fully predictable ways, even in the absence of any explicit rules. Hence, Bourdieu can speak of a 'logic of practice'. Yet, Bourdieu makes clear that habitus cannot be considered in isolation. When individuals act they always do so in specific social contexts or settings. Bourdieu considers that particular practices or perceptions are created not by the habitus considered in isolation but rather by the relation between the habitus and the specific social contexts or 'fields' within which individuals act.

Bourdieu has offered various definitions of a 'field.' What follows is a very general outline of his definition.[54] To begin, it is important to understand that the concept is relational not linear: "To think in terms of field is to *think relationally*";[55] "We are dealing with a network of relationships that get reduced to linear processes." The term attempts to avoid a fixed, mechanical concept of structure.[56] A field is a social space structured with its own laws of functioning and its own relations of force which are particular and relatively autonomous to that field. The structure of a field at any given time is determined by the relations between the positions that agents occupy in the field. Each position is defined by its relationship to all the other elements in the field.[57]

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[54]While 'field' is the most common term Bourdieu uses, he also sometimes refers to such social contexts as 'games' or 'markets.' When these other terms are used they must be understood in the particular sense that Bourdieu has developed for the field and not in terms of game theory or economic theory. They must also be understood in the sense that what is being described is a process to orient a research procedure rather than an abstract formal and static definition. As such, the descriptions and use of the field have varied and evolved over the course of the extensive work done by Bourdieu in various areas and he often refers to them as 'open' definitions which acquire their full meaning and form only by application to a particular context and problem.

[55]P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992) at 96. [hereinafter *An Invitation to Reflexive Sociology*].

[56]P. Bourdieu, *In Other Words* at 44. The field can be related to a magnetic field or a force field. It is not a mechanical structure: *In Other Words* at 194. For a similar use of the term force field and a related term constellation, both drawn from the work of Benjamin and Adorno, see Jay and Bernstein, *supra* note 47.However, Bourdieu distinguishes the social field and a magnetic field: "Sociology is not a chapter of mechanics and social fields are fields of forces but also fields of struggle to transform or preserve those fields of forces." *An Invitation to Reflexive Sociology*, at 101.

[57]"At each moment, it is the state of the relations of force between players that defines the structure of the field." *Invitation to Reflexive Sociology* at 99.

The field is dynamic; a change in the agents' positions means a change in the structure of the field. In any given field there is a competition between agents occupying the diverse positions within the field, or attempting to create new ones, for control of the interests and resources (capital) which are specific to the field in question. Agents enter a field with different amounts of capital which they can 'invest' in the contest. The relative positions of the agents within the field are determined by the amount of capital that they possess or acquire and their interrelationships with other positions or agents in the process. The emphasis in study is not on interactions between individuals, but rather on the relationship between positions occupied by agents which can be analyzed independently of the characteristics of the occupant of the position. Any social formation, such as a particular society or state, is made up of a series of fields and sub-fields. Each field is relatively autonomous but still structurally related with other fields within the social formation. Bourdieu summarizes this in the following terms:

> In analytic terms, a field may be defined as a network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose on their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.).
>
> In highly differentiated societies, the social cosmos is made up of a number of such relatively autonomous social microcosms, i.e., spaces of objective relations that are the site of a logic and a necessity that are *specific and irreducible* to those that regulate other fields.[58]

Although Bourdieu uses the term 'capital' to describe the resources possessed and struggled for by agents within a field , he makes clear that his analysis is not a purely economic one. The economic field, while important, is only one of many fields. Like habitus, capital does not exist and function except in relation to a field. Different fields

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[58]*An Invitation to Reflexive Sociology* at 96.

have different forms of capital which are not always measured by economic criteria. Capital can take different forms - economic, social, symbolic, or cultural - and it exists in different proportions in different social fields.[59] It can be transferred from one field to another and it is the product of previous struggles and accumulations. It can also be converted from one form into another. For example, cultural capital in the form of educational qualifications may be converted into economic capital through the acquisition of lucrative jobs. The amount and type of capital possessed by an agent or a 'player' determines "her *'relative force in the game'*, her *position* in the space of play, and also her *strategic orientation toward the game."*[60]

For Bourdieu the effects created within a field are not the sum of a series of random actions or the result of a concerted plan. Instead they are the product of a competition within the field for the capital available within the field. The characteristics of the competition are shaped by the nature of the field which in turn is related to the assumptions which are written into the very structure of the field itself.[61] The outcome of these competitions can change the relations between the positions occupied by agents who are participating in the competition and this process can change the parameters of the field

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[59]It is often difficult to distinguish Bourdieu's use of the term 'capital' from the term 'power' and he sometimes uses them interchangeably although capital is the preferred term. The relationship can be seen in the following quotation:

> We also have *trump cards*, that is, master cards whose force varies depending upon the game: just as the relative value of cards changes with each game, the hierarchy of the different species of capital (economic, social, cultural and symbolic) varies across the various fields. In other words, there are cards that are valid, efficacious in all fields - these are the fundamental species of capital - but their relative value as trump cards is determined by each field and even by the successive states of the same field.
>
> This is so because, at bottom, the value of a species of capital (e.g., knowledge of Greek or of integral calculus) hinges on the existence of a game, of a field in which this competency can be employed: a species of capital is what is efficacious in a given field, both as a weapon and as a stake of struggle, that which allows its possessors to wield a power, an influence, and thus to *exist*, in the field under consideration instead of being considered a negligible quantity. *An Invitation to Reflexive Sociology* at 98.

[60]*An Invitation to Reflexive Sociology* at 99.

[61]P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings Law Journal 814 at 852 [hereinafter "The Force of Law"].

and the rules of the game themselves. Therefore, while the actions of the agents are structured by the form of the field and the agents' relative positions within the field as determined by their respective volume and type of capital, the outcome of the relations and struggles between the agents can alter the parameters and the form of the field and part of the competition between agents may involve attempts to alter the parameters or the field or the 'rules of the game'.

The actions of agents within the field are not generally outcome of conscious calculation of costs and benefits. In the relations between agents within the social field, the concept of habitus is of major importance. As Bourdieu states:

> The motor - what is sometimes called motivation - resides neither in the material or symbolic purpose of action, as naive finalists imagine, nor in the constraints of the field, as the mechanistic thinkers suppose. It resides in the relation between the habitus and the field which means that the habitus contributes to determining what determines it.[62]

By virtue of habitus, agents are already predisposed to act in certain ways. Because individuals are products of particular histories reflected in their habitus, their actions can never be analyzed simply as the outcome of an abstract rational calculation. Instead, they are the result of an encounter between the habitus and capital possessed by agents and the social field in which the action is taking place.[63]

The Juridical Field

Bourdieu has applied his work to law. In an article in The Hastings Law Journal, Bourdieu describes the juridical field in the following terms:

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[62]*In Other Words* at 195.

[63]*Language & Symbolic Power* at 17. "To be more precise, the strategies of a "player" and everything that defines his "game" are a function not only of the volume and structure of his capital *at the moment under consideration* and of the game chances (Huygens spoke of *lusiones*, again from *ludus*, to designate objective probabilities) they guarantee him, but also of the *evolution over time* of the volume and structure of this capital, that is, of his social trajectory and of the dispositions (habitus) constituted in the prolonged relation to a definite distribution of objective chances." *An Invitation to Reflexive Sociology* at 99.

> The juridical field is a social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy. It also the space in which such debate functions. These professionals have in common their knowledge and their acceptance of the rules of the legal game, that is the written and unwritten laws of the field itself, even those required to achieve victory over the letter of the law ...Thus, a superior power appears before the litigants, one which transcends the confrontation of private world-views, and which is nothing other than the structure and the socially instituted space in which such confrontations are allowed to occur.[64]

In his discussion of the juridical field Bourdieu also points out another important feature of the juridical field which is common to all fields:

> Entry into the juridical field implies the tacit acceptance of the field's fundamental law, an essential tautology which requires that, within the field, conflicts can only be resolved *juridically* - that is, according to the rules and conventions of the field itself. For this reason, such entry completely redefines ordinary experience and the whole situation at stake in any litigation. As is true of any "field," the constitution of the juridical field is a principle of the constitution of reality itself. To join the game, to agree to play the game, to accept the law for the resolution of the conflict, is tacitly to adopt a mode of expression and discussion implying the renunciation of physical violence and of elementary forms of symbolic violence, such as insults. It is above all to recognize the specific requirements of the juridical construction of the issue. Since juridical facts are the products of juridical construction, and not vice versa, a complete retranslation of all of the aspects of the controversy is necessary in order, as the Romans said, to *ponere causam* (to "put" the case), that is to institute the controversy *as a lawsuit*, as a juridical problem that can become the object of juridically regulated debate. [italics in the original][65]

Bourdieu sees the juridical field as place of competition between actors who possess a socially recognized technical competence to "*interpret* a corpus of texts sanctifying a correct or legitimized version of the social world."[66] He develops his concept of the juridical field to critique both an internal legal formal perspective which sees law as

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[64]"The Force of Law" at. 831.
[65]"The Force of Law" at 831-832.
[66]*Ibid.* at 817.

absolutely autonomous in relation to the social world,[67] and an external instrumental perspective which perceives law as a reflection or tool of the dominant groups.[68] He tries to show how his approach can account for both the relative independence from external determinations and pressures of legal practice and discourse and the fact that the law always responds to a state of power relations and "the choices which those in the legal realm must constantly make between differing or antagonistic interests, values and world-views are unlikely to disadvantage the dominant forces."[69]

Bourdieu's essay attempts to achieve this objective through an analysis of the juridical field by studying the social universe (the field) in which law operates and in which judicial authority is produced and exercised. Bourdieu suggests that the logic of the juridical field is the product of two factors: "on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and, on the other hand, by the internal logic of judicial functioning which constantly constrains the range of possible actions, and, thereby, limits the realm of specifically judicial solutions."[70] Bourdieu looks at the division of juridical labour, the role of legal habitus, the role of juridical language and interpretation, the institution of a juridical monopoly in legal professionals, the power of law in *naming* where law has a role as "the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone" and as "the quintessential form of "active" discourse, able by its own operation to produce its effects,"[71] the relation of law

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[67]Bourdieu uses Kelsen as his ultimate exponent of pure legal theory freed from any social determination. He suggests that this 'formalist ideology' has become the 'professional ideology of legal scholars.' "The Force of Law" at 814.

[68]The example used is Althusser and the 'structuralist Marxists'. Bourdieu critiques the metaphor of base and superstructure and the relative autonomy of law as ignoring both the historical conditions under which that relative autonomy emerges from struggles within the political field and the specific form of judicial discourse which contributes to this autonomy.

[69]"The Force of Law" at 842.

[70]*Ibid.* at 816.

[71]*Ibid.* at 838-839.

and those who practice it to the dominant economic and political powers, and the law as "an intrinsically powerful discourse coupled with the physical means to impose compliance on others... a quintessential instrument of normalization."[72] In his conclusion Bourdieu deals with the fact that it is the structure of the juridical field and not the simply the combination of the individual actions taken within the field which creates the effects of the field:

> But the effects that are created within social fields are neither the purely arithmetical sum of random actions, nor the integrated result of a concerted plan. They are produced by competition occurring within a social space. This space influences the general tendencies of the competition. In turn, these tendencies are tied to the assumptions that are written into the very structure of the game whose fundamental law they constitute - in the case considered here, for example, the relationship between the juridical field and the field of power. Like the function of reproducing the juridical field with its internal divisions, and hierarchies, and the principle of vision and division which is at its base, the function of maintaining the symbolic order which the juridical field helps to implement is the result of innumerable actions which do not intend to implement that function and which may even be inspired by contrary objectives.[73]

It is open to argument whether Bourdieu succeeds in establishing his stated objective of transcending the debate between legal formalism and instrumentalism. My own conclusion is that while he provides a productive and interesting perspective on the issues, he does not achieve the grand reconciliation or transcendence that he states as his objective. First, Bourdieu understates the sophistication and subtlety of both the formalist and instrumentalist positions which he critiques.[74] Second, Bourdieu's analysis is what it claims

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[72]*Ibid.* at 848. The role of law as an instrument of normalization is also prominent in the work of another French intellectual, Michel Foucault who speaks of disciplinary norms and the internalization of such norms. See M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vantage Books, 1979) [hereinafter *Discipline and Punish*]; other relevant works include: "Governmentality" in G. Burchell, C. Gordon and P. Miller eds. *The Foucault Effect: Studies in Governmentality with Two Lectures and an Interview with Michel Foucault* (Chicago: University of Chicago Press, 1991) at 87 and "Two Lectures" in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977,* Colin Gordon ed. (New York: Pantheon Books, 1980) at 78 [hereinafter *Power/Knowledge*].

[73]"The Force of Law" at 852.

[74]It is a common enough rhetorical technique to establish a simplified and caricatured image of an opposing position (an academic straw man/woman) in order to refute it. However, I would suggest that

to be - a 'sociology'; while this is one perspective, it is relatively general and theoretical in its treatment of the participants in the judicial field and the nature of judicial processes and discourse.[75] Finally, this is extraordinarily complex issue and I question whether a grand synthesis is possible. A detailed discussion on this point would require another thesis which would relate and compare Bourdieu's approach to that of other sociologists, philosophers and legal theorists.[76] For the purpose of this thesis, the value of "The Force of Law" is that it illustrates Bourdieu's application of his concepts to the juridical field.

While my use of the term field is influenced and inspired by Bourdieu's work, I take this as a starting point, a method of looking at a particular problem rather than as a full theoretical model which can be applied without modification. Most of Bourdieu's work which is available in translation, operates at a fairly general, technical and theoretical level.[77] Hence he can speak of an economic field, a juridical field, a political field, an academic field, or a field of cultural production. I am interested in a more limited field, what Bourdieu would call a sub-field and I am interested in it from the perspective of a lawyer practicing within the field. I find Bourdieu's work productive but I do not suggest that I use his terms exactly as he would, nor do I approach the study with the perspective or expertise of a sociologist; I am interested in a particular sub-field, the legal

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most contemporary Marxist and formalist positions take much more nuanced and complex positions than those portrayed by Bourdieu in the article in respect to the issue of law's relative autonomy.

[75]Hence it is open to some of the same criticisms that I make of formal administrative law. Such a degree of abstraction is difficult to apply in all contexts.

[76]See *supra* notes 48 and 50 for references to the work of other sociologists and critiques of Bourdieu in relation to this point. None of these references deal specifically with Bourdieu's work in relation to law.

[77]I am aware that Bourdieu would take issue with this statement and point to his detailed empirical studies in a broad series of fields. However, many of these studies are not available in translation. Most of the work that I have seen does divide social space into very broad general fields. There is very little work done at a specific agency level. That which there is makes considerable use of technical quantitative sociological methods such as surveys, statistical information, and questionnaires which are in no way part of my approach. Bourdieu makes considerable emphasis on a 'scientific' approach and while his work talks of a balance between an objective structural approach and an individual phenomenological approach, his work weighs heavily toward the structural, objective side. From my perspective, he appears more interested in Grand Theory and overall approaches to social issues and philosophy than he is in the messiness of individual instances.

administrative field of these marketing boards, and I wish to focus on legal issues from the standpoint of a lawyer involved in that sub-field as a participant on behalf of the marketing boards.

What is suggestive, in Bourdieu's work, and perhaps novel in the context of the present thesis, is the opening that the concept of the field provides in order to look at the complex factors which make up the legal administrative fields in which the Alberta marketing boards operate. The relational and shifting nature of the field captures a sense of the dynamics and interplay of various factors all of which impact on the legal environment in which participants resolve issues. Some of the sense in which I find this most useful is apparent in Bourdieu's discussion of the state. He discounts the notion of the state as "a well-defined, clearly bounded and unitary reality which stands in a relation of externality with outside forces that are themselves clearly identified and defined":

> In fact, what we encounter, concretely, is an ensemble of administrative or bureaucratic fields (they often take the empirical form of commissions, bureaus and boards) within which agents and categories of agents, governmental and nongovernmental, struggle over this peculiar form of authority consisting of the power to *rule* via legislation, regulations, administrative measures (subsidies, authorizations, restrictions, etc.), in short everything that we normally put under the rubric of state policy as particular sphere of practices related, in this case, to the production and consumption of housing.[78]

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[78] *An Introduction to Reflexive Sociology* at 111. The case that Bourdieu is discussing was an analysis of the role of the state in the economics of housing in France between 1970 and 1980. Bourdieu points out that the forces belonging to both the private sector and the public sector are "sub-universes themselves organized as fields that are both united by and divided over internal cleavages and external oppositions." *Ibid.* at 112.

Thus, although he questions the value of the notion of the 'state' except as 'a convenient stenographic label - but for that matter a very dangerous one,' Bourdieu would define the state as:

> the ensemble of fields that are the site of struggles in which what is at stake is - to build on Max Weber's famed formulation - the *monopoly of legitimate symbolic violence*, [internal footnote relating to the state as the source of symbolic power and commenting on the adaptation of Weber's maxim omitted] i.e., the power to constitute and to impose as *universal* and *as universally applicable* within a given "nation", that is within the boundaries of a given territory, a common set of coercive norms. *Ibid.* at 112.

By focusing on a particular field in which I have considerable experience, I hope to be able to illustrate a similar dynamic in the operation of its legal administrative field.

The concept of habitus is also useful because it provides a means for developing a 'logic of practice' or a 'feel for the game' in relation to the practice of law within this specific field. It is with the notion of a legal habitus conditioned and modified by its relation to this particular legal administrative field that I hope to articulate some of the sense of practice within this area without losing in a minutiae of detail some of the importance of the structures and dispositions created by the impact of formal administrative law in this area. I want to convey some of the 'feel for the game' that is essential in practice in determining what I term "the realm of the possible": the particular range of outcomes which are possible within a particular legal administrative field in relation to a particular issue. However, with the concept of the field and the capital possessed by participants within the field, I want to examine some of the elements which structure the parameters and form of the field and the rules by which the 'game' is played by the participants. In this respect formal administrative law has an important role both directly in structuring aspects of the legal administrative field and indirectly through its influence on the habitus of the participants. I also seek to show how this specific legal administrative field is influenced and must adapt to shifts induced by other broader fields which impact upon it and to which it must relate. Thus, like Bourdieu, I seek to move beyond the arbitrary division between theory and practice and between "lawyers' values" and "administrators' values." I also hope that these concepts and my own experience will enable me to examine these issues from a perspective which can at least partially address two issues:

1. a problem of methodology that is faced in any detailed examination of administrative law within the context of a particular agency;
2. the fact that almost all work in administrative law takes a viewpoint which is 'external' to administration.

I propose to deal first with the problem of methodology.

A Problem of Methodology

I have argued that a significant criticism of administrative law is that it deals with only a very limited portion of the field in that it concentrates unduly on the issue of judicial review and the role of the courts. Furthermore, this approach ignores the nature of the administrative process by focusing too much on the formal administrative law and too little on informal administrative law. Similar criticisms of law as formalistic and process oriented; concentrating on procedure and forms and ignoring the substance of what is happening have been made from a number of standpoints. Whether the criticism is directed from the standpoint of legal realism,[79] Marxist legal studies,[80] feminist legal studies,[81]

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[79]See e.g. W. Fisher III, M. Horowitz and T. Reed eds. *American Legal Realism* (New York: Oxford University Press, 1993) [hereinafter *American Legal Realism*]. The law in action is emphasized instead of the law in books. Law is what judges and administrators do. See also G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995) [hereinafter "Minda"].

[80]A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) [hereinafter "Hunt"]; E.P. Thompson, *Whigs and Hunters*; A. Woodiwiss, *Social Theory After Postmodernism: Rethinking Production, Law and Class* (London: Pluto Press, 1990); D. Hay, "Property, Authority and the Criminal Law" *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975) are all explicitly Marxist critiques of law. The writings of critical legal theorists also draw on marxist concepts. This point is discussed in detail by J. Boyle in "The Politics of Reason: Critical Legal Theory and Local Social Thought" in J. Boyle, ed. *Critical Legal Studies* (New York: New York University Press, 1994) at 505 and several essays in the collection such as those by Peter Gabel adopt explicitly marxist perspectives. More general Marxist and Critical Theory works can be found in the bibliography. (See e.g. the works by Gramsci, Hall, Laclau and Mouffe, Jay, and Held).

[81]See e.g.: C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); M. Minnow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca and London: Cornell University Press, 1990); C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts: Harvard University Press, 1987) and *Toward a Feminist Theory of the State* (Cambridge, Massachusetts: Harvard University Press, 1989). Various feminist legal articles are also found in the collections by J. Boyle ed., *Critical Legal Studies* [hereinafter "Boyle"], and by D. Kairys ed., *The Politics of Law: A Progressive Critique* (Rev. ed.) (New York: Pantheon Books, 1990) [hereinafter *The Politics of Law*]. On a more general theoretical level, the works of D. Harraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991) and S. Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986), make related points with respect standpoint theory and the concept that any perspective is a perspective which is situated within a particular social, historical and gendered context which cannot be ignored.

critical legal studies,[82] or critical race theory,[83] the complaint is that the 'real' basis for decisions is ignored in favor of a formalistic ostensibly 'neutral' process which in reality is equally implicated in power relations.[84] A detailed discussion of the debates concerning this issue is beyond the scope of this thesis. Instead I want to focus on a narrower methodological problem which impacts on this emphasis on formal law in general and the courts in particular.

I would suggest that at least part of the reason for the emphasis on the courts in academic work on administrative law is methodological. The courts generate 'texts' which can be readily accessed and analyzed by scholars and practitioners. Courts are also granted the authority to determine the 'facts' upon which their decisions will be based. The nature or indeed the existence of 'facts' or of 'objective reality' is a matter of interminable debate in philosophy, the natural sciences, and the social sciences. There is no definitive conclusion

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[82]M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Massachusetts: Harvard University Press, 1986); R. Unger, *The Critical Legal Studies Movement* (Cambridge, Massachusetts: Harvard University Press, 1983); *The Politics of Law*; Boyle; and J. Leonard ed., *Legal Studies as Cultural Studies: a reader in (post) modern critical theory* (New York: State University of New York Press, 1995) [hereinafter *Legal Studies as Cultural Studies*]. In a Canadian context, see: J. Bakan, "Constitutional Arguments: Interpretation of Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 123 and Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Canadian Bar Review 307; A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507; A. Hutchinson, Mice Under a Chair: Democracy, Courts and the Administrative State" (1990) 40 University of Toronto Law Journal 374 and "Working the Seam: Truth, Justice and the Foucault Way" *Dwelling on the Threshold* (Toronto: Carswell, 1988); and A. Bunting, "Feminism, Foucault, and Law as Power/Knowledge" (1992) 30 Alberta Law Review 829.

[83]K. Crenshaw *et al.* eds., *Critical Race Theory: The Writings That Formed the Movement* (New York: The New Press, 1995); M. Klein, "Race, Racism and Feminist Legal Theory" (1989) 12 Harvard Women's Law Journal 115; N. Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo Law Review 325.

[84]There is also an extended discussion of this point by Bourdieu in "The Force of Law." Of course many of the claims to a better grasp of reality made by the legal realists, Marxists, and by Bourdieu would themselves be problematized by many feminist, critical legal and critical race scholars. In addition there are divisions within each of these theoretical approaches as well. For a discussion of some of the differences within Critical Legal Studies see the introduction by J. Boyle in Boyle ed. *Critical Legal Studies*. G. Minda discusses all of these movements in an American context in *Postmodern Legal Movements: Law and Jurisprudence at Century's End, supra* note 79. Some of the more radical critiques of law can be found in *Legal Studies as Cultural Studies* and in D. Caudill and S. Gold eds., *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (New Jersey: Humanities Press, 1995).

to this debate; which in one form or another it has engaged theorists for as long as we have records of their thoughts and their debates. What is important in the context of the courts is that within a particular discourse, the courts have the authority to make determinations of 'fact' and to provide authoritative interpretations of law which are given a status of legitimacy and indeed existence which is not granted to other participants in the discourse. The courts have a special position as authoritative fact-finders and interpreters. Their texts become 'official texts' and when combined with the power of the state which they can invoke they have 'real' effects on the participants. In Foucault's term, 'power/knowledge',[85] the courts exercise power partly because they define what constitutes knowledge and truth within certain contexts within the legal discourse and legal discourse is a form of discourse with its own power of creating legitimated and enforced norms.[86]

Therefore, the texts that the courts generate are both a textual and a legal interpretation of an event and an authoritative determination of the facts which constitute that event for the purposes of interpretation and enforcement. To a considerable degree, 'facts' become facts when they are recognized as such by the courts; circumstances which will not be recognized by the courts have a tenuous status in legal discourse. The entire structure of legal discourse makes it very difficult to argue that a court is 'factually wrong.'[87] Even if a person disagrees with the decision of the court, the 'facts' for that particular case have been established.

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[85]Foucault, *Power/Knowledge*. See also *Discipline and Punish* and the various collections of essays cited in the bibliography.

[86]Bourdieu makes a similar point in "The Force of Law" when he talks of the courts' 'power of naming' (see 837-839) but he distinguishes his position from 'a radical nominalism (suggested in certain of Michel Foucault's analyses)' by suggesting that legal discourse must function within the limits of the existing historically constituted structures of the world. (839). Whether this is a fair characterization of Foucault's position is another question, one unfortunately beyond the scope of this thesis.

[87]A circumstance regularly noted, if not always applied, by appeal courts in reviewing trial decisions.

This issue is widely recognized in the legal community; yet even if it is accepted as a problem, there remains the issue of access. The legal process generates texts, documents to which there is public access. At least notionally there is a text recording the process and basis of decision-making. A record is created; this in itself is a form of power/knowledge - what is preserved is the record of a court's view of a particular dispute; it becomes progressively harder to access the evidence and arguments presented by the parties on the record and the background to the dispute and the facts and materials that might be significant but which, for one reason or another, did not find their way into the official 'record' of the proceedings. Extremely relevant material in the possession of the parties is not 'public' and is generally not accessible. Over time all that remains tends to be the official record.

This problem is compounded in administrative law where much of the documentation that is generated is not public and not accessible. More importantly, there is a significant dimension of the decision-making process which may not generate or preserve records at all particularly where there is no proceeding or no adjudicative hearing. There is no text, no document to rely on, to criticize and to interpret. Much of what is done takes the form of informal, off the record communications, often verbal and seldom recorded in any form that is subsequently accessible by third parties. Such communications may be internal, within the agency, or may involve communications with external parties. The significance of such communications is recognized in almost every study of administrative agencies;[88]

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[88]See e.g. the Law Reform Commission of Canada, Working Paper Number 25, *Independent Administrative Agencies* (1980) at 82:

> *Ex parte* communications may be made from ministers to agencies concerning matters of general policy or individual cases. Government departments or ministers may sometimes issue policy statements or make speeches which may have an impact on agencies even though they have no formal status. Less formal, but equally or more important, are the personal contacts through agency participation in meetings and conferences or on task forces, in which clearly expressed and generally agreed upon policy preferences may become highly influential on future agency decisions.

This quotation is cited in M. Rankin and L. Greathead, "Advising the Board: The Scope of Counsel's Role in Advising Administrative Tribunals" (1993) 7 C.J.A.L.P. 29. Similar points are made by Steele *supra*

yet the effect is difficult to analyze precisely because they are so ephemeral and inaccessible.

The question of access is critical. Access is in general limited until after the fact, if it is available at all, and it is very resource intensive. Interviews or the historical study of documents, biographies, and various other forms of recollections are very labour intensive and maddeningly partial (in both senses of the word: incomplete; and reflecting a particular point of view). Access to internal documentation is restricted and such documentation does not always exist. Time, resource and access restraints make this type of study difficult and relatively rare. These are very real constraints which impact even on those disposed to this type of analysis. The result is that the majority of the legal discourse centers around what is accessible and what is recognized as authoritative. This same point can be extended to administrative agencies. Most of those studied are the agencies which occupy a decision-making role analogous to the courts and which most particularly create a record and a written decision.[89]

In some sense, much of legal discourse is more akin to literary interpretation than to some of the other social sciences. There is less reliance on empirical work[90] and more emphasis on the interpretation of text, be it cases or statutes. To a considerable degree the source of study is generated for the researcher in cases and in statutes. This provides a common, accessible text for discussion and debate. While this analogy is by no means complete and the emphasis is changing, there is also considerable force to it. Problems of methodology are in many ways less evident in much legal scholarship, not in relation to theoretical

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note 4, Mashaw *supra* note 8, *Without the Law supra* note 5 and Gellhorn *et al supra* note 11. See also Cohen *supra* note 41.

[89]See e.g. E. Rubin, "The Practice and Discourse of Legal Scholarship" (1986) 86 Michigan Law Review 1835 where this point is discussed in the context of legal scholarship.

[90]I use this term in only a very general non-technical sense to refer to research which generates information and material other than that available by recourse to readily accessible documents available in law libraries.

approaches, of which there are many, but in relation to subject matter. The advantage of common subject matter allows a focus on issues of theory and interpretation which would not be possible without a defined domain of discussion. Yet this same process also marginalizes and excludes material which does not become recognized as part of the record. This denies certain groups the opportunity to participate in the discourse and has been a significant feature of critical legal studies critiques of law, particularly those who provide feminist or critical racial studies critiques. Focus on formal written records also obscures the operation of forms of power which influence the outcome but do not appear on the record. Far from marginalizing such operations of power through such exclusion, the effectiveness of the power is enhanced by being invisible. Once again, this has been a focus of critiques of law ranging from legal realism to Marxism, feminism and critical legal and critical racial studies.[91]

An Internal Point of View

By adopting an internal participant's point of view in an area in which I have extended experience over a long period, some of this methodological problem can be addressed. Part of the problem is how to bring in some of my insights of experience as a participant in a particular administrative context. It is not that the discourse rejects this information, but the standards it requires have a certain exclusionary effect. These standards require some document or some individual to quote to support assertions. In the case of some informal communications, this is difficult, if not impossible. Yet to ignore this dimension of the administrative process is to present a partial and distorted view. I do not mean by this to suggest that there is such a thing as a complete and fully objective perspective; all views are to some extent partial and come from a particular situated standpoint; but this does not preclude arguments concerning the relative merits of particular points of view; nor does it

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[91]See *supra* notes 79-84.

preclude the argument that an approach which includes information that is otherwise marginalized or excluded is to be preferred.

To ignore the dimension of the participant is also to ignore what I consider to be one of the most interesting questions of administrative law - what is the relationship between 'formal law' and this informal, undocumented process which forms an integral part of administration and decision-making and what should this relationship be. Any answer to this question is 'partial' in both senses of the word but it seems to me that this is a critical issue, often debated in the abstract, but far less often considered in specific contexts.

What I want to do is to provide a participant's point of view concerning certain issues which arose in the context of two farm marketing boards in Alberta; specifically the point of view of my participation as one of the legal counsel for these boards. I want to interrogate my point of view and my involvement in these specific issues and how they relate to the relationship between law and administration with regard to the concepts of the legal administrative field and habitus. As part of this discussion I want to interrogate the point of view of an individual placed at the intersection of this interaction between law and administration: a lawyer retained to represent the interests of a particular agency in its relations with producers, processors, the general public, other similar agencies and various levels of government. I want to illustrate a perspective which is not often used in analysis - that of a lawyer acting for an intermediate agency which regulates and which is regulated by another level of administrative agency.

While I have had generous access to various files, documents and recollections concerning these issues, this is not a contemporaneous record of the experience or a memoir as such. It is a subsequent interrogation of a past recollection colored by my subsequent experience and considerable additional theoretical reading and contemplation. It does not, and cannot

assume a detached objectivist[92] viewpoint; it is neither the agencies' point of view nor that of a complete outsider; it is the point of view of a legal participant the nature of whose involvement is both in a certain sense identified with the agencies involved and in another sense that of an outsider.

What I intend to do is to examine certain events and certain legal issues within a specific legal administrative field from a particularly situated perspective.[93] I would hope that the perspective is not excessively partisan, but it is far from objective. I do not consider this a defect for the present purposes because part of my thesis will be the suggestion that it is extraordinarily difficult to develop, from some notionally external and objectivist perspective, general rules of administrative law which can apply across all contexts, in all situations and from all perspectives. For example, attitudes to judicial intervention can vary depending upon the issue and what other party is involved. They can also vary depending upon the access of the party in question to other means of reviewing or reversing an unfavourable decision.[94]

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[92]The term 'objectivist' is taken from the work of Sandra Harding who uses this term to argue against the assumed neutrality of positivist definitions of objectivity.

[93]Donna Harraway calls this type of knowledge acquired in a particular social, cultural, historical and gendered context, "situated knowledge."

[94]In this respect, it is interesting to note the shift in position with respect to judicial activism of many American commentators who were unhappy with the thrust of the Reagan appointments to administrative agencies. During the 1960's and early 1970's liberal scholars generally favoured activist courts which would flesh out generally worded legislative enactments and push social reforms while conservatives advocated judicial restraint. With more conservative judicial appointments, the situation is often reversed; conservatives advocate judicial action to strike down legislative provisions while liberals advocate judicial deference to statutes passed by a Congress more liberal than the executive. Similarly, from a position where liberals generally opposed judicial review which overturned legislative provisions and actions by administrative agencies, as unduly restrictive and an interference with the democratic process and the administrative agencies it produced, there has developed a sense that more judicial intervention is needed to preserve the original intent and independence of these agencies against interference and manipulation by the executive. The present position of judicial deference mandated by the US Supreme Court is criticized as unduly restrictive. Almost the exact opposite shift can be seen in conservative commentators who support judicial deference to the Reagan executive actions.

A Different Perspective: The Point of View of the Agency Lawyer

It is not my intention to suggest that an external viewpoint in respect to administrative agencies is wrong or is less accurate than some form of internal viewpoint. Nor is it my intention to suggest that the issues dealt with in the bulk of administrative law literature are not important or useful. However, any perspective taken conditions the conclusions reached and the assumptions upon which they are based and it is impossible not to adopt a perspective when approaching the topic. I also want to suggest that a useful supplement to the general external viewpoint taken in the literature is that of lawyers acting for administrative agencies. There is a valuable role for lawyers and for 'legal values' within administration when they display a sensitivity to context and a respect for the values and the needs of administration. I also think that the attempt to draw clear distinctions between law and administration fails to recognize how the two concepts are inextricably intertwined. I intend to show how this can be illustrated by the application of Bourdieu's concepts to my study of the legal administrative field in which the farm marketing boards operate.

I want to shift the focus, the point of view, to that of a lawyer acting for specific agencies over a period of time within a specific legal administrative field. This is a perspective which is neither completely external nor completely internal in terms of any dichotomy between law and administration. I want to look at how law functions in this context, within the agencies in relation to the law that they generate and in relation to how they interact with other agencies or arms of the government and with other participants within the specific legal administrative field. This is similar to Mashaw's internal view of agencies in his work but also a slight shift in position - Mashaw does reflect the agency point of view but from a detached 'objective' third party point of view.[95] My position is less

[95]The entire notion of an 'objective' viewpoint is fraught with difficulty. There is no detached objective viewpoint from which observations can be taken (what Donna Haraway refers to as ' the God Trick'). The

detached in that it is the point of view of a participant. Yet at the same time it is not precisely the agency's point of view;[96] it is conditioned both by the legal administrative field in which the agency operates and by my perspective and habitus as a lawyer.

Conclusion

This is not a theoretical work in the sense of developing a new comprehensive theory of administrative law assuming that such an undertaking were possible;[97] it makes no radical claim to theoretical originality although I am not aware of any other work on administrative law which uses Bourdieu's work as a starting point. Concern for context and sympathy for an agency point of view are not novel.[98] Skepticism concerning the ability to formulate general rules which will apply across all administrative situations is

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same issues look very different from different social, political, philosophic and economic positions and different conclusions will flow from these underlying, often unacknowledged, assumptions. Any observer is historically, economically, socially, culturally and politically situated and constituted and this cannot be avoided. Sensitivity to this issue does not resolve the divergence between various points of view, but it at least makes clear that these points of view exist and that they condition any conclusions reached.

[96]Of course this also begs the question of how far it is possible to represent the point of view of a legal entity which acts through various individuals who may themselves have conflicting motives and perceptions.

[97]Nor is it a theoretical work in the broader sense of the philosophy of law or the nature of law itself. This does not mean that there are not serious questions and concerns in this regard. Nor does it mean that I accept a humanist liberal attitude to law as unproblematic or as politically or socially neutral. Law is deeply implicated in issues of power and social domination. Even the fundamental assumptions of autonomous rational individual subjects, existing within a social structure consisting of particular institutions and a determinate system of rules can be questioned. This is one of the attractions for me of the work of both Bourdieu and Foucault and other theorists in philosophy and sociology. However, the fascinations, complexities and endless dialogue of philosophy and social theory in respect to these issues are beyond the scope of this thesis, and in many aspects beyond the scope of my knowledge if not my interests. This thesis acknowledges its limitations in the sense that while many of these issues are relevant and important to administrative law, and have shaped or altered my own attitude toward the subject, the approach and discourse adopted here are relatively conventional For a broader discussion of these issues see some of the general philosophical and sociological works cited in the bibliography.

[98]See among others: Willis, Macauley, Janisch, Arthurs, Mashaw, and Reid. Generally, the more involvement with the author has had with specific agencies, the more sympathy is shown for their point of view and for the complexities of agency activity and the need for sensitivity to context. As well, there is less advocacy for general models and more appreciation of the need to develop context sensitive pragmatic approaches tailored to each agency's situation and mandate.

also not new.[99] What I am attempting is to develop the work of Bourdieu as a framework to describe and examine two specific administrative agencies and the legal administrative fields in which they operate from the perspective or position that I have been discussing. This is presented as a perspective; it is one of many which are involved in this particular context and I suggest that it is a useful one from which to consider the intersection, overlap and blending of law and administration which occur within the agencies and within the legal administrative fields within which the agencies operate. Such an approach may bridge some of the gap which is exists between the theory of administrative law which emphasizes the application of formal principles of procedure and judicial review to particular agencies and the practice of administrative law in respect to many agencies in which formal proceedings and litigation may form a very small part of the practice in relation to a particular agency. It is a double shift in perspective: it draws upon the work of Bourdieu in an attempt to make visible aspects of legal practice within a particular legal administrative field; and it does so from a participant's perspective different from that of either a sociologist or a legal theorist.

[99]In fact, this is one reason why there is considerable debate on whether there really are basic principles and a coherent doctrine, or even an agreed definition of the scope, of administrative law. See *supra* notes 9-20 and accompanying text.

Chapter Two

The ACP and the APPDC: the Legislative and Regulatory Framework

Introduction

In this chapter I want to move from a general discussion of the concept of the legal administrative field in administrative law to the consideration of two specific agencies operating within particular legal administrative fields: the Alberta Pork Producers Development Corporation (the "APPDC") and the Alberta Chicken Producers (the "ACP"). These two entities are farm marketing boards, a term which requires definition. A commonly accepted general definition of the term "marketing board' as it is used in agricultural marketing is given by Hiscocks:

> A marketing board is a compulsory horizontal marketing organization for primary or processed natural products operating under authority delegated by the government. The compulsory feature means that all farms producing a given product in a specified region are compelled by law to adhere to the regulations of a marketing plan. The horizontal aspect means that marketing boards control the output of all farms participating in the particular marketing scheme and that they aggregate the supply from all farms up to a chosen or permitted level. Government authority through legislation is essential to achieve the required compulsion. The power of boards utilizing this authority is generally wide enough to affect the form, time and place of sales and, directly or indirectly, the prices paid.[1]

While this definition is useful as an introduction, it implies a far greater degree of uniformity between marketing boards in different agricultural products than actually exists and it applies most clearly to boards which exercise supply management functions. It is a

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[1]G. Hiscocks, "Theory & Evolution of Agricultural Market Regulation in Canada" (1972) 7 *Canadian Farm Economics* 20 [hereinafter Hiscocks]. This definition is quoted by a number of the other sources listed in the bibliography including: J.C. Gilson and R. Saint-Louis, *Policy Issues and Alternatives Facing the Canadian Hog Industry* (Ottawa: Agriculture Canada and the Canadian Pork Council, 1986) [hereinafter Gilson]; British Columbia, Legislative Assembly, Select Standing Committee on Agriculture, *Marketing Boards in British Columbia* vol. 5, "Marketing Boards in Alberta and Marketing Orders in the Pacific Northwest." (Victoria: November 1978).

common mistake to assume that all marketing boards exercise such supply management functions or that the same functions are exercised by each board. Much of the commentary and criticism concerning marketing boards tends to deal with them as a single model based on certain supply management boards. One of the purposes of this chapter and the thesis in general will be to illustrate how this generalization is inaccurate and misleading.

What the definition does establish is that a marketing board is established and operates under authority delegated by the government and administers a compulsory marketing plan which is created by regulation under the authority of specific government legislation. In Alberta, both the APPDC and the ACP were created pursuant to the provisions of the *Marketing of Agricultural Products Act.*[2] This legislation creates the boards, provides them with their authority to regulate, and governs both how they operate and how they are supervised and controlled. The Act creates some of the structure and parameters of the legal administrative field within which the boards function; it defines some of what is and is not possible for a particular board; it establishes a number of the entities which are significant within the legal administrative field; and it sets out some of the legal mechanisms and resources which are available to agents in the legal administrative field in their relations and struggles with each other. To paraphrase the quotation from Bourdieu in chapter one where he discusses the state: what is created is a legal administrative field within which agents and categories of agents, governmental and nongovernmental, struggle over this peculiar form of authority consisting of the power to *rule* via legislation, regulations, administrative measures (subsidies, authorizations, restrictions, etc.), in short

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[2]S.A. 1987, c. M-5.1 [hereinafter "the 1987 Act]. The boards in question were created under a predecessor Act, *The Marketing of Agricultural Products Act,* R.S.A. 1955, c. 192 as the Alberta Hog Producers' Marketing Board in 1969 and the Alberta Broiler Producers' Marketing Board in 1966. The 1987 Act instituted certain changes in what was required to be placed in producer plans and there were other amendments but the basic provisions of the Act remained substantially the same. For clarity, the references in this overview will be to the 1987 Act, except where otherwise specifically noted.

everything that we normally put under the rubric of state policy as a particular sphere of practices related, in this case, to the production and marketing of agricultural products.[3]

Any detailed discussion of the legal administrative fields[4] in which the two boards operate must begin with some knowledge of this Act. Therefore, a review of the Act is a necessary starting point. I will then provide an overview of the regulatory structure of the ACP and the APPDC as it can be determined from their respective Plans and regulations. There are two points to this overview: to point out some of the significant structural differences between the two boards and their legal administrative fields; and to illustrate how little sense of the legal administrative field can be determined solely by reviewing the Act, the Plan and the regulations. This chapter is, of necessity, primarily descriptive. However, it provides an essential background and reference point for a more detailed examination of particular aspects of the legal administrative fields in which the two boards operate.

The *Marketing of Agricultural Products Act*: An Overview

The *Marketing of Agricultural Products Act* is an umbrella act which deals with the establishment and administration of various producer plans intended to give the producers of a particular agricultural product the power to impose some degree of self-regulation on the production and marketing of their agricultural product within the Province of Alberta.[5] The Act authorizes a group of producers of a particular agricultural product to apply to a supervisory body established under the Act, the Alberta Agricultural Products Marketing

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[3]See chapter 1, note 78 and accompanying text for Bourdieu's quotation which referred to the economics of housing in France.

[4]As noted in chapter 1 and following upon this quotation from Bourdieu, I intend to use the term "legal administrative field" rather than "legal field" because I feel that it better captures the complex nature of the field created which combines elements of both a legal and administrative nature.

[5]This type of Act is not unique to Alberta. Similar, although not identical, Acts can be found in all provinces since at least the 1960's when the majority of the marketing boards were established. Marketing boards presently exist in every province. While the bulk of the marketing boards were created during the 1960s, the concept of compulsory producer controlled cooperative marketing and the basic structure of the umbrella acts had been developed in the late 1920s and early 1930s. See chapter 3 for further discussion of this point.

Council,[6] to create a regulatory plan which establishes a board or commission to regulate or to promote the production and marketing of that agricultural product.

Producer Plans

There are two types of entities that may be established under a plan: boards and commissions. Boards are entities which administer plans which provide for some degree of compulsory marketing regulation through the control and regulation of marketing or marketing and production of an agricultural product. Commissions are entities which administer plans designed to initiate and carry out projects or programs to "commence, stimulate, increase or improve" the production or marketing or both of an agricultural product but which do not have any powers to control or regulate the production or marketing of the agricultural product.[7] A commission may have the power to collect a levy or service charge from producers, but the funds collected are used solely for educational, research and promotion purposes.[8] While boards are given similar mandates to those of commissions in respect to promotion, the essential difference between the two types of entity are that boards have some powers to control and regulate the marketing, production, or both, of an agricultural product, while commissions have no such powers. In either case, a Plan submitted to the Marketing Council must set out the terms under which the proposed board or commission is intended to operate. The Plan for a particular

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[6]The Alberta Agricultural Products Marketing Council is the agency established under the Act to supervise the creation and operation of all producer organizations established pursuant to the Act. A separate agency, the Alberta Agricultural Products Appeal Tribunal, was established under the 1987 Act to provide an appeal mechanism from decisions of the producer boards. Similar agencies are generally created under the umbrella acts in the other provinces although sometimes the appeal and supervisory functions are combined in a single agency. This was the case in Alberta until 1987 when the Appeal Tribunal was first created. Prior to that time, the Marketing Council carried out both types of functions. Both these agencies are discussed in more detail below.

[7]Some care must be exercised in comparing this situation to other provinces because the same distinction is not always used. In a number of other provinces producer controlled bodies which exercise marketing regulation powers may be called marketing commissions.

[8]Depending upon the Plan approved, the service charge or levy may be refundable to producers upon their request or it may be non-refundable. Both types of commissions currently exist.

agricultural product operates as the framework or constituting document for the marketing board or commission which is established. Each plan is different and is tailored for the needs of a particular industry and the producers of a particular agricultural product.

A proposed plan must specify what agricultural product is to be the subject of the plan, whether the plan will apply to all of the province or only parts of it, whether any type of agricultural product or any persons are intended to be exempted from the plan, what regulation making powers specified under the Act the board or commission wishes to exercise, how the operation of the plan will be financed, and details concerning the composition and the manner of election of the members of the board of directors for the board or commission. In the case of boards, the plan must also specify what powers the board will have to control and regulate the marketing or the production and marketing of the agricultural product. The potential regulatory powers are very broad and are set out in sections 26 and 27 of the Act.[9] They include, among others, the following powers: to regulate price; to set quotas for production or marketing or both;[10] to control and regulate the production and marketing of the product including requirements that the product be marketed through the board or through a designated agency;[11] and the power to prohibit

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[9]There are some 35 regulation making powers set out in these sections of the Act. The powers are set out in very broad general terms and the intent is that each Plan can be tailored to a particular agricultural industry by including those powers which are required to create the regulatory system desired by the producers of the particular agricultural product. At present there are 16 boards and commissions created under this legislation.

[10]Those boards which regulate production and marketing through the establishment of quotas are called supply management boards. Such boards generally also have the power to regulate price. The ACP is such a board and it now regulates both production and marketing by way of a quota system although at an earlier point it regulated only marketing. A person is not permitted to produce or market chicken without holding the appropriate quota from the ACP which also has the power to establish the price at which various types of chicken will be sold.

[11]A second common type of marketing board is one in which production is not regulated but all product which is produced must be marketed through the marketing board or a designated agency. This type of board is referred to as 'single desk selling' and it exercises marketing, but not production control functions. The APPDC is this type of board. It does not regulate production and it does not restrict the number of hogs that a particular producer can market. There are no quota setting powers authorized under

any person from producing or marketing the product unless so authorized by the board; and the power to levy and collect service charges on the agricultural product marketed and to use those service charges to finance the operations of the board.[12]

Proposed plans involving boards and commissions[13] are not established until after they are approved by a plebiscite involving all eligible producers of the agricultural product to be regulated. The determination of what constitutes: an eligible producer; a sufficient number of eligible producers; and a sufficient portion of the total agricultural product that is marketed or is capable of being produced by the eligible producers is made by the Marketing Council which determines when sufficient eligible producers who market or can produce a sufficient amount of the agricultural product have registered in order for a plebiscite to be held. The plebiscite is conducted by and under the control of the Marketing Council and requires the approval of a majority of the eligible producers who have registered with the Council for the purpose of voting on the plebiscite.[14]

If the Plan is approved by the producers, the Lieutenant Governor in Council approves the Plan and passes a regulation under the Act which establishes the Plan and creates the board or commission which is to administer the Plan. The board or commission established becomes a body corporate with the power to pass regulations regulating the agricultural product in accordance with the provisions of the Plan and the powers contained within it.

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this Plan. Instead, as a single desk selling system, it requires that all hogs produced in the Province of Alberta for slaughter must be marketed through the APPDC.

[12]The rights of commissions to collect and use service charges and levies have been discussed above at note 8. The power to impose and collect a service charge gives boards and commissions the ability to be self-financing. A more detailed description of the two boards and the differences between them will be developed later in this chapter. At this point it is significant to note that two boards established under the same Act at approximately the same time exercise significantly different powers in very different marketing systems which reflect the different nature and ideology of their respective industries.

[13]Commissions which have a service charge which is refundable at the option of the producer may be established without a plebiscite. Several commissions have been established in this manner. Commissions where the service charge is non-refundable require a plebiscite.

[14]The exact terms of each plebiscite are set by the Marketing Council and may require a greater level of approval than a bare majority and also will generally require that the producers voting must constitute a specified percentage of the total production of the agricultural product.

However, before any regulations can be passed by a newly created board or commission, the Marketing Council, with the approval of the Minister of Agriculture, must pass an authorization regulation specifying which of the regulation making powers set out in the Plan can be exercised by the board or commission and indicating whether there are any restrictions or conditions imposed on the exercise of these powers. In accordance with the provisions of the Plan, the operations of a board or commission are controlled by a board of directors elected by producers in accordance with the provisions set out in the Plan. Every member of the board of directors of a board or commission must be a producer or the representative of a producer if the producer is a corporation.

While the Plan establishing a particular board or commission provides an outline of the extent of the authority which may be exercised by that body, it is framed in very general terms with regulation making powers described in the general terms taken from sections 26 and 27 of the Act. It is only when the board or commission passes regulations pursuant to its authority under the Plan and the authorization regulation from Marketing Council that the specific nature of the marketing system which will be in place for the agricultural product to be regulated becomes apparent. It is the regulations passed by the board or commission which create the specific regulatory terms under which the system operates.

There is a great deal of flexibility in the type of Plans that can be created and in the regulations that can be passed by a board, and to a lessor extent a commission, under a particular Plan provided that the appropriate powers are included in the Plan and have been delegated by the appropriate authorization regulation from the Marketing Council. Plans can therefore be tailored to the needs of producers in a specific industry and are kept general in nature so that a board or commission has flexibility to respond to changing economic circumstances and to new developments within the industry by passing new regulations. If changes to a Plan are required, the Act contains specific sections dealing with how amendments to the Plan can be developed and when a plebiscite of producers

will be required to approve the Amended Plan.[15] While the Act and the plans are structured in such a way as to give boards and commissions considerable flexibility, there are significant limitations built into the Act which can restrict the autonomy and regulatory freedom of action of boards and commissions.

The Marketing Council

All marketing boards and commissions are supervised by the Agricultural Products Marketing Council. The members of the Marketing Council are appointed by the Lieutenant Governor in Council who designates the chairman and vice-chairman of the Council.[16] All members, except the chairman, are appointed for a term of 3 years and can only be reappointed for one further 3 year term. Subject to the approval of the Minister of Agriculture, and in accordance with the *Public Service Act* there can be appointed a General Manager of the Council and such other employees as are required to conduct its business.[17] The expenses of the Marketing Council, including the salaries of its employees are paid by the Department of Agriculture and its offices are in the same building as the Department.[18] Considerable use is made by Marketing Council of the facilities and

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[15]Generally fundamental changes to the plan such as changes to permit control of production or marketing and the imposition of quotas would require a plebiscite. More minor amendments which do not change the basic purposes of the board or the nature of its regulatory powers might not require a plebiscite in order for the amendment to be approved. In the first instance this determination, as with most matters concerning plebiscites, is made by the Marketing Council.

[16]There are no formal qualifications for appointment and the appointments are at the discretion of the Minister of Agriculture. Most of the individuals appointed are involved in the agricultural industry in some manner although individuals who are not are also appointed to reflect consumer interests. Many members are agricultural producers of some type with grain, mixed farming, and cattle producers being most predominant although some members are also appointed who not producers but are consumers, food processors, agricultural suppliers or employees of the Department of Agriculture. Usually there is at least one hog producer and one member from one of the supply management boards out of a total Council of some 10 to 12 members. In recent years, it has been rare for employees of the Department of Agriculture to be appointed to the Council but this has occurred in the past.

[17]For most of this period, these employees have consisted of a General Manager and perhaps an Assistant General Manager or Executive Assistant, a Secretary to the Council, and such secretarial staff as is required.

[18]There is currently a proposal under discussion whereby a portion of the expenses of the Marketing Council and the Appeal Tribunal will be recovered by a levy from the boards and commissions that they supervise with the intent that eventually the system would be entirely funded by the various producer

employees of the Department of Agriculture and there are regular communications and consultations between the General Manager and the Chairman of Marketing Council and the Minister of Agriculture and senior members of the Department.

The Council has a broad mandate in respect to both the establishment of plans and the supervision of the operations of boards and commissions. Under section 11 of the Act, the Council, with the approval of the Minister, has the power to issue directions to a board or commission. This power to direct is defined in very general language.[19] The Council also has the power under section 13, to make regulations concerning plebiscites and "respecting any matter necessary or advisable to carry out the intent and purpose of this Act." It also has the power to make regulations prescribing by-laws for the conduct of the business and affairs of boards and commissions and the conduct of and procedures at their meetings.[20] The Lieutenant Governor in Council also retains broad regulatory powers under section 12 which are in addition to those exercised by the Marketing Council and go so far as to authorize the taking over of the assets and duties of a board or commission by the Council or a trustee.[21]

In addition to its general regulatory power, the Council also has a direct supervisory power over regulations passed by a board or commission. As previously noted, a board or commission cannot exercise the power to make regulations under either section 26 or

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boards and commissions. The details of this proposal have been under discussion for several years and have yet to be implemented.

[19]The Marketing Council may:

> (b) direct a board or commission to carry out any purposes of a plan that the Council considers necessary or advisable;
>
> (c) make any direction necessary to a board, commission or person for the purpose of administering this Act, the regulations or a plan.

[20]See s. 20. Once again, the power to pass regulations under ss. 13 and 20 requires the approval of the Minister.

[21]They also include: designating agricultural products for the purposes of the Act; designating particular activities as marketing or as processing for the purposes of the Act; requiring that certain regulations made by a board or commission under ss. 26 or 27 cannot be filed unless approved by the Lieutenant Governor in Council; and exempting persons or products from the operation of a plan.

section 27 unless authorized to do so by a regulation of the Council passed with the approval of the Minister.[22] Such approvals can be granted on a restricted or conditional basis. In addition, once a general authorization regulation has authorized the board or commission to make regulations, all regulations made by a board or commission must be submitted to the Council for review and approval and the Council has 45 days to conduct this review.[23] The Council can approve, disapprove or request amendments to the regulation and it is only after this approval process is completed that the regulation can be filed under the *Regulations Act* and take effect. As well, at any time, the Council can request that a board or commission amend or repeal provisions in its regulations. If the board or commission does not comply with such a request, the Council can, with the approval of the Minister, amend or repeal the regulation itself.[24]

The Appeal Tribunal

In addition to being subject to supervision by the Marketing Council, the actions of boards and commissions are also subject to review by another body, an Appeal Tribunal established pursuant to section 39 of the Act.[25] Section 36 of the Act provides that:

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[22]This regulation is usually referred to as an Authorization or Implementation Regulation. The first such authorization regulation is passed by the Marketing Council once a Plan has been filed as a regulation and upon the passage of this authorization regulation, the board or commission can proceed to make regulations consistent with the authorization regulation.

[23]See s. 29. As previously noted, certain limited types of regulation must be approved by the Lieutenant Governor in Council under s. 12(d).

[24]See s. 30.

[25]The Appeal Tribunal is a creation of the 1987 Act. Prior to that time, Marketing Council exercised the appellate powers which are now given to the Appeal Tribunal. The 1987 Act split the appellate and supervisory functions between these separate bodies. A primary reason for this was to prevent the inevitable tensions that arise between an appellate body and the agency it reviews from interfering with the ongoing regulatory relationship between the Marketing Council and all boards and commissions. The members of an appeal tribunal are appointed by the Minister and may be appointed for a particular appeal or for a term of not more than 2 years although this term can be renewed so long as a person does not serve more than 6 consecutive years. Employees to provide administrative services can be appointed pursuant to the provisions of the *Public Service Act.* These services are generally provided by the employees of Marketing Council and the operations of the two bodies are carried out from the same office. The members appointed by the Minister are generally individuals with some involvement in the agriculture industry. While the Tribunal retains a legal advisor for appeals, none of the members appointed have had legal experience or have been employees of the Department of Agriculture.

> A person affected by an order, direction or decision of a board or commission may, within 60 days from the day that he is served with it, apply to the board or commission, as the case may be, to have the board or commission review its order, direction or decision.

This section therefore contemplates that the initial stage in a review process is a request by an aggrieved person that the board or commission review its own decision. If the aggrieved person is not satisfied with the decision of the board or commission on the review, that decision can be appealed to the Appeal Tribunal.

There are extensive procedural requirements set out for both reviews and appeals. In general, a review is less formal and has fewer trappings of a judicial proceeding. Many of the standard features of an administrative adjudicative body are included in the Tribunal's powers on an appeal and some also apply to a review including:

- the right to attend all hearings in respect to an appeal or a review
- the right to have a decision rendered within a specific time period
- the right to be represented by legal counsel
- the right to "an adequate opportunity" to make representations, present evidence and cross-examine witnesses
- the right to written reasons

The Appeal Tribunal has certain additional powers which are relatively standard for statutorily mandated hearings including: powers to compel the attendance of witnesses and to compel them to give evidence under oath and to produce "any record or thing" that relates to the appeal; the power to receive new evidence not presented at the review; the power to take evidence under oath and to administer the oaths; the power to hold that judicial rules of evidence do not apply; the duty to record all evidence given; and the power to apply the Alberta Rules of Court relating to payment of conduct money and witness fees.[26]

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[26]See the rules governing reviews and appeals set out in s. 40. The influence of the general principles of administrative law concerning adjudicative hearings upon these legislative provisions is obvious and there is nothing that is particularly unique about the nature of the provisions governing the conduct of proceedings. Similar provisions can be found in many other statutes dealing with adjudicative hearings. Various difficulties can arise in practice when this McRuer inspired model of an adjudicative hearing is applied in instances which have regulatory implications far beyond a bi-polar dispute between a board and

On an appeal to the Tribunal, the board or commission being appealed from has the same rights as a person under the section. The Tribunal has the power to confirm or rescind the order direction or decision under appeal or it can rescind and refer the matter back for a re-hearing with such recommendations as it considers appropriate. The Tribunal does not have the power to order the board or commission to take a particular action. However, a copy of the decision goes to the Marketing Council which, with the approval of the Minister, does have the power to direct the board or commission to take a particular action.

There is no provision in the statute for an appeal to the courts of a decision of the Appeal Tribunal; however, there is no privative clause restricting judicial review. The only provisions in respect to reviews or appeals which refer to the courts is the provision providing for an application to court by a party wishing to appeal a decision of the Tribunal relating to hearing evidence of a confidential nature pursuant to section 41 and a further provision whereby the Appeal Tribunal may, and if so directed by the court it shall, state in the form of a special case for the opinion of the court any question of law arising in the proceedings. Therefore, any application for judicial review of a decision of the Appeal Tribunal would be governed by the normal principles of administrative law.[27]

Review of Marketing Council Decisions

Unlike the provisions with respect to reviews by boards and commissions and appeals from those reviews, there is only a very limited scope for review of any action taken by the Marketing Council. The review and appeal mechanisms under the Act provide that a

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an individual. Some of these issues will be discussed in chapters 5 and 6 when specific issues faced by the ACP and the APPDC are discussed.

[27]There are no reported decisions in which a decision of the Appeal Tribunal, or before 1987 the Marketing Council sitting as an appeal body, has been considered by the Alberta courts. I am aware of several unreported cases in which applications for judicial review were made either in respect to a final decision or in respect to interlocutory decisions in ongoing proceedings. In those cases which proceeded to consideration by the courts, none of the applications were successful.

'person, board or commission' affected by 'an order, direction or decision' of the Council can apply to the Council to review its decision in the same manner that a board or commission can be asked to review its orders, directions or decisions. However, there is no provision for an appeal of any decision made by the Council in reviewing its previous order, direction or decision. The Appeal Tribunal has no jurisdiction to hear an appeal concerning a Council decision. The powers of the Appeal Tribunal to summon and enforce the attendance of witnesses, to compel witnesses to give evidence on oath or otherwise, and to compel the production of documents all contain specific exceptions exempting "members of the Council or employees under the Council's administration."

The protection from review extended to Council goes beyond the issue of appeals. The Act contains a provision in section 45 enabling the Council to apply to Court for an order directing a board, commission or person to comply with the Act, the plan or the regulations. A similar power is given in s. 45(2) to a board or commission but s. 45(7) explicitly provides that: "An application under subsection (2) shall not be brought against the Council, its members or the employees under its administration."

An additional protection for the Council and its employees is contained in section 9 of the Act. This section provides that for the purposes of section 35 of the *Alberta Evidence Act* any record in the possession of the Council is deemed to be in the possession of the Minister and any member of Council is treated as if "he were an employee of the Government." The intent of this section is to extend the privilege against production afforded to the Crown to the Marketing Council. No similar protection is afforded to boards and commissions.

In terms of a challenging a decision of Marketing Council in the courts, there are a number of difficulties. The scope of any application for judicial review is severely restricted both by the evidentiary and the statutory protection provided to Council and its employees and

by the nature of most of Marketing Council's activities which fall within the area that the courts have traditionally regarded as administrative or legislative discretion and policy and thereby beyond the scope of judicial review. In addition, it is arguable that the intent of the 1987 Act which created the Appeal Tribunal was to split off the adjudicative functions formerly performed by the Marketing Council to the new body, the Appeal Tribunal leaving the Marketing Council to carry out administrative and policy functions. Marketing Council as its own reviewing agency is therefore essentially beyond review except through the political process. From the point of view of boards and commissions, in most cases the only effective appeal against a decision of Marketing Council becomes a political one to the Minister of Agriculture or to the Cabinet in general. Because so many of the regulatory functions of Marketing Council can only be exercised "with the approval of the Minister," any serious dispute between a board or commission and the Marketing Council is likely to involve the Minister to some degree.

Summary of The Act

This overview of the Act sets out the basic legal mechanisms for the creation and regulation of marketing boards[28] and the Plans that they administer. But it also illustrates how little can be determined about how the administrative system operates without some sense of the context in which this framework is set; it establishes little beyond the bare outline of some of the entities such as producers, marketing boards, the Marketing Council and the Appeal Tribunal which operate within the legal administrative field and some of the legal rules which govern the relations between these entities; other important participants, such as processors, are barely mentioned. The Act conveys no sense of the political, historical, social and economic factors which have shaped and continue to shape the legal administrative field and the relations between the various participants or agents

[28]Since both of the agencies that I will be considering are marketing boards, I will not be referring hereafter to marketing commissions unless specifically noted.

within the field. To say that a marketing board can be created does nothing to indicate what type of marketing board will be created and how it will reflect and respond to the needs and the ideologies of the industry and the producers for which it is created. To say that regulations can be passed does nothing to indicate what the form of those regulations will be or how they will be administered. To say that supervision is possible does nothing to indicate how and when that supervision will be exercised and who will make this decision. To proceed further, it is necessary to look at the Plans and the regulations which established the ACP and the APPDC.

The Regulatory Structure of the ACP (to 1992)[29]

The Alberta Broiler Producers' Marketing Plan 1965,[30] established a Plan to provide for "the effective promotion, control, and regulation in any and all respects and to the extent of the powers vested in the Board, of the transportation, processing, packing, storing and marketing of the regulated product[31] within the Province of Alberta" including the prohibition of such activities in whole or in part. The Plan applied to all persons in the Province of Alberta involved in these activities and set out various purposes including:

a. maintaining a fair and stabilized price for the regulated product;

b. developing and maintaining the orderly marketing of the regulated product;

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[29]This discussion relates to the ACP's regulatory structure as it existed in 1992. There have been extensive regulatory changes to both the Plan and the Regulations since that date. I do not deal with these changes in detail and my discussion is directed to the Plan and Regulations as they existed to 1992 since these are the relevant regulations for the specific legal issues which are reviewed in detail in this thesis. Where it is necessary to refer in later chapters to the changes made in 1993, and subsequently, these references will be specifically made.

[30]Alta. Reg. 17/66 as amended. This was the regulation under which the ACP was first created as the "Alberta Broiler Growers Marketing Board". The name has subsequently been changed twice, first to the Alberta Chicken Producers' Marketing Board in 1986 and then to the Alberta Chicken Producers in 1993. The reasons for the name changes will be referred to in a later chapter. For convenience, I refer throughout the thesis to the board as the ACP. The 1965 Plan has since been replaced by a new Plan in 1993 (Alta. Reg. 70/93) but a detailed discussion of this new Plan extends beyond the period of review in this thesis.

[31]"regulated product" was defined in the Plan as meaning "any or all of roasters, broilers, or rock cornish chicken within Alberta." Each of these types of chicken were also defined in the Plan.

c. ensuring a continuous year-around supply of the regulated product for the trade and consumer market;

d. working with other marketing boards having similar objectives which may be established in Canada;

e. making regulations providing for the marketing of broilers, roasters. and rock cornish chicken through separate quotas for each category.[32]

Various terms were defined in section 2 of the Plan and the ACP was established as a Board consisting of five registered producer members having authority to administer the Plan. The balance of the Plan related to constitutional matters such as the plebiscite for the Plan, meetings of registered producers, election of members of the Board, quorums, and the operations of the Board. Under the final section of the Plan the Board was empowered to accept and exercise any power or authority delegated to it by or pursuant to the Canada Act.[33] Aside from these general provisions, there was no reference in the Plan to the specific regulation-making powers of the Board.

In order to determine what power the ACP had to make regulations, it was necessary to refer to the authorization regulation passed by the Marketing Council which delegated or vested certain specific powers to make regulations to the ACP under certain designated sections of the *Marketing of Agricultural Products Act.*[34] These powers included: the

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[32]See Alta. Reg. 17/66, s. 3. Other purposes included: maintaining a uniform high quality product; maintaining adequate advertising and promotion of the regulated product; and becoming a member of farm organizations. These provisions are not emphasized because they do not relate to the compulsory marketing function of the Board.

[33]The significance of this section is not apparent from the Plan but "Canada Act" was defined in the *Marketing of Agricultural Products Act* as the *Agricultural Products Marketing Act* (Canada) and a similar authorizing power appeared in the Act. The importance of the Federal legislation and of a national marketing plan in chicken will be discussed in later chapters.

[34]Alta. Reg. 458/67. Powers under the then existing Act were divided into two sections. Under one section, Marketing Council was given certain regulation-making powers which it could delegate to a board. Under the second section, certain regulation-making powers could be vested in the board by the Marketing Council. Unlike the present structure described in the general overview of the *Marketing of Agricultural Products Act* above, the ACP's Plan did not specify all of regulation making powers that might be exercised with the approval of Marketing Council. This procedure was a change instituted by the 1987 Act. In order to find what powers had been delegated to marketing boards created prior to 1987 it was necessary to locate the appropriate authorization regulation and cross-reference the subsections referred to in the regulation to the appropriate subsections in the then existing Act. Because of various

power to establish and regulate the marketing of the regulated product on a quota basis; the authority to set the price of the regulated product, subject to the duty to consult with an Advisory Committee established under the regulation; the power to prohibit any marketing of the product except in accordance with the system to be established by regulation of the ACP; and the power to institute and collect a service charge, subject to the service charge changes being approved by producers at their next general meeting.[35]

Pursuant to the authority of the authorization regulation, the ACP passed the Alberta Chicken Producers' Marketing Regulation.[36] This was the operating regulation made by the ACP and approved by Marketing Council and it provided the detailed regulations for the establishment and regulation of marketing through marketing quotas.[37] Under the Regulation, no person can engage in hatching, processing or marketing of chicken without a valid license from the ACP.[38] There are detailed provisions for the application for the various forms of license and the renewal, cancellation and revocation of licenses. Detailed reporting requirements are placed on each type of licensee to enable the ACP to know how many chicks have been placed with a producer and how much chicken has been

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consolidations and amendments, determining what powers were actually delegated had become a confusing process. A major part of the new Plan approved in 1993 involved amending the form of the Plan to include the powers from the Act within the Plan itself. Reference to the authorization regulation is still necessary, but it is now possible to look at the Plan and get a fairly clear idea of the nature of the potential powers of the marketing board created.

[35]I have included reference to only some of the most important regulation making powers. There were many others relating to enforcement and reporting and to incidental matters which are not specifically referred to.

[36]There have been various forms of this regulation starting in 1968 (Alta. Reg. 33/68 as amended; repealed and replaced by Alta. Reg. 354/72 as amended; repealed and replaced by Alta. Reg. 152/86 as amended; repealed and replaced by Alta. Reg. 35/91). The references which follow are to the 1991 regulation, Alta. .Reg. 35/91, unless otherwise noted. When the new Plan was passed in 1993, Alta. Reg. 35/91 was repealed and replaced by Alta. Reg. 84/93. A new replacement marketing regulation is currently in the process of being filed but neither it nor Alta. Reg. 84/93 will be discussed in detail.

[37]It was not until the 1993 that the authority to regulate production, as well as marketing, was granted to the ACP under the terms of the new Plan approved by producers in a further plebiscite. This new Plan also made the changes necessary to have the Plan conform to the structure contemplated under the 1987 *Marketing of Agricultural Products Act* which has been discussed above and changed the name of the board to the ACP.

[38]All of these terms are defined under the regulation. See s. 2.

marketed by each producer. A service charge is established for all live weight of chicken marketed and there are specific obligations placed on processors to deduct this service charge and remit it to the ACP. The types of quota which can be established by the ACP are set out in detail and no person is allowed to market chicken except pursuant to one of the forms of quota or an exemption or permit under the Regulation. No processor can buy chicken from any person other than a licensed producer and no producer is allowed to market chicken at less than a price established by the Board. The basis for the calculations that determine how much chicken can be marketed by a quota holder are set out in the regulation and there are detailed regulations concerning many aspects of quota including: applications for quota; general quota increases; definition and treatment of different types of quota; the transfer, division or leasing of quota; requirements concerning the premises required to produce chicken; variations in production cycles and the amount of chicken to be produced in any production cycle; penalties for over or under marketing of chicken; the operation of a quota exchange; and the ability to reduce or cancel quota under specified conditions.

The Plan and the regulations clearly establish the ACP as a supply management marketing board. The ACP has the power to limit supply by limiting the amount of chicken which can be marketed, since, beyond a small exemption intended primarily for personal consumption and sales at farmer's markets, no person could market chicken without a quota issued by the ACP. Under the Regulation, the ACP can set the amounts of chicken that can be marketed under each quota in each production cycle and the times at which it can be marketed. Only registered producers holding quota can market chicken and they must market it in accordance with their quotas.[39] The ACP has the power to set minimum

[39]The primary change to this system in 1993 was the addition of the power to regulate production. Therefore, quotas now relate to production as well as marketing and monetary penalties for overproduction can now be imposed. Prior to this time, the only penalty possible for over-marketing was a permanent or temporary reduction of marketing quota.

prices for broiler chicken after consultation with an Advisory Committee provided for under the authorization regulation.[40] Control of marketing is achieved by requiring processors to buy only from producers who hold quota and to pay the regulated price for the chicken purchased. The operations of the ACP are financed by the service charge provided in the Regulation and processors are required to deduct this service charge from proceeds due to producers and then to remit it to the ACP. By far the bulk of the Regulation deals with detailed provisions relating to the various types of quota and how it is to be dealt with. It is clear that the quota system is the foundation of the regulation and control of marketing which is contemplated under the Plan and the Regulation.

The Regulatory Structure of the APPDC (to 1993)[41]

The APPDC was established pursuant to the Alberta Hog Producers' Marketing Plan, 1968.[42] The initial Plan was amended on several occasions which will be discussed in more detail in the next chapter. The description which follows relates to the Plan as it existed after 1981 when it assumed substantially the form which it retained until its replacement in July, 1996. The Plan applies to all persons who "produce, market, or process hogs." The general purpose and intention is described as to "provide for the effective sale and promotion of hogs and processed pork, and the effective control and regulation of all aspects of the marketing of hogs within the Province, including the prohibition of such

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[40]The Advisory Committee includes processor representatives and representatives of certain other producer and farm organizations.

[41]This date was chosen to correspond to the time period considered in the review of detailed issues in this thesis. However, there were no major changes to the Plan and Regulations between 1993 and 1996. A replacement for the 1968 Plan has been filed on July 10, 1996, as Alta. Reg. 141/96. Work is currently under way on new Marketing Regulations which are anticipated to become effective in October or November of 1996. The new Plan contains few major changes from the earlier Plan; it is primarily an update and a revision to correspond to the 1987 Act. However, the new Marketing Regulation contemplates a fundamental change: the APPDC will no longer be the sole marketer of hogs within the Province of Alberta. Producers and processors will have the option to deal directly with each other. These proposed regulations were reviewed with producers in meetings scheduled in August, 1996. While this change must be noted for accuracy, the events leading to it will not be a focus of discussion in this thesis which will concentrate on an earlier historical period.

marketing in whole or in part,".[43] There follow 11 specific purposes some of the most significant of which are:

a. establishing facilities through which producers can sell hogs, including the establishment of a teletype system as one of the selling mechanisms available to the Board;

b. establishing methods and conditions of sale in respect of hogs;

c. providing for all buyers of hogs equal opportunity to bid on hogs sold by or through an electronic communications system provided by the Board;

d. acting as principal in the development of a market for hogs and processed pork, with power to undertake and carry out all aspects of such marketing;

e. using service charges and other sources of capital as are available to carry out the development of an export market for hogs and processed pork;

f. establishing, from time to time, the manner in which the teletype system will operate and the information contained on the teletype tape, including but without limiting the generality of the foregoing, the power to determine the range but not the price at which the hogs may be offered for sale.[44]

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[42]Alta. Reg. 195/68 [hereinafter the Plan or the 1968 Plan]. Although amended on several occasions, this Plan remained in effect until July 10, 1996. The board established was initially called the Alberta Hog Producers' Marketing Board. It subsequently changed its name to the Alberta Pork Producers' Marketing Board (at which time the name of the Plan was also changed to the Alberta Pork Producers' Marketing Plan, 1968). A second name change was made to the present name, Alberta Pork Producers Development Corporation. The motivation behind this second change of name was a desire by pork producers to remove the reference to "Marketing Board" in order to distinguish their organization from supply management boards with whom the term "marketing board" was usually associated by consumers, economists and politicians. For convenience, I refer to the board throughout as the APPDC.

[43]Alta. Reg. 99/81 changed this definition by adding references to the "sale and promotion of hogs and processed pork" instead of simply referring to "promotion". It also added a subsection which authorized the Board, in order to "effectively promote and sell hogs and processed pork" to acquire the business or shares of a company located in or out of Alberta which had as one of its objects the power to process and sell pork and pork related products. The purpose of this amendment is not apparent in the Plan but will be discussed in a later chapter.

[44]See the Plan, s. 3(2). Various portions of these provisions were the subject of ongoing disputes and received legal interpretation in court challenges to the Plan. This will be discussed in a later chapter. Other purposes included: providing relevant educational information and assisting in research on production, marketing quality improvement and consumption of pork products; providing market information services; encouraging the improvement of assembly, transportation and handling of hogs; improving understanding within the swine industry and with related industries; and working with other marketing boards or agencies having similar objectives. These were very important, but less contentious activities and they were related more to promotion, research and public relations rather than to the regulation of marketing which is the focus of this thesis.

The Plan provided that all hogs covered by the Plan must be sold through the facilities provided by the APPDC and it prohibited any other sales.[45] After provisions relating to the plebiscite to approve the Plan, the APPDC was established as a board consisting of nine registered producer members, who would have authority to administer the Plan. The balance of the Plan related to: the division of the provinces into nine districts, each of which would elect one director and five delegates; annual meetings of producers and delegate meetings; nominations and elections; and general administrative and operating authorizations. The APPDC was also empowered to accept and exercise powers and authority delegated to it under the *Agricultural Products Marketing Act* (Canada). As in the case of the ACP, no regulation-making authority was specifically conferred in the Plan and again reference must be made to the appropriate authorization regulation made by the Marketing Council.

Under the authorization regulation passed by the Marketing Council various powers were delegated or vested in the APPDC to make regulations.[46] The powers under the Act which were delegated included: directing and controlling, either as principal or agent, the marketing of the regulated product; requiring that the regulated product be marketed by or through the APPDC and prohibiting any person from marketing hogs except through the APPDC; requiring persons producing the regulated product to sell through the APPDC and persons buying the regulated product to buy from or through the APPDC; imposing and collecting service charges; licensing persons engaged in marketing or processing of the regulated product and prohibiting marketing without a license; and requiring the

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[45]The Plan, s. 3(3) and s. 3a.

[46]Alta. Reg. 28/72, as amended. This regulation replaced the original authorization regulation (Alta. Reg. 230/69) and although there have been various amendments, it has remained in force to the present although a new authorization regulation is now being filed as a result of the new Plan filed in July, 1996. The regulation as described is the one that was in effect from 1980 onward. Amendments after that date were minor. Prior amendments, some of which were very contentious, are discussed in a later chapter.

purchase price for the regulated product to paid through the APPDC.[47] The authorization regulation required that the delegates must approve any increase in the service charge and it limited the amount of the service charges that could be used for a research fund. It also authorized the APPDC to make direct settlements to producers for hogs sold and provided that the APPDC could pool all sales received and pay producers a pooled price. Specific authorization was also given in respect to the following:

a. the power to establish the form of operation of the teletype and the information to be shown, including the power to determine the range, but not the price, within which hogs may be offered for sale;

b. the power to negotiate directly with a processor or buyer for the sale of hogs, without first offering the hogs for sale through the teletype system;

c. the power to sell through direct negotiation hogs, that were previously offered for sale through the teletype system and not sold, at a price which may be less than the price range offered for sale through the teletype system.[48]

What is equally significant in this authorization regulation is what is not delegated to the APPDC. Unlike the ACP, the APPDC did not receive the authority: to establish a quota system; to limit the supply of regulated product marketed; or to set the price to be paid for the regulated product. No authority of any kind was included to regulate production of hogs; only marketing could be controlled and the only control that could be imposed was that hogs marketed in Alberta had to be marketed through the APPDC.[49]

The primary regulation made by the APPDC to implement the Plan is the Hog Marketing Regulation which establishes the selling system used by the APPDC to market hogs.[50] The

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[47]Once again, only the most significant powers are listed. There were many other incidental powers also included.

[48]There is no indication in the regulation why these particular powers are specifically referred to in expanded form. Each of these powers will be specifically dealt with in a later chapter when the disputes between the APPDC and the processors and between the APPDC and the Marketing Council are discussed.

[49]None of these powers could be delegated under the authorization regulation because they were not within the purposes set out under the Plan.

[50]Alta. Reg. 242/87, as amended. This is the major regulation under which the APPDC functions. There are certain additional regulations dealing with a Producer Indemnity Fund and certain specific situations

essential feature of the system is that no person shall offer hogs for sale except to or though the APPDC and no person shall buy hogs except if they are sold by or through the APPDC.[51] The APPDC is authorized to sell and purchase hogs as either a principal or as an agent for a producer and it can specify, by order, the manner and times at which hogs can be marketed; it may offer hogs for sale or receive offers for sale through the medium of an electronic communications system or otherwise or it can negotiate directly with buyers. All sales proceeds for hogs must be paid to the APPDC which pools all sales receipts for each day and then pays that pooled price to producers who sold hogs on that day. The APPDC is authorized to operate terminal yards and can direct shipments of hogs to particular terminal yards or assembly yards. Any person who produces, processes or markets hogs is required to furnish any information concerning that production, processing or marketing that the APPDC may require. A licensing system for buyers, transporters, and assemblers of hogs is established.

The bulk of the detail under the Hog Marketing Regulation deals with relations with processors: the establishment of a selling system and other means of negotiating and contracting with processors; the establishment of terms and conditions of sale and payment; delivery and liability issues; the provision of financial security by processors; reporting requirements from processors; and the means of payment and settlement for hogs. Aside from the requirement to sell hogs through the APPDC, there is very little in the regulations dealing with relations between producers and the APPDC except in the

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which have arisen but these have little impact on the ongoing operations of the APPDC and they are not dealt with specifically here. The marketing regulation has been replaced several times since the first marketing regulation in 1969. The description which follows is based on the current regulation Alta. Reg. 242/87, as amended. Earlier provisions will be referred to where required in later chapters.

[51]As discussed above in note 41, it is contemplated that this regulation will be replaced in late 1996 and that the new regulation will fundamentally alter the nature of the selling system by no longer requiring that all sales of hogs must be made through the APPDC. This is a topic which is beyond the scope of this thesis but it must be noted that the discussion herein will soon be outdated in terms of the fundamentally altered nature of the system.

most general terms[52] and there is nothing concerning regulation of the nature of producers' production facilities or farm operations.

The APPDC Plan and regulations create a system in which all hogs marketed in Alberta must be marketed through the APPDC and no direct negotiations are permitted between producers and buyers. This is what is commonly referred to as a single desk selling marketing board; the APPDC becomes the sole marketer of hogs for all producers in the province and it negotiates with buyers on their behalf. There is no restriction on who is allowed to produce and market hogs or upon the number of hogs that may be marketed by a producer.

Analysis of the Legal Framework

From an administrative law standpoint, the framework established by the *Marketing of Agricultural Products Act* is interesting in a number of respects. The marketing boards are given extensive powers to regulate the industry of which their members are a part. They are essentially self-financing, paying for their operations through service fees collected from producers. They are composed of and elected by producers of the regulated product and do not depend upon the government for their appointment or continued tenure. They are, therefore, not subject to the fiscal and appointment controls experienced by many agencies which are financed and appointed by the government. They have broad powers of regulation which affect not only their member producers but purchasers of the product and anyone who wants to become a producer of the product. They employ their own staff who are not government employees and who are answerable to the producer elected board of

[52]An exception is the Regulation creating the Producer Hog Indemnity Fund which is a voluntary insurance program to which producers contribute premiums in order to be insured against losses during delivery. The establishment and operation of this fund have not been matters of controversy and have not given rise to any major legal issues. I am therefore concentrating on the marketing and regulatory functions of the APPDC and not on this service function, nor the promotion, educational and research activities referred to above.

directors. They are an agency which is part of a self-regulating producer structure rather than an agency appointed by the government to carry out government policy.

Despite this apparent degree of authority and independence, there are extensive controls built into the Act to supervise the conduct of boards and to provide both formal and informal appeal mechanisms to challenge the decisions of boards. The extensive supervisory and direct regulatory powers of the Marketing Council and the Minister and the Lieutenant Governor in Council mean that a board's freedom of action can be severely restricted by an aggressive exercise of Marketing Council's powers. A great deal will therefore depend upon the manner in which the Marketing Council exercises its powers and how it perceives its mandate. There is also the question of whether Marketing Council's actions will be reactive or proactive, passive or aggressive. Since so many of the powers exercised by Marketing Council are subject to the approval of the Minister of Agriculture, the Minister's attitude and that of the Lieutenant Governor in Council are also clearly vital. Despite the flexibility of the framework of a Plan approved under the Act, the degree of self-regulation permitted will depend vary depending upon the attitude that Marketing Council adopts and upon the position taken by the Minister and by the Lieutenant Governor in Council in respect to disputes between a board and the Marketing Council and in respect to the general directions given to the Marketing Council both formally and informally.

There is therefore an interesting balance between the grant to producers of economic and market power through an extensive power to regulate and the restriction of that power through administrative controls built into the Act. Various questions are raised: Is the board responsible to the producers who elect and finance it or does it have a broader public responsibility? Whose interests must the board consider in exercising its authority? Is it a public agency or a private producer body? How can the balance between producer interests and the interests of the public and the industry at large be maintained? What

degree of regulation of marketing and of production (where applicable) is appropriate? How are the interests of non-producers to be protected? What happens when some producers do not agree with the decisions of the board? When issues arise concerning these questions, there is a strong potential for conflict between the perceptions of a board on the one hand and the Marketing Council on the other hand concerning the purpose of the Act and the role to be played by the Marketing Council. Is the Marketing Council a facilitator or a regulator? Who does the Marketing Council represent? What role should it play in the creation of regulations? Who is Marketing Council accountable to? None of these questions are clearly answered by the statute. To indicate that a board has the power to make certain regulations or that the Marketing Council has extensive supervisory powers which it can exercise does not establish if, or how, the regulation making powers and the supervisory powers will be exercised. While some of the broad outline of the legal field in which Alberta marketing boards operate can be determined from this review of the Act and the Plans created thereunder, more is required to understand the specific nature of the legal administrative fields for the ACP and the APPDC. The potential for a great deal of flexibility and for a strict degree of control both exist under the Act; more is required before a sense of the operations and dynamics of the legal administrative field can be obtained.

Conclusion

Some of the general outlines of the legal administrative field established by the *Marketing of Agricultural Products Act* are apparent from a review of the structure of the Act. Some sense of the nature of each board is also apparent from an overview of the Plans under which the marketing boards were created and the regulations which they have created and which they administer. It is clear that two very different regulatory systems have developed for chicken and pork although they developed in the same period in the same Province. It is also apparent that the term "marketing board" can refer to very different

entities. However, what is not apparent from this review of the legislation and the regulations is why marketing boards and marketing board legislation were created, why producers of two agricultural products in the same province have developed such different marketing systems, and why each board has developed in the manner that it has. Nor does this overview indicate those less visible aspects of the field which impact upon what may or may not be possible within these particular legal administrative fields and upon how the legal powers granted to each of the entities created under the Act, the Plans and the regulations will be exercised. This type of appreciation cannot be developed in the abstract; it requires a political, economic and historical context in which to situate the legal administrative fields of marketing boards and the agents active within the fields. In order to address these points, the next chapter will examine some of the economic, political, historical and social factors which led to the creation of marketing boards as a statutorily authorized means of intervention in agricultural markets.

Chapter Three

Government Intervention, the Farm Income Problem and the Development of Farm Marketing Boards

Introduction

This chapter will explore some of the aspects of the agricultural economic fields and political fields which led to the development of marketing boards. As part of this discussion, I intend to make use of the theoretical structure of fields developed by Bourdieu and discussed in chapter 1. This will involve the application of all three of the concepts discussed: the field, capital and habitus. Within the confines of this thesis this discussion cannot be a complete application of the theory to these legal administrative fields; it can only highlight some of the ways in which this approach provides a means to examine aspects of the fields that more traditional legal approaches leave untouched as something outside the discipline. Still, within the limits of this thesis, a number of important points can be made.

No particular field, legal or otherwise, arises in isolation; it has an historical genealogy and trajectory[1] and it cannot be considered in isolation from the other fields with which it intersects and relates and whose elements also form part of the field in question. The agents within the field also have a their own genealogies which, in part, account for the various forms of capital which they possess and the form of their habitus which

[1]A particular legal administrative field has its antecedents which are important in looking at how the field was formed and what problems it was intended to deal with since these factors help to determine the parameters of the field. Additionally, the issues faced by a marketing board and its relations to its producers, processors, the government and other participants in the field change and shift over time. A marketing board that has existed for 30 years is in a different position than when it was a newly constituted board. The position of other agents in the field also does not remain static.

predisposes them to act in certain ways. Because so much of the dynamic of any field depends on the encounter between the habitus and capital possessed by agents, it is impossible to understand the dynamics of the field and the relations between the agents without some sense of this history.

Marketing Boards: Heretics among the Heretics

If administrative agencies can be described as 'structural heretics'[2] in relation to the traditional division between legislative, executive and judicial functions, then marketing boards are heretics among the heretics - they do not easily fit within any of the traditional models of administrative agencies.[3] They exercise statutory powers but because they are elected and financed by producer members, they enjoy an autonomy of appointment and a financial independence from government which distinguishes them from most other statutory agencies. Like trade unions, marketing boards create a mechanism for collective action by producers to enhance their economic position and provide a statutory form of countervailing power, but some marketing boards,[4] unlike trade unions, have the statutory authority to set prices and to limit supply or production by regulation. Marketing Boards are granted a statutory authority for economic regulation on behalf of producers which arouses the wrath of many economists[5] and some consumer groups[6] yet they have enjoyed

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[2]The term is from H. Janisch, "Independence of Administrative Tribunals: In Praise of Structural Heretics" (1988) 1 C.J.A.L.P. 1.

[3]In one of the very few references to marketing boards in legal literature, J. Frecker, "Administrative Tribunals and Access to Policy Development" (1992) 6 C.J.A.L.P. 69 at 70 states: ... others such as commodity marketing boards, are so far removed from the type of decision-making we normally associate with courts that it may be misleading to characterize their actions as judicial, quasi or otherwise."

[4]As discussed above, different agricultural products have generated very different marketing schemes; some marketing boards have both supply management and price setting powers; others reject any concept of supply management, and some occupy a space somewhere in between. The differences in the nature of the ACP and the APPDC will illustrate this point.

[5]Warley refers to the reactions of economists as "an almost Pavlovian reaction." Extreme examples of this position can be found in the Fraser Institute publications on milk and eggs in B.C.: H. Grubel and R. Schwindt, *The Real Cost of the B.C. Milk Board: A Case Study in Canadian Agricultural Policy* (Vancouver: The Fraser Institute, 1977); T. Borcherding and G. Dorosh. *The Egg Marketing Board: A Case Study of Monopoly and its Social Costs* (Vancouver: The Fraser Institute, 1981)[hereinafter Borcheding}. The general position taken by agricultural economists is discussed in G. Skogstad. "Policy

a greater level of government support and a lower level of scrutiny from both the public and the courts than have trade unions.[7] While they are elected by producers of the agricultural product that they regulate, Marketing Boards do not really fit the model of a self-governing profession. They are subject to a greater degree of supervision and regulation by government in their operations and structure than are most self-governing professions and they operate in a more obviously politicized environment with the acknowledged objective of promoting producers' economic interests. Unlike self-governing professions, they do not establish a code of conduct for their members and their authority is limited to specific aspects of promotion, production and marketing of the agricultural product rather than to regulating or codifying the producers' farming practices.

Marketing Boards combine functions that are elective, representative, legislative, administrative, and adjudicative. They are the elected representatives of an interest group; they are regulators with extensive statutory powers; they regulate the industry of which they are a part; and they, themselves, are subject to regulation, supervision and control by another administrative agency, and to an administrative appeals process. They are a clear illustration of the type of complex hybrid agency which makes it difficult to develop clear

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under siege: supply management in agricultural marketing" (1993) 36 Canadian Public Administration 1 at 11-13. Other examples can be found in works cited in the bibliography.

[6]In the 1970s, the issue of supply management became a major focus of various consumer groups which launched challenges to both the egg and dairy industries. See: *The Commission of Inquiry Into Certain Allegations Concerning Commercial Practices of the Canadian Dairy Commission,* The Hon. H.F. Gibson (Ottawa: Supply and Services Canada, 1981); National Farm Products Marketing Council, *Proceedings of the Public Hearings: Canadian Egg Marketing Agency's Pricing Formula: Summary of Findings and Recommendations* (Ottawa: 1976). Consumer concerns and those of economists were reflected in a series of reports done for the Economic Council of Canada and summarized in *Reforming Regulation,* Economic Council of Canada (Ottawa: Supply and Services Canada, 1981) and J. Forbes *et al., Economic Intervention and Regulation in Canadian Agriculture* (Ottawa: Economic Council of Canada, 1982).

[7]In Bourdieu's terms, the marketing boards have a greater amount of political and perhaps legal capital than trade unions. As well the general habitus of the government, the courts, and perhaps the public, is more favourably disposed to farmers and marketing boards than to labour and trade unions. This analogy to trade unions should not be taken too far since marketing boards and trade unions are created and function in different economic and legal fields.

universally applicable principles of administrative law which apply in all situations or which can explain the operations of these agencies.[8] While marketing boards are in some ways atypical agencies, some of these characteristics make them interesting subjects for more detailed study. They operate in a politicized economic area with a long history of extensive government involvement and are part of a tripartite system of provincial regulation[9] which tries to combine enhanced economic power (capital in Bourdieu's terms) for producers with the sometimes conflicting interests of processors, retailers and consumers and with the economic and political policies of the provincial government under whose statute they are created. They also operate in an area which is subject to extensive and changing economic developments and pressures over which they have little control. This combination of circumstances creates an interesting, yet usually overlooked, environment in which to examine various issues of administrative law that arise in such a regulatory field. As noted in chapter 1, marketing boards have received very limited attention in legal literature.[10] Yet a great deal of the 'law' in our society comes from such complex hybrid agencies and marketing boards have a major impact in the Alberta and

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[8]While not referring to farm marketing boards, R. Stewart comments on this same issue:

> Beyond the potential distorting effect of any effort to discern and apply a common model of administrative law is a more devastating objection -- its irrelevance. Most administrative agencies act in a highly charged field of political forces which include the legislature, other executive bodies and officials, and a variety of more or less well-organized political, social and economic groups and interests. The internal bureaucratic organization, traditions and expectations of the agency and its personnel are also major factors in its environment. The policies adopted by agencies, the energy and effectiveness with which they are pursued, and the agency's ultimate impact on the world may all be far more a function of these factors than the formal apparatus of administrative law. ("The Reformation of American Administrative Law" (1975) 88 Harvard Law Review 1667 at 1670).

[9]As will be noted in the discussion of the ACP, this tripartite system (producer board, Marketing Council and Appeal Tribunal, and Lieutenant Governor in Council) becomes more complex when national agencies and national supply management systems are considered.

[10]The only law review article which I have located dealing specifically with marketing boards is C. Green, "Agricultural Marketing Boards in Canada: An Economic and Legal Analysis" (1983) 33 U.T.L.J. 407 and this article is written from the point of view of an economist. There are discussions of marketing board cases in a constitutional context in various texts and articles but the focus is general constitutional law, not the nature of the boards or their administration. What discussion there has been is found in journals and texts on agricultural economics or public administration. These articles concentrate on economic and political issues and have very little discussion of legal issues which may arise in the area.

Canadian agricultural industries. Within this complex and changing regulatory system, the concept of the legal administrative field becomes a useful heuristic device.

Marketing boards are a form of government authorized intervention through regulation into agricultural markets. The marketing legislation is enacted within a particular political field and it creates a legal administrative field and certain administrative entities which intervene in a particular agricultural marketing field. The agricultural marketing system is altered by its interaction with this legal administrative field but it also impacts upon the legal field, just as this legal administrative field forms one of the places where the economic field of the agricultural marketing system and the national and provincial political economic and political fields intersect. These relations are not static; the parameters of the fields and the capital and habitus of the various agents or individuals within the field shift and evolve over time as a result of the competitions and struggles for position and capital by the agents in their relations with each other.

The historical, economic and political developments which gave rise to marketing boards have determined the habitus and the capital possessed by the various agents such as producers, processors, and the boards themselves within the legal administrative fields in which the ACP and the APPDC were created and function. While the ACP and the APPDC were not created until the latter half of the 1960s,[11] their legal administrative fields and the habitus and capital of the agents within the field were shaped and determined in part by political, economic and legal fields which preceded them; the problems to which the boards were a response have a long history and many of the agents in the field were dealing with these problems before the boards' creation. An examination of some of these

[11]For reasons that will be discussed at a later point, chicken and pork were not among the first agricultural products in which the issues arose which gave rise to the development of marketing boards. Therefore, although I will make as much effort as possible to refer this discussion to chicken and pork and the circumstances of the ACP and the APPDC, some of the general and historical discussion will need to refer to other agricultural products as well.

factors is therefore an essential background context for an examination of the two Alberta boards and their respective fields. This examination cannot be exhaustive, but it can highlight some important factors and issues which can then be examined in the specific context of the Alberta boards and their legal administrative fields in the next chapter.

I propose to begin with some general comments about the political field and government intervention in agriculture and its relevance to and impact upon the legal administrative field. This will highlight the importance of both the political element of the field and the political capital possessed by agents within it. I will then shift the focus to discuss some aspects of the agricultural economic field in relation to the farm problem or farm income problem faced by producers in every agricultural marketing field. An understanding of the farm income problem and of the features of agricultural markets which create it is essential in order to understand the origins, development and operation of farm marketing boards. The concept of market power, which is essential in understanding the operation of agricultural markets and the nature of the farm problem, will be related to the concept of capital in Bourdieu's work. I will then look at some of the historical economic and political factors which led to the creation of farm marketing boards.

Government Intervention: the Impact of the Political Field

The overview of the *Marketing of Agricultural Products Act* and of the ACP and APPDC in chapter 2 has already pointed out areas in which the attitudes of various agents or agencies which form part of the government are crucial to understanding what is likely to happen within in the legal field. Here I am concerned with looking at some of the factors which lead to government intervention in agriculture and at why there is such a large political element in the administrative legal field in which the Alberta marketing boards function.

Government intervention in agriculture is not a modern development. Kohls[12] suggests that although farm policies change, the basic instruments of farm policy - price fixing, income supplements, supply control, government purchases and storage, and demand expansion programs - have been used throughout history: "They were part of the farm programs of the early Egyptians, Romans and Greeks and they are found in the most recent farm bill."[13] Historical support for this point is easily found. Both Kohls and Galbraith describe price and production controls in Virginia in the 1630s when each Virginia planter was restricted to 1000 tobacco plants of 9 leaves each.[14] Adam Smith criticized protectionist agricultural policies in *The Wealth of Nations*. E.P. Thompson has documented the conflicts between old feudal customs of common tenure of agricultural land and the enclosure policies of Whig landowners developing in response to new agricultural technology and practices and the role of the Parliament and the courts in these disputes.[15] Similarly, the Highland clearances in Scotland in the 18th century were, in considerable part, motivated by changes in agricultural technology which favoured enclosure and sheep farming[16] and the Irish potato famine was exacerbated by the Corn Laws which protected British grain from foreign imports and by the attitudes taken by the landlords of agricultural tenants in Ireland.[17] The examples could be multiplied and spread

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[12]R. Kohls and J. Uhl, *Marketing of Agricultural Products* 7th ed. (New York: Macmillan Publishing Company, 1990) [hereinafter Kohls]. This is a standard American text dealing with agricultural marketing. I will use it as a reference for many of my comments in this chapter relating to government intervention and agricultural marketing. While it deals primarily with an American context, the issues addressed also apply in Canada.

[13]Kohls, at 357. These comments were made before the most recent Farm Bill referred to *infra.* note 65 which is described as a fundamental change to American agriculture policy. However, despite the declared intent of the new Farm Bill, I doubt that Kohls would be prepared to withdraw this statement. The provisions may change over time but substantial elements of the policies and programs remain.

[14]Kohls at 357; J. Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin Company, 1952) at 155-156 [hereinafter Galbraith]. Tobacco remains one of the few products in the US to which production quotas are specifically attached.

[15]E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (Harmondsworth: Penguin, 1975).

[16]J. Prebble, *The Highland Clearances* (Harmondsworth, Middlesex, England: Penguin Books, 1963).

[17]C. Woodham-Smith, *The Great Hunger* (Harmondsworth, Middlesex, England: Penguin Books, 1962). For additional references on this point, see the bibliography in Kohls at 369.

across many societies and many centuries. Agriculture has been intimately connected with problems of politics, public order and security throughout recorded history.

Food has always been recognized as a unique and strategic resource:

> ... the uniqueness of food as a product has fostered government involvement in its production, marketing, and consumption. The availability of an adequate and reasonably priced food supply influences social stability and international power relations. As a strategic commodity, nations may elect to trade off some economic efficiency for self-sufficiency in food production. Society may also elect to interfere with "free markets" where it is judged that these will lead to unacceptable income or product distribution. Should the rich man's cat get the milk needed by the poor man's child? Should food prices be permitted to rise when the effects will be more damaging to the poor than the rich? Should consumers be permitted to choose poor diets if this influences national health, worker productivity, and unemployment? Do farmers have the right to a guaranteed price above costs of productivity? Obviously, value judgments are involved here, and these will color society's attitudes toward government food market policies.[18]

Kohls suggests that farm policies are an attempt to achieve broadly held social goals through the instruments and powers of government. For these reasons, agriculture is a significantly subsidized and regulated industry in almost every developed country.[19] In the field of economic regulation, problems of production and marketing such as: the balance of supply and demand; income and price stability; and stable and secure production; must be balanced against the costs to the consumer of such measures and issues of efficiency. These issues are complex and value laden and there is no clear consensus on what should be done among economists, politicians or farmers themselves.[20] This makes issues

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[18]Kohls at 356.

[19]The forms of subsidization may vary but the fact of subsidization is a constant. While there is a great deal of rhetoric about free trade in the international trade of food, most developed countries still protect and subsidize domestic agriculture and may devote extensive resources toward subsidizing the export of agricultural products. The increasing internationalization of agricultural markets is placing strains on these policies but examination of the agriculture provisions of the North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO) and the discussions leading to and resulting from these agreements make clear that subsidization and protection of agriculture remain major issues.

[20]This comment is not confined to the agricultural sector. For a discussion of some of the issues and types of regulation and government intervention in an American context see: S. Breyer, *Regulation and Its Reform* (Cambridge, Massachusetts: Harvard University Press, 1982) [hereinafter Breyer]; C. Sunstein,

concerning government policy concerning agricultural policy and regulation a highly controversial and political area where agents in various agricultural marketing fields seek to use their political capital to influence government policy at political and administrative levels and where the various aspects and entities of government are themselves participants in the agricultural marketing field and in the struggles to acquire additional capital and to reshape the parameters of the field.

The food industry is among the most highly regulated of all consumer product industries because of its importance to consumers, farmers, and society in general. Many food industry regulations stem from consumer concerns with the wholesomeness, quality, and cost of the food supply and from the efforts of farmers and consumers to maintain a workable competitive food marketing system. In a useful classification, Kohls divides food marketing laws and regulations into six classes:

1. Regulations to maintain competition and prevent monopoly.[21]
2. Regulations to control monopoly conditions.[22]
3. Regulations to facilitate trade and provide public services.[23]

After the Rights Revolution: Reconceiving the Regulatory State (Cambridge, Massachusetts: Harvard University Press, 1990) and "Paradoxes of the Regulatory State" (1990) 57 University of Chicago Law Review 407; S. Rose-Ackerman Smith, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (New York: The Free Press, 1992); R. Pierce Jr. and E. Gellhorn, *Regulated Industries: In a Nutshell* 3ed. (St. Paul, Minn.: West Publishing Co., 1994); and J. Mashaw *supra* chapter 1, note 8. There is also an extensive Canadian literature on issues of regulation. P. Bryden, "Canadian Administrative Law: Where We've Been" (1991) 16 Queen's Law Journal 7 at 9-14 provides a useful overview of the present Canadian approaches to regulation and lists most of the major texts the field and the government initiatives which have been undertaken in regulatory matters. Symposiums on regulation are also found in (1982) 20 Osgoode Hall L. J. and (1993) 33 Alta. L. R. See also the chapter on regulation by H. Janisch in J. Evans, H.. Janisch and D. Mullan, *Administrative Law: Cases, Text and Materials* (4ed.) (Toronto: Edmond Montgomery Publications Limited, 1995).

[21]For example, combines legislation and other statutes designed to restrict anti-competitive activities. Historically this has been a major concern of farmers who are almost always selling their product into a concentrated and imperfectly competitive market. This aspect of 'market failure' has been one of the major rationales for the development of producer marketing boards. For a discussion of market failure, see Breyer.

[22]This would include those industries where a natural, or government supported, monopoly arises which is then regulated to some degree as a public utility. Examples would include the restrictions on rail freight rates, the regulation of grain elevators and various aspects of the grain trade, and farm related restrictions on banking activities and, on the consumer side, the regulation of marketing boards or any other body which has been granted, or has achieved, a partial or exclusive monopoly in the sale of an agricultural product.

4. Regulations to protect consumers.[24]
5. Regulations to directly affect food prices.[25]
6. Regulations to foster economic and social progress.[26]

I do not propose to review each of these forms of regulation since this is not a general study of government intervention or regulation in agriculture; it is concerned with a particular form of such intervention in the form of marketing boards. However, certain points of relevance for the study of the legal field emerge from this general discussion of government intervention.

Marketing boards and the regulatory system that they establish are only one part of a much larger system of regulation that operates at both national and provincial levels. In so far as the boards operate in interprovincial or export markets, an expanded political field involving other jurisdictions and other entities is sometimes relevant. Producer farm marketing boards operate in a very complex, highly regulated, and political field in which

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[23]Examples would include the development of market information services, the establishment of quality standards and government inspection, the construction or subsidization of transportation, processing and marketing services for export trade, and the provision of technical and other information to improve production yields and the quality of the product. An aspect of regulation that is not often noted is the importance of grades and standards. This system is so widespread and so taken for granted that it is not often discussed but the modern agricultural system relies on government established and operated inspection and grading services. The operation of the other types of facilities and public services described are among the most important means by which governments subsidize the agricultural industry by providing a large degree of the infrastructure which it requires to operate. This tendency is most pronounced in relation to the export market.

[24]Various health and safety regulations concerning the growing, transportation, processing and sale of food products. Quality and grade standards facilitate commerce but they also provide consumers with some assurance as to the product that they are buying. While some degree of consumer regulation is clearly necessary, it can also impose substantial trading costs and in international trade ostensibly health related regulations form some of the most effective non-tariff barriers used to protect the domestic agricultural industry. Quality and grading standards can be used for the same purposes.

[25]Producer marketing boards are one commonly cited example. However, in some cases such as fluid milk prices, the prices are often established by some board or commission directly appointed by the relevant government. Historically, in Alberta the price of fluid milk has been set by the Public Utilities Board and the fluid milk industry has been regulated under its own Act since the 1930s. A price setting or price control power was used extensively during wartime by the Federal Government in relation to a variety of agricultural products. Various forms of subsidization programs may also affect food prices either directly or indirectly.

[26]This is a generic category which may include a myriad of purposes and which serves as a general category for regulations which affect the food industry but do not fall within one of the other categories. Of course this classification is not meant to suggest that particular regulations are limited to only one of the 6 classifications; a particular regulation may seek to achieve several of these objectives.

government policy may be influenced by considerations quite different than producers' concerns. Marketing boards exist in a field where there is extensive government involvement and where the government has definite policies.[27] This means that the scope of discretion for the ACP and the APPDC may be considerably less than a review of their Plan and regulations might indicate and it also means that the political field is a major element in the legal administrative fields in which the ACP and the APPDC operate.[28]

To determine what is legally possible for these boards in relation to particular issues, it is necessary to consider what position will be taken by various elements of the government including the Marketing Council, the Minister of Agriculture, and the Lieutenant Governor in Council.[29] Each of these agents are active participants in the field who have their own capital, habitus and strategic interests and whose actions have a major effect on both the parameters of the legal administrative field and upon how particular issues are resolved. They interact not only with the boards but with each other and with the other participants in the field. Attempts to influence the position that they take and to obtain their support are made in most disputes, sometimes with decisive results. When controversial issues arise in the industry, the role of politicians and senior level administrators is often considerable, but seldom direct. This point will be developed at greater length when the

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[27]The importance of agriculture to the development of western Canada has meant that it has always formed an important element of government policy at both the provincial and federal level. An awareness of and sensitivity to government policy is therefore an important part of the portion of the habitus of the marketing boards that Bourdieu refers to as a sense of the rules of the game. The ability to influence this policy forms an important element of the marketing board's political capital.

[28]It also provides a rationale as to why the *Marketing of Agricultural Products Act* contains mechanisms to supervise, control and limit the discretion of marketing boards. In this regard, refer to the discussion in chapter 2 and see further reference to the Alberta political field in chapter 4.

[29]In turn this may involve having some idea of the advice that the Minister, the Cabinet or Marketing Council are receiving from the employees of the Department of Agriculture. It also requires some sense of the relative political capital of each entity, position or individual and an appreciation of some of the elements of their respective habitus which will influence how they relate to each other and how they are likely to respond in a particular situation and how effective the response will be. It is a mistake to regard all these entities as one; they and, in the case of positions, the individuals who hold the position, are all participants in this field, and in others as well. A knowledge of the importance of these relations forms part of the habitus, or sense of the rules of the game, for agents in the field.

specific fields of the ACP and the APPDC are reviewed. At this point it is sufficient to note that any system of analysis which does not take these factors and entities and their respective political capital into account, misses much that is essential in understanding the operations of these fields. It is impossible to separate this political element from the legal administrative fields: it is an intrinsic part of them and of the habitus and capital of the agents within the field whose relations and struggles with each other shape the legal administrative field. Yet much of this political capital and habitus and some of the relations between agents remain invisible to formal administrative law.[30]

The Importance of the Economic Field

The essence of the legal structure established by a producer farm marketing system is that it is economic regulation - under the legislation the marketing boards created and the regulations they make are designed to have economic impact on a particular agricultural marketing field. However, marketing boards do not exist in isolation. They are part of large complex agricultural marketing systems which are increasingly international in scale. This places limitations upon the boards which significantly effect the legal administrative field in which they operate. The legal administrative field of the boards impacts upon the agricultural marketing field but it is also impacted upon and limited and shaped by elements of the agricultural marketing field. Clearly the agricultural marketing field has a major impact upon and an intricate connection with the legal administrative field. Some sense of the nature of the agricultural marketing field, its participants and the problems that they face is therefore essential. However, there is a limited value to doing this in the abstract without specific reference to particular marketing fields and I therefore propose to

[30]Perhaps it would be more accurate to say these relations are not invisible to formal administrative law, they are excluded by definition from consideration because they are "political" rather than "legal" problems. This entire thesis is focused on showing that an attempt at this type of distinction is far too narrow and that the use of the concept of the legal administrative field allows a much more complex and useful analysis.

focus my general comments in this chapter on one aspect of the agricultural economic field which is common to all agricultural marketing fields and which was a major rationale for the development of farm marketing boards.[31] To appreciate some of the limitations that agricultural producers face and some of the major problems to which marketing boards are a response, it is necessary to discuss what is referred to as the "farm problem" or the "farm income problem". This is the fundamental problem faced by individual producers in any agricultural marketing system and marketing boards developed out of attempts to respond to aspects of this problem.

The Farm Income Problem

In almost any agricultural market,[32] farmers face a series of farm marketing problems which are collectively referred to as 'the farm problem' or the 'farm income problem.' Kohls provides a concise summary of the farm income problem in the following terms:

> Many farm price and income problems stem from the nearly competitive nature of agriculture, the inelastic demand for most farm products, and the low income elasticity of food. As price-takers, farmers attempt to improve profits by expanding production. This shifts the agricultural supply curve rightward along an inelastic demand. Farmers do not easily adjust output to falling prices, and they face a cost-price squeeze because the prices of purchased inputs do not adjust downward as much as farm prices. Although inelastic demand gives farmers an incentive to restrict supply and raise prices, their large numbers, geographic dispersion, and widely varying economic situations make organization for farmers difficult. It is also difficult for farmers to influence demand for food as other businesses do with advertising, promotion, and other market development tools. In contrast to these conditions, the farmer sells his products to an imperfectly competitive food

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[31]More specific aspects of the economic field which impact on the ACP and the APPDC will be discussed in the next chapter.

[32]In its most general sense an agricultural market is the system by which agricultural products produced by a farmer reach the consumer whether in natural or processed form. The number of transactions between the initial sales by the farmer and the final purchases by the consumer may vary extensively: in the case of farmers' markets or other direct sales there may be none, whereas processed or prepared foods sold to distant consumers may involve dozens of transactions. Different agricultural markets will vary in size, geographic location, and those involved. However, these markets must deal with certain basic problems: what to produce; how much to produce; how to market the product; where to market it; in what form it will be marketed; what price will be paid; and how will the product be assembled and transported to processors, retailers and consumers. A system must develop through which these choices are made.

> marketing system that adds some 60 percent of the total value of food products, readily adjusts quantity and prices to changes in consumer demand, engages in extensive market development activities, and has varying degrees of control over the final selling prices of food products.[33]

In regard to the farm income problem, the most important problems faced by farmers are:

1. lack of accurate market information
2. low and unstable prices
3. lack of market power

These are related and long-standing problems and most government farm policies aimed at producer marketing and at improving the level of farm incomes have sought to deal with one or more of these issues; the farm problem is often cited as one of the major justifications for government intervention in agriculture. I want to review each of these three issues briefly because they all form part of the rationale under which marketing boards were developed and under which they are justified. They also remain problems to which chicken and hog producers and the ACP and the APPDC must respond and that response, together with the reaction of other agents in the field such as processors and the Marketing Council, forms one of the major dynamics which shapes the specific legal administrative fields in question.

Lack of market information

The first agricultural marketing problem for a producer is to determine as accurately as possible in each production cycle[34] what the demand, supply, and price for the product is likely to be by the time that the product is ready for market.[35] The need for accurate market information is crucial and it is generally perceived that buyers have an advantage

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[33]Kohls at 356.

[34]The production cycle will vary depending upon what agricultural product is being produced. Hogs have a production cycle of 5 to 6 months from birth to market. Chickens have a production cycle which varies from about 7 to 12 weeks depending upon the type of bird being produced.

[35]Kohls at 100.

over producers in access to this information and in their ability to respond to the information that they receive. The ability of an individual producer to influence either supply or demand is negligible and there is often an inherent time lag in production which makes it impossible to alter production quickly in order to respond to changes in supply or demand which impact upon price. For example, to raise a hog from the time it is weaned to market weight takes between 5 and 6 months. But the actual time required to alter the volume or timing of production is even longer because it will involve increasing or decreasing the number of breeding sows and may involve the need for construction of additional confinement facilities.[36] The situation is also complicated in that the producer requires not only accurate future price information on the product being produced, but also accurate information on the future prices of input prices for farm products. In the case of hogs, the future price of grain has a significant impact on production decisions since the cost of feed is the major input cost in hog production; the relation of the price of the grain required to feed the hogs to the price that the producer anticipates receiving for the finished hogs has a major impact on production decisions and the potential for making or losing money in hog production. Similar considerations apply for chicken production.

Low and Unstable Prices

Price instability tends to be a characteristic of all non-regulated agricultural markets. Economic theory holds that it is evident that the effects of a change in demand on prices and consumption depend on the elasticities of demand and supply. Since elasticities of demand and supply in agriculture are both low, small changes in demand and supply can

[36]This assumes that the operation is a 'farrow to finish' operation which is now the most common type of production for larger producers. In this form of production a herd of breeding sows is farrowed and the offspring are raised (finished) to market weight. A second type of operation buys young hogs (weaners, i.e. young hogs who have been weaned from their mother) from another producer and finishes those hogs to market weight. While this type of operation would not have the delay of acquiring and breeding more sows, it could only acquire more hogs if weaner producers were able to increase their production of weaner pigs and this would involve such a time lag.

cause violent changes in agricultural prices. Conversely, large changes in agricultural prices or farm input prices cause only small changes in agricultural production and consumption. Time lags inherent in the production of livestock prevent quick responses to changes in price or demand or changes in the costs of farm inputs and the inability of individual farmers to influence either supply or demand or to control farm input prices in a market where there is an inelastic demand curve for agricultural products means that the response of livestock prices to changes in supply and demand can be violent.[37]

Market Power

In general terms, market power refers to the ability to advantageously influence markets, market behaviour, or market results. While it is typically considered in relation to influence over prices, it can also involve influence over demand, product flows, quality, marketing fluctuations, and other participants' market behaviour. While the term can be defined in a general sense, it is difficult to observe or measure directly in the marketplace. Its effects tend to be indirect: on prices, contract terms, firm behaviour and other aspects of particular markets. "None have seen it but many have felt it."[38] Bargaining power is a related term which refers to the relative strength of buyers and sellers in influencing the terms of exchange in a transaction. Bargaining power requires market power, but market power is a broader concept, not limited to the buyer-seller situation. Food retailers, for

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[37]In the case of hogs it is also cyclical. As hog prices increase, more sows are acquired and production is increased. However, by the time this production is available the increased production causes a drop in price which results in a decrease in production and the cycle is repeated. In Alberta, as part of the North American market, this cycle is usually considered to be about 4 years in duration. The hog cycles are also impacted by grain prices in two aspects - higher grain prices mean higher feed costs and higher grain prices also mean that some grains normally available for feed may be sold into other markets instead. Both of these factors as well as their converse can impact on hog cycles. The most important relationship is not necessarily the hog price in isolation but the hog price relative to the price of grain (referred to as "the margin"). Similar considerations occur in chicken although the cycles are shorter. This is not as evident under the Canadian supply management system which stabilizes both price and supply, but these volatile cycles can be seen in the American chicken market which has developed in a different fashion. This significance of this factor will be discussed further in the following chapters.

[38]Kohls at 260.

example, may influence farm prices and sales through their merchandising and pricing practices without ever directly negotiating with farmers.[39] Therefore, like market power, bargaining power is a relative term which can only be defined relative to some lack of power of other participants in the marketing field.

When a particular agricultural marketing system is considered as a field, the correspondence between market power and Bourdieu's term, capital is evident. Market power is a form of capital and the relative amounts of capital possessed by various participants in the market defines their relative position in the field and shapes the outcome of relations between them. Both market power and capital are relational terms. The fact that market power is a relation rather than an attribute which can be easily measured corresponds to what Bourdieu has to say about capital and fields. So does the fact that it can only be measured relative to the power/capital of other participants. The effects are experienced even though aspects of the field may be difficult to define or to observe. As noted in chapter 1, Bourdieu's use of the term 'capital' in the context of his work refers to various forms of power and not simply to capital as it is often used in economic terms. Economic capital is only one form of capital. Even within the economic field, there are various forms of capital. The form of economic capital which is being considered here relates not so much to the capital resources of individual farmers (although these were

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[39]Kohls at 261. In Alberta this is a significant factor in both chicken and pork because the retail market is highly concentrated. The strength in retailer market power means that retailers have a major influence on the nature of the product produced and it is difficult for either producers or processors to increase their margins between revenues and costs. A number of US studies indicate that the balance of power between retailers and processors is shifting to retailers (See e.g. Kohls at 262-263). G. Coffin *et al.*, *Performance of the Canadian Poultry System Under Supply Management* (Department of Agricultural Economics, Macdonald College of McGill University, Ste. Anne de Bellevue and Le department d'economie rurale, Universite Laval, Quebec, 1989) [hereinafter Coffin] suggest that in Canada, relative to the US, retail margins have not dropped while both distributor and producer margins have done so. They suggest that too little attention is paid to retailer power. L. Martin, *Alternative Business Linkages: The Case of the Poultry Industry* Agriculture Canada. Working Paper 10-93 (Guelph: George Morris Centre Food Industry Research Group, 1993) [hereinafter Martin] mentions a similar point, but suggests that in the case of products subject to supply management, the producer stability in prices is part of what allows the retailers to maintain their high margins because supply is stable and they do not have to compete for supply. Retailers therefore possess a large amount of marketing capital compared to processors or producers.

extremely limited in comparison to marketers or suppliers) but rather to market power which can be defined as the ability to influence the behaviour of the market and the conduct of participants within the market. For convenience, I will refer to this by the term 'marketing capital' to distinguish it from other forms of capital such as political capital or legal capital. For the purposes of this thesis, I treat marketing power and marketing capital as synonymous terms.

Kohls suggests that there is a general consensus that, compared with food marketing firms, farmers have inferior market and bargaining power; in Bourdieu's terms, farmers possess very limited marketing capital within the agricultural economic field compared to other participants, particularly processors or other large buyers or suppliers. There are various reasons for this: farmers' large numbers; the small size of farm operations relative to other sectors of the industry; the low level of organization of farmers; high fixed costs in farming operations; the geographic and product specialization of farming operations; and the production by farmers of homogeneous products. Continuing decentralization and integration in agriculture have reinforced this prevailing imbalance of power between farmers and food marketing firms.[40] As individual producers in an atomistic system producers are dealing with a concentrated number of buyers and processors who are much

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[40]Kohls at 264. Large food marketing firms are able to access product from wider areas and serve national markets whereas farmers are located in a specific geographic area. These firms increasingly integrate more and more portions of the agricultural marketing system within a single decision-making structure. In addition, the increasing internationalization of food markets requires larger infrastructure and more integrated operations in order to compete in the markets. Food marketing firms are better positioned than individual farmers to respond at this level. Without a similar degree of organization and integration, farmers are limited in their ability to access more remote markets, to alter production quickly to respond to changes in price or to influence price.
This is important in agricultural markets, such as pork in Alberta, where a significant portion of the production is exported. It becomes more significant in chicken if various international agreements such as NAFTA and GATT result in the loss of import controls (as is the case under the new WTO agreement) or protective tariffs. The import tariffs of 200-300 % which have been substituted in the dairy and poultry industries for the import controls relinquished under GATT negotiations were challenged by the Americans as a violation of the NAFTA agreement and the issue was considered by a Bi-national Panel under the dispute resolution provisions. In a decision reached in July, 1996, the Panel ruled that these tariffs do not breach Canada's obligations under the NAFTA agreement. However, it is unclear at this time what further action will be taken by the Americans.

larger in size than any individual farmer and who have a far greater degree of flexibility in marketing decisions.[41] There is, therefore, a very asymmetrical balance of marketing capital between a large number of individual producers operating in an atomistic purely competitive market and a limited, very concentrated, number of buyers and processors.[42] From the farmers' perspective, this imbalance of market capital is a major factor which contributes to the relatively low farm prices and incomes, frequent below-cost or fluctuating farm prices, and the shifting of the cost of some marketing functions and risks to farmers. It is one of the major factors which led to attempts by farmers to organize collective cooperative marketing organizations. It was the failure of these voluntary cooperative marketing organizations which led to the development of statutory compulsory producer marketing organizations.

Factors Which Led to the Development of Marketing Boards

While government intervention in agriculture has a long historical past, marketing boards themselves are a 20th century development. They arose from basically two causes:

1. the failure or limited success of voluntary marketing cooperatives to maintain or to restore market and bargaining power (marketing capital) to agricultural producers;
2. the impact of the world depression in the 1920s and 1930s.

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[41]In the case of both chicken and pork, the market has very clear expectations about the age and weight at which chicken or hogs will be marketed. If they are not marketed at the expected age and market weight, there are severe reductions in the amount received. As well, feed costs are a major component of production costs and, particularly in hogs, these increase substantially as the animal gets older. Both chicken and hog production are confinement operations which depend on getting animals to market weight within the shortest time possible with a good feed conversion ratio; any disruption or delay in marketing will destroy any profit margin which may exist and may cause overcrowding problems in the confinement facility. Once they have placed animals in production, both hog and chicken producers must market at a particular time; they therefore cannot withhold supply to influence price and, in any event, no individual producer has sufficient volume to effect the supply. Large processors integrated with downstream portions of the marketing system have a greater flexibility in responding rapidly to changing market conditions.

[42]The processing sectors in both chicken and pork are very concentrated in Alberta. Currently 2 major processors process nearly all the hogs sold for slaughter in Alberta on an approximately equal basis. In chicken there are 2 major processors, one of whom processes approximately 90% of the chicken produced.

I want to begin with the experience of the cooperatives because they are the direct predecessors of compulsory producer controlled marketing boards.

The Experience of the Cooperatives

Cooperative marketing organizations were voluntary farmer organizations created by farmers who were dissatisfied with their position in the marketplace and in particular with their treatment by agricultural marketers, suppliers, and various middlemen involved in the agricultural system by which farm products produced by the farmer were delivered to consumers. The root problem that these farmer organizations sought to address was the weakness in bargaining power of individual farmers within the agricultural market. Farmers possessed very limited marketing capital within the agricultural economic field compared to other participants. The efforts of producers in various agricultural products to redress this situation and increase their bargaining power are one of the major underlying elements led to the development of farm marketing boards and form an important element in an appreciation of the form of the legal fields which developed around marketing boards as part of the various agricultural marketing fields.

Galbraith[43] suggests that there are, in principle, three things that the farmer can do to offset his or her weakness in bargaining power:

1. dissolve the power of those to whom he or she sells or from whom he or she buys;
2. obtain the benefits of enhanced market power associated with changes in demand;
3. develop 'countervailing power'[44] in the marketplace.

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[43]Galbraith, chapter XI, at 154-165.

[44]Galbraith defines countervailing power as a counterpart of competition and as an element in the modern market. When concentration or collusion impairs or destroys competition in a particular market, it creates incentives for customers or suppliers to develop a countervailing power. The creation of market power in a particular entity or group of entities (monopoly or monopsony and oligopoly or oligopsony) creates an incentive to the organization of another position of power to neutralize this. This countervailing power

If these techniques are successful, farmers will be able to increase their marketing capital within the marketing field relative to other participants in the marketplace. In Bourdieu's terms, farmers and farm organizations attempt to organize and use their collective political and economic capital to achieve this increase in their collective and individual marketing capital relative to other agents within the marketing field. In this process, attempts to use political capital held by farmers and farm groups to influence government policy and to secure favourable government intervention in the form of regulations, resources, and influence play a major role. This political element and the competition among various agents in the field for the attention and resources of government remains an important element of the legal administrative fields in which the ACP and the APPDC are part.

Galbraith suggests that all three techniques have been employed by farmers at various times. The Granger movements of the 1860s and 1870s attacked the market power of banks, railroads, commission merchants, warehousemen, farm machinery companies and other merchants with whom farmers did business with what Galbraith describes as almost "revolutionary venom." While Galbraith describes the Granger movement itself as short-lived, he suggests that it was "the precursor of a considerably more durable effort to dissolve opposing market power," the efforts of which led to the passage of the Sherman Anti-Trust Act of 1890. He states:

> Farmers, far more than labor, the urban middle class or any other group including the liberal intellectuals of the day, forced the passage of the Sherman Anti-Trust Act of 1890. It is perhaps not entirely an accident that meat-packers, tobacco companies, the farm-machinery industry, milk distributors and, in the early days, the railroads, all of whom buy from, sell to or serve the farmer, have been prominent targets of this legislation. During its sixty-year history, the strongest regional support for the Sherman Act and its supplementary legislation has come from the farm states.[45]

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may take the form of government intervention. Two of the major areas that Galbraith looks at in terms of the development of countervailing power are the labor market and agriculture.

[45]The Patrons of Husbandry or Grange was a movement which developed in the Midwest farming states and experienced a rapid growth in these areas. Within a five year period within the 1870s over 766 local granges were established in Canada, primarily in Ontario. This coincided with the relatively depressed

A similar point on the importance of populist and farm movements in relation to anti-trust legislation in Canada is made by Richter. Hiscocks also suggests that "the history of the development of the organization of agricultural marketing is closely aligned with the history of the development of farm organizations in general particularly those designed to bring some kind of pressure on governments."[46]

Attempts by farmers to support policies which increased demand for their products and thereby their market power concentrated with very limited success in the 19th century on support of an inflationary money policy designed to reduce the burden of indebtedness and to increase purchasing power.[47] 20th century forms of this policy include support for

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markets and prices for farm products in the 1870s and 1880s and the increased commercialization of agriculture which meant that farmers were more affected by the relationship between the prices of agricultural inputs and their farm prices. The Grange sought to improve the situation of farmers through collective action and to exert educational, cultural and political influence on behalf of the agricultural community. They were particularly dissatisfied with the role of middlemen between the farmer and the consumer as they felt that middlemen exacted unwarranted margins at the farmers' expense. The Grange emphasized cooperative buying and selling and the regulation and restraint of monopoly power on the part of those with whom the farmer dealt. They sought, with considerable early success, regulatory restrictions on banks and railroads. They suggested that there was a permanent inequality in the agricultural market system that could only be dealt with by collective action and government regulation of monopoly. Galbraith at 158-159; W. Drummond, W. Anderson and T. Kerr, *A Review of Agricultural Policy in Canada* (Ottawa: Agricultural Research Council of Canada, 1966) describes the Canadian experience [hereinafter Drummond *et al.*].

[46]J. Richter, "Political Aspects of the Economic Organization of an Industry," *Market Regulation in Canadian Agriculture.* Marketing Board Seminar, University of Manitoba, 1972 at 21; Hiscocks *supra* chapter 2 note 1 at 11. The political influence of farmers and farm organizations was and remains a significant factor in federal and provincial politics in Canada. This is particularly the case in western Canada where agriculture was a major element of government policy in the development of the region and remains one of the most important industries. The economic and political capital of farmers relative to other groups in the political or economic fields is complex, difficult to measure with any certainty, and has shifted and continues to shift over time. However, it is clear that this influence, and such government intervention as has occurred, has not prevented the increasing concentration of both the processing and retail sectors of the Canadian agricultural marketing system. See Coflin and Martin *supra* note 39 and also J. Gilson and R. Saint-Louis, *Policy Issues and Alternatives Facing the Canadian Hog Industry* (Ottawa: Agriculture Canada and the Canadian Pork Council, 1986) [hereinafter Gilson]. The situation in the Alberta pork and chicken processing and retailing sectors has already been discussed. Any political capital possessed by farmers and farm organizations has not prevented large concentrated retailers and processors from consolidating a very high degree of marketing capital relative to farmers and farm organizations.

[47]Galbraith suggests that as changes in the nature of the banking system and lending practices made this form of credit engineering as a monetary policy less feasible, and in the disappointment of the results from such campaigns, farmers "turned to more forthright methods of equalizing their market power."

various types of government action designed to increase demand for particular farm products and to either restrict imports or boost exports of a particular product.[48] Another aspect of the continued importance of this producer concern with increasing demand can be seen in the extensive promotional, educational and advertising activities carried out by both the ACP and the APPDC for their respective products. In this instance, farmers make use of the collective resources of their organization to promote, advertise and market their product thereby seeking to increase demand for their products and, more indirectly, their marketing capital.[49]

The strategy most directly related to marketing boards is the development of countervailing market power. The first attempts by farmers to organize to create countervailing market power involved the development of voluntary cooperatives which allowed farmers to buy farming inputs or to sell their products cooperatively. Often founded on the Rochdale principles of cooperation,[50] these cooperatives became

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[48]In both Canada and the US, governments have historically been more receptive to providing financial assistance to farmers or producer organizations or to promotional activities than they have been to major changes in fiscal policy or to tough anti-monopoly measures which have been advocated by the farming communities. For example, despite a long campaign, Canadian farm organizations had little success in changing the National Policy of tariff protection which kept input prices high and the early *Combines Investigation Acts* were generally ineffective. Except in times of war, or severe financial crisis and social disruption, governments remained reluctant to institute measures advocated by the farm community but opposed by industrial, banking and corporate interests. Support for farmers and farm organizations was acceptable; large scale interference with these other economic interests was generally not.

[49]As noted in the previous chapter, this is an important aspect of the activities of both the ACP and the APPDC. It is particularly important in meat products such as pork or chicken where there are alternate competing meat products and shifts in consumer preferences over time can have significant impacts on demand for the product. Increasingly, as consumer preferences shift to more prepared and ready to eat products and with the growth of the fast food industry and the increasing proportion of the food dollar spent on eating outside the home, these promotional activities include working with processors and customers to develop products which will meet this demand. These activities are not focused on here because in general they enjoy widespread support at all levels of the industry and government and generate almost no legal issues.

[50]Named after a cooperative established in 1844 in England in Rochdale this form of organization incorporated various principles the most common of which were: one man [person] one vote; limited returns on capital; patronage dividends. In general there was something of a distinction between the original British model and the American agricultural cooperatives on the issue of profit. The American cooperatives did not seek to eliminate profits but to divert them to their members - their main purpose was to reduce costs and make money for their members rather than for various middlemen. It was found that the greatest opportunities came in reducing costs rather than diverting profits.

widespread in the farming areas of the US. and Canada from the late nineteenth century into the early 20th century. In certain industries such as grain, dairy and fruit they enjoyed substantial producer support. In the grain industry, which was by far the dominant sector of the Canadian agricultural industry and the major agricultural export, elevator and marketing cooperatives also obtained significant government support.[51] Cooperatives remain a significant element in the agricultural industry today in many sectors in both Canada and the US.[52] However, in so far as their purpose was to provide countervailing

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[51]During the period from the mid 1890s to the 1930s, the grain industry, especially wheat, involved the bulk of the farmers and the bulk of agricultural income and the export trade. To a significant extent the grain industry was the agriculture industry and the economy of the prairies was a grain economy. Drummond *et al.* state that this period was marked by "continuous efforts by farmers and by governments to reform the methods of marketing grain." Western farmers were concerned about high protective tariffs on farm machinery and by the local monopsony that they faced when selling their grain. In particular, the railway often granted exclusive loading rights to a particular grain elevator company thereby effectively creating a monopoly. Government response took several forms: regulation, licensing and bonding of grain dealers; legislative and regulatory requirements concerning impartial allocation of railcars and the provision of loading platforms and facilities; the establishment of statutory freight rates for grain shipped from western Canada for export (The Crowsnest Pass Agreement of 1897 is (in)famous in Canadian agriculture and its restrictions are only now being ended in return for one time payments to eligible producers). A further response was support for producer grain marketing cooperatives.
Between 1909 and 1911 Manitoba acquired over 174 grain elevators which it leased to a cooperative formed to market grain on the Winnipeg exchange. Based on the recommendations of a government commission, Saskatchewan provided loans, grants and guarantees to a cooperative company designed to compete at all stages of the marketing process. An Alberta cooperative elevator company was formed two years later. Created in 1918 in each of the prairie provinces, by 1923-24, the three provincial Wheat Pools had created a network of country elevators and terminal facilities which handled over 50% of the grain marketed in western Canada. See Drummond *et al.* and C. Wilson, *A Century of Canadian Grain: Government Policy to 1951* (Saskatoon: Western Producer Prairie Books, 1978) and *Canadian Grain Marketing* (Winnipeg: Canadian International Grains Institute, 1979).

[52]For a more detailed discussion of agricultural cooperatives see the books and articles cited in S. Kelly et al., "Agricultural Law; A Selected Bibliography 1985-1992" (1993) 19 William Mitchell Law Review 481 at 495-497. Some of the largest agribusiness entities in the US and Canada began, and in many cases continue, as cooperatives. For reasons particular to their industries, such cooperatives are particularly common in the dairy, fruit, and grain industries (the latter particularly in Canada). In Alberta, the largest chicken processor which processes perhaps 90% of the Alberta production and is also a major processor in B.C. is a producer cooperative. In the Alberta pork industry there is no equivalent producer cooperative but between 1981 and 1995 the APPDC owned all the shares of Fletchers Fine Foods Ltd.. These shares have now been distributed to those present and former pork producers who paid an additional levy between 1981 and 1985 to finance the acquisition of the company. The details of that transaction which also involved outside equity financing are beyond the scope of this thesis. At the present while a significant percentage of the shareholders of Fletchers are present or past producers, this percentage is now significantly below 50%.

market power for farmers, particularly in the marketing of farm products, they have had limited effect. Very few survived for more than a few years as bargaining instruments.

The reasons for this failure are important to the development of marketing boards and the operation of the legal fields in which they are situated. Galbraith analyzes the situation in the following terms:

> As a device for getting economies of larger-scale operations in the handling of farm products or for providing and capitalizing such facilities as elevators, grain terminals, warehouses and creameries, co-operatives have enjoyed a considerable measure of success. For exercising market power they have fatal structural weaknesses. The co-operative is a loose association of individuals. It rarely includes all members of a product. It cannot control production of its members, and, in practice, it has less than absolute control over their decision to sell. All these powers over its own production are possessed, as a matter of course, by the corporation. A strong bargaining position requires the ability to wait - to hold some or all of the product. The co-operative association cannot make nonmembers wait; they are at liberty to sell when they please and, unlike the members, they have the advantage of selling all they please. In practice, the cooperative cannot fully control even its own members. They are under constant temptation to break away and sell their full production. this they do, in effect, at the expense of those who stand by the co-operative. These weaknesses destroyed the Shapiro co-operatives.[53]

In the Canadian context a classic example of this marketing problem at a provincial level was the collapse of various attempts to provide for the "orderly marketing" of fruit by various producer associations and cooperatives in the B.C. fruit industry. The 1956

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[53]Galbraith at 161. Aaron Shapiro was the primary exponent of the development of cooperatives in the US. His name is often associated with them. See Galbraith and Kohls and the works in the bibliographic article cited in note 52. Borcherding *supra* note 5 at 6-7, suggests that the lack of success and "notorious instability" of co-operatives is based on two facts: first, the market for inputs that they compete with is more competitive than is generally realized by "the hopeful founders of co-ops"; second, middlemen-type functions are costly to carry out and much skill is required to effect an efficient coordination." Borcheding suggests that the incentives for nonprofit co-op managers and individual members to bear risk and invest in information with uncertain payoffs is less than in profit oriented firms. As these quotes indicate, Borcheding takes a position opposed to marketing boards on economic grounds and this position appears to extend to cooperatives as well which Borcheding regards as a less efficient competitive entity than the for profit corporation.

Commission of Inquiry into the B.C. fruit industry summarized these efforts which began in the late 19th and early 20th century in the following terms:

> but for a variety of reasons such co-operative efforts, although started with enthusiasm, soon lost support and became ineffective. Economic difficulties soon led to other attempts at co-operation, and the process of voluntary integration and disintegration repeated itself.[54]

The major problem was the classic 'free-rider' problem noted in economic and regulatory theory. Because membership in the co-operatives established was voluntary, a relatively limited number of non-members could destroy the group advantages by employing a separate personal selling policy. Independent growers of tree fruit, which was a seasonal perishable product, were able to benefit from higher prices at the most favourable marketing times in nearby markets without incurring the costs of storage and shipping to distant markets incurred by the cooperative growers in an effort to maintain prices and reduce seasonal variations.[55] Therefore, the growers who gained the most were those who did not join and this caused many members to break their contracts with the cooperative in order to sell independently. The problem was compounded by the fact that the courts refused to specifically enforce contracts requiring producers to sell their products through the organization.[56] The inability of the cooperatives to enforce their contracts and the free

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[54]*Report of the Commission on the Tree-Fruit Industry of British Columbia,* Dean E.D. MacPhee, Commissioner, October, 1958 at 50. Further details of this history are set out in this Commission of Inquiry and a subsequent Commission of Inquiry (*Report of the Commission of Inquiry - British Columbia Tree Fruit Industry,* Peter A. Lusztig, Commissioner, May, 1990) which have been held into the B.C. tree fruit industry. See also the materials of the B.C. Select Standing Committee and Drummond *et al* and Hiscocks.

[55]A large portion of the B.C. tree fruit crop was marketed into interprovincial and export markets which. involved substantially higher marketing costs for growers. This situation also raised constitutional issues for attempts to develop effective provincial marketing legislation which tried to control produce raised in the province but sold into these interprovincial or export markets. See *infra* notes 69 and 70.

[56]*Vancouver Island Milk Producers' Ass'n. v. Alexander,* (1922) 30 B.C.R. 524 (C.A.); *B.C. Poultry Ass'n v. Allanson,* [1922] 2 W.W.R. 831 (B.C.S.C.); *Kelowna Growers Exchange v. De Caqueray,* (1922) 70 D.L.R. 865 (B.C.S.C.). See generally R. Sharpe, *Injunctions and Specific Performance* 2nd ed. (looseleaf) (Aurora, Ont.: Canada Law Book Inc., 1995) at 9-8 to 9-12 [hereinafter Sharpe]. The difficulty with the position of the courts that damages were an adequate remedy for breach of contracts by growers to supply their produce is that the real damage was not the loss of a particular amount of a generic product, but rather the loss of the ability of the cooperative to influence prices by managing and restricting supply; for this problem, damages were not and adequate remedy. Of course, the restriction of supply and

rider benefits of independent selling led to the breakdown of the cooperative selling system. Since the majority of growers still believed that a collective marketing scheme would benefit the industry, this led to grower pressure for a compulsory scheme. If countervailing marketing power was to be exercised by producers, it would require legislation to make participation compulsory for all growers of a product.[57] Producer and government recognition of the need for such countervailing market power was the first major impetus for the development of legislation authorizing producer marketing boards for particular agricultural products.[58] Even the grain cooperatives, by far the largest and most substantial producer marketing organizations encountered financial and marketing difficulties which led them to pressure the federal government for marketing legislation particularly after an attempt by the Saskatchewan legislature to turn the Saskatchewan Wheat Pool into a compulsory grain marketing cooperative was held to be ultra vires.[59]

'competition' was not a purpose with which the courts of the time sympathized although the producers in question voluntarily agreed to become members of the cooperative and had contracted to supply their produce. Nor was it a type of damage that the Courts were prepared to recognize, measure and compensate.

[57]The importance of the need for compulsory marketing is emphasized by the fact that the areas in which cooperatives have been most successful are areas such as dairy and grain in which the nature of the product and the distribution system created an major incentive for producers to organize cooperative marketing organizations to collect, store and distribute the product. When these organizations were able to operate in an environment which included some form of statutory compulsory marketing (dairy in both Canada and the US, grain in Canada), they flourished.

[58]A second legislative initiative was to place provisions in the statutes which authorized co-operative associations specifically providing for specific performance and injunctions to enforce sales agreements with members. See *Manitoba Wheat Pool v. Tracey,* [1931] 2 D.L.R. 805 (Man. C.A.) which is discussed in Sharpe at 9-10. In that case an injunction was granted to protect a marketing scheme partly on the basis that a specific performance and injunction clause in the agreement had also been included in the Act which created the Wheat Pool as a co-operative. A more recent case to the same effect based on a similar provision in the *Cooperative Associations Act,* R.S.B.C. 1975, c. 66 is *Fraser Valley Mushroom Growers' Co-operative Ass'n. v. Ursulak,* [1988] B.C.W.L.D. 2741 (B.C. C.A.). There is a similar provision in the Alberta *Co-operative Associations Act.* Despite the existence of these provisions, they are seldom used by co-operatives, and since they apply only to co-operative members, they are of no assistance in dealing with non-members who may continue to enjoy free-rider benefits.

[59]*In re The Grain Marketing Act, 1931,* [1931] 2 W.W.R. 147 (Sask. C.A.) considering *The Grain Marketing Act, 1931* Statutes of Saskatchewan 1931, c. 87. The Court of Appeal had no difficulty in determining that since the vast majority of grain was sold in export markets, the Act was ultra vires on the basis that it attempted to regulate interprovincial and export trade.

The financial and marketing difficulties faced by the prairie wheat pools resulted in the federal government reluctantly responding to producer pressure and forming the Canadian Wheat Board in 1935 for what it hoped would be a temporary emergency period. In 1943 as a further 'temporary wartime

The Impact of the Depression

A second major impetus for the development of legislatively sanctioned compulsory producer marketing boards was the total collapse in farm prices and incomes which accompanied the world depression of the late 1920s and the 1930s. While all industries were effected by the depression, the effect on the primary agriculture industry was far more severe. Net farm income in Canada fell to what Drummond describes as "ruinously low levels" declining from $642 million in 1928 to $109 million in 1933.[60] In view of the devastated position of the farm industry it appeared that the competitive market had failed. In these crisis circumstances, government intervention to correct market failure and to improve what was accepted as the weak bargaining position of farmers became an accepted, if not entirely uncontraversial, solution.[61] The crisis of the depression placed

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measure' the Wheat Board was made the mandatory monopoly marketing agency to purchase and sell all wheat produced in a specifically defined region including the prairie provinces and the Peace River block of B.C. Oats and barley were added to the Wheat Board's authority in 1949 and this authority continues to the present although it is currently subject to various challenges. See Drummond *et al.*; A. Schmitz and A. McCalla, "The Canadian Wheat Board" in *Agricultural Marketing Boards - An International Perspective* (Cambridge, Massachusetts: Ballinger Publishing Company, 1979) at 79; and C. Wilson, *A Century of Canadian Grain: Government Policy to 1951* (Saskatoon: Western Producer Prairie Books, 1978) and *Canadian Grain Marketing* (Winnipeg: Canadian International Grains Institute, 1979) [hereinafter "Wilson"]. This was by far the most extensive government involvement in compulsory marketing prior to the 1960s but it is not dealt with here in detail for because the size and primarily export based nature of the grain industry meant that different considerations applied than those which faced other agricultural producers: this marketing control developed much earlier; took its own legislative form; operated on a vastly wider scale; was intimately connected with overall federal government transportation policy and international trade concerns; and was based on federal powers and legislation. The Canadian Wheat Board and its monopoly on all export sales is currently a major issue in the western Canadian agriculture industry. This will be discussed further in later chapters in a specifically Alberta context.

[60]Drummond *et al.* at 33.

[61]*Ibid.* at 33-35. See also the *Report of the Royal Commission on Price Spreads, 1935*. Drummond suggests that the overall conclusion of the Commission was that widening spreads between what producers received and what consumers paid arose because atomistic competition had been replaced by imperfect competition or near monopoly in the manufacturing and distributive sectors of the industry. It found that manufacturers and distributors were able to pay less and charge more than they could in freely competitive positions and that primary producers were seriously exploited. With some reservations, the Commission recommended a considerable degree of government intervention to restore competition. This provided a form of official recognition and therefore additional political capital to a position that had formed a major demand of farm based populist and cooperative movements.

tremendous pressure on governments to do something to alleviate the farm income problem.

Various government support programs were implemented during this period at both the federal and the provincial levels to support the farm community such as: debt adjustment programs; water development projects; land utilization and resettlement schemes; development of new cultivation practices; and other forms of financial assistance to farmers. These programs in Canada had their parallels in the New Deal model of farm programs which developed in the US, except that the Canadian governments of this period were less willing to commit to subsidization and stabilization programs which involved significant government expenditures.[62] The effect of the depression and the New Deal on American administrative law is a common theme in American literature,[63] and agriculture was no exception to these general developments. The foundation of the present American farm program with its price stabilization and support programs geared to: a base market price support in return for contractual and acreage and production restrictions; subsidization of exports, government purchase and storage of storable crops; and marketing control orders in the dairy and fruit industries[64] can all be traced to this period.

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[62]Drummond *et al.* provide a comparison of the Canadian programs with the New Deal programs developed in the US. See also Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton, New Jersey: Princeton University Press, 1966). In general, in Canada both provincial and federal governments were more reluctant to provide direct subsidization in the form of price supports, export subsidies or government purchase of product. They were more willing to look at compulsory collective marketing in certain industries most notably the grain and dairy industries although they hoped that such legislative intervention would be temporary. Differences in how programs developed in the two countries can also be related to the dominance of the grain industry in Canadian agriculture and the effect of this dominance on agricultural policy.

[63]See R. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard Law Review 1667; A. Aman Jr., "Administrative Law in the United States - Past, Present and Future" (1991) 16 Queen's Law Journal 179; C. Edley Jr., *Administrative Law: Rethinking Judicial Control of the Bureaucracy* (New Haven: Yale University Press, 1990) and "The Governance Crisis, Legal Theory, and Political Ideology" 1991 Duke L.J. 561; and C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Massachusetts: Harvard University Press, 1990). Similar references can of course be found in Canadian literature on regulation and administrative law. See *supra* note 20.

[64]Marketing control orders in these particular industries are a form of supply management which is similar in nature to supply management marketing boards although the legal forms are different. Except for milk (80% of all Grade A milk in the US was covered by marketing orders in 1987) these marketing

These programs must be considered in any purported comparisons between the American 'free market' and Canadian 'supply management.'[65] Government intervention in agriculture and in agricultural marketing and production decisions is significant in both countries; it may take different forms but it addresses many of the same issues. During this depression period, the first Canadian marketing legislation which authorized compulsory marketing boards was enacted,[66] the Canadian Wheat Board was established,[67] and provincial

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orders are primarily used in specialty crops concentrated in restricted geographic areas. In most instances they are combined with strong producer cooperatives in the industry and some of the cooperatives, particularly in the dairy industry have become huge agribusinesses which dominate their markets. A similar process took place during this period in the Canadian fluid (raw as opposed to processed into cheese, butter or other milk products) milk industry and the generally favourable attitude of provincial governments toward producer dairy organizations and cooperatives also meant that a substantial degree of vertical integration was achieved through the growth and development of producer cooperatives for processing and distribution of milk and milk products.

[65]In April 1996 a new Farm Bill was passed by the Congress and signed by President Clinton. Its explicit intent is to make major changes to the system that has existed since the 1930s. While the general direction of the Bill indicates an intent to free farmers from restrictions on their production decisions which they have agreed to in return for price supports, and while the amount of subsidization is to be reduced in phased amounts over the next 5 to 7 years, the Bill is complex and has been subject to intense lobbying efforts. Despite political rhetoric about free trade and about freedom in the agricultural markets, politicians of all ideologies continue to support programs which benefit the portions of the industry prominent in their respective states and American agriculture remains highly subsidized particularly in certain segments.

[66]The first such legislation, aside from temporary war measures taken by the federal government with respect to wheat during the First World War, was passed in B.C. in 1927 as the *Produce Marketing Act* and was patterned on Australian and New Zealand marketing legislation passed some years earlier. (*Report of the Commission on the Tree-Fruit Industry of British Columbia* Dean E.D. MacPhee, Commissioner, October, 1958 at 50). This Act was intended for use in the tree fruit and vegetable industries and was a response to the difficulties encountered by the voluntary cooperatives. It was followed by the *Dairy Products Sales Adjustment Act* designed to provide a means to pool returns from sales of fluid and manufactured milk among all producers in the Vancouver milkshed.

The first federal marketing legislation, the *Natural Products Marketing Act, 1934*, was passed in 1934 and all nine provinces passed legislation giving effect within their provincial jurisdictions to the federal legislation. The model for this legislation was the British legislation of 1931 and 1934. This federal legislation has been the model for subsequent marketing legislation in Canada. See: S. Hoos ed., *Agricultural Marketing Boards - An International Perspective* (Cambridge, Massachusetts: Ballinger Publishing Company, 1979) at 101 and 305-306 [hereinafter Hoos]; M. Veeman, "Agricultural Marketing Boards in Canada" in Hoos at 59 and "Marketing Boards: The Canadian Experience" (1987) 69 *American Journal of Agricultural Economics* 992. For the British experience, see P. Giddings, *Marketing Boards and Ministers: A study of agricultural marketing boards as political and administrative instruments* (Westmead, Farnborough, Hants, England: Saxton House, 1974) [hereinafter Giddings] which also provides considerable detail concerning the political process leading to the creation of the marketing legislation and is an excellent examination of the complex relationship between politics, economics, legislation and administration involved in the establishment and operation of marketing boards.

[67]The situation in the grain industry and the some of the factors leading to the creation of the Wheat Board were described *supra* note 59.

governments became active in the regulation of the fluid milk market.[68] The legal model had been created but this did not mean that marketing boards became common or that they enjoyed widespread support from all levels of government or from all commodity groups and individual producers.

The Further Development of Marketing Boards

It is beyond the scope of this thesis to trace the full and tortured development of marketing legislation in Canada by both the provincial and federal governments as they embarked on a 50 year process to find a legislative basis for effective producer marketing boards which could operate effectively in a federal system and which would survive constitutional challenges in the courts.[69] This would require a thesis in itself, one which looked at the history of the development of the Canadian agricultural industry and the

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[68]Most provincial governments responded during this period to the crisis in their local dairy industry (another industry in which cooperatives were prominent) by enacting dairy control legislation which regulated production, distribution and pricing in the local fluid (raw) milk market. Like the federal government in the grain industry, most provincial governments hoped that these were temporary depression related measures but the systems established have remained. Dairy control legislation occurred earlier and followed a somewhat different form (often under separate acts) than other marketing legislation for reasons specific to the industry. Raw milk was bulky and very perishable; it had to be marketed immediately and could be transported safely only a short distance. The resulting local nature of the market and the need for safe transportation and distribution created a distribution market that resembled a natural monopoly which placed individual farmers at a severe disadvantage and raised health and safety concerns relating which created social policy considerations for regulating milk quality and setting standards for both production and distribution. This led to regulation which was more akin to regulation of a natural monopoly or public utility: there was more direct government intervention through direct appointments; restrictions on the number of distributors; and by price regulation by provincial Public Utilities Boards. The perishable nature of fluid milk also meant that it was not transported for long distances and there was little interprovincial movement of fluid milk. It was therefore practical to establish a provincial system for regulating fluid milk. The same did not apply to the processed milk market which by its nature could be marketed intraprovincially and in the export trade and it was not until the 1960s and 1970s that an effective supply management system was developed on a national basis.

[69]Both of the initial B.C. Acts, together with the first federal legislation of 1934, did not survive judicial challenges. See *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction,* (1931) S.C.R. 357; *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.,* [1933] 1 D.L.R. 82 (P.C.); and *Reference re the Natural Products Marketing Act, 1934,* (1936) S.C.R. 398 considered and approved in *A.G. B.C. v. A.G. Can.* [1937] 1 D.L.R. 691 (P.C.). The Saskatchewan experience in legislating compulsory co-operative grain marketing has already been referred *supra* note 59. Gilson suggests that few other spheres of economic activity in Canada have raised as many constitutional questions as agricultural marketing. legislation. (Gilson at 131).

legislative and judicial experience in the overall context of changes in the nature of Canadian federalism and the evolution of Canadian constitutional law within which agricultural marketing cases have played a prominent role. For reference, I have attached as an appendix a brief chronology and description of some of the major legislative and judicial developments from the late 1920s to approximately 1980 when the present form of national plans for supply management were found to be constitutionally valid.[70] Clearly, as the appendix demonstrates, the federal nature of the Canadian political system and the division of powers under the British North America Act complicated attempts by either the federal or provincial governments to create marketing boards which could effectively regulate agricultural markets which did not conform to provincial boundaries. Some form of cooperation between the federal and provincial governments was essential where product was produced in a province but marketed interprovincially or internationally and it proved difficult to find a system that was effective and that would survive judicial scrutiny. But the impact of the courts is only one reason that it took until the 1960s before marketing boards became widespread in commodities other than grain, fruit and vegetables or dairy.

While I do not wish to survey the entire history of the development of this legislation, there are certain points which are important. The basic form of the marketing legislation dates back to the 1930s, but the vast majority of present marketing boards were not created until the 1960s and it was not until the 1970s that present form of national supply

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[70]See Appendix, 323. For further discussion of the historical development of marketing boards and marketing legislation, see: Hiscocks; Drummond; *Report of the Commission on the Tree-Fruit Industry of British Columbia 1958;* Hoos; W. Bishop, *Men and Pork Chops: A History of the Ontario Pork Producers Marketing Board* (London, Canada: Phelps Publishing Company, 1977) [hereinafter *Men and Pork Chops*]; G. Skogstad, *The Politics of Agricultural Policy-Making in Canada* (Toronto: University of Toronto Press, 1987); and G. Perkin, *Marketing Milestones in Ontario 1935-1960* (Parliament Buildings, Toronto: Ontario Department of Agriculture, 1962) [hereinafter *Marketing Milestones*]. For a discussion of the constitutional aspects of marketing legislation see P. Hogg, *Constitutional Law of Canada* Vol. 1, 3rd ed., (supplemented looseleaf) (Toronto: Carswell, 1992) and also other standard texts such as White and Lederman and Laskin [citations omitted].

management programs were implemented and survived constitutional challenges. Aside from the Courts, marketing legislation and the creation of marketing boards encountered opposition on a number of fronts. Both the federal and the provincial governments showed a great deal of reluctance in approving compulsory producer marketing boards. They generally responded only to crisis situations such as in grain and fluid milk.[71] When the initial federal legislation of 1934 was ruled unconstitutional, no further federal legislation was passed until 1949 and, aside from regulation of fluid milk, the only major provincial activity was in specific sectors of the fruit and vegetable industry particularly in B.C. and Ontario.[72] Many other provinces, like Alberta, did not even have marketing legislation during this period and those that did made little use of it except in those provinces which did not have separate legislation to deal with fluid milk. In part, this reluctance was ideological; many politicians and civil servants did not accept that it was appropriate to intervene to impose compulsory marketing on agricultural markets and on either producers who did not want it or upon processors who were opposed to it; their habitus was strongly inclined against this type of action and they preferred to encourage and support voluntary producer cooperative action.

But this reluctance in respect to compulsory marketing also reflected the habitus and position of producers in many commodity groups. While there was strong support across commodity groups for government action to restrict anti-competitive behaviour on the part of those with whom the farmers dealt, there was strong opposition from producers

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[71]And in both these cases, most of the governments involved initially hoped that the measures taken would be temporary and that once the crisis in the industry passed, compulsory marketing would no longer be necessary. See *supra* notes 59 and 68.

[72]Fruit and vegetables were perishable products produced in a limited geographic area. Because of the nature of the product and the problems caused by the seasonal and perishable nature of the product most of these sectors had also been involved in co-operatives and had organized producer groups who favoured some form of collective marketing. For a history of marketing boards in Ontario prior to 1960, see *Marketing Milestones.* The B.C. experience is described in *Report of the Commission on the Tree-Fruit Industry of British Columbia 1958* and in the materials of the B.C. Legislative Assembly's Select Standing Committee (British Columbia. Legislative Assembly. Select Standing Committee on Agriculture, *Marketing Boards in British Columbia* vols. 1 and 4, January 1979).

within some commodity groups to compulsory marketing.[73] The habitus of many producers made them opposed to any compulsory restriction on their freedom to make their own marketing decisions.[74] While both government and producers recognized that producer bargaining power was weak compared to other segments of the industry and that this was a major factor in the farm income problem, there was no consensus on the issue of compulsory marketing. So during the period prior to 1950, neither producers, the government, nor the courts were convinced that widespread compulsory producer controlled marketing were a good thing. Co-operatives were acceptable and had widespread support at all levels, but co-operatives did not work as a means of enhancing producer bargaining power and hence producer's marketing capital remained low compared to processors and distributors.

The Second World War had a major impact on the habitus of both producers and the Federal government concerning regulation of marketing. Agriculture was fully regulated under the "War Measures Act" during the war and the immediate post-war recovery period and the federal government used various subsidies, together with marketing and price controls to attempt to meet desired product mix and level of output for both domestic and export requirements. During the war most agricultural commodities operated under some form of temporary board which regulated most, if not all, aspects of marketing.[75] While the policies developed were primarily intended to meet short-run war related objectives, a number of policies developed continued into the post-war period. The type of subsidization programs that formed the foundation of the American New Deal

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[73]This opposition was particularly strong among cattle and pork producers. Chicken was not an issue at this time since commercial production of meat chicken in any significant volume did not begin in Canada until the late 1950s.

[74]In his discussion of the British marketing legislation of 1931 and 1933 which served as the model for the Dominion Act of 1934, Giddings points out that there was considerable opposition from producers. What many farm groups in Britain wanted was import controls, not marketing boards.

[75]These include the Meat Board, the Dairy Products Board, the Agricultural Supplies Board and the Special Products Board in addition to the Canadian Wheat Board which was made a compulsory marketer in 1943.

farm programs of the 1930s were a product of this war period in Canada and while most of these programs were intended as temporary war time measures, many of them continued and became the basis of subsequent government agricultural policy.[76]

Experience with wartime regulation of marketing increased the familiarity of both the federal government and producers with marketing regulation. The Federal government continued to regard compulsory marketing as primarily a short term measure to deal with the war and its immediate aftermath. However, the relatively high and stable prices enjoyed by producers and their experience with regulation by the temporary government boards increased producer awareness of the potential of marketing regulation, particularly when the recovery of food supplies in the early 1950s resulted in a return to lower and unstable prices. More producer groups became interested in marketing boards for their product and the 1950s saw the beginnings of a system which made some degree of federal provincial cooperation possible. By 1956, there were 26 producer-controlled boards concentrated primarily in Ontario and B.C. and involving primarily fruit or vegetable products.[77] The situation was summed up by the B.C. Commission of Inquiry of 1958 into the tree fruit industry as follows:

> On the one hand, this survey shows that producers of agricultural products in most Provinces of Canada have been slow to make great use of the marketing legislation that is in existence in each Province. On the other hand, it does show that the idea of orderly marketing has taken root in all areas of Canada.[78]

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[76]Examples include: a feed-grain freight assistance program on feed grains moved from the prairies to eastern Canada and to B.C. in order to promote increased livestock production; an *Agricultural Prices Support Act* establishing a board to support prices for farm products by buying product at a definite price and stockpiling the product or by a determination of a minimum price for a product and payments to producers of the difference between the minimum price and the actual price realized by the producer; the establishment of the Canadian Wheat Board as compulsory; removal of all tariffs on farm machinery; government guarantees of longer term agricultural loans; and various other specialized forms of subsidies.

[77]This excludes the dairy and grain industries. However, the successful experience with marketing control of producers in these two commodities made other commodity groups more receptive to the idea of producer controlled marketing boards.

[78]*Report of the Commission on the Tree-Fruit Industry of British Columbia 1958* at 56.

It took another period of low agricultural prices and severe farm income problems before this situation changed.

The 1960s

The 1960s brought a period of severe marketing and price problems in the agriculture industry. Despite significantly increased government involvement in efforts to increase productivity, to expand and develop export markets, and to provide price supports to enhance price stability and to maintain farmers' incomes, and despite the growth of a variety of subsidy programs, there continued to be a large gap between farm incomes and the generally rising incomes of the balance of the economy. These continuing farm income problems, combined with the fact that the 1960s were a period which was more receptive to government intervention in the economy, made provincial governments far more receptive to producer requests for marketing boards.[79] The success of marketing controls in the fluid milk and grain industries and the fact that there were now existing marketing boards which producers in other provinces could model their proposals upon were also important factors. Once this process started it developed its own momentum. The successful establishment of producer boards in other provinces increased the political capital and the legal capital of groups producers seeking to convince their provincial government and their fellow producers to set up a similar board.[80] Thus both hog

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[79]This position was not unique to agriculture. The combination of the depression and the war related government intervention resulted in a massive increase in government involvement in most sectors of the economy and society in general Government intervention in the economy came to be perceived as necessary and acceptable in order to achieve social and welfare aims. This led to the growth of what is commonly referred to as the 'welfare state.' As indicated *supra* note 63 this is an important theme in both American and Canadian materials on administrative law. In Bourdieu's terms, there had been a major shift in the habitus of the participants in the political field concerning increased government intervention. As well, it has always been during periods of low prices or other trade disruptions when farm incomes are very low that the pressure for change upon governments and their willingness to consider change is greatest.

[80]Once a legal form is created it acquires a presence and history of its own. Future legislation and regulation draws upon existing models. A form of legislative habitus is created. Thus the Dominion Act of 1934 drew upon the British Acts of 1931 and 1933 and all subsequent marketing legislation was modeled upon this Act. Similarly, the earliest boards created in particular commodity in one province often became

producers and broiler producers in Alberta were able to draw upon the experiences and models developed in other provinces, particular Ontario in pork and Ontario and B.C in chicken, during the process which led to the creation of the ACP and the APPDC.[81]

However, before moving to the specific context of these two boards, there are two other general and background areas that I wish to comment upon to provide additional context: the fact that like the political field, the economic field is a part of and places definite limitations on marketing boards; and the role and importance of history in developing the capital and habitus of the agents within particular legal administrative fields. These last remarks will serve both as the conclusion to this chapter and as an introduction to the specific discussions concerning the ACP and the APPDC in the next chapter.

Economic Limitations on Marketing Boards

Producer marketing boards may be part of a particular agricultural marketing system and they may impact on the choices that the system makes in responding to the problems which must be resolved in the particular agricultural market which develops, but they are only one of many participants in the market and there are significant transactions and entities within the market over whom they have little influence. The examples of a concentrated retail market and shifts in consumer preferences have been referred to above. For each agricultural product, the system which develops will be shaped by a complex series of factors. This makes it necessary to look at particular agricultural marketing

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models for groups in other provinces seeking to develop a board in the same commodity. The process became easier because there were models to draw upon and to point to in representations to both the government and to other producers.

[81]M. Hawkins *et al.*, *Development and Operation of the Alberta Hog Producers Marketing Board,* Bulletin 12 - General Information, rev. ed. (Edmonton: University of Alberta, 1977); Alberta Chicken Producers' Marketing Board. *Annual Report 1991.* For the Ontario hog experience see *Men and Pork Chops* and *Marketing Milestones.* For chicken in Ontario see S. Leeson, *The Ontario Poultry Industry: An Illustrated History* (Guelph: Ontario Poultry Council, 1986).

systems in order to see what factors shape the particular market or field which is being considered.

What is particularly relevant for the consideration of the ACP and the APPDC is that while one of the expressed objectives for marketing boards is a desire to increase producers' market power and while the legislation and regulations purport to convey regulatory marketing power to the marketing board, the amount that the legislation or the marketing board can actually achieve is limited by economic factors in the relevant agricultural marketing field. Even if producers exercise a compulsory marketing power through a marketing board, they must still deal with processors and retailers who are powerful market forces and who are increasingly concentrated and vertically integrated. A marketing board may increase the marketing capital held by producers' within a particular field, but it does not mean that their marketing capital will exceed that of other agents within the field. The question of capital is complicated. Collectively producers possess a certain capital within the legal administrative field that is partly historical, partly ideological, partly economic and partly statutory. Compulsory statutory organization may give them collectively additional marketing capital but this effect is not clear cut since they must deal with other participants who also have extensive market capital and political capital. The potential effects of marketing boards are often exaggerated by those who look only at the wording of the legislation and do not consider these additional factors; the actual results are sometimes difficult to measure, shift over time, and are complicated by various economic factors and within the field. Marketing boards do not exist in isolation; they exist in economic markets which are large, complex and increasingly international in scale and which are impacted by many factors and agents beyond the control of provincial or even federal legislation. While this position can be discussed in the abstract, it varies for each particular marketing board and legal administrative field.

Capital and Habitus - Why is History Important?

This review of some of the political, economic and historical factors which have impacted upon the development of marketing boards is in no sense exhaustive. However, it does illustrate an number of important points and it has served to relate Bourdieu's concepts which were discussed in chapter 1 to the legal administrative fields of agricultural marketing boards. The first point is that there is always a significant degree of government intervention and regulation in agriculture. Agricultural policy and regulation is an important aspect of government and the political field always impacts upon the agricultural economic field. Marketing boards are a particular type of government regulation but they are only one element in a complex, highly politicized field in which various entities and aspects of government play an active role as agents within the field and where the potential positions which may be taken by the agencies of government are always an important issue. This emphasizes the fact that the political capital possessed by all agents within the field including the marketing boards, processors, the Marketing Council, the Minister of Agriculture, and other elements of the government, have an important effect on what may or may not be legally possible within the legal administrative field; it is impossible to determine how the system will operate in practice without at least some sense of this factor.

A second point is the fact that agricultural marketing legislation is economic regulation. This means that it cannot be considered without some sense of the agricultural economic field that it is designed to regulate. The review of the farm income problem identified fundamental problems faced by producers in agricultural markets: lack of market information; low and unstable prices; and lack of market power relative to other agents in the field. The correspondence was drawn between market power and what was defined, following Bourdieu, as marketing capital. Various collective actions by farmers to increase their marketing capital in order to develop a countervailing power in the marketing field

relative to other agents were discussed. It was pointed out that the recognition of their low degree of marketing capital was a major factor in the organization of farm marketing cooperatives. The structural weaknesses of these cooperatives in increasing the bargaining power of producers was discussed and it was pointed out that these weaknesses led to producer pressure for compulsory marketing organizations.

Several important factors flow from this discussion. Farmers organized politically to obtain various forms of intervention to deal with what they saw as the failure of the market to deal with the farm income problem. With various degrees of success they sought to use their collective political capital to obtain government intervention to correct what they perceived as abuses in the marketing system and they also organized themselves into cooperatives to act collectively to increase their marketing capital. The cooperative and the anti-trust movements created a group of strong farm organizations and gave these farm groups significant political capital. While technological, economic and demographic changes[82] may have altered this political capital, farm organizations and farmers retain significant political capital and governments are sensitive to the importance of this political capital.

While the history of farm marketing legislation was not reviewed in detail, several points were made. The first was that although the models for this legislation were developed in the 1920s and 1930s, the initial responses were only in those industries such as grain, dairy, and fruit and vegetables where there was an economic crisis and there were organized cooperative farm groups to press for these measures as a partial solution to the crisis. It took 30 years before the use of marketing boards in other commodities became

[82]These changes mean that there are fewer farmers and agricultural workers and those that remain are a much smaller portion of the electorate. The growth of urban populations and the development of other industries have also reduced the relative importance of agriculture. However, the degree of the shift in political capital is difficult to measure and does not precisely correspond directly to the shift in these factors.

widespread. It was not enough for the model to be developed. A shift in the habitus of producers within the other commodity groups, of the federal and provincial governments, and of the courts had to develop before the rapid expansion of the 1960s could occur. What was not acceptable to many commodity groups, to the governments, or to the courts in the 1930s evolved over time to a point in the 1960s where, in another perceived crisis period of low agricultural incomes, it became accepted as a potential method of improving producers' marketing capital. This historical discussion illustrated a further point. There are limits to what marketing legislation can accomplish. Without consideration of the political and economic factors which impact on the field and without some sense of the habitus and capital of the agents within the field, it is impossible to understand what is likely to occur. In the next chapter, I propose to relate these points to the specific legal administrative fields of the ACP and the APPDC.

Chapter Four

The Alberta Context: The APPDC and the ACP

Introduction

This chapter will begin by examining some of the aspects of the economic and political fields which have particular significance for the APPDC and for the ACP and for the manner in which each has responded to the farm income problem which was discussed in the preceding chapter. This will be done in the context of a brief historical discussion of the evolution of each of the boards. It will be an overview, but it will set the context for a discussion in the next chapter of certain specific legal issues which each board dealt with. It will also point out some of the factors which have led to a habitus within the chicken industry which is far less confrontational, both with processors and with the provincial government, than that which has developed in the hog industry. The chapter will conclude with a brief discussion of the political field in Alberta which relates the points made in the previous chapters to a specifically Alberta context. Detailed discussion of the impact of the political field on the two boards will be deferred until a later chapter.

For the sake of clarity, I have chosen to focus on certain political and economic factors which impose constraints upon the realm of the possible for each marketing board and which thereby influence and shape the legal administrative fields in question. Any study of the legal administrative systems of these boards which does not look at the impact of these factors, fails to appreciate how the field functions and leaves major aspects of its operations invisible. I acknowledge that there are many other relevant factors and agents which have an effect in the fields but will not be mentioned or will be mentioned only in

passing. Given the complexity of the fields in question, this is inevitable and choices have to be made.

Marketing Boards: the Early Experience in Alberta

When discussions began in the early 1960s in Alberta about the creation of marketing boards in various industries including hog and broilers these discussions, took place in the context of the existing Canadian experience of the previous 30 years. There was successful and ongoing compulsory marketing in the grain and dairy industries, both of which were familiar to Alberta farmers and legislators. There were existing models of legislation and existing marketing boards in other provinces. Some of the constitutional and other legal issues concerning the creation and operation of marketing boards had been resolved in the courts. The move toward marketing boards had gained momentum in other provinces whose hog and chicken industries suffered from similar marketing concerns. At this historical moment the particular trajectories and intersection of the political, economic, and legal fields which had occurred and the corresponding and related shifts in the habitus of both government and producers created a set of circumstances in which the creation of the ACP and the APPDC and their respective legal administrative fields had moved into the realm of the possible.

In the agricultural marketing field, the Alberta government has never been particularly enthusiastic about marketing legislation or marketing boards. Alberta was one of the last provinces to enact marketing legislation. While all nine provinces, including Alberta, passed legislation in 1934 to allow provincial boards to accept powers under the Dominion *Natural Products Marketing Act*, no local boards were established in Alberta pursuant to this legislation prior to the Dominion act being declared ultra vires. Unlike B.C. or Ontario, Alberta did not proceed to enact its own provincial legislation even after

the B.C. legislation was held to be constitutional in *Shannon*.[1] In 1949, Alberta passed the *Agricultural Products Marketing Act* but this Act applied initially only to the marketing of oats and barley. Alberta did not enact further marketing legislation until 1955 at which point only Quebec and Newfoundland did not have such legislation. While similar in form to the legislation passed in other jurisdictions, the Alberta legislation was more of a skeleton. It did not provide for the establishment of a provincial board to supervise the creation and operation of local boards in particular commodities. Prior to 1965, only one board was created under this legislation.[2]

It was only with the amendments to the *Marketing of Agricultural Products Act* in 1965 that the mechanism for the creation of marketing boards was really available in Alberta and that the provincial government began to seriously consider the creation of farm marketing boards for various agricultural products in response to the factors discussed in chapter 3. These amendments established the Alberta Agricultural Products Marketing Council, added additional agricultural products within the ambit of the Act, brought the legislation into greater conformity with the most recent legislation in provinces such as Ontario and B.C.[3] and provided for the establishment of marketing commissions as an alternative to marketing boards.

While it responded to the momentum which developed during the 1960s for the creation of provincial marketing boards, the Alberta government was not a major supporter of the concept nor a major innovator in the general legal field of farm marketing boards. At the

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[1]*Shannon v. Lower Mainland Dairy Products Board,* [1938] 4 D.L.R. 81 (P.C.).

[2]This was the Alberta Vegetable Board which dealt with the sale of vegetables to processors but did not deal with sales of fresh vegetables intended for consumption in their natural form. The board operated more in the nature of a co-operative or marketing association than a compulsory marketing board. It negotiated contracts on behalf of growers with processors who contracted for the product. The industry involved was relatively small and the board which had been created in the late 1950s was not particularly active by the mid 1960s.

[3]As discussed in chapter 3, the legal and political capital of producer organizations seeking to obtain legislation and approval for the establishment of marketing boards was significantly enhanced by the successful establishment of such boards in other provinces.

first meeting of the national and supervisory boards, Alberta representatives from the provincial government and the Agricultural Products Marketing Council described the Alberta attitude as one of "toleration."[4] Alberta did not want to deny its producers advantages conferred by other provinces through the marketing board system but it was not an enthusiastic proponent. This attitude is significant when it is considered that it was expressed in a national forum devoted to marketing boards at a period of time which was, in many ways, the high point of support in Canada for the concept of marketing boards. It was within this general political environment that the APPDC and the ACP were created as two of the earliest marketing boards in Alberta.

The Creation of the APPDC

Prior to 1960 hogs were generally considered a supplementary farm enterprise which required little care, almost no investment, and consumed what would otherwise be waste products especially for dairy and grain farmers. They were often referred to as "the mortgage lifter" because they provided an opportunity to improve the farm's cash flow. Most farms in Alberta had some pigs but there were relatively few large operations and very few farms devoted exclusively to hog production.[5] This meant that there were a very large number of producers each of whom produced a limited number of hogs. It was relatively easy to move in and out of hog production depending upon an individual farmer's assessment of the profitability of hogs compared to other agricultural products; the hog industry was therefore characterized by cyclic production and a large number of producers who moved in and out of the industry depending upon their perception of the potential for profit.

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[4]National Farm Products Marketing Council, *Proceedings of the Federal-Provincial Marketing Seminar* (January, 1974) at 4.

[5]*The Hog Marketing Review Committee Report*, James L. Foster, Chairman, January 20, 1981 at 10-11 [hereinafter "The Hog Marketing Review Committee" or the Foster Report"].

The situation had begun to change in the 1950s with major developments in the confined feeding of livestock; applying the same principles as those used in feedlots, farmers began to raise hogs in total confinement. This led to more specialization in intensive hog production units and the size of the units increased. This in turn meant that producers who had invested significant amounts in specialized confinement hog operations could no longer move in and out of the market as easily although a considerable adjustment in production could still be made. The trend to a smaller number of farms producing hogs but each farm producing more hogs has continued since the 1950s. The general pattern of the industry was a large and but declining number of small producers who produced a small number of hogs while a small but increasing number of producers produced a large percentage of the hogs in larger and larger production units.[6]

The nature of the industry meant that producers were not disposed to any system which restricted entry and exit from the industry. In addition, because of its prominence as a barley growing region, Alberta possessed a comparative cost advantage in raising hogs and was always oriented to export markets rather than simply producing for domestic consumption.[7] These factors, together with the relatively free movement of red meat between Canada and the US for most of the period, meant that supply management was neither practical nor desired by producers.[8] Any system which developed had to develop within these constraints.

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[6]In 1976, 11.24 % of farms produced 72.45% of the hogs for an average size of 997 hogs per farm. In 1994, 13.02% of farms produced 71.09% of the hogs for an average size of 2662 hogs per farm. The number of producers had declined from 8873 to 3957. APPDC, "New Fresh News," March 13, 1995.
[7]This comparative cost advantage arises because the largest component of hog production costs is feed for the hogs. Alberta hogs are fed feed in which the major component is barley. Alberta is a major barley producing region which produces one half of all the barley grown in Canada. Alberta therefore provides hog producers with access to barley at a cost which is lower than in other regions where feed must be imported. Historically, a major concern in the Alberta pork industry has been the perception that Federal feed grain assistance programs and the Crowsnest Pass Rates for shipping grain have distorted this competitive advantage and fostered new pork production in Ontario and, particularly, in Quebec.
[8]As will be discussed in relation to the ACP, the success of supply management depends in large degree on the ability to control supply within a local market. If there is free movement of the product into the

Some of the general factors which led to the increased use of the marketing board concept in Canada in the 1960s have been discussed in chapter 3. In Alberta, the primary factors which led to the creation of a hog marketing board were producer concerns with the non-competitive nature of the Alberta market,[9] the lack of adequate price information,[10] and the lack of market power of a large group of individual producers dealing with a limited number of processors.[11] There was less concern with a stable market as it was recognized by producers that hog prices and hog production would continue to move in cycles which reflected the North American nature of the hog market.[12] After several years of consultation between various producer organizations and the provincial government, in February and March, 1968, the Marketing Council conducted an opinion poll among producers in which 3 alternate types of organization were presented.[13] Based on the results of this opinion poll which favoured the plan presented for a marketing board, a Plan for a marketing board was finalized and Marketing Council established registration and voting procedures for a plebiscite of eligible producers to consider the Plan. In

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market from other markets, even a fairly limited amount of such product can severely impact on the ability to manage supply and prices within the local market.

[9]Only 2% of Alberta hogs were sold by auction and this was used as the base price for widely varying contracts offered by processors to various producers and assemblers. It was felt that with such a small market, processors could easily manipulate the price. Various means by which this was done were discussed at The Hog Marketing Review Committee hearings in 1980.

[10]Because almost all hogs were sold by private contract with widely varying conditions and prices, there was no way for individual producers to access sufficient information to make informed pricing decisions.

[11]When the APPDC was created there were approximately 9 processors in Alberta and 2 in B.C. who regularly purchased hogs in the Alberta market. This can be compared to approximately 10,000 producers, most of whom produced a limited number of hogs.

[12]Because there were no restrictions on the movement of red meat local processors had to compete locally with pork products from other provinces and geographic regions. The fact that Alberta produced more hogs and cattle and more pork and beef than it consumed meant that these products had to be sold in other markets. As well, the beef and pork markets in North America had never developed along strictly provincial or national lines.

[13]For details, see M. Hawkins *et al., Development and Operation of the Alberta Hog Producers Marketing Board,* Bulletin 12 - General Information, rev. ed. (Edmonton: University of Alberta, 1977). The opinion poll was required because there were differing opinions between producers and between various existing farm organizations about what type of agency should be created to sell hogs. The proposal for a marketing board was only one of 3 options presented to producers and the Marketing Council became involved because after several years of discussion the farm organizations involved could not agree on a plan.

November, 1968, 86.4% of the eligible producers who voted approved the Plan.[14] An initial board of directors was appointed in February 1969 and, after the passage of the necessary regulations, the APPDC began selling operations in November of 1969.

The original selling system established was based on the Ontario model which had been operating since the early 1960s and established the APPDC as the sole marketer of hogs through a teletype Dutch auction system.[15] In this system, the APPDC acted more as a single clearing house between producers and processors than as an active marketer. The subsequent history of the APPDC is the process of changes to this selling system designed to increase the role of the APPDC as an active marketer and negotiator in order to increase price competition between processors and to improve the price of hogs in Alberta relative to other markets.[16] Each change occurred in the face of fierce processor

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[14]9300 producers registered to vote. 7362 producers voted and of these 6418 voted in favour of the Plan. The number of hog producers should be contrasted to the number of chicken producers who obtained quota which is discussed below. This reflects the very different nature of the two industries.

[15]In its initial inception, the APPDC acted as an interface or clearing house between producers and processors. The initial selling system adopted by the APPDC was a teletype Dutch auction system modeled after the Ontario system which had been operating since the early 1960s. See Bishop, *Men & Pork Chops: A History of the Ontario Pork Producers Marketing Board* for a description of the system and a history of the development of the Ontario Board which was the first hog marketing board in Canada. The book is particularly useful in chronicling the development of the Board from the point of view of a participant. It particularly conveys the amount of political activity which surrounded the inception of the Board and its ongoing operation and the degree to which there were divisions within the industry at various times. It illustrates the degree to which the formal legislation and regulations have little meaning without an appreciation of the personalities, organizations, economics, administration and politics which provide the context (or in my case, the field) within which the Board operated. This account should be compared and contrasted with that of Perkin, *Marketing Milestones in Ontario 1935-1960* which is a history of compulsory farm marketing during this period written by a retired civil servant who was chairman of the Ontario Farm Products Marketing Board (the Ontario equivalent of the Agricultural Products Marketing Council). The contrast between the perspectives taken on various controversial events which occurred during the period illustrates clearly the different habitus and position within the field of a marketing board director and the chairman of the supervisory board.

[16]A significant portion of the APPDC's activities and revenues are devoted to promoting pork consumption and to consumer education. In addition there is extensive support of industry research in all aspects of swine production. This aspect of the APPDC's operations does not distinguish it from other marketing boards and marketing commissions, has widespread industry support, and does not require any significant regulatory structure. Therefore while it is a major function of the APPDC, it will not be emphasized in this thesis which will concentrate on the marketing aspect of the APPDC's mandate and powers.

resistance.[17] The APPDC's marketing system changed several times and portions of the Plan and the authorization and marketing regulations were extensively amended. A detailed discussion of this evolution is beyond the scope of this thesis but the basic thrust of the changes was to strengthen the position of the APPDC as the sole marketer of hogs in relation to its ongoing disputes with processors over the selling system, the lack of bidding competition between processors for hogs ,and the price paid for hogs in Alberta relative to the price paid in other markets. This is a fundamental issue in relation to the APPDC and it will be discussed at length when specific issues faced by the APPDC are examined in the next chapter. At this point, I wish to focus on a description of the selling system which has evolved.

The Selling System[18]

The structure of the Plan and the Regulations are designed to authorize hog producers to use their collective bargaining power to negotiate with processors rather than to regulate production or supply of the product. Any person can become involved in hog production and there is no restriction on the number of hogs that person can produce. However, if they wish to sell hogs for slaughter in the Province of Alberta, they must be sold through the APPDC which must market all hogs that producers choose to produce and market. The APPDC is the sole marketer of hogs sold for slaughter in the Province;[19] with certain limited exceptions, producers do not and cannot negotiate individually with processors for

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[17]This conflict was not confined to Alberta. In 1981 the Economic Council of Canada stated: "During the last two decades there has been a continuous and bitter struggle between hog producers and the meat packers for some form of workable competition in the marketplace." *Reforming Regulation* (Ottawa: Supply and Services Canada, 1981) at 59.

[18]Note the comments in chapter 2 about the proposed changes to the APPDC's selling system which are contemplated for late 1996. This means that the description given here will have been substantially changed. See chapter 2, note 41.

[19]The definition of "hogs" in the Plan and regulations refers to hogs produced in Alberta and sold or offered for sale for slaughter. This means that breeding stock sold between producers or young hogs just weaned (weaners) who are sold by weaner producers to other producers to be finished for slaughter are not regulated in any way. It is only hogs which are being sold for slaughter which are regulated.

the sale of hogs in the Province of Alberta although they may choose to market their own hogs to processors located outside the province.[20] The APPDC has no price setting power under its Plan. It can negotiate sales to processors but it cannot force them to buy at a particular price; it can only refuse to sell the hogs if the price offered is unacceptable at which point it must try to find alternate markets for the hogs.[21]

The APPDC is directly involved in negotiating sales to processors, in operating a selling system where processors bid for hogs, in operating a hog assembly system and coordinating producer deliveries to processors in accordance with the sales negotiated, in developing new export markets and negotiating and completing export contracts and sales, and in receiving and accounting to producers for all sales receipts. It, therefore, has a much larger staff than the ACP and it performs very different functions, many of which are more akin to a commercial operation than a regulatory body. These operations are authorized in fairly general form under the regulations which confer an authority to undertake these functions but provide very little detail concerning how they will be carried.[22]

Under the marketing system as it has evolved, prices are negotiated by the APPDC with processors and sales and deliveries of the hogs are co-ordinated and organized by the APPDC. All proceeds from the sale of hogs to processors are paid to the APPDC which deducts all marketing expenses and its service charge from the proceeds and calculates the amount to due each producer for the hogs that the producer provided to the APPDC for sale. Returns to producers are pooled on a weekly basis and producers are paid the net

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[20]Since at least the 1980s a significant volume of hogs have been marketed by some hog producers primarily located in southern Alberta directly to processors in the US. The question of whether these hogs can be made subject to the APPDC's service charge has been contentious.

[21]The right of the APPDC to refuse to sell hogs to an Alberta processor if the price offered was unacceptable was challenged by one processor and upheld by the Court of Queens Bench in *Gainers Inc. v. Alberta Pork Producers Marketing Board,* (1985) 41 Alta. L.R. (2d) 229. This case will be discussed further in subsequent chapters.

[22]See the discussion of the Hog Marketing Regulation in chapter 2.

weekly pool price for any hogs they sold during that week. Actual returns to producers vary depending upon the number and weight of hogs delivered and the quality of the hogs as determined by a grading index agreed upon between the APPDC and the processors and based upon the inspections done by federal inspectors.[23] While individual producer indexes vary depending upon the quality of the hogs that they deliver, all producers receive the same weekly pooled price which is then multiplied by the dressed weight of the hogs delivered and the index determined for the hogs delivered by the particular producer.[24]

The size of the APPDC's activities is significant. In 1994, 3965 producers sold 1,973,181 hogs through the APPDC and the APPDC's hog sales generated revenues of $238,729,449.00.[25] Unlike chicken, the size of Canadian pork production is such that it cannot be absorbed in the domestic market and the export market is very important with over 20% of Canadian production being exported. The export market is particularly important to Alberta because both B.C. and the US Pacific Northwest and California markets are pork deficient regions. Alberta has always supplied a significant portion of the B.C. market and with relatively low production costs, it can compete in the Pacific Northwest and California markets with the American midwest pork producing regions.[26]

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[23]The grading index assesses hogs in relation to a desired dressed weight [i.e. weight after slaughter and evisceration] and desired fat to lean meat ratios. Based on the inspection conducted at the time of slaughter the producer is given an index for the hogs delivered established against a base index of 100.

[24]For example, if a producer received an index of 108 for a shipment of hogs the producer's receipts would be determined as follows: total dressed weight x weekly pool price x 1.08. Some export sales are made on a live weight basis and these are converted to dressed weight based on a yield percentage factor which changed in 1994 from 78% to 80%.

[25]APPDC *Annual Report, 1994*. It should be noted that the recognized marketings of slaughter hogs on which the service charge of $1.25 was collected was a higher number, 2,043,462. This is because a certain number of hogs are marketed directly by producers to small abattoirs which then remit the service charge. Because of the small volumes involved, these hogs are not required to be sold through the APPDC so long as the service charge is paid. Actual Alberta production is somewhat higher than this total when hogs sold directly by hog producers to processors in the US. and, to a lessor degree processors in other provinces, are considered. These hogs are not included in the above total because they are not hogs on which the service charge was collected.

[26]Historically, the American midwest regions which are located near to the major corn producing areas in the US. (corn is the major component of feed for most American produced hogs) have produced the bulk

There are also significant sales to Asian markets and significant export sales have been made to Cuba and to Russia. Alberta exports the largest percentage of its pork production of any Canadian province and the development of new export markets and the maintenance of existing export markets is a major aspect of the operations of the APPDC. In the hog industry, there is no national plan and no national agency. This means that an entire level of marketing control which is essential to the system of marketing chicken does not exist in pork.[27]

Economic Constraints on the Marketing System of the APPDC

If processors wish to buy hogs produced and sold for slaughter in Alberta, they are required to purchase these hogs through the APPDC. What seems, at first review, to be a statutorily created marketing monopoly with an unrestrained right to decide whether or not to sell hogs and to determine what is an acceptable price is less absolute than it might appear simply from the legislation and regulations. The APPDC faces major practical economic constraints which make the statutory monopoly in marketing less absolute than it might appear. The APPDC has no power to force processors to buy its hogs; it must negotiate with them to determine how many hogs will be purchased and the price that will

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of the hogs in the US. Some of this production is now shifting to states such as Arkansas and North Carolina where some very large integrated production and processing facilities have developed and there appear to be fewer environmental restrictions.

[27]When the *Farm Products Marketing Agencies Act* S.C. 1970-71-72, c. 65 was passed in 1972 it was after one of the longest debates on record in the House of Commons. The beef and pork industries, particularly in western Canada, bitterly opposed the proposal and their proposed inclusion. The Act was amended several times during the 3 year period from its introduction to its final passage and, after lengthy and bitter opposition, western livestock producers were successful in having hogs and cattle deleted from the provisions of the Act. See G. Skogstad, "The Farm Products Marketing Agencies Act: A Case Study of Agricultural Policy" (1980) 6 *Canadian Public Policy* 89.

The Canadian Pork Council, of which the APPDC is a member, is a national federation of provincial hog producer marketing organizations. It provides valuable services to the industry in respect to relations with the federal government, international trade development, defence of producer interests in international trade disputes concerning pork, such as the American countervail actions, in respect to industry research, and in respect to other issues of concern to pork producers on a national and international basis. But it is a voluntary federation, it is not established under the *Farm Marketing Agencies Act*, and it has no role in the regulation of the production or marketing of pork.

be paid. The collective marketing power of producers acting through a single compulsory marketer is limited by the fact that in Alberta since 1985 there have been only two major processors who purchase hogs.[28] A single large marketer is faced by two large buyers each of whom purchase approximately fifty percent of the hogs sold.

The APPDC's power is also limited because it does not determine how many hogs will be produced or when the hogs will be delivered to market; such production decisions are made by individual producers. It is required to find sales for all hogs that producers choose to produce and because the nature of hog operations makes it impossible for producers to withhold hogs from market once they have reached market weight, the APPDC must either sell the hogs it receives to the two local processors or arrange sales in geographically distant markets.[29] Similarly, while both processors are free to obtain hogs from sources outside of Alberta the cost and limited volume of such hogs available means that this is done only to a limited extent.[30] Therefore, while theoretically the APPDC could refuse to sell hogs to the Alberta processors or those processors could refuse to buy these hogs, there would be severe economic consequences for both parties. At various points in the conflict between the APPDC and the processors, these options have been used to put

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[28]Even before this point, it was the position of the APPDC that the processors divided market share and conspired to avoid competition and thus leave the Alberta price low relative to other markets. This led to a class action by certain producers and the APPDC against the packers and to a *Combines Act* prosecution. These matters will be discussed further in the next chapter.

[29]Patterns of hog production in the North American market and closures of nearer plants in the US now mean that the only practical markets for significant numbers of live hogs are the processors located in the American midwest at least 2000 miles away. This means significantly increased sale costs to arrange sales in these distant markets, assemble the hogs, and to transport the hogs 2000 miles across an international border. It also means increased stress on the hogs and increased shrinkage of market weight because of the long distance transportation. Thus while large numbers of hogs have been shipped to these markets during strikes or lockouts at the Alberta plants, it is not the preferred alternative.

[30]Import of live hogs from the United States is banned for herd health reasons (concerns about pseudo rabies) and there are only limited numbers of hogs available for sale to other than domestic processors in the other western provinces. In addition since the Alberta market price has generally been lower than the price in other available markets, it would seldom be economic for processors to acquire hogs at a higher price in other markets and also have to pay the transfer costs to bring the hogs to Alberta.

pressure on the other parties, but they are short term measures and this type of escalation of the conflict has often resulted in government intervention.[31]

The APPDC's ability to influence price is also limited by the constraints under which the processors operate. In the western Canadian market, the processors sell to a very concentrated retail sector which is dominated by one or two companies.[32] This concentration gives these retailers a tremendous degree of economic power vis a vis the processors. It has imposed a major constraint on the ability of both processors and producers to increase margins and has resulted in high retail margins relative to the rest of Canada, even when producer and processor margins were falling.[33] The nature of the pork industry is such that processors operate with very low margins. Hog prices are a major portion of processors' costs, and because the concentration and market power of the retail sector makes it difficult to pass on increased production costs to retailers, there is a limit to what processors can pay and remain in business.

A second limitation is the fact that the Alberta market is part of a North American pork market and the Alberta processors must compete in this larger market as well as in export markets in Asia. Not only do Alberta processors have to sell significant amounts of pork products at a competitive rate in geographically distant markets where they must pay transport costs to get the product to these markets, but they must also remain competitive in the Alberta market where retailers can and do choose to obtain pork products from

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[31]For example in 1977, in 1980, and in 1984-85, the government became involved when the disputes were leading to these types of market confrontations. See chapter 5 for details of these confrontations.
[32]Fresh and processed pork is sold in Alberta mainly to retail chain stores. In 1980, one chain, Safeway, handled an estimated 60-70% of all pork products retailed in the province. Two other large firms handled the bulk of the remaining 30% of pork retail sales. While this figure has varied somewhat in the following decade the dominance of the major chain stores remains and the retail industry is highly concentrated.
[33]Coffin and Martin *supra* chapter 3, note 39. Also M. Hawkins and R. Norby. "The Implications of Vertical Integration by Food Retailers on the Canadian Pork Marketing System." Occasional Paper. Department of Rural Economy, (Edmonton: University of Alberta, 1977) and the concerns expressed by The Foster Committee (25-29) regarding the dominant position of Safeway in the Alberta retail market.

processors outside Alberta.[34] This process is being accelerated by process of rationalization in the North American pork processing industry which involves the increasing size, specialization, technological innovation and capacity of processing plants. This has placed increasing pressure on processing plants to modernize and rationalize in order to stay competitive. The trend which has developed is toward fewer but much larger single story, single purpose plants with vastly increased capacity and the ability to make use of economies of scale and technological innovation to reduce production costs.[35] There is no ability on the part of the APPDC to shield either its producers or local processors from these economic trends and a major issue in the Alberta industry has been the perception held by producers and the APPDC that they were being asked to subsidize smaller, older, less efficient plants through the medium of a lower hog price than in other Canadian and American markets.

This process of processing concentration and rationalization can be traced in Alberta. In 1967, there were 9 major pork slaughter/processing plants in Alberta and two in B.C. who routinely handled the Alberta hog kill and had a capacity of over two million hogs. Each plant was a multi-species plant handling both cattle and hogs and occasionally lamb. By October 1980, there were 4 major pork processing firms and 2 small packers in Alberta. It was at this point that the APPDC purchased Fletchers Fine Foods Ltd. By 1984 only two major packers remained: Fletchers Fine Foods Ltd. and Gainer Inc. and these two plants

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[34]Pork processors must also compete in sales to retailers with other meat products such as beef or poultry. Changes in consumer preferences both in respect to the type of meat and in respect to the amount of processing they expect have changed significantly and continue to change.

[35]Major technological innovations include: development of high capacity equipment for dressing and processing, faster curing and refrigeration all of which have enhanced plant productivity and created incentives for expansion of capacity; introduction of vacuum packaging in barrier films which changes production and marketing patterns by extending shelf life and delivery times without freezing - this makes larger processing plants with nationwide distribution possible; labor saving changes although there is still a high labor component in processing industry costs; and the transfer of meat cutting and processing from retail stores and kitchens to the meat industry - this has resulted in an increasing emphasis on new specialized products and has led to the processed meat product lines being the major profit center with the kill and cut operations being seen as the weakest link in the production chain and as a mechanism to deliver product for further processing where the bulk of the profits are made.

had expanded their capacity to the point where between them they could, and generally did, handle the entire Alberta production of approximately 2 million hogs. Even with modernization and technological improvement, these plants with capacities of approximately 20,000 hogs per week are less than half the size of some of the major US. plants and there is debate about whether the current Alberta production can support more than one modern plant and about whether there is the potential to increase hog production to a point where it would be practical to build new plants.

As has been noted, the pork industry operates in a North American market although there are some regional and national differences. With the exception of the US. countervail actions commencing in 1984,[36] the tariff on red meat has traditionally been low or non-existent and there is a large cross border movement of product and technology. To a large extent the hog price in most Canadian markets tends to reflect the US. price with appropriate adjustments for transportation, tariff and brokerage costs. In Alberta, the price range which the APPDC establishes every day when it solicits bids from processors is based on a formula takes into account hog prices in certain American markets.[37] This reflects the reality that the Alberta market price cannot be isolated or insulated from the larger North American market. The major issue of contention between the APPDC and the processors during the 1970s and 1980s was what the Alberta price should be relative to these other markets. This remains a major issue: processors suggest that because they face a strong retail sector, operate in an industry with very low margins, and must market much of their product into geographically distant markets, they require a price which is lower than other markets located nearer to major consuming centers and they suggest that because of comparative cost advantages to hog production in Alberta, producers can

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[36]The effect of the countervail actions will be discussed further in subsequent chapters.

[37]At one time, this formula also included hog prices in Manitoba and Ontario. This is no longer the case. Almost every hog market in Canada uses some form of formula price based either on American markets or on specific Canadian markets. For example, the B.C. price has traditionally been determined by taking the Alberta price and adding a certain agreed amount per hog.

afford a lower hog price; producers suggest that other processors are able to compete in equally distant geographic markets while paying higher hog prices and suggest that the lack of price competition in Alberta and the low price relative to other markets means that producers are being asked to subsidize inefficient packing plants.

The Alberta market price also cannot be shielded from the cyclical nature of hog prices. In general the North American hog cycle lasts about four years with two years of low average hog slaughter and higher average hog prices, followed by two years of higher average slaughter and lower average hog prices. Gilson summarizes the basis for these cycles as follows:

> It is not necessary to go over the pure causes of cyclicity in the hog sector. Let it be sufficient to reemphasize the point that commercial piglet and hog producers make their basic production investment decisions long before the factors influencing prices for pork during that time period will be known.[38]

The normal impact of these cycles can be impacted by the availability and prices of corn, soybeans and barley which are the major components of feed. Changes in these factors can have a severe impact on the immediate profitability of hog production and can cause significant and fairly sudden changes herd size.[39]

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[38]Gilson, *supra* chapter 3, note 46 at 10 and Table 2.7 at 14. See also G. Shepard and G. Futrell, *Marketing Farm Products: Economic Analysis* 7th ed. (Ames: The Iowa State University Press, 1982) [hereinafter Shepard] on the Cobweb theorem of livestock cycles. The major reason for the time lag noted by Gilson is that while it takes only 6 months to raise a hog from birth to market weight, it takes additional time to acquire the necessary breeding stock to increase production and it is 10-12 months before offspring from this increased breeding stock is available for the market. This situation is complicated further if there are shortages in breeding stock.

[39]Corn and soybeans are the major components of feed in the US. In Canada it is barley with various forms of protein supplement. It should be noted that approximately half the barley grown in Canada is produced in Alberta. It is on this basis that Alberta is referred to as having a comparative cost advantage. Some idea of the significance of feed prices can be obtained by looking at one of the long term Japanese export contracts arranged by the APPDC in 1979 in which the price of hogs was tied to the price of feed. This contract assumed that 371 kg. (17bu.) of barley and 68 kg. of 40% commercial protein supplement would be needed for each hog to achieve a dressed carcass weight of 73kg. (160 lb.) based on a live weight of approximately 90 - 100 kg. The actual rate of feed consumption varies between producers with more efficient producers having higher feed conversion ratios meaning that the hogs grow to market weight faster on less feed; nevertheless, feed costs are the most significant and most variable component of producer input costs.

There are several points to this review of the market in which the APPDC operates. Notwithstanding its statutory position, the market power and marketing capital of the APPDC is limited. The legislation makes the producer organization a participant in the market system but the position it occupies in the market is not a dominant one. The nature of the market which has developed makes it extremely difficult for the APPDC to force processors to pay higher prices. Neither it, nor the processors, can act in isolation from the market forces which restrict their ability to increase their respective margins. They must also react to the complex, changing and competitive nature of the North American and international pork markets. International markets, fluctuating availability and price of feed, dominant retailers, changing consumer preferences, competition from other meat products, the American countervail actions, and changes and innovation in hog production and in the processing industry are just some of the factors which impact on the APPDC's marketing function but which extend beyond its regulatory authority.[40]

Conflict within the System

Friction is natural and inherent in a system where the APPDC seeks to negotiate the highest price possible while the processors want to pay the lowest price possible. Such negotiations will always have the potential to create friction. However, the inability of both producers and processors to increase their margins significantly within the market or to pass increased production costs on to the next stage of the marketing system, exacerbates the tension inherent in the system. The relatively small size and outdated state of many of the processing plants in Alberta, which precluded economies of scale and increased efficiencies enjoyed by many of their competitors in other markets, also added to

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[40]Recognition of this fact was one of the rationales for the acquisition of Fletchers Fine Foods Ltd. in 1981. It was felt that forward integration by producers into processing would give producers an opportunity to have a fair competitor for hogs, to encourage new technology and production efficiencies and to develop further export markets in the Pacific Northwest. It was also felt that this investment would give producers an opportunity to participate in the rationalization of the processing industry which was occurring.

this tension. The system of confrontation was therefore inherent in the field and it plays a major role in shaping the habitus and capital of the agents within the field, and ultimately the parameters of the field itself. This habitus of confrontation is a major contrast with the position of the ACP.

The ACP: Early History of Chicken Production

The commercial chicken industry is a much newer industry than the pork industry. Prior to 1950, commercial broiler production was virtually non-existent in Canada and in its infancy in the US.[41] The chicken that sold for meat was a byproduct of flocks kept for egg production and was usually sold either live or simply plucked but not eviscerated. Chicken was not a major part of consumer diets and was dwarfed by beef and pork consumption. One study describes early poultry production in western Canada as follows:

> Early poultry production in western Canada had small flocks predominating with much of the product consumed on the farm or exchanged at local stores for other goods. The incidence of disease and malnutrition was high, production per hen was low and quality erratic. Seasonal gluts and shortages were a regular feature of the industry.[42]

It was only after World War II that commercial broiler production began, first in the US. and somewhat later in Canada.

During the 1950s and the early 1960s there were rapid advances in genetics, nutrition, disease control and housing of birds which made possible year round supplies of quality product, faster gains, and lower feed consumption. This new technology made possible the development of larger, specialized, efficiently managed production units devoted solely to broiler production.[43] The processing industry also developed rapidly producing products

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[41]A broiler is a young tender meat chicken grown exclusively for meat.

[42]Canada West Foundation Special Task Force Report, *Western Canadian Agriculture to 1990* (Calgary: Canada West Foundation, 1980) at 149 [hereinafter *Western Canadian Agriculture to 1990*].

[43]Research into genetics, nutrition, housing and disease control continue at a rapid pace: "More is probably known about the nutritional requirements, metabolism, genetic potential, behaviour and

that responded to consumer demand for more convenience and variety. A product was developed that responded to consumer needs and the growth in the industry was rapid and the development of this industry dramatically altered consumer meat product consumption. Production efficiencies were such that chicken in the US. actually cost consumers less in 1975 than in 1950.[44]

The production efficiencies developed by technology tended to favour larger specialized poultry producing units in which large amounts of chicken could be produced at low cost. This meant that commercial chicken production became a specialized operation and not simply a side line to a mixed farm where a small chicken flock was kept for eggs and meat. This meant that fewer farmers produced significantly more birds. "Growth and specialization have been the hallmarks of the poultry industry's development."[45] While technological development and specialization have led to the development of a large and important agricultural industry, the effect on producers has been more complex and the Canadian and American chicken industries have developed in significantly different ways. Marketing Boards operating supply management systems have been a major factor in this difference.

The American broiler industry is highly concentrated and almost completely integrated. Broiler production is concentrated in the south Atlantic and south central states which produce over 85% of all US. production.[46] Almost all of this production is controlled by large vertically integrated processing firms. Martin summarizes the situation as follows:

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composition of broiler chickens than that of any other domesticated species. It is the most efficient in rate of growth and utilization of feed of all animals used for food production. The rate of progress in the industry is an example of the kind of results that can be achieved by intensive research." *Western Canadian Agriculture to 1990* at 150.

[44]Kohls, at 429. Per capita chicken consumption in the US. more than tripled between 1950 and 1987. This occurred at a time when other meat consumption was either declining or remaining constant. See generally Shepherd at 345 and Kohls, chapter 25 as well as *Western Canadian Agriculture to 1990.*

[45]Kohls at 424.

[46]Seven states account for over 72% of production, and three, Arkansas, Georgia and Alabama account for over 44% of all broilers. Martin at 31.

> The US. broiler industry is highly vertically integrated. The significant economies of size in poultry processing and the large proportion of value added in processing are major drivers toward the processor being the coordinator of the industry.
> Broiler companies control the product from the selection of the strain of bird to points of final distribution of ready-to-cook and further processed products. Generally, broiler companies own the breeders, hatchery, feed mill and processing plant but contract with farmers for their supply of broilers. The pattern of contracting is quite similar across the country in contrast to the variation found in the turkey and egg industries. Company owned production is the exception rather than the rule with 90 percent or more broilers grown on contract with family production units.[47]

The balance of power in these production contracts is clearly with the integrated processor and not with the producer. The producer is insulated from the large price fluctuations which are characteristic of the market because payment is based on a minimum payment per pound, per bird, or per unit of space with incentives for performance. However, virtually every production and management decision is made by the integrator and the grower has almost no independence in the operation. There is also no security for growers who may be required to make significant capital investments in facilities with no guarantees that the production contract, which is usually on an annual basis, will be renewed.[48] These factors together with constantly increasing demands from integrators to producers for upgraded facilities and management contracts have caused substantial friction between integrators and their contract farmers. This has led to court cases in several states where it is alleged that processors have violated statutes which are intended to prevent them from refusing to deal with growers who belong to grower organizations who seek to represent the interests of the growers.[49]

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[47]*Ibid.* at 33.

[48]See C. Fulcher, "Vertical Integration in the poultry industry: the contractual relationship," *Agricultural Law Update*, Jan. 1992, 4 for a detailed discussion of the provisions in such contracts and some of the problems which have arisen.

[49]See D. Frederick, "Legal Rights of Producers to Collectively Negotiate" (1993) 19 William Mitchell Law Review 433; N. Hamilton and G. Andrews, "State regulation of contract feeding and packer integration in the swine industry" *Agricultural Law Update*, Jan. 1993, 4.

A major reason for the high degree of integration is the nature of the major price cycles to which the broiler chicken market is susceptible and the consequent risks of broiler production. As previously discussed, most livestock products including hogs are subject to price cycles primarily due to limited market information and biological time lags between producers' production decisions and when the new product can be marketed. The price cycles in poultry are much shorter because of the shorter biological time span to raise a broiler and the consequently shorter production cycles.[50] However, this also means that price and supply fluctuations can be more rapid and more extreme. In addition the number of transactions involved in acquiring inputs to produce broilers also increases grower risk. Hatcheries purchase eggs from breeder stock companies or producers. Once hatched, the chicks are sold to broiler producers to bring to market weight. Feed accounts for up to 60% of production costs so, as is the case with hogs, the feed grain industry has a significant impact on the profitability of production. Once chicks are at market weight they must be sold to the processor immediately. Any failure to market results in major escalations in feed costs and reduced returns. There is no ability to hold the product on the farm to await better prices. The demand for poultry products is quite price elastic which again creates greater price and supply instability.

Producers faced significant periods when returns did not cover the costs of production. There were therefore tremendous variations in supply as well as price and many producers where unable or unwilling to finance the costs of erecting facilities and acquiring chicks when returns were so uncertain. This meant that hatcheries, feed companies and processors found it hard to coordinate their production in view of limited and fluctuating supply. There were therefore serious market risks for all participants in the production,

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[50]Broiler chickens acquired as chicks are raised to market weight in 7-8 weeks. Roasters take perhaps 3 weeks longer and cornish take less time. When the time frame to adjust breeding flocks and hatchery supplies is considered, the ability of the entire system to make large adjustments may require 8 or 9 months or longer. However, so long as chicks are available for purchase, an individual purchaser can adjust production in a much shorter time.

processing and distribution systems. This led to vertical integration: first by feed manufacturers and hatcheries, and later by processors and specialist firms. It was driven by two primary factors: the need to reduce risk and financing costs for farmers ; and the cost advantage of a coordinated and integrated system. While this system has led to integration and greatly expanded production, it has not eliminated the price cycles. The industry remains highly volatile with major earning fluctuations.

The outcome of this process in the US has been an industry which is technology driven, concentrated, and highly integrated. Specialist firms are able to coordinate all aspects of production and distribution up to the final delivery to the consumer. The growth of retail chain stores and fast food outlets created a demand for a few highly successful, and standardized value added products. The system is geared to large low cost operations that produce primarily standardized products at a relatively low cost relative to other meat industries.[51]

The Canadian Experience

Prior to the formation of provincial broiler marketing boards in Canada, broiler production was developing in the same pattern as in the US. Few independent producers could withstand the price instability and frequent low prices. Production varied substantially depending upon current prices and feed companies, hatcheries and processors were extensively involved in production either directly or through contract or financing arrangements with growers. Unlike the situation in pork where such integration by

[51]The largest US poultry producer, Tyson Foods Inc., is one of the largest agribusinesses in the US. It is based in Arkansas and there have been allegations by the beef industry that enforcement of packing plant health regulations have been relaxed in the poultry industry compared to the beef industry. This has prompted a lawsuit by the cattle industry against the USDA (*The [Toronto] Globe & Mail* 18 July, 1994) and the US Secretary of Agriculture Mike Espey was forced to resign after allegations that his policies were influenced by gifts from Tyson. The size and power of the US industry as well as suggestions that its health standards are lower are major concerns of the Canadian chicken industry in relation to the possible effect of NAFTA.

processors was unusual, a prime motivation for producers in considering marketing regulation was to limit further vertical integration and preserve independent growers. The second major concern was to establish price and supply stability and to maintain producers' incomes above the cost of production. During the 1960s, producers in various provinces began considering provincial broiler marketing boards and by the mid 1960s several had been established and others were in the process of being formed.[52]

The Creation of the ACP

When discussions regarding the creation of a Broiler Marketing Board in Alberta began in 1964, producers identified their problems as low price, increasing vertical integration, little producer bargaining power, and unstable supply.[53] All three aspects of the farm income problem were thus addressed and there was the added concern that processor and hatchery integration would mean that there would soon be no independent producers. At this time there were 3 major processors who accounted for over 97% of broiler processing in the province. After a Plan was developed by the Alberta Broiler Growers Association in consultation with the Alberta Agricultural Products Marketing Council and approved by eligible producers in a plebiscite in 1966, the Alberta Broiler Growers Marketing Board[54] was formed in June 1966 and the Alberta Broiler Growers Marketing Plan, 1965[55] came into operation in September, 1966. Initially there were approximately 100 registered

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[52]This general process is discussed in Chapter 3. See Leeson *supra* chapter 3, note 81 in respect to the development of the Ontario poultry industry and the materials of the B.C. Legislative Assembly Select Standing Committee on Agriculture *Marketing Boards in British Columbia* vol. 3 October 1978 in respect to the development of the B.C. Board. These two boards were the earliest to be established in the chicken industry in Canada with B.C. in 1962 and Ontario in 1965. Ontario had also earlier experiences with various forms of negotiation with processors but these did not take the form of a marketing board.

[53]Alberta Chicken Producers' Marketing Board, *Annual Report 1991.*

[54]The name has subsequently been changed twice, first to the Alberta Chicken Producers Marketing Board and then to Alberta Chicken Producers. The first name change reflected the fact that regulation was extended from broilers to include other types of chicken (roasters and cornish hens). The second name change reflected a common pattern in western Canadian marketing boards to delete reference to the term "marketing board" in their name to avoid the unfavourable associations which had developed to that term.

[55]Alta. Reg. 17/66.

producers who were issued marketing quotas to produce broiler chicken based on their historical marketings.[56] The existing degree of integration is shown by the fact that when the ACP was established, quotas were issued to existing growers based on historic production and integrated operations held about 35% of the quota.[57]

At this time Broiler Marketing Boards had been created in Ontario and British Columbia and the model for the Alberta Board drew on the B.C. and Ontario experience. This meant that it developed directly as a quota board with supply management powers rather than going through a period of evolution as a negotiating agency with no supply management function. The Plan established provided for the promotion,[58] control and regulation of Alberta broiler chicken marketing and established marketing quotas for registered producers based on an allocated number of square feet of production facilities. The ACP had the power to limit supply by limiting the amount of chicken marketed since, beyond a small exemption intended primarily for personal consumption, no person could market chicken without a quota issued by the ACP. The ACP also had the power to set minimum

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[56]Some form of historic production is almost always used to determine initial quotas to existing growers. This is often a very contentious issue which leads to court challenges by existing or potential growers who feel unfairly treated. See e.g. *Bedesky v. Ontario (Farm Products Marketing Board),* (1975) 58 D.L.R. (3d) 484 (Div. Ct.), affirmed (1975) 62 D.L.R. (3d) 265 (C.A.), leave to appeal to S.C.C. dismissed (1975) 62 D.L.R. (3d) 266 (note) (S.C.C.); *Retmar Niagara Peninsula Developments Ltd. v. Ontario (Farm Products Marketing Board),* (1975) 58 D.L.R. (3d) 517 (Div. Ct.); *Bacon v. Ontario (Flue-Cured Tobacco Growers Marketing Board),* [1959] O.W.N. 256 (H. Ct.).

[57]Alberta Land Use Forum, *The Common Ownership of Land: Agricultural Processing and Marketing Facilities in Alberta,* Technical Report 7, 1974 at 106.[hereinafter Alberta Land Use Forum]. In fact, this may understate the total because this was only quota actually issued in the name of the integrated operations. It does not include situations where there were contractual arrangements under which a producer was financed and controlled by a hatchery or processor on the US model.

[58]Promotion of chicken consumption in general and of Alberta chicken in particular through advertising and consumer education and support for various research projects designed to improve production practices and technology, chicken breeds and other aspects of the industry are a major function of the ACP. However, this aspect of its operations has aroused very little controversy within the industry and it is not a major part of the regulatory system. It is a function performed by both marketing boards and marketing commissions. Therefore the concentration in this thesis will be upon the aspects of the ACP which relate to the regulation of marketing and production.

prices for broiler chicken after consultation with an Advisory Committee provided for under the Implementation Regulations.[59]

Since 1966, the chicken industry and the marketing system in Canada have changed substantially and a national marketing plan and national agency have been established. The ACP has evolved to accommodate these changes and the substantial growth of the industry[60] and its regulatory field has expanded to include a national supply management system which has no equivalent in pork and which is now an integral part of the ACP's operations and of the marketing system. It is beyond the scope of this thesis to trace that evolution in detail, but certain aspects of this evolution require discussion.[61]

The Issue of Integration and Cooperation with Processors

The history of the chicken industry in Alberta has been marked by a high degree of cooperation between the ACP and processors. At the time of the inception of the Board integrated operations held about 35% of the quota allotted. By 1971 integrated operations had acquired additional square footage and a study commissioned by the Marketing Council found that 41% of issued quota was held by the 3 processors.[62] After consultation with the government and Marketing Council, two steps were taken to deal with this situation: a regulation was passed by the APC which prohibited any grower who had more

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[59]Refer to chapter 2 for reference to the specific regulations in question.

[60]In 1991, 25 years after the creation of the Plan, chicken production was 4 times greater than in 1966. There were 238 quota holders as compared to an original number of about 100. The time required to produce a broiler had dropped from 66 days to 40 and feed conversions had increased by over 25%. ACP *Annual Report, 1991*. In 1992, the actual farm cash receipts for chicken in Alberta in were $77,097,000.00. There were 246 registered producers who produced an average of 259,000 kg., live weight, per farm.

[61]As discussed in chapter 2, except where otherwise specifically noted, I am confining my discussion to the situation as it existed in 1992. The Plan and the Regulations were extensively revised in 1993 at which time they were the subject of a producer plebiscite which approved the new Plan and Regulations by a vote of 300 to 17. It should be noted that there have been further significant changes in the Regulations since 1993 and more are currently contemplated. These are not dealt with since they are beyond the time period in which the issues that I intend to refer to arose and were dealt with.

[62]*Annual Report 1991* at 24; Alberta Land Use Forum at 106. Since this time, the number of processors has dropped to two and over 90% of the processing is done by one processor.

than 3% of the total existing quota from acquiring any additional quota; and an informal agreement was reached with the largest processor - Lilydale Co-operative (then named the Alberta Poultry Marketers Co-operative) - where it agreed that within 10 years it would divest itself of the additional square footage that it had acquired since the inception of the board and that it would not acquire additional square footage. Over time, this agreement was honoured and the Board regulation, the informal agreement, and quota expansion to existing and new growers has resulted in processors currently holding less than 7% of allocated quota.[63]

This type of cooperation between the ACP and processors was not unusual. Another example of the emphasis on cooperation occurred during the 'chicken and egg war.'[64] While other provinces passed regulations prohibiting the import or sale of out of province chicken, the Alberta Minister asked Alberta retailers and wholesalers not to import chicken or turkey until the issue could be resolved. The procedure worked and there were only limited effects in Alberta from the conflict.[65] This approach was possible partly because of the concentration of the Alberta industry with only 2 or 3 significant processors and with only one dominant retailer.

This cooperative approach was also shown in the one case in which legal action was instituted by the ACP against a processor. In 1971 Canada Packers, the other significant processor, was prosecuted successfully under the *Marketing of Agricultural Products Act* for producing roaster chicken[66] without a quota. However, when the processor indicated

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[63]*Annual Report 1991* at 24; *Alberta Land Use Study* at 107 for the situation in 1973.

[64]It was this dispute that provided the final impetus for the development of effective federal legislation to provide for national supply management. See P. Weiler, *In the Last Resort: A Critical Study of The Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974) at 156-164; and the discussion in the Appendix.

[65]*Annual Report, 1991.*

[66]Roaster chicken was a heavier bird raised for several weeks more than the broiler chickens which were the bulk of the industry. In 1971 this type of production was relatively new and was not widespread. The issue of roaster chicken was one of the major issues faced by the ACP and it generated the bulk of the

that it required such roasters for its operations and would shut down its plant if it could not obtain such a supply, the ACP provided assurances that the company would receive adequate supplies of roaster chicken. The ACP was willing to accommodate and respond to the need expressed.[67] The ACP has continued to consult closely with processors and to adapt production in response to processor requirements.

Informal agreement rather than direct coercion was typical of the ACP and the industry procedure during this time. This was made easier by several factors: the number of persons involved in the industry was small;[68] the regulation of price and supply meant that processors had a stable source of supply and input into pricing decisions through the industry advisory committee which protected their margins; the largest processor was a co-operative whose members included most of the quota holders; a tradition existed of co-operative principles and this tradition promoted consensus resolution of issues rather than legal confrontation. This does not mean that there were not serious disputes in the industry. However, in terms of relations between growers and processors the linkage between production, processing and distribution that in the US. was achieved through vertical integration, was achieved in Alberta through a supply management system which accepted significant processor input on issues of supply and price and in which the largest processor was and remained a grower co-operative. Linkage was achieved without vertical integration and there never has developed the same antagonistic relationship

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administrative appeals and legal actions in which the ACP was involved. It will be discussed in detail in the next chapter.

[67]See the Lutgen decision of the Alberta Agricultural Products Appeal Tribunal *infra.* chapter 5, note 79 at 11. While the APPDC has had major conflicts with processors over the market price of hogs, it too has made major efforts to educate producers to the changing needs of processors in terms of the type of hog marketed and lean meat to fat ratios. The issue in the hog industry remains market price, not the need to adapt to changing consumer and retailer demands.

[68]The original number of registered growers was approximately 100. This compares to the approximately 10,000 initial producers for the APPDC.

between producers and the Board on one hand and processors on the other which was the most consistent feature of the hog industry in Alberta.[69]

Despite the form of the regulations, the relationship which has arisen is clearly not simply the ACP imposing its will on processors under its regulatory power even though this power is far more extensive than that held by the APPDC. The extensive contacts, links and consultation, both informal and formal, which occur at all levels between producers, the processors and the ACP are an important factor in creating a framework and a habitus in which problems are resolved by informal consultation rather than confrontation and the imposition of regulatory power upon the processors.

The National Marketing Plan

Like most supply management boards, the ACP operates as part of a national system of supply management. Under the auspices of a national plan and a national agency (the Canadian Chicken Marketing Agency [hereinafter the CCMA])[70] established by agreement

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[69]The B.C. Legislative Assembly Select Standing Committee on Agriculture evaluated the Alberta Advisory Committee in the following terms:

> The committee's nine members representing primary production to consumer are consulted if changes in the marketing quota and price levels are contemplated. The committee and the board meet at least three times per year to discuss various issues and policies pertinent to the industry. The board therefore draws heavily on the experience of industry persons of mature judgment and business intuition for short- and long-term market planning. Conflicts of interest, if present, are solved through mutual understanding and a spirit of co-operation, thus avoiding litigation. It is probably this spirit of co-operation and participation that has facilitated the cohesive and efficient application of the supply management system to the Alberta broiler industry. (vol. 5 at 28).

This is not an automatic response in a supply management situation. In fact the B.C. Select Standing Committee was clearly contrasting the situation in Alberta with a much more confrontational and antagonistic situation which appeared to exist in the B.C. regulatory system where the B.C. Chicken Board often ignored the directions of its supervisory board and enjoyed a direct relationship with the Minister of Agriculture which allowed it to bypass the supervisory board. (See the comments concerning the B.C. Broiler Board in B.C. Select Standing Committee on Agriculture, vol. 3 at 95).

[70]Established under the *Farm Products Marketing Agencies Act* by agreement between the federal government, provincial agriculture ministers, the supervisory boards or councils in each province and provincial boards in 1978. The enactment of the *Farm Products Marketing Agencies Act* by the federal government in 1972 and the subsequent establishment of various marketing agencies was the culmination of nearly 50 years of attempts to develop a workable legislative framework for interprovincial regulation with a federal framework. Various earlier attempts by both the federal and various provincial governments had been ruled unconstitutional. With the development of supply management boards in the feather

between the provinces, the provincial marketing councils (or their equivalents), and the provincial boards, the supply of chicken is managed on a national basis. Each year a total annual allocation of 'domestic chicken production'[71] is determined for six production periods and this production is allocated to each province which is a party to the agreement in accordance with an agreed formula which determines that province's percentage of the national quota.[72] Each provincial board then divides its allocation among its producers. In Alberta the total amount of quota issued by the ACP is identical to the total national allotment of the ACP under the CCMA agreement. As specific periodic allocations change, production and marketings are adjusted accordingly. Provinces which fail to adjust their production and which overproduce are subject to penalties for overproduction. While there is some interprovincial movement of chicken, particularly in relation to the secondary processing industry,[73] most chicken is consumed in the province in which it is produced.[74] Canadian chicken is not exported in significant amounts.[75] The system in

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industries in the 1960s the question of interprovincial regulation of product became acute resulting the "Chicken and Egg Wars" of 1970-1971 where various provinces tried to ban the import of product from other provinces. For a further discussion of this process, refer to the Appendix and to Skogstad *supra* note 27. The circumstances under which Alberta and the ACP became a signatory to the national plan will be discussed in the next chapter as one of the specific legal issues faced by the ACP.

[71]One of the keys to a national supply management program is the existence of import controls imposed by the federal government which restrict imports of supply managed products to very low levels. No product can be imported without a permit and each product has a Global Import Quota which restricts the volume of permits allowed. In 1992 the Global Import Quota for chicken was set at 7.5% of domestic Canadian chicken production for the previous year. A small additional amount of Supplementary Imports requiring a special import permit may be allowed to accommodate temporary market shortages. These import controls are essential for the effective management of a supply management system. Under the most recent GATT agreement, import controls are to be replaced by tariffs which start at very high levels and are to be slowly reduced. This issue has also been addressed under the NAFTA agreement and one of the major ongoing issues in the industry is the impact of these agreements on the eventual future of the supply management system in Canada.

[72]In 1992 Alberta was allocated an annual quota of 45,308,403 kg. eviscerated weight out of a total national allocation of 556,293,574 kg.

[73]Secondary processing refers to processing beyond the slaughter and evisceration of chicken for the sale of fresh or frozen product. The most prominent example is the fast food industry with major consumers such as KFC or MacDonalds creating chicken products for sale. The growth of the secondary processing industry in certain provinces has been another factor which has placed strains on the national allocation system.

[74]Historically a certain amount of Alberta production has been marketed in B.C. In 1971 this amount was estimated to be 15% of Alberta's production and although this amount has declined, this has been a continuing source of tension with B.C. and the B.C. Board and provincial government at both the

place is designed to provide a stable domestic market designed to meet domestic consumption and is protected from competition with imported supplies.

Under the CCMA agreement it is contemplated that provincial formulas may change over time based on various factors including changes in population and consumption and changes in relative costs of production. However, any changes in formulas are very contentious as are the annual allocations and the determinations of any the penalties to be paid by provinces that overproduce. There have been a number of disputes which have led to court cases or to particular provinces withdrawing or threatening to withdraw from the CCMA. The threat of withdrawals and actual withdrawals by various provinces who are dissatisfied with their market share remains a problem. Since 1989 B.C. has not been a member of the national plan and there are currently serious problems with Ontario and between Ontario and Quebec which have placed serious stress on the system.[76] The issue of chicken production in the Northwest Territories which is outside of the national plan is also an outstanding issue.[77] Provincial governments have often been active in such disputes and in attempts to obtain larger allocations for their province. Government

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provincial and national level as B.C. has made a concerted effort to increase its provincial production and to displace Alberta imports.

[75]In 1992 exports were less than 1/4 of 1% of Canadian production.

[76]Quebec has responded to major increases in production in Ontario by increasing its production as well. Other boards including the ACP have followed the same course and in 1994 and 1995 there was severe downward pressure on price as a result of this increased production and returns for both processors and producers were negative for considerable periods of time. The situation also led to litigation between the CCMA and the Ontario Board which placed in question the status of the national agreement. *Ont. (Chicken Producers' Marketing Bd.) v. Can. (Chicken Marketing Agency),* [1993] 1 F.C. 116 (T.D.). It was only in 1995 that the parties were able to reach agreement on changes to the national agreement and some degree of stability was re-established. In 1993 B.C. entered into a one year contract similar to those entered into by Alberta prior to it joining the CCMA and in 1994 B.C. producers voted to rejoin the CCMA if certain conditions were met.

[77]This is particularly the case as a result of the recent decision of the NWT Court of Appeal in a case involving attempts by the Canadian Egg Marketing Agency (CEMA) to prevent unregulated production in the Northwest Territories, from being sold in Alberta. The decision in this case has potential implications for chicken as well. Leave to appeal to the Supreme Court of Canada is being sought. *Canadian Egg Marketing Agency v. Pineview Poultry Products Ltd. and the Commissioner of the Northwest Territories; Canadian Egg Marketing Agency v. Frank Richardson operating as Northern Poultry and the Commissioner of the Northwest Territories,* Appeals 00579 and 00580 (N.W.T. C.A.).

support for a provincial board is perceived as very important in negotiations concerning changes to the formula, allocations, and penalties for overproduction.

The Marketing System

As has been noted, the ACP is a supply management board. The intent is to ensure a steady supply of product[78] and to ensure a stable price which provides producers with a level of return which is above their cost of production. The management of supply is accomplished through a quota system. Only registered producers who have been allotted quotas are allowed to produce chicken and they must produce and market in accordance with their quotas.[79] Prices are established by the ACP in consultation with the Advisory Committee, which includes processor representatives and significant processor input, and which has regard to prices in other provinces, general market conditions and to the costs of production to producers established through the use of nationally agreed formulas. An attempt is made to maintain prices above producers' cost of production based on the nationally established formula.[80] The ACP does not arrange actual sales or receive sale

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[78]In this case the product is chicken which is divided into 3 types: broilers, roasters and cornish. The types of chicken are determined by weight and there are specified production cycles for each type. Separate quota is allocated for each type of chicken. The development of the roaster chicken industry and the legal issues it raised will be discussed in Chapter 5.

[79]Marketings are based on an allotted quota of a certain number of kilograms per production cycle (which varies depending upon which of the 3 types of quota is held) which is calculated in relation to authorized production facilities determined on a square footage basis (the conversion to metric units of measurement was made first in respect to weight and only very recently in respect to authorized production facilities). When it is necessary to adjust marketings to conform to variations in the national allotment, they are adjusted per marketing cycle by varying the percentage of the allocation which can be produced. This is possible because the technology of chicken production has improved to a point where more birds and a greater weight of chicken can be produced in allotted production space than is contemplated under the regulations. While the ACP when established only regulated marketings of chicken, since 1993 it also has the ability to regulate production and to impose monetary overproduction penalties. This was necessary to conform to the requirements of the national plan.

[80]As will be discussed subsequently, the price setting power of the ACP can be exaggerated. There are a large number of factors which prevent it from setting whatever price it desires. The apparent authority conferred by the statute is in practice substantially more limited and prices must be negotiated with the processors. During the period of crisis in the industry during 1994 prices dropped substantially and there was danger that they would drop further. At this point the price was significantly below the cost of production.

proceeds. Sale, delivery and payment arrangements are handled directly between producers and processors who enter into their own contracts. Control is achieved by requiring processors to pay the regulated price for the product to producers, but to deduct the service charges or levies payable to the ACP from the proceeds due to producers and to remit this amount directly to the ACP. Except in the case of certain small processing plants which historically have specific growers with a special small plant quota assigned to them, producers are not assigned to a particular plant.[81] The staff required is small. For most of its first 20 years, the ACP operated with a secretary manager and one or two office staff.[82]

The Price Setting Power of the ACP

The apparent price setting power of the ACP set out in the regulations is actually limited in a number of respects by economic factors beyond its control. There are a large number of factors which prevent it from setting whatever price it desires. Some of these include: processor resistance and the need for local processors to be able to compete in a national market;[83] competition from alternative products such as beef and pork; retailer strength and ability to source product outside of the province;[84] the effect of prices in other

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[81]This special form of quota known as small plant quota has recently been amalgamated with the general quota categories and it no longer exists as a special type of quota since 1996. It was created specifically to deal with the needs of certain small geographically isolated processors who required an accessible supply of product. It should be noted that when the ACP was first created there were 3 major processors. There are now 2 major processors and Lilydale, which is a producer owned co-operative processes over 90% of Alberta's chicken production at its various plants.

[82]From 1967 to 1986 there was a joint administration of the Turkey and Broiler Boards. One individual acted as Secretary-Manager for both boards. During this period there were only two Secretary-Managers with the second continuing from 1972 to 1986. It was only in 1986 that separate offices, Secretary-Managers and office staff were established. The number of staff remains very small. The contrast with the APPDC is evident.

[83]Lilydale is a major processor in B.C. as well as Alberta. While cooperation with processors is the norm in Alberta, the recent Ontario situation in which nearly every pricing decision of the Ontario Board was opposed by processors and resulted in appeals to the Supervisory Board, illustrates that processor - marketing board cooperation cannot be assumed in a supply management situation. Note also the comments concerning the B.C. position *supra* note 69.

[84]The dominant position of Safeway and other major retailers has already been discussed in relation to pork. A similar situation exists in chicken although the situation is not as strained because the relatively

provinces;[85] competition between provinces for shares of the national allocation; demands of secondary processors; changing patterns of consumer demand; political pressures which are reflected in the positions taken by Marketing Council and the government; and the prospect of increasing US. imports as import controls are relaxed under NAFTA and the GATT (now WTO) agreements. The apparent authority conferred by the statute is in practice substantially more limited. While the supply management system is generally successful in maintaining a stable provincial market and price, it is not immune from pressures and changes in the market, in the industry and in broader national and international markets. It must respond and adapt to these pressure and changes; failure to do so results in severe stresses within the system in the short term and is impossible in the longer term.

The Value of Quota

In Alberta no person is allowed to market chicken beyond a limited exemption[86] without a quota. Since the initial quotas were established in 1966 and granted to the existing producers based on historic production, applicants for new quota are placed on a new grower waiting list in chronological order based on the date of their application. When new quota is allotted, 65% goes to existing growers and 35% goes to new growers from the list. While the number of registered producers has expanded from approximately 100 in 1966 to 238 in 1991 to over 300 at present and chicken production has more than

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stable price and supply of product means that all elements of the industry can plan ahead and are generally able to maintain their margins. Still, retailer power and ability to source product from other sources cannot be ignored. While imports of chicken are limited, they do exist, and on at least one occasion a major Alberta retailer was able to bring in fresh chicken from as far away as North Carolina (testimony at a hearing of the Canadian Import Tribunal concerning US corn imports).

[85]When the disputes within the Ontario industry had an impact on their price for chicken, the changes in this market impacted the markets of other provincial boards which generally use the Ontario price as a benchmark in setting their own prices. See above, notes 76 and 80.

[86]Since 1993 this exemption level is 2000 birds per year for an individual and 6000 birds under a specific communal group production quota. There are also restrictions on how and where such birds can be marketed.

quadrupled since 1966, there is a far greater demand for quota than the amount available.[87] In the early 1990s some of the applicants near the top of the new grower list had been on the list for over 20 years without being allocated quota. Sales of existing quota by producers are restricted in that quota must be sold with the production facilities to which it is allocated or since the early 1990s it can also be sold through a quota exchange established under the regulations. No producer is allowed to acquire more than 1.25% of the total allotted quota and once production facilities are sold there are restrictions on resale or transfer of the quota to other facilities.[88]

The fact very little new quota is issued to applicants means that the only way quota could be acquired during this period was to purchase it from an existing quota holder. Since there was always more demand for quota than the amount available, this meant that existing quota holders had a valuable property right. This is a major area of debate between advocates and opponents of supply management.[89] I do not intend to discuss this point further at this time, but it is a significant element of the ACP's legal administrative field and its impact will be discussed in later chapters.

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[87]A significant portion of the increase in the number of growers relates to the extension of quota to roaster growers in 1988 and the granting of quota to many of the Hutterian Brethren Colonies in 1993. Both of these issues will be discussed in the next chapter.

[88]It should be noted that this is the situation as it existed in 1991. Since this time, changes have been made, and more are contemplated, to ease the transfer and leasing restrictions on quota and to increase the percentage of allotted quota that can be held by one producer. The trend it clearly toward making quota more easily transferable and marketable.
The issue of quota value and quota transfer has also been an ongoing concern of the Marketing Council which has monitored this situation and has pressed the ACP to move toward loosening quota transfer restrictions and toward developing a clear quota transfer policy.

[89]The value of quota, the restrictions on transfer and on one producer holding more than a small percentage of total quota, and the benefit conferred on the original quota holders are among the major objections that economists raise to quota. See Borcheding *supra* chapter 3 note 5 and *Reviewing Regulation supra* chapter 3 note 6 for an example of this position. For a defence of supply management, see British Columbia Federation of Agriculture, *Submission by the B.C. Federation of Agriculture to the Standing Committee on Agriculture Province of British Columbia,* September 1977; H. Coffin and R. Romain and M. Douglas, *Performance of the Canadian Poultry System Under Supply Management* (Department of Agricultural Economics, Macdonald College of McGill University, Ste. Anne de Bellevue and Le departement d'economie rurale, Universite Laval, Quebec, 1989). An extensive discussion of arguments from both points of view can be found in Gilson, chapter 14 and in vol. 4 of the B.C. Standing Committee.

The Political Field in Alberta

The political situation in Alberta is that a single political party has been in power since 1971. Prior to that date, another political party had been in power for 35 years. For most of the relevant period there has been little prospect of a political challenge from another party. This has meant that relations with the provincial government have focused on the governing party in general and the cabinet in particular. Decisions made by the cabinet are unlikely to be challenged in the legislature and the prospect of an opposition party being elected and altering the policy is remote. While the government is sensitive to public criticism and does occasionally alter policies in the face of severe public complaints, the cabinet has the power and control to impose decisions that it makes and, if the political will exists on a particular issue, it can proceed despite considerable opposition and publicity generated by affected groups.

The limited prospects for any form of electoral challenge to the government has various implications for the political field. Most policy issues are determined by contests and decisions within the governing party and within the cabinet and senior bureaucracy.[90] Access to important ministers becomes very important and becomes a major element in the political capital possessed by particular agents. The position of the cabinet and the relevant minister in relation to particular issues becomes very important and information concerning these positions adds to the political capital of those who possess the information. A sense of the habitus of significant politicians and of the senior bureaucracy becomes very important. Since the average tenure of a Minister of Agriculture during this period was approximately 3 to 4 years[91] this means that each change of Minister requires a

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[90]The degree to which any legislature is a check upon the executive branch in either Canada or the US is a matter of ongoing debate in administrative law and political theory. However, the issue is relatively clear within the Alberta context.

[91]Between 1971 when the Progressive Conservative government was first elected and the present there have been 7 Ministers of Agriculture.

reassessment by the agents in the field of the habitus and the relative political capital within the cabinet of the new Minister. It also means attempts to influence and educate the new Minister in respect to the particular concerns of the agents involved. This process is shifting and is always ongoing and it is an invisible, but important element in the legal field. Yet although the habitus of individual ministers is important, the general habitus of the government is even more significant.

The limited enthusiasm of the provincial government for marketing boards has already been noted. If anything, the attitude of 'tolerance' to marketing boards on the part of the provincial government has deteriorated over time, particularly in the 1990s. In the recent GATT negotiations, in contrast to the positions of various other provinces, Alberta did not speak in favour of the retention of import quotas for supply management products and instead took a position in favour of tariffication.[92] Comments in the Alberta legislature by the Minister of Agriculture and in the press by the Premier questioned the role and future of marketing boards.[93] The Alberta government has also strongly supported attempts to allow grain producers to deal directly with US. customers rather than being forced to sell into American markets through the Canadian Wheat Board going so far as to hold a plebiscite of Alberta grain producers on the issue[94] and announcing its intention to

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[92]This was the position that eventually prevailed in the GATT negotiations despite opposition from the Canadian delegation. There were strong representations from the dairy and poultry sectors in favour of the retention of import quotas. The Alberta government was the only provincial government to take a position in favour of tariffication.

[93]See Premier Ralph Klein quoted in *The Western Producer*, 9 June, 1994. See the Minister of Agriculture, Food and Rural Development Walter Paszkowski quoted in Alberta Hansard October 26, 1993 at 1045 and in *The Western Producer*, 23 June, 1994.

[94]The results of this plebiscite announced in December 1995 showed a majority of those voting were in favour of a more open system allowing producers more freedom to sell their own grain both domestically and into the American market. Supporters of the Canadian Wheat Board have criticized the wording of the plebiscite as misleading and in July, 1996, a federal task force which had toured western Canada to receive submissions on the future of the Wheat Board made a series of recommendations which do not appear to have satisfied either side in the debate. What is significant in this context is the strong position taken by the Alberta government and the related comments which reveal a habitus that is highly critical of compulsory marketing boards.

intervene in actions involving some farmers opposed to the Wheat Board in order to challenge the jurisdiction of the Canadian Wheat Board's monopoly.[95]

In part this position is ideological; the present government has a strong public commitment to privatization, the reduction of the size of government, and the reduction of the regulation in the economy. It is strongly free market oriented and looks with suspicion on any form of regulation that interferes with 'competition' and the 'free market'.[96] However, this position is not anti-farmer; the government has a strong base in rural Alberta and 'farmers' and the 'family farm' retain a powerful symbolic capital which the government acknowledges and shares with a large portion of the rural electorate. The position taken is therefore phrased in terms of advocating greater freedom of choice for individual farmers.

It is important to note that this habitus is not based solely on ideology. In large part, the position of the government on marketing boards also reflects some of the realities of the Alberta agricultural industry where some of the dominant elements of the Alberta agricultural industry are either hostile or ambivalent to aspects of the marketing board concept. In Alberta, the primary agricultural products are grains, cattle and hogs and all of these products are produced for export in amounts that far exceed the requirements for provincial domestic consumption. Up to two thirds of the value of Alberta agricultural

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[95]The Alberta Government has announced an intention to commence an action for a declaration that the Provincial Crown is not subject to the provisions of Federal Act and can purchase grain from farmers, transport it to the US and then resell it to the farmers involved. The action has not proceeded and the most recent comments in the press from the Minister of Agriculture indicate that the Government has some reservations about proceeding with the action at this time. There are serious divisions in the Alberta grain industry on this point. The significance for this thesis is the strong position taken by the Alberta Government and its willingness to challenge existing structures to support this position. As of late October there is currently a trial underway in the Federal Court in which the Alberta Barley Commission, several grain growing associations based in Alberta and various individual producers are challenging the monopoly of the Canadian Wheat Board as a violation of the rights of producers under the *Charter of Rights.* The Federal Minister of Agriculture has also announced that while there may be some modifications of the system, the monopoly selling position, at least in respect to export sales of wheat, will remain.

[96]In the *Western Producer* article referred to in note 93, Premier Klein was quoted as saying: "Society is moving toward a free market economy and we simply think that there are enough markets and enough resources within the farm communities to sell those products at a good price [without marketing boards]".

products are exported, primarily to the US. Almost all of these exports are grain, cattle or beef and hogs or pork; the local vegetable production does not meet domestic needs and there are not large export markets in milk, eggs or poultry which are produced almost entirely for the provincial domestic market. The Alberta government is therefore strongly free trade and export oriented and is concerned with any programs which could negatively impact trade with the US or which might impede the expansion of Alberta exports in these agricultural sectors. The Alberta government remains lukewarm at best and hostile at worst in its attitudes to import controls which form an important part of any national domestic supply management decision.[97] To the degree that marketing boards are perceived by the government or significant elements in the agriculture industry as an impediment to free trade or to export opportunities, there is a tension between their needs and the position of the government. This is a tension within which the APPDC and the ACP must function.

Marketing Boards must be able to adapt to the major changes which are occurring at the provincial, national, and international level in almost all agricultural marketing fields. No agricultural marketing field and no regulatory system can remain static in the face of an increasing pace of technological and competitive changes within their industry or can ignore shifts in agricultural markets which are increasingly interrelated and international in scope. Many of the factors which impact on the marketing fields in which particular marketing boards operate are international in scope and provincial or even federal legislation cannot completely protect or isolate the market or the board from these factors over time. If the legal administrative field fails to adapt to changing conditions, tremendous strains are placed on the field and the relations between the agents within it.

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[97]Fortunately for the ACP, the federal government and some other provincial governments have been more supportive and the question of the type of restrictions on imports is constitutionally a matter of federal jurisdiction. As well, the ACP has made a major effort to show ways in which the Alberta chicken industry as a whole is a valuable and productive part of the agricultural economy.

Conclusion

Without a sense of the significant political and economic factors which influenced the development of the legal administrative fields of each of the ACP and the APPDC, it is impossible to understand how these fields operate. The economic, political and legal fields are all interrelated and intersecting. Elements of each field form parts of the various fields in which marketing boards operate including their particular legal administrative field. A sense of the information and issues discussed in this chapter is essential in order to flesh out the outline provided by the review of the Act, the Plans and the Regulations provided in chapter 2. Some of the parameters of the legal administrative fields may be determined by the regulatory provisions described in chapter 2, but those provisions give no sense of how the agents within the field interact with each other or of how particular struggles within the field will be resolved. Nor do the provisions of chapter 2 give any sense of the economic and political factors which significantly impact upon the fields in question but which remain invisible when the focus is confined to the decisions of the courts or the Act, the Plan and the Regulations. This chapter provides some sense of why the fields for two agricultural products in the same province developed in substantially different ways. While they operate under the same government, and under the same provincial legislation, the two boards have developed very different responses to the farm income problem faced by their respective producers. What is acceptable or necessary in the chicken industry may not suit the pork industry. There are economic and political constraints which limit the ostensible authority conferred by the legislation and regulations and which determine the outcome of "legal issues" which arise in either field.

Chapter Five

Legal Issues Dealt With by The APPDC and the ACP

Introduction

In this chapter I will examine certain legal issues which arose for each of the marketing boards in order to illustrate the operation of their respective legal administrative fields in specific contexts. This will take the more general discussions of the previous chapters and apply them to specific legal issues to illustrate some of the complex interactions which take place within the legal administrative fields of each of the boards. The issues on which I propose to focus are among the most significant legal issues that were faced by the boards. In the case of the APPDC, this issue will be the ongoing disputes between the APPDC, the processors and the Marketing Council. In the case of the APC, the issues examined will be: roaster chicken quota; the circumstances leading to the entry of the ACP into the national plan; and the unregulated production of various Hutterite Colonies. These issues were chosen because they were major issues on which legal input was required and in which the issue in question was multi-faceted and was not confined to a single court case or a single administrative proceeding which could be considered in isolation. The detailed review of these issues means that this chapter is lengthy, but some of this length is necessary in order to deal with these issues in a way that is substantial and not superficial and which gives a sense of the complexity of the relations involved within the fields in question.

The APPDC's Conflicts with the Processors and the Marketing Council

The history of the development of the APPDC is intrinsically tied to its fundamental conflict with the processors over the nature of the selling system for hogs and the question of the price of hogs. This history of conflict involved the Marketing Council as well. Essentially, the Marketing Council became involved with disputes between the APPDC and processors virtually every time the APPDC modified its selling system. The first such dispute occurred in November 1972 when the APPDC modified its original teletype Dutch auction system which had been modeled after the Ontario system. The changes enabled the APPDC to refuse to disclose whether a lot had been withdrawn from the teletype system because it had been sold or because it had been withdrawn by the APPDC. They were authorized by new regulations passed by the Board of Directors of the APPDC and by an amended authorization regulation passed by the Marketing Council on the same day.[1] On the same day that the Board of Directors of the APPDC passed the regulations, they also heard an application for a review of the changes by a representative of the processors and dismissed the application. The processors appealed to the Marketing Council which heard the appeal on December 5, 1972 and rendered a written decision on December 7, 1972[2] denying the appeal. The Marketing Council accepted that the APPDC was within its legal authority and that it had a legitimate "objective to attempt to influence the price to the producer without actually determining the price." However, while it acknowledged that the present change might assist in that regard, it also criticized both the packers and the

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[1]Alta. Reg. 329/72 (Marketing Council regulation passed at a meeting on November 1, 1972 and filed November 6, 1972). Alta. Reg. 19/73 and Alta. Reg. 20/73 (APPDC regulations passed November 1, 1972 and filed January 29, 1973). All 3 regulations had been drafted by the APPDC and its solicitors. At this point Marketing Council had not instituted the practice of referring all proposed regulations to the Legislative Counsel's Office for review and comment.

[2]Alberta Agricultural Products Marketing Council, *In the Matter of the Marketing of Agricultural Products Act, Chapter 225 R.S.A. 1970 As Amended: And in the Matter of an Appeal by the Meat Packers Liaison Committee to the Agricultural Products Marketing Council (hereinafter called the Council) Pursuant to Section 26 of the Said Act: And Between: The Meat Packers Liaison Committee, Appellant - and - The Alberta Hog Producers' Marketing Board, Respondent.* Findings and Decision, December 7, 1972.

Board for viewing each other as "an enemy rather than as a partner in the marketplace" and the Marketing Council attempted to address some packer concerns by requiring that the APPDC provide to the processors weighted market summaries of sales. Marketing Council suggested that once the Board followed its direction, the processors might voluntarily "and as a gesture of good faith" discontinue their inter-office telephone conference system which the Board objected to. Marketing Council also expressed its intention to formally establish an advisory committee to the Board consisting of all elements of the industry.

From the point of view of the legal administrative field, there are a number of significant points. First is the fact that the regulatory changes, including the authorization regulation, were drafted by the APPDC and approved by the Marketing Council as a matter of course. No formal review process of the draft regulations was followed. This was left to the packers' appeal. Second, the Marketing Council then sat as an appellate body on a decision that involved regulations passed specifically under its amended authorization regulation which it had just approved. Third, the appeal was conducted in an informal manner: although the APPDC was represented by legal counsel, the packers were not and the hearing was held in one day with a written decision two days later. Fourth, the Marketing Council saw the APPDC and the packers not as antagonists but as 'partners' who should "get on with the business of improving and expanding the pork industry in Alberta for the benefit of both producers and packers. To assist in this it encouraged cooperation and supported the APPDC's authority to intervene in the market while also directing the APPDC to provide weighted price information which would address the packers concerns. Its decision reflects impatience with the attempts by both parties to show how the other party was refusing to cooperate. Fifth, the Marketing Council refused to address APPDC suggestions that there was collusion among packers who purchased a consistent market share rather than competing for hogs. Marketing Council considered

this "in many respects irrelevant to the issue to be decided" and held that it was not the proper body to consider these issues. This was an issue that the Marketing Council clearly did not wish to become involved with. Sixth, the appeal was the culmination of a year long process in which the packers and their legal counsel had approached Marketing Council on various occasions to complain about the activities of the APPDC in changing and proposing to change the procedures used in the selling system.[3] This was information that the Marketing Council had received in its supervisory role. This fact did not appear in any way in the appeal nor was it reflected in the decision. Yet it was information that was clearly part of the knowledge of the Marketing Council members who were now acting as an adjudicative body.

In many ways this appeal set some of the pattern for what followed. It reflects the positions of each of the three main groups involved: the board, the processors, and the Marketing Council. The Board perceived a major marketing problem to be collusion between the packers who refused to bid competitively for hogs and who obtained stable market shares of available hogs for each packer. The Board sought ways to change its selling system to make this cooperation between processors more difficult and to thereby encourage price competition. It sought to take an active role in the market to achieve a better hog price for producers. The processors saw the role of the Board as the facilitator of an auction process. They objected to any changes which would alter this process or interfere in any way with their ability to maintain a stable market. They demanded that the APPDC conform to "generally accepted principles of auction selling." In their perspective, the APPDC should be a price-taker and accept what the processors offered based on their needs in the processing industry. Innovations by the Board which interfered with this process and made the Board a more active marketer were consistently opposed by the

[3]The Hog Marketing Review Committee Report at 33. There were also extended and ongoing discussions between the packers and the APPDC.

processors. The Marketing Council was drawn into these disputes both as a supervisory regulator and as an adjudicative body for processor appeals. It preferred to avoid the fundamental conflict between the parties and to encourage them to cooperate rather than to treat each other as enemies. It recognized that the Board had a role beyond that of a simple facilitator of an auction but it did not look favourably on actions by the Board which led to confrontation with the processors. These positions continued to be reflected in the further confrontations which occurred.

In 1974 the APPDC obtained a further amendment to its authorization regulation from Marketing Council and then passed further regulations giving it the authority to modify its selling procedures by negotiating directly with processors or buyers without first having to offer the hogs for sale through the teletype system where they would be available to all processors. Once again these proposals were opposed by the processors. In this case, Marketing Council passed the authorization regulation in the form requested by the APPDC[4] but then questioned the authority of the APPDC to implement such changes to its selling system without a plebiscite of producers. The Marketing Council considered that any such change was beyond the authority conferred by the Plan and that any amendment to the Plan to create such authority was of a sufficiently fundamental nature that it required a plebiscite. It suggested that such activities of the APPDC amounted to determining the price for hogs which was not a power given under the Plan.[5] The Marketing Council sought and obtained an opinion from a lawyer in the Attorney General's office confirming these doubts. The APPDC disputed this point and obtained a legal opinion from its solicitors indicating that it had the authority to proceed without a plebiscite and that a power to negotiate price was not the same as the power to set price.

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[4]Alta. Reg. 117/74. Once again the regulation was drafted by the APPDC's solicitors. There was no formal review process.

[5]The 1972 Marketing Council decision had recognized the right of the APPDC to intervene in the market to affect price so long as it did not set the price. However, the Marketing Council took the view that engaging in price negotiations was price setting. This was a view always shared by the larger packers.

The APPDC's authority was established by the direct intervention of the Minister of Agriculture who supported the position of the APPDC, directed the Marketing Council to continue apply the amendment to its authorization regulation which was in question and subsequently amended the *Marketing of Agricultural Products Act*[6] to make clear that this type of change to its regulations by the APPDC did not require a plebiscite.[7] This process took place without any formal proceedings by any party. It became public when it was discussed in briefs submitted to The Hog Marketing Review Committee in 1980 by both the Marketing Council and the APPDC. Although the new regulations allowed for substantial changes to the selling system, these did not occur at this time. The primary emphasis on new initiatives by the Board at this time related to export contracts to Asian markets and to improvements to the assembly system that it operated to enhance the APPDC's ability to organize shipments of hogs.

This period was one of crisis in the Canadian pork industry in general and in Alberta in particular. Hog production in Alberta fell by almost one half between 1971 and 1976. The regular hog cycles were aggravated by record high grain prices which increased feed costs and decreased the availability of feed since grain could be sold at high prices into export markets. It was also during this period that federal grain transportation policies and significant provincial subsidy programs in Quebec led to a major increase in hog production in eastern Canada while hog production was declining in western Canada. Despite its comparative cost production advantage, Alberta became a net pork importer in this period but, despite this fact, hog prices in Alberta remained low relative to other

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[6]S.A. 1976, c. 32, s. 7.

[7]See letter of Dr. Hu Horner, Minister of Agriculture, to Marketing Council (4 February 1975) submitted as part of the materials presented to The Hog Marketing Review Committee and referred to in briefs submitted by Mr. Clark Ferries, Chairman of Marketing Council, and by the APPDC. These materials also included notes of a meeting with the Minister held the same day at which representatives of both the APPDC and Marketing Council attended. Normally such documents would not be part of the public record but they became so as a result of these briefs at the public hearings held by The Hog Marketing Review Committee. The creation of this Review Committee, the hearings held, and report issued will be discussed below.

markets. This led to major disputes between the Board and the packers. It also meant that the government faced considerable political pressure to take steps to assist hog producers and to deal with the crisis in the industry.

In 1977 relations between the APPDC and processors had deteriorated to the point where the APPDC refused processor bids on the bidding system which it considered to be excessively low relative to other markets and advised producers to keep their hogs on the farm. As discussed in previous chapters, this was a drastic and very limited remedy because the nature of hog production is such that this could be done for only a very short time without serious economic harm to both producers and packers. This advice to producers was therefore an indication of the level of crisis in the industry. The confrontation escalated and hogs began to be withheld. At this point, the Minister of Agriculture[8] became directly involved and ordered a 60 day resumption of trading. This order was complied with even though it was not made under any formal power under the Act. The Minister also commissioned an independent study of the dispute and the relationship of hog prices in Alberta to other markets. When completed, the study suggested that Alberta hog prices should bear a relationship to other markets and vary in accordance with current trade patterns. The report also suggested that the expected price relativity had not occurred in the manner which economic theory would suggest and indicated several factors which led to this distortion.[9] After this study was received, a committee of Department of Agriculture staff and various directors and staff of the APPDC reviewed the report and some of the questions concerning the APPDC's authority

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[8]This was a new Minister of Agriculture, the Hon. Marvin Moore, who had been appointed since the disputes in 1974.

[9]H. Harries and Associates Ltd., *Price Relationships in the Alberta Hog Market* (Edmonton: October, 1977). The report by Dr. Hu Harries suggested that the price relationship between the Alberta market and other markets was distorted. He suggested that the major problems were an inefficient plant sector which did not compete for hogs and recommended government assistance for a remodeled processing sector and a subsidy for producers during this remodeling phase. This report gave significant symbolic and political capital to the APPDC in relation to its ongoing disputes with the processors about price relativity.

under the Act and the regulations and assisted in the design of a new selling system which was introduced in March 1978 at a meeting with processors attended by the Minister who expressed his support for the amended selling system. The Marketing Council was not involved in this consultation process.[10] It had been bypassed by the direct involvement of the Minister. Again, this entire process took place without formal proceedings of any kind and once again the objections of Marketing Council were ignored.

The 1978 changes to the selling system and the entry by the APPDC into domestic contracts with some of the smaller Alberta processors for the supply of hogs that were not sold through the bidding system initiated a new 3 year conflict between the APPDC, some of the larger processors, and the Marketing Council that culminated in The Hog Marketing Review Committee hearings of 1980 and the Committee's report in 1981. This conflict involved processor approaches to the Minister, appeals to the Marketing Council, applications to the Courts, partial processor boycotts of the selling system, a class action commenced by certain producers and the APPDC against the processors for damages for conspiracy in restraint of trade and breach of the *Combines Investigation Act,*[11] a direct intervention by the Marketing Council restricting the APPDC's marketing powers, a mass protest rally by producers, and the recission of the Marketing Council's actions. The process brought relations between the APPDC and the Marketing Council to a breaking point.

When the new selling system was introduced, the processors made submissions to the Minister who met with them and directed them to the Marketing Council. The Marketing Council referred the packers to the APPDC which heard and rejected the application for a review of the new selling system and the domestic contracts. This decision was appealed by some of the packers to the Marketing Council in late 1978. After an initial hearing,

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[10]See The Hog Marketing Review Committee Report at 34.
[11]R.S.C., 1970, C-23.

Marketing Council referred the question to the Court for determination of the legal questions raised by the processors concerning the authority of the Board to implement the changes it had made. Although it was not made apparent at the hearing, the position taken by Marketing Council must be considered in relation to the intervention of the Minister described above. As became apparent at the proceedings of the Hog Marketing Review Committee in 1980, Marketing Council shared many of the concerns of the processors concerning the authority and activities of the APPDC. It had meetings in October 1978 prior to the appeals with the Minister in which it raised these concerns and it had obtained further opinions from different lawyers in the Attorney-General's Office raising questions about the authority of the APPDC to take certain actions. However, it was also aware of the position taken by the Minister in support of the APPDC and the proposed selling system both prior to and at this meeting. The issue at stake was so fundamental to the potential structure of the system that it became easier for the Marketing Council to avoid direct confrontation with either the APPDC or the Minister by referring the matter to the court as a legal issue for interpretation.

The court challenges filed by two of the major packers questioned the authority of the APPDC to sell hogs by contract without first offering them through the selling system.[12] An initial application was made to the District Court to determine whether the appeals would be heard as a de novo hearing or as an appeal on the record. The District Court determined that the appeals would proceed as appeals on the record from the Marketing Council.[13] Subsequently, as part of their application, the two major packers sought to

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[12]The suggestion was that this violated a requirement that all buyers be given an equal opportunity to bid on all hogs which were available for sale. The position of the APPDC was that this requirement applied only to hogs which were actually offered over the bidding system in place. This was one of the points on which the APPDC and the Marketing Council, and their respective legal opinions, had differed over in the 1974 dispute.

[13]*Swift Canadian Co. Ltd.* v. *Alberta Hog Producers' Marketing Board; Canada Packers Limited* v. *Alberta Pork Producers' Marketing Board,* (1979) 9 Alta. L.R. (2d) 217 ((Dist, Ct.).). The decision was issued on April 19, 1979.

obtain production of the contracts entered into by the APPDC with their smaller competitors. This was opposed by both the Board and by the contracting packers who filed affidavits indicating that their commercial position could be damaged by disclosure of this information to their competitors. This issue proceeded to a hearing at which the District Court held that the contracts did not have to be fully produced and that commercially sensitive information such as the pricing formula could be deleted from the information provided.[14] After this decision was rendered, the actions did not proceed to a hearing on the merits although they remained outstanding together with the adjourned appeals to the Marketing Council. While one of these actions was discontinued in late 1979, the other remained outstanding at the time of the hearings and subsequent report by the Hog Marketing Review Committee but was not actively pursued by the packer involved. It remained outstanding until 1981 when the action and the packer appeal to the Marketing Council which had been adjourned pending the court action were discontinued.

While the court action proceeded during 1979 there were fewer confrontations. The APPDC obtained from the Minister an amendment to the Plan clarifying that only hogs sold through the electronic bidding system had to be offered to all buyers.[15] It also requested that the Minister direct that Marketing Council reaffirm Alta. Reg. 117/74 which the Marketing Council had passed but then questioned. This led to meetings in late 1979 between the Deputy Minister and the Marketing Council and to two meetings in early 1980 with the Deputy Minister, the Marketing Council and the APPDC at which the outstanding issues and methods of clarifying any outstanding legal issues by meetings

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[14]*Swift Canadian Co. Ltd. v. Alberta Hog Producers Marketing Board,* (1979) 9 Alta. L.R. (2d) 107 (Dist.Ct.).

[15]In February 1979 an amendment to the Plan was filed as Alta. Reg. 51/79 clarifying that the duty to give an equal opportunity to bid on hogs applied only to hogs sold over the electronic bidding system. This undercut one of the basic arguments raised by the packers in their court challenges. It was one of the reasons that the judicial review applications and the appeals to the Marketing Council were ultimately discontinued.

between the APPDC's solicitors and the solicitors from the Attorney-General's Office were discussed.

These issues had not been resolved before the confrontation with the processors again escalated in early 1980. In February, the Alberta hog price dropped substantially and the price gap with other markets became significantly larger than normal. The APPDC requested a public inquiry into allegations concerning the collusive nature of the meat packers' buying practices and when no reply was received from the government, the APPDC indicated publicly its intention to commence legal action against the packers for collusion in the market. The APPDC then discontinued the operation of its teletype system under which lots of hogs were offered for sale and a number of packers cut back their daily purchases of hogs. Hogs were not able to move to market and backed up on the farms. Once again one of the parties, in this case the packers, was refusing to participate fully in the system. This again placed the marketing system in a major crisis. In late February, the Minister[16] announced his intention to appoint a Committee who would conduct hearings into the state of the Alberta hog industry. A meeting of the packers and the APPDC was called on March 6, 1980 by the Marketing Council. At this meeting, which the APPDC perceived as threatening on the part of Marketing Council, a proposal for a revised selling system was presented by one of the packers.[17] The next day the APPDC and several hog producers filed a Statement of Claim initiating a class action on behalf of all hog producers against most of the packers and some of their senior officers claiming $73,000,000.00 in damages for conspiracy in restraint of trade. On March 14, 1980 without any further meetings, Marketing Council passed a regulation which was filed

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[16]A new Minister of Agriculture, the Hon. Dallas Schmidt, had been appointed recently. Relations between the new Minister and the APPDC were not as close and the APPDC had less direct access to the new Minister than it had under the previous two Ministers who had been strong supporters of the APPDC.
[17]Alberta Pork Producers Marketing Board,. *11th Annual Report,* "Summary of events in early 1980" at 8. For a summary of the situation from the perspective of the Marketing Council, see National Farm Products Marketing Council, *Proceedings of the Federal Provincial Marketing Seminar* (Charlottetown, P.E.I., 1980) at 20.

on March 17, 1980 as Alta. Reg. 99/80 and delivered to the APPDC on March 19, 1980. The effect of this regulation was to remove from the APPDC to the Marketing Council the operation of the single desk selling system. All sales decisions and any changes to the system would require prior approval by the Marketing Council. The regulation was to take effect on April 11, 1980. In the interim the APPDC was instructed to stop rejecting packer bids and the Marketing Council indicated that it would be implementing a new marketing system.[18]

These actions occurred immediately prior to the annual country meetings with producers in each of the APPDC's districts and the actions resulted in widespread producer anger and attempts to organize a mass protest. On April 2, 1980, after the country meetings, the Board of Directors of the APPDC met with the Agriculture Caucus Committee and were told "The Minister has authorized me to tell you that A. R. 99/80 [sic] is held in abeyance until October 1st at least." On the same day a new regulation was passed by the Marketing Council delaying the effect of Alta. Reg. 99/80 until October 1, 1980. Also on April 2 the Minister formally signed a Ministerial Order appointing The Hog Marketing Review Committee.[19] On April 11, the Marketing Council passed an Order, which was countersigned by the Minister, appointing 3 of its members as a Council Committee to monitor hog sales and the marketing system. On April 16, the Minister, the Deputy Minister, and the Chairman of Marketing Council attended a mass meeting of producers in Red Deer. 800 to 1000 producers attended to express anger and concern and to demand the repeal of the regulation and the resignation of the Chairman of Marketing Council who

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[18]At the Hog Marketing Review Committee Hearings the APPDC brief cited a document from the Chairman of Marketing Council to the Minister in which he stated: "We have muzzled the Board."

[19]The Chairman of the Committee was Mr. Jim Foster, a former Attorney-General. One pork producer was appointed as well as the vice-chairman of the APPDC and the general manager of one of the largest packers. The committee was not given the power to subpoena witnesses and did not hear evidence under oath but instead invited voluntary responses from all interested participants. Its mandate was to review the entire state of the hog marketing system and to make recommendations to the Minister regarding any possible changes.

acknowledged at the meeting that the new marketing system proposed by Marketing Council was based in part on a packer proposal presented at the meeting of March 6, 1980. Other farm groups also became involved in opposing the regulation and there were questions asked in the legislature.

On April 23, 1980, the Marketing Council passed a further regulation repealing Alta. Reg. 99/80. On May 2, 1980 the Committee of Marketing Council which was monitoring the selling system recommended that the APPDC reestablish the range or price below which it would exercise its right to refuse bids.[20] The Minister supported this recommendation and the APPDC implemented this recommendation on May 6, 1980. On May 12, the Minister announced a Temporary Alberta Emergency Stop-Loss Program for hogs. This program had been a major request of producers and the APPDC to meet what they considered an emergency situation in the Alberta industry.[21]

The Hog Marketing Review Committee began hearings on April 17 and between that date and June 24 it held over 100 hours of public hearings around the province and received over 150 briefs and submissions including major participation and submissions from the APPDC and various directors and staff, the Marketing Council through various members and its Chairman, various representatives of the Department of Agriculture, several of the major processors, various farm organizations and many individuals including a large number of producers. After the confrontations of March and April 1980 the Minister had chosen to refer the entire matter to the Hog Marketing Review Committee and all

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[20]When the APPDC had discontinued its teletype system in February, it had stopped providing this information. The packers objected to this because it meant that they did not know what the lowest bid was that would be accepted by the APPDC.

[21]Once again the crisis in the industry was occurring at a low point in the hog cycle when producer margins were particularly poor. The Stop-Loss Program requested by producers was intended to deal with this temporary situation and with the competitive problems faced by Alberta producers as a result of such programs which already existed in many other provinces. The government had been very reluctant to consider this type of program in Alberta. The entire crisis and the actions of all parties took place within the context of the severe losses being suffered by many producers.

participants recognized this Committee as a major opportunity to present their views on the future structure of the industry. On January 20, 1981 the Committee presented its report to the Minster of Agriculture. This report provides an important third party review of the state of the legal administrative field at this time. It was also a major site of struggle over the shape that the field would assume in the future in view of the crisis in the industry and the attempts by Marketing Council and the processors to restrain the APPDC's attempts to modify its selling system and their attempts to take away the APPDC's power as a single desk selling agency and the APPDC's vigorous defence of its authority and its attack on the activities of the processors and the activities and objectivity of the Marketing Council.

The state of relations between the APPDC and Marketing Council at this time can be seen from some of the concerns noted by the Hog Marketing Review Committee:

1. Marketing Council "implied that the Board did not represent producers but had become a dictatorial body operating in isolation of the electorate";

2. Marketing Council suggested that the Board had expanded its authority and powers beyond the intent of the legislation and that in several instances the Board was acting outside its jurisdiction and beyond the mandate given to it by producers. It questioned the Board's right to: operate a trading company; negotiate sales with specific packing firms; enter into domestic contracts without offering the same contract to all packers; own property; direct the supply of hogs to the market through booking procedures; change marketing procedures without a plebiscite or consultation; retain an operating surplus; function so as to protect any one packer from the buying power of others in the market. All these submissions were supported by the packers.

3. Producers and the APPDC perceived the Marketing Council as an antagonist which sympathized with the packers and "dismissed out-of-hand" the Boards concerns;

4. frequent suggestions were made that the chairman of the Marketing Council had lost his impartiality and intended to suppress the Board and producers questioned the entire membership of Council and the extended tenure of some members including the Chairman;

5. the combination of appellate and supervisory functions performed by Marketing Council was criticized;

6. Marketing Council was criticized for acting on its own initiative and evaluating a complex marketing situation without recourse to the expertise available to it from the Department of Agriculture and for substituting its own opinion for the decisions and policy directions indicated by successive ministers of agriculture;[22]

It should be noted that these concerns are summarized in the more diplomatic language of the report. The actual submissions were more antagonistic. It was clear that all communication and trust between the Marketing Council and the APPDC (the 'Board') had broken down. In its introduction, the Committee described the situation in the following terms:

> The history of hog marketing in Alberta is wrought with conflict, confusion and distrust. Producers first reacted to this environment in 1967 by forming a marketing board. This changed the market from a free-wheeling, open forum to a centralized highly regulated exchange.
> As the Board matured and became a seasoned veteran of the marketplace, it challenged both the industry and the Government with new adaptations to the system, both in the Board's role as producer representative and as the operator of the marketing exchange.
> Many of these changes resulted from distrust and led to further distrust. Direct conflict finally became evident, first between the Board and the purchasers and finally among all participants, the Board, the packers, the Marketing Council and the Department of Agriculture.[23]

In a 72 page report, the Committee reviewed the history and state of the Alberta industry, the economics of the industry, the development of the conflict, and industry concerns expressed at the hearing by all participants. It proceeded to make a series of 26 recommendations. It did not reach formal conclusions on many of the issues and allegations raised above but instead simply made recommendations for changes to improve

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[22]The Board submission went so far as to suggest that the Marketing Council had refused to amend the Plan in 1974 to accommodate the changes necessary to implement revisions to the selling system and suggested that this occurred despite the direction of the Minister of Agriculture that such a change should occur. The Hog Marketing Review Committee did not make a determination on this point.
[23]The Hog Marketing Review Committee Report at 1.

the system. As significant as the changes it recommended, were the changes that it did not recommend.

The outcome of the Hog Marketing Review Committee was beneficial for the APPDC in a number of respects:

1. The Committee accepted that producers should be free to acquire a packing plant although it expressed reservations about the Marketing Board owning the plant. In February 1981 the Plan was amended by Alta. Reg. 99/81 to authorize the purchase by the APPDC of the business or shares of a packing plant and the APPDC was able to complete the purchase of Fletchers Fine Foods Ltd. in early 1981. Marketing Council had opposed any action by the APPDC to acquire a packing plant and the packers had expressed similar opposition;

2. The Committee recommended the retention of the single desk selling system and acknowledged that given an oligopolistic market place, the Marketing Board should have wide flexibility in designing and operating a hog marketing system. The APPDC's marketing powers remained in place. This had been a major point of attack by both Marketing Council and the packers.

3. Marketing Council was criticized for not carrying out its functions effectively and a restructuring of the Marketing Council was recommended with the further recommendation that a separate appeal tribunal be established. Although a separate appeal tribunal was not established until the new *Marketing of Agricultural Products Act* was passed in 1987, there were a number of changes made by the Minister in the membership of Marketing Council and the Chairman who had attracted such severe producer criticism was replaced.

4. The Committee also recommended that the government participate in a program whereby producers, the provincial government and, if possible, the federal government should share the costs of a program designed to protect producers from financial collapse during periodic low-price, high input phases of the market. This had been a major issue for producers and the APPDC in view of the existence of such programs in other provinces.[24]

In general, the Committee noted and deplored the lack of cooperation and hostility among the participants in the industry and the regulatory system and made various

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[24]This is the Stop-Loss Program referred to above in note 21.

recommendations to improve communication and cooperation within the industry and between the Marketing Council, the APPDC and the Department of Agriculture. However, the Board selling system and its authority remained intact, the Chairman of the Marketing Council was subsequently replaced, and the purchase of Fletchers Fine Foods Ltd by the Board proceeded. The effect of the Committee recommendations gave the APPDC significant additional political and symbolic capital in respect to its objectives and its defence of its authority to modify its selling system. While no party escaped without criticism in the report, the practical effect enhanced the legal and symbolic capital of the APPDC relative to both the Marketing Council and the processors.

In January 1984 the APPDC passed the *Hog Marketing Levies Order* under the authority of the Federal *Agricultural Products Marketing Act.*[25] This Order gave the APPDC the right to collect its service charge on hogs produced in Alberta but marketed outside the province. This provision was challenged by one of the southern Alberta producers who regularly marketed hogs into the US without paying a service charge. When his application for review was dismissed by the Board of the APPDC, the producer appealed to the Marketing Council. Marketing Council held that the collection of the service charge was not valid because the APPDC had not obtained authorization from the Lieutenant Governor in Council to accept the delegation of the federal power. While the APPDC did not accept this interpretation of the law and the relevant provision of the *Marketing of Agricultural Products Act*, it did not apply for judicial review of this decision. The decision was made to seek the cabinet approval rather than precipitate another dispute with the Marketing Council. Before this could take place, another major confrontation concerning the selling system began.

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[25]Now R.S. 1985, c. A-6. The order was filed as SOR/84-190, 1984. It was made pursuant to the Federal Act and the *Alberta Hog Order* C.R.C., Vol. II, c. 103 which was the Order which granted authority to the APPDC to pass the *Hog Marketing Levies Order*.

The confrontation began in October 1984 when the APPDC again changed its selling system to provide that it would no longer accept bids below an acceptable price range which it established each day having regard to other North American markets.[26] If bids were below the minimum price established as acceptable within the range, the APPDC would refuse them and market the hogs elsewhere, primarily to the US where its surplus hogs were already going.[27] This was a change from the previous system where the APPDC would basically accept bids until the volume of hogs available for sale was used up and would only contemplate US sales as a last resort.[28] Once again, the issue for the APPDC was the Alberta markets low price relativity with other markets and once again the Board took action at a point when producer margins were very poor.

At the point when this change was announced, there were only two remaining major processors in Alberta, Gainers Inc. and the APPDC-owned Fletchers Fine Foods Ltd. Despite the fact that there were now only two processors and that one of them was owned by the Board, there was very little price competition for hogs between the two processors who generally obtained the hogs that they required without the need to compete in price

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[26]The intervening period had been relatively calm in terms of disputes over the selling system and conflicts with the Marketing Council. However, the class action against the processors had remained active and attempts by the processors to have the Statement of Claim struck out on the basis that it did not disclose a class action were unsuccessful. *Alberta Pork Producers' Marketing Board et al. v. Swift Canadian Co. Ltd et al.,* (1981) 16 Alta. L.R. (2d) 313; affirmed (1984) 34 Alta. L.R. (2d) 274 (C.A.); application for leave to appeal dismissed May 24, 1987, 33 Alta. L.R. (2d) xxxvi (S.C.C.). Charges had also been laid against a number of the processors under the *Combines Investigation Act* in February 1982 and these proceedings were continuing as well. In December 1983 three companies (Burns, Gainers and Swift Canadian) entered into a settlement agreement in the class action agreeing to pay over $700,000.00 and on the same day, the 3 firms pled guilty to a charge of conspiracy to lessen competition in the purchases of hogs under s. 32(1)(c) of the *Combines Investigation Act* and were each fined $125,000.00. The actions and combines proceedings proceeded against the other parties, principally Canada Packers.

[27]During this period, Alberta producers were producing nearly 40,000 hogs per week but the two plants were only killing 28,000 to 29,000 hogs per week. The excess hogs were being marketed in the US and this had a downward impact on the price in Alberta.

[28]Unlike the disputes in 1974 and 1978, this change was a change in selling policy. It did not require an amendment of the existing Plan or Regulations. This meant that the change was made by a decision of the Board of Directors of the APPDC. No input or approval from the Marketing Council was required.

bidding.[29] The Alberta hog price remained low relative to other markets and rather than simply accept this price the APPDC was prepared to actively intervene and move hogs out of the province to other markets without first ensuring that Alberta processors had received all the hogs that they desired. The new change was strenuously resisted by Gainers Inc. which suggested that this change meant that by setting a minimum acceptable price as part of the daily price range for bids, the APPDC was now setting hog prices and that this "price setting" was beyond its jurisdiction.[30] This conflict initiated what became known in the press as the "hog wars" and it extended until late 1985. It involved court challenges to the changed selling system and to the APPDC's ownership of Fletchers,[31] a series of appeals to the Marketing Council on the ownership issue and on various alleged abuses by the APPDC of the selling system in order to benefit Fletchers over Gainers, a public media campaign by Gainers Inc. including press and television commercials, a series of producer meetings and media confrontations, a proposed intervention by Marketing Council in the selling system, various threatened or initiated defamation actions involving various representatives of Gainers Inc., the APPDC and the Marketing Council, an attempt by Gainers Inc. to bypass the selling system and to defy the regulations by contracting directly with producers, and a threat by the APPDC to contract its entire production to Fletchers.

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[29]Fletchers Fine Foods Ltd. was managed by a Board of Directors who were appointed by the APPDC but whose mandate was to operate at arm's length in a commercially viable matter. The fact that even a board owned processor was generally unwilling to engage in price competition to secure more hogs than its competitor points out some of the economic constraints on processors which complicated relations with the APPDC. Very seldom did either processor bid more than the minimum price at the bottom of the acceptable price range listed by the APPDC. It also points out the fact that even a statutory single desk selling agency had only a limited impact in raising hog prices for producers and that hog prices remained subject to market considerations.

[30]As noted in earlier chapters, while the *Marketing of Agricultural Products Act* contemplated that such a power could be given to marketing boards, this power had never been sought by the APPDC and was not one of the powers contained in either the Plan or the Authorization Regulation. The argument now made by Gainers Inc. was a variation on the same argument that had been made by the Marketing Council and the processors since 1974.

[31]*Gainers Inc. v. Alberta Pork Producers' Marketing Board and Attorney General of Alberta,* (1985) 41 Alta. L.R. (2d) 229 (Alta. Q.B.) [hereinafter *Gainers Inc.]*; *Wayvel Farms Ltd. v. Pork Producers' Marketing Board (Alta.) and Fletchers Limited,* (1985) 63 A. R. 189 (Alta. Q.B.) [hereinafter *Wayvel*].

During the 'hog war' between Gainers Inc. and the APPDC, relations between the APPDC and the Marketing Council once again deteriorated to a point of complete breakdown. Marketing Council released to Gainers a large number of documents given to it by the APPDC over an extended period and many of these documents were used by Gainers in subsequent court actions, in appeals to the Marketing Council and in its advertising and political campaign.[32] Marketing Council was perceived by the APPDC as biased and its role as an adjudicative appeal body to resolve issues raised by Gainers was questioned. It was suggested by the APPDC that the issues of the APPDC's authority to change its selling system and to purchase and own Fletchers should be dealt with by the courts in the context of the legal proceedings commenced by Gainers rather than by the Marketing Council in the appeals filed on the same issues. In this case the APPDC was much more willing to defend its authority in the courts than it was to appear before an administrative body which it perceived as hostile and biased.[33]

Relations with Marketing Council deteriorated to the point where certain APPDC advertisements in reply to the Gainers advertisements specifically quoted members of Marketing Council as making hostile comments about the APPDC which reflected and supported the Gainers position. Marketing Council was perceived by and presented by the APPDC as firmly partisan towards Gainers Inc. and as hostile to the APPDC. The APPDC

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[32]A similar complaint was made by the APPDC during the packer appeals and confrontations which led up to the Hog Marketing Review Committee in 1980. The APPDC felt that materials given by it to its supervisory body for information should not be released by that body to third parties who wished to attack the APPDC.

[33]The result of these submissions was that the Marketing Council adjourned the appeals on these issues pending the outcome of the court proceedings. Once again these issues were so fundamental and so much part of a larger conflict that the Marketing Council preferred to have the issues considered first by the courts. Marketing Council did proceed with various Gainers Inc. appeals concerning specific time periods where it was alleged that the system had been abused by the APPDC to favour Fletchers over Gainers. In these cases the APPDC presented extensive evidence on the operation of the selling system and the fact that it had been applied equally to both packers on the basis of the highest price obtaining the hogs. The intent was, in part, to build a record for potential appeals of any adverse decisions. One of the grounds of any such appeal would have been allegations of actual bias or the appearance of bias on the part of members of Marketing Council.

went so far as to request in September 1985 that the Minister of Agriculture call a judicial inquiry into the actions of the Marketing Council.[34] The Board was perceived by Marketing Council as out of control, dictatorial, and unnecessarily confrontational and hostile to both the packers, particularly Gainers, and to the Marketing Council. Normal relations of any kind did not exist and the problems noted in 1981 by the Hog Marketing Review Committee had not been resolved. Once again the system was in crisis.

By late 1985 the situation had escalated to a point where the term "hog wars" was not entirely a misnomer for the situation within the legal administrative field. Gainers Inc. was attempting to bypass the selling system and was encouraging producers to buy directly from it in clear defiance of the regulations and it was urging the Government and Marketing Council to take action to remove the APPDC's "hognopoly"[35] by removing its power as a single desk seller. The APPDC was considering entering into a contract with Fletchers Fine Foods Ltd. for virtually all of its hog production and had also considered, but chosen not to take, action to remove the license of Gainers Inc. to buy hogs.[36] It was urging the both the Marketing Council and the Department of Agriculture to take action against Gainers Inc. for defying the regulations in purchasing hogs directly from producers.[37] The Marketing Council was again talking about taking direct action to design and implement a new selling system and this was again a subject of discussion and anger at

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[34]Some four weeks later the Minister of Agriculture replied indicating that the various allegations in the APPDC's correspondence had been considered and that there was not a sufficient basis for a judicial inquiry.

[35]This was a term used by Gainers Inc. in its public relations campaign and television and print advertising which attacked the APPDC and its powers and operations. This campaign was begun in February 1985 and continued through the summer.

[36]Pleadings had been drafted for injunctive relief and a show cause hearing in respect to removal of the license was set for December 1985.

[37]Some producers did choose to sell hogs directly to Gainers Inc. which offered price incentives to them that it would not offer in purchasing hogs on the APPDC selling system. While Gainers Inc. made extensive efforts to attract such hogs, it was not successful in convincing producers to supply it directly with a sufficient and regular volume of hogs necessary to carry on its operations. The bulk of producers chose to support the APPDC although it was clear that there was more division among producers than in the conflict of 1980 when producers were clearly united against the actions of the Marketing Council.

the fall producer meetings and of submissions to the Minister of Agriculture and other members of the Cabinet and Caucus.[38] The APPDC had been successful in both Court challenges at the Court of Queen's Bench although appeals of both these decisions were anticipated.[39] The appeals before Marketing Council which had been heard[40] concerning alleged misconduct in the allocation of hogs recommended more cooperation and directed that the Board provide more sales information, but did not find misconduct in the conduct of hog sales as had been alleged by Gainers Inc.[41] The conflict was being conducted in the media, in the courts, in administrative proceedings, at various producer meetings organized by both the Board and Gainers Inc., and at a political level.[42] A series of defamation actions had been commenced or were contemplated involving primarily representatives of Gainers Inc. and the APPDC but also involving a government employee who was a member of Marketing Council and various media outlets. Various court proceedings designed to challenge potential decisions and actions by Marketing Council

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[38]This proposal was made by Marketing Council in August of 1985. It proposed that the single desk selling authority be removed from the APPDC. The proposal was endorsed by Gainers Inc. but rejected by the APPDC which stated "the Board is not prepared to abandon its role as the sole marketer of hogs on behalf of Alberta producers." The Marketing Council proposal was discussed at fall producer meetings which strongly opposed the proposal. At this time the Minister and the Cabinet did not express any public position on the proposal although the proposal had been initiated after a direction from the Minister in July that Marketing Council review the selling system. After the APPDC and producer protests the Minister indicated that any proposals would not proceed without a vote of producers.

[39]The *Wayvel* decision was rendered on September 9, 1985. The *Gainers Inc.* decision was rendered on November 20, 1985.

[40]As noted, other appeals which were challenges to the ownership of Fletchers and to the validity of the changes to the selling system, were adjourned pending the then existing court challenges. As a result of the court decisions in favour of the APPDC and as a result of the agreement ultimately reached in early 1986, these adjourned proceedings were ultimately abandoned. If Marketing Council had attempted to proceed with these hearings prior to the court decisions, an application for prohibition had been prepared and was ready for filing.

[41]While certain minor irregularities were shown in one or two days of sales over a period of several months, Marketing Council did not find evidence of any deliberate misconduct or any cases where hogs were sold to Fletchers despite higher bids from Gainers. It did, once again, deplore the lack of cooperation between the APPDC and Gainers Inc. and ordered the APPDC to make more details of sales available to buyers.

[42]In terms of political capital, it was significant that the owner of Gainers Inc., Peter Pocklington was a prominent Progressive Conservative and was at that time also involved in a bid for the federal leadership of the party. It was also significant that a provincial election was anticipated in early 1986 and that in the fall of 1985 Premier Peter Lougheed retired and was replaced by Premier Don Getty.

had been discussed by the APPDC and prepared but not filed. The APPDC was requesting a judicial inquiry into the conduct of Marketing Council and what it perceived as partisan actions favouring Gainers Inc. All sides were seeking to invoke government intervention: Gainers Inc. wanted the APPDC restrained and its right to single desk selling removed: the APPDC wanted the Marketing Council to be investigated and disciplined for what it perceived as a pro-Gainers bias and also wanted the government to make clear that no changes to the selling system would be made by the Marketing Council; the Marketing Council wanted the Minister's and the government's support in its confrontations with the APPDC.

The conflict was eventually resolved by a 60 day truce between the APPDC and Gainers Inc. commencing in December 1985 arranged by the new Premier of Alberta during which all court actions and administrative proceedings were held in abeyance and during which a government appointed agent monitored and studied the Board's selling system with a view to determining if changes could be recommended while retaining an active role for the APPDC. This was followed by a negotiated contract, again with direct involvement from the Premier, under which the bulk of the production was divided at an agreed volume between Fletchers and Gainers and the price was to be established based on a formula price which was drawn from hog prices in several agreed markets. The terms of the contract and the price formula remained confidential, but it was for a 39 month period.[43] The truce and the contract which followed were brokered and facilitated by the direct intervention of the Premier of Alberta.[44] Up to this point in the conflict, the government had remained publicly neutral although relations between the APPDC and the then

[43]From April 1986 to July 1989.

[44]In terms of the timing of this intervention, it occurred at a time when a provincial election was anticipated. Shortly after the contract was resolved, a provincial election was called.

Minister of Agriculture[45] were not good and there was also ongoing friction with the Department of Agriculture.[46] In the terms of the 60 day truce which was arranged, the Government agreed to "preserve the integrity of the Plan." This was a response to the proposals to remove single desk selling powers from the APPDC and concerns about the renewed Marketing Council activity in this area.

The agreements were also facilitated by government grants and guaranteed loans to Gainers Inc. and a grant to the APPDC to pay the $5.5 million balance of the Fletchers purchase price which permitted the reduction of the producer service charge per hog from $3.00 to $1.00 per hog.[47] Subsequently, during the next 3 years there were additional government loan guarantees given to both Gainers Inc. and Fletchers Fine Foods Ltd. to finance acquisitions or plant expansions.[48] Marketing Council was essentially bypassed in all these discussions and the level of contact between it and the APPDC remained minimal. The proposed Marketing Council examination and revision of the selling system did not proceed and no further reference was made to it. All administrative proceedings and court proceedings were discontinued as part of the agreement.[49] No major changes to the selling system were recommended by the Government appointed agent and it remained intact.

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[45]The Hon. Leroy Fjordbottom had replaced the Hon. Dallas Schmidt. A matter of concern for the APPDC was that the Minister represented a riding in the extreme south of the Province in an area in which there had always been considerable opposition to the APPDC among hog producers.

[46]This tension with both the Minister and the Department was another factor which led to the direct involvement of the Premier in the discussions which took place since he was perceived by the APPDC as more removed from, and hence more neutral and less identified with, Marketing Council than the Minister of Agriculture.

[47]Both of these grants were announced before the end of the conflict and before the contract was negotiated. During the summer and fall of 1985 the Government also announced major new assistance payments to livestock producers and a set of initiatives to improve the competitive position of the Alberta livestock sector. These grants and the loan guarantees were part of these initiatives.

[48]Government loan guarantees to Gainers Inc. eventually totaled approximately $55 million while Fletchers Fine Foods Inc. received $20 million in loan guarantees to finance the acquisition of the assets of a US packer centered in California but active throughout California, the Pacific Northwest, Hawaii, and to a lessor extent, the American Midwest.

[49]The exception to this was the *Wayvel Farms* challenge to the purchase of Fletchers. This appeal proceeded and was heard and dismissed by the Court of Appeal (*Re Wayvel Farms Ltd. and the Alberta Pork Producers' Marketing Board et al.,* (1987) 46 D.L.R. (4th) 72). The applicant in this case was a southern Alberta producer who marketed the bulk of his hogs into the US and opposed the purchase (it

The 39 month contract led to a period of relative peace in the ongoing confrontations between the APPDC and Gainers Inc.[50] However, a further source of conflict between the APPDC and Marketing Council developed as a result of the proposals made in 1987 for a new Marketing of Agricultural Products Act. The draft act had been prepared by the Legislative Counsel's office in consultation with the staff of the Marketing Council with very little input from any of the marketing boards or commissions. When the draft act was made available, the proposals aroused widespread opposition among the boards and commissions and resulted in a joint submission to the government and to the Agricultural Caucus Committee by almost all the boards and commissions. As a result of these submissions and the ongoing conflict with the Marketing Council over the proposed Act, the new Minister of Agriculture[51] appointed a special representative to review these concerns. The special representative, who was a practicing lawyer with an agricultural economics background, met with the various parties and with the solicitors for the concerned boards and commissions. As a result of these meetings, several substantial amendments were made to the proposed Act. The bulk of the concerns expressed involved concerns that Marketing Council was attempting to expand its powers under the Act and that the changes had been made reflecting only its position and with no input from the

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was in fact the same producer who had appealed the *Hog Marketing Levies Order*). However, the initial application and the appeal were argued by the lawyers retained by Gainers Inc. in the challenge to the selling system (*Gainers Inc. v. Alberta Pork Producers Marketing Board*) and the file number used by those lawyers was the same in each case.

[50]It was not, however, a peaceful period for the processors. At the beginning of June, 1986 workers at both plants went on strike and the APPDC had to move all hogs south to the US for a two or three week period. At the end of this time the Fletchers strike was settled but a long and bitter Gainers strike continued until December. The need to move hogs into the US in 1986 was expensive for Alberta producers because there was a substantial countervail duty placed on live hogs as a result of American countervail actions first commenced in 1985. The amount of this countervail has varied from time to time and there have been a series of administrative proceedings under the American legislation and subsequently the FTA and NAFTA challenging both the imposition and the calculation of the countervail. Substantial numbers of hogs also had to moved to the US and to other provinces during a long strike at the Fletchers plant in 1988.

[51]As noted, there had been an election in 1986 and a new Minister, the Hon. Peter Elzinga, was appointed in May after the election. Relations between the APPDC and the new Minister, who came from a riding near Edmonton, were initially much better than under his predecessor.

boards and commissions involved. Subsequent to the passage of the new Act, the Minister's special representative was appointed as the new Secretary-Manager of Marketing Council and there was a complete turnover of Marketing Council staff. Several members of the Marketing Council were also not reappointed although the chairman remained the same and two former members of Marketing Council were appointed to the Appeal Tribunal created by the new Act. Assurances were given that the new Act was intended to preserve the status quo and not to make changes in the operation of the system. In this case the dispute was clearly not simply with the APPDC but also reflected similar concerns held by boards and commissions which had enjoyed much more amicable relations with Marketing Council.[52]

The next two year period saw attempts to establish better relations between the APPDC and the Marketing Council. Considerable progress was made in respect to better communications and a better working relationship,[53] but this process began to break down after the Government of Alberta took control of Gainers Inc. in October 1989. Gainers Inc. had defaulted on loan payments made under the government guaranteed loans and the Government elected not to close Gainers but to carry on operations under the supervision of a Ministerial Task Force. The APPDC strongly and publicly opposed this position and the management of Fletchers Fine Foods Ltd threatened to close their Alberta plant if the government involvement in Gainers Inc. continued.[54] The takeover of Gainers meant that one of the two processors was owned by the sole marketer of hogs, the APPDC; the other

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[52]The ACP was one of these boards.

[53]For example, Marketing Council forwarded on to the cabinet an order made by the APPDC in respect to a Hog Marketing Levies Order made under the Federal Act together with the APPDC's request for the authority to accept the delegation of power under the *Alberta Hog Order*. Despite the support of the Marketing Council and the Minister of Agriculture, the Cabinet refused to pass an Order in Council authorizing the Hog Marketing Levies Order. This position was based on the opposition of powerful members of the cabinet who represented southern Alberta ridings in which producers who sold hogs into the US without paying the APPDC's service charge and opposed any attempts to change this situation.

[54]This position was taken by the management of Fletchers in November 1989 and was subsequently supported by a vote of APPDC's directors and delegates at their semi-annual meeting later that month.

was owned by the Government of Alberta. This created a major change in the administrative dynamic within the legal administrative field and created a situation fraught with apprehensions of apparent or actual bias on the part of the APPDC, the Marketing Council and the Government of Alberta. It also raised the potential for direct conflict between the APPDC and the Government of Alberta as the new shareholder of Gainers Inc.[55] The prospect of direct conflict with the Government created a significant shift in the legal administrative field.

It is in the next series of disputes that arose between the Marketing Council and the APPDC that the effect of the shift in the legal administrative field was most apparent. The focus of these disputes had less to do with pricing issues with the packers and more to do with the continued ownership of Fletchers by the APPDC. The first issue which arose concerned the manner is which the APPDC disclosed the operations of Fletchers Fine Foods Ltd. in the APPDC's annual financial statements. The APPDC favoured a consolidated method which provided less information about the Fletchers operations. The Marketing Council demanded a method of disclosure which would disclose the Fletchers information separately and would show much clearer financial information concerning the Fletchers operations. After an extended series of meetings and correspondence and review of conflicting accounting opinions obtained by the APPDC and the Marketing Council, the Marketing Council passed a regulation requiring that the financial information be provided in the form it required.[56] The APPDC was not able to prevent this regulation for a number of reasons: the position of the Minister favoured that of Marketing Council; a substantial

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[55]These tensions were already apparent at a meeting between the APPDC's board of directors and the Gainers Ministerial Task Force in January 1990 to discuss possible rationalization of the industry. The Government Ministers demanded that the closure notice of the Red Deer plant be lifted and that the APPDC divest all shares in Fletchers or remove its single desk selling authority before any discussion of rationalization could proceed. The Government Ministers also indicated an intention to keep Gainers Inc. in operation and to expand it if necessary. All this information was distributed to all producers by an APPDC newsletter dated January 17, 1990.

[56]Alta. Reg. 56/90. Although the regulation was drafted in general form as applying to all boards and commissions, it was clearly directed at the situation of the APPDC.

group of producers also wanted to see this information disclosed to producers in the Annual Reports; and this was a technical argument which was not conducive to arousing major producer protest.

A second issue concerned the release by a member of the Marketing Council to a group of producers opposed to the continued ownership of the shares of Fletchers by the APPDC of a large number of APPDC documents and minutes which had been provided to the Marketing Council. These documents were incorporated in affidavits filed by this producer group in an action commenced against the APPDC in the summer of 1990 seeking divestiture of the Fletchers shares to those producers who had paid the extra service charge of $2.00 between 1981 and 1985.[57] This meant that these documents were made publicly available since they were filed in court proceedings. Since this was the third time that documents provided by the APPDC to the Marketing Council had been given to persons wishing to take action against the APPDC,[58] the APPDC sought assurances that the member of Marketing Council who had released the documents would be disciplined and that safeguards would be put into place to prevent further occurrences. It also raised concerns about restrictions on information concerning Fletchers operations and whether this should be given to the Department of Agriculture when the government was involved in the ownership and operation of Gainers Inc., the major competitor of Fletchers. When it did not receive from Marketing Council assurances that it felt were satisfactory,[59] the

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[57]When Fletchers was purchased in 1981, the service charge was increased from $1.00 to $3.00 per hog to pay for the acquisition of the shares. The service charge was reduced back to $1.00 per hog in late 1985 when the APPDC accepted the Premier's offer of a grant of $5.5 million to pay off the balance of the purchase. Producers who had produced hogs during this period and paid the higher service charge were called extra-levy producers within the industry. A certain group of these producers felt that the shares of Fletchers should be distributed to the producers who had paid the "extra-levy."

[58]Earlier incidents had occurred in 1978 when documents were released to the packers who then used them in their appeal to Marketing Council and the subsequent court application, and in 1984 when a large number of documents were released by Marketing Council to Gainers Inc. See note 32 above.

[59]While apologies were made by Marketing Council, no changes in procedure were instituted which would prevent further occurrences. The member who provided the documents was not disciplined or publicly criticized, but when his term was finished, he was not reappointed. He subsequently became an

APPDC began to delay sending in minutes of its meetings and the minutes that were sent in became very short containing very little substantive information. Marketing Council made several demands that this practice change and that the information it required be provided. When the APPDC did not respond to Marketing Council's satisfaction, the Minister of Agriculture acting upon the recommendation of Marketing Council, on December 11, 1990, issued an direction under s. 11 of the *Marketing of Agricultural Products Act* which directed the APPDC to produce the minutes of all its meetings and which prohibited the APPDC from holding any meeting of its Board of Directors or any committee of the Board of Directors unless there was a member of Marketing Council physically present at the meeting. It also directed that the Pork Countervail Contingency Fund be investigated by Marketing Council. In this case the Minister's position and that of the cabinet fully endorsed the position of the Marketing Council. Despite the protests of the APPDC, the government fully supported the actions taken by the Marketing Council.

This problem was compounded for the APPDC by a division among hog producers over various issues, most particularly the ownership of Fletchers and the question of the sale of hogs produced in Alberta outside of the Province by producers directly rather than through the APPDC. On the question of Fletchers, there was a strong division of opinion among producers as to whether the shares of Fletchers Fine Foods Ltd. should continue to be held by the APPDC or should be distributed to producers. There was a further division of opinion as to whether these shares should go to current producers or should recognize the producers who paid and extra-levy of $2.00 per hog between 1981 and 1985 to finance the purchase of the shares. Various plans had been discussed and developed prior to this time to deal with these issues including a unit trust concept and a producer patronage recognition plan. In 1990 a group of producers commenced legal action seeking

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MLA for the governing party from a Southern Alberta constituency as did another vocal opponent of the APPDC.

a declaration that the shares of Fletchers Fine Foods Ltd. were held in trust for the extra-levy producers and seeking an order that the shares should be distributed to those producers.[60] It was this litigation in which the APPDC documents provided by a member of Marketing Council were used in affidavits. An appeal was also launched to the Appeal Tribunal concerning the same issue and a public relations campaign was also launched in the media by these producers. In the context of the disputes with Marketing Council, this meant that Marketing Council could suggest that it was also acting on behalf of a significant group of producers in raising concerns about the ownership of Fletchers and disclosure of information concerning the operations of Fletchers. Producers therefore did not appear to be united on this point and the Marketing Council and government could suggest that they were acting on concerns which had also been raised by producers. Similarly, on the issue of the sale of hogs to the US, it had been the cabinet and not the Marketing Council which had blocked a regulation authorizing the APPDC to collect its service charge on these hogs primarily based on representations from producers in southern Alberta.[61] Thus again, there was a significant group of producers (many of whom were also involved in the group supporting the Fletchers litigation) who had different interests than the APPDC and who made their opposition clear to the government and were favourably received. The fact that there were producers opposed to the actions of the APPDC gave significant additional symbolic capital to the Marketing Council and the

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[60]While some of these producers had long been opposed to the continued ownership of the shares by the APPDC, others had become concerned because of the threatened closure of the Red Deer plant by the management of Fletchers as part of its confrontation with the Government over the takeover of Gainers Inc. The support of the Board of Directors for Fletchers' management on this issue created divisions between producers as well as conflict with the Government.

[61]It was significant that the former Minister of Agriculture and now Minister of Forests and the Treasurer of Alberta (the Minister most directly involved in the decisions concerning Gainers Inc.) were both from ridings in southern Alberta where a significant number of producers shipped hogs out of the province and were opposed to paying any form of levy on these hogs. Thus although a form of regulation was accepted by the Marketing Council and did no more than extend to the APPDC the same federally delegated powers under the *Agricultural Products Marketing Act* (Canada) used by hog marketing boards in other provinces, the cabinet and the Minister of Agriculture would not allow this regulation to proceed and to be registered.

Government who could present their actions as partially in response to producer concerns. It also significantly lowered the political capital of the APPDC which could no longer depend on a full support from producers.

The period which followed the Minister's direction of December 11, 1990, was very tense. What began as a conflict about the actions of a particular member of Marketing Council and a historic grievance of the APPDC concerning past experiences with the release of documents by the Marketing Council escalated into what was perceived by Marketing Council and the government as direct defiance of the system by the APPDC.[62] No meetings of the Board of Directors of the APPDC or any of the Board Committees could take place unless a member of the Marketing Council was present. The only part of APPDC Board of Director meetings which were closed to Marketing Council were when the APPDC solicitors were present and discussing legal matters. This question of solicitors' privilege was only conceded by Marketing Council when legal proceedings were threatened on the point and it was given only on the basis of solicitor's undertaking by APPDC counsel that only legal matters would be discussed in the closed portion of the meeting. Virtually all communication between Marketing Council and the APPDC took place between the APPDC solicitors and solicitors retained by Marketing Council specifically to deal with this situation. There were an extended number of meetings between the Board of Directors and Marketing Council and a large volume of correspondence was exchanged on various issues. Detailed reviews of the selling system and of the APPDC accounts were carried out by consultants retained by the Marketing Council. There were a series of issues on which disputes arose: whether Marketing Council members could attend the Fletchers Fine Foods Ltd. annual meeting; whether Fletchers had been favoured over Gainers Inc. by the APPDC holding cheques for

[62]The perceived refusal by the APPDC to transmit its minutes or to give information about its activities was seen as a form of direct defiance of the regulatory system since the ability of the Marketing Council to act in a supervisory capacity depended upon it having sufficient information about the APPDC's activities.

payment of hogs for a longer period than normal thereby extending financing to Fletchers and whether this arrangement had been concealed; whether an arrangement with both packers for payment by APPDC of countervail on pork products was appropriate and whether it was proper to keep this agreement confidential for commercial purposes; how, and under what conditions, funds raised by a special increase in the producer levy for a national Pork Countervail Contingency Fund[63] would be returned to producers once it was determined that it was no longer required; and whether previous APPDC minutes had adequately disclosed what went on at meetings of the Board of Directors.

There was a clear and expressed perception on the part of Marketing Council that the APPDC was attempting to hide secret benefits to Fletchers Fine Foods Ltd. and was acting in an irresponsible manner in respect to the potential consequences of its responses to the American countervail action.[64] What made these disputes different from those which had occurred in the past was that Marketing Council's position was fully supported not only by the staff of the Department of Agriculture[65] but also by the Minister of Agriculture and by the Cabinet. The situation was also different in that a significant number of producers were also concerned about the ownership of Fletchers and wanted to see more financial information released and a change in the ownership structure and that

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[63]This fund was a result of national cooperation between most of the provincial hog marketing boards to develop a fund to give processors assurances that subsequent retroactive assessments of countervail tariffs on pork by the Department of Commerce under the ongoing Administrative Reviews it had initiated would be paid. The concern was that otherwise processors would depress the Canadian hog price in an attempt to anticipate future retroactive assessments. The fund eventually became unnecessary when a Bi-National Panel overruled the decision that pork imports, as opposed to imports of live hogs which remained countervailable, were harming the American market.

[64]While the details of these arrangements are not particularly relevant, they were an attempt by the APPDC to make certain that the American countervail actions did not disrupt the Alberta market or prevent the export of pork products by Alberta packers to the US. The concern of the Department of Agriculture was that these arrangements might be used by the Americans to extend their countervail actions to other commodities. There were conflicting legal opinions obtained from American trade lawyers by the APPDC and by the Department of Agriculture on whether this was possible or likely. The Marketing Council clearly sided with the Department of Agriculture.

[65]As noted in the Hog Marketing Review Committee Report of 1981 and as seen again during the 1984-85 'hog wars' tension between the APPDC and the staff at the Department of Agriculture, who generally sided with the positions taken by the Marketing Council, was nothing new.

legal and administrative proceedings initiated by a group of producers concerning this matter were pending.

During this period, any proposed action by the APPDC was subjected to intense scrutiny. Much of the energy of senior staff, the Board of Directors and legal counsel was involved in responding to the issues with Marketing Council by correspondence, the provision of legal opinions, meetings, telephone conversations, and the organization of presentations and submissions to Marketing Council and the Government which explained and justified the APPDC's actions. None of this took the form of any formal proceedings and it did not have widespread publicity. However, it was absolutely crucial to the APPDC and its continued operation. In the first several months after the Section 11 direction, there was a very real concern that the Cabinet might choose to take action to take over the operations of the APPDC under the powers which it had pursuant to the Act. The APPDC's efforts within the legal field were an attempt to retain its ability to act in the market and to respond to the issues raised by Marketing Council in such a way that no justification for further action by Marketing Council or the Cabinet was presented. This tested the extreme limits of what was possible within the legal administrative field and it was clearly not a situation which could persist over an extended period of time.

Eventually the tensions led to a meeting between the Board of Directors and a special committee of Cabinet in April 1991 at which no staff, no lawyers, and no representatives of the Marketing Council attended. Tension was very high at this point and it was seriously contemplated by the APPDC that one outcome of the meeting might be the removal of the Board of Directors and the assumption of direct control by the Marketing Council or some other representative appointed by the Cabinet. At this meeting the APPDC agreed to accept the government's position on the countervail arrangements with the packers, and agreed to participate in a proposed rationalization committee designed to

look at rationalizing the packing industry in Alberta.[66] The APPDC also gave various undertakings concerning the ownership of and business and financial relations with Fletchers Fine Foods Ltd. and concerning future cooperation with Marketing Council. While tension remained high, this meeting and the general policy decisions which the APPDC agreed to implement, lowered substantially the possibility of a direct confrontation in which the operations and management of the APPDC would be suspended by the government which would assume direct control. Over the next several months, these arrangements were implemented and in November 1991, the Section 11 directive was removed. During this period there was also an opinion poll conducted by the APPDC under the supervision of Marketing Council in which producers were asked to express their opinion on whether ownership and control of Fletchers should remain with the APPDC. The result of this poll indicated that producers wished to see control and ownership pass to producers.[67]

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[66]The establishment of this Committee was announced by the Minister of Agriculture in May 1991. The committee was composed of 4 producers: two members of the Board of Directors of the APPDC, a leading member of the dissident producer group and a former chairman of the APPDC. The intent was to look at the packing industry in Alberta and report to the Minister on possible recommendations to rationalize the industry. It was understood that this might mean changes in the ownership of Fletchers Fine Foods Ltd. to remove control from the APPDC and the government removing itself from the ownership of Gainers Inc. and that it might involve some form of amalgamation of the two companies. However, the deliberations and recommendations of the Committee were to remain confidential and to be provided directly to the Minister. This report was delivered to the Minister of Agriculture in early September, 1991, but it was not made public and its recommendations were not acted upon by the Government. The Report was eventually made public by a member of the opposition in October, 1992. Essentially this Report had recommended that both Fletchers Fine Foods Ltd. and Gainers Inc. transfer their assets to a newly incorporated company in return for equity. The new company which would also have public financing and financing from hog producers paid for by an additional levy would operate a single large modern processing facility designed to compete with larger and more efficient American plants. While the Government did not accept the recommendations of the report, from the perspective of the disputes between the Government and the APPDC the creation of the Committee and its work provided a valuable cooling off period and reduced tensions which had been at a breaking point.

[67]This opinion poll was first announced in November 1990 and it was conducted in the spring of 1991. As a result of the announced poll and its subsequent result, both the court action and appeal proceeding by the group of extra-levy producers were suspended and eventually discontinued.

Relations with Marketing Council remained poor. This was highlighted in June 1992 when Marketing Council published its annual report for 1991. This report contained suggestions that the APPDC:

1. Secretly used hog producers' funds to reimburse Alberta packers for United States countervail duties;

2. Extended "significant" unsecured credit to Fletchers Fine Foods Ltd. by not depositing immediately cheques from Fletchers after it had purchased hogs;

3. Failed to record some decisions by board directors;

It suggested that the APPDC had ended these practices on Marketing Council's orders. It also suggested that Marketing Council had issued its direction after the APPDC in 1990 and 1991 had shown "disregard" for the regulations concerning reporting on these meetings and it criticized each of these actions. The APPDC took strong exception to each of these comments and the possibility of a defamation action against Marketing Council was raised and the APPDC issued its own press releases and correspondence taking issue with the Marketing Council's statements on each point. The issue was not resolved and although the matter did not proceed to legal proceedings, relations remained tense.[68]

A further producer poll was conducted in 1992 in which producers by a fairly narrow margin agreed that the shares of Fletchers should be distributed to the extra-levy producers who had paid the additional $2.00 levy between 1981 and 1985. During this year there was also a major appeal by Gainers Inc. who argued that it was entitled to a historic share of the hogs marketed by the APPDC and that it was the APPDC's obligation to ensure that Gainers Inc. received these hogs. This hearing before the Appeal Tribunal

[68]A further Marketing Council regulation, Alta. Reg. 431/91 was passed which required certain procedures to be followed by marketing boards or commissions who held funds in trust for producers. This was again a general regulation but directed at the APPDC. It did not become a major issue since it did not require major changes in the accounting practices already followed by the APPDC.

was a fundamental challenge to the operation of the selling system. It took place in hearings which extended over a period of over 6 months and resulted in transcripts which were over 1500 pages. It was by far the longest and most complex appeal ever dealt with by the Appeal Tribunal and involved a detailed review and defence by the APPDC of its selling system. A very clear intent of this approach on the part of the APPDC was to provide the record for a court challenge of any adverse decision and to make clear to the Appeal Tribunal that what Gainers Inc. was requesting would be fundamentally opposed by producers and require fundamental changes to the selling system.[69] The final decision by the Appeal Tribunal rejected the Gainers Inc. submission that there was any obligation on the part of the APPDC to provide a specific number or percentage of hogs to Gainers Inc. or to direct producer deliveries to Gainers Inc. The decision recommended that the APPDC review its selling system but left the system unchanged. This decision marked the end of a period of conflict within the system which began in 1989 with the Government takeover of Gainers Inc. and marks the end of the period under consideration in this thesis. There have been further major developments in the Alberta pork industry since this period but they extend beyond the period of time considered in this thesis.[70]

The ACP and the National Plan

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[69]The background context to this concern was that a processor owned by the Government of Alberta and overseen by a Ministerial Task Force was appealing to a Government appointed Appeal Tribunal. Some of the evidence and the examination of witnesses and production of documents at the hearing was intended by the APPDC to make clear that this Government involvement existed. Although this was not the primary focus of the evidence presented, and was not mentioned in the decision, it would have formed part of the grounds of any appeal of the Appeal Tribunal's decision.

[70]Some of these developments include the sale by the Government of Alberta of the assets of Gainers Inc. to Burns Foods in January 1994, the divestiture of the shares of Fletchers Fine Foods Ltd. by the APPDC in 1995, and a vote by producers on a revised Plan in April, 1996. This new Plan was filed in July 1996. There are also current discussions about changing the system to allow more open marketing of hogs without the need to go through the APPDC as a single desk seller and it is contemplated that this change will occur through amendments to the APPDC's marketing regulations in late 1996. All of these developments have major implications for the future of the industry and the legal administrative field but they are beyond the scope of this thesis.

The ACP was an initial supporter of the national marketing legislation during the controversy which surrounded its passage. Part of this support stemmed from the fact that about 15% of Alberta's chicken marketings were sold into B.C. primarily to chicken deficient regions in the north or the interior. During the chicken and egg war, the B.C. Board with the support of its provincial government sought to ban the sale of out of province chicken. Attempts by the ACP and government officials, including the Minister of Agriculture, to resolve this issue through meetings with their B.C. counterparts failed to resolve the problem. Eventually the B.C. regulation was declared unconstitutional, but the long term desire of B.C. to become self-sufficient in chicken continued to be strain on relations between the Boards.[71] The initial position of Alberta was to hope that a national plan would protect this market and prevent attempts to disrupt interprovincial markets.

Agreement on a national chicken marketing plan was not reached until 1978 and by this time the position of the Alberta board had changed. When the Canadian Chicken Marketing Agency (C.C.M.A.) was established in 1978, Alberta refused to join. There were a number of factors which led to this decision. The Alberta Turkey Board had joined its national plan and felt that it was unfairly treated in relation to the allocation of market share; there was concern expressed by growers who grew both turkeys and chickens that the same thing would happen in chicken. During the 1970s, the Alberta market for chicken was growing much faster than that of any other province as a result of the economic boom and influx of population. During this period sales increased each year by an average of 12.1% meaning that sales had doubled in a 6 year period. Proposed allocations based on historic marketings would not recognize this growth and the potential for continued growth. The Alberta market would be fixed at a level below its current production and

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[71]*Kelly Douglas Co. v. British Columbia (Broiler Marketing Board),* [1978] 2 W.W.R. 1 (B.C. S.C.). During the 1970s over half of the expenditures of the B.C. Board went toward a freight promotion levy designed to help Fraser Valley producers and processors compete against chiefly Alberta imports. (B.C. Select Standing Committee on Agriculture, vol. 3, chapter 4).

there would be very limited ability to expand to meet continued growth in consumer demand. There was also the concern that traditional markets in the interior of B.C. and in the Northwest Territories would not be recognized. Since the court decisions striking down provincial attempts to restrict imports, there was less concern about provincial restrictions from B.C. Accordingly, Alberta refused to join the C.C.M.A. and remained outside the national agreement.

This position changed in 1983 as a result of a leveling off of the growth in demand for chicken in Alberta and because of a legal action taken by the CCMA. In March 1983, the CCMA brought action against Lilydale Cooperative under the *Canadian Chicken Orderly Marketing Regulation* SOR/79-560 as amended and the *Canadian Chicken Licensing Regulations* SOR/81-517 as amended. Under these regulations a processor marketing from an unregulated area such as Alberta into regulated areas had to be licensed and required a quota. This was not a processor quota but it required that the processor had to be processing and marketing chicken which had a national quota allotted. The action did not go to trial. Legal opinions obtained by the Board and by a study commissioned for the Alberta government[72] indicated that the action likely would be successful. Lilydale Co-operative was vulnerable to such an action because it operated and marketed in B.C. as well as Alberta. As well there was the threat that other regulated provinces would dump chicken into the Alberta market which was no longer expanding while Alberta would be unable to export chicken. Accordingly, a market agreement was entered into between the Alberta Board and the CCMA. on July 1, 1983 and this agreement was continued in subsequent years. The agreement did not make Alberta a member of the Agency, but under the agreement Alberta received a market allocation in line with its population of

[72]Deloitte Haskins & Sells Associates, *The Implications of Alberta's Participation in the National Poultry Marketing Agencies* (Edmonton: Deloitte Haskins & Sells Associates, 1984). This report was commissioned by the Marketing Council. It reviewed the history of the conflict and of the legal action and expressed the opinion that the action would likely be successful. This confirmed the legal opinion given to the ACP by its lawyers.

9.41% of the national total and Alberta agreed by contract to conform to agency rules and to pay agency fees. Alberta representatives participated in Agency meetings but did not have a vote. As will be discussed below, this agreement with the national agency had a major impact on legal issues which were beginning to arise at this time concerning roaster chicken.

The action by the CCMA had been prompted by several factors. The demand for Alberta chicken had continued to increase during the late 1970s and the beginning of the 1980s; it nearly doubled again between 1977 and the beginning of 1983.[73] Alberta was able to enjoy market expansion both prior to and after the establishment of the national agency by not participating. Alberta enjoyed a "free-rider' position in poultry taking the benefits of limited foreign imports, under the import controls enacted under the national plan, while being able to increase its production at the same point that other provinces had limited their production under the national plan. It was this position that the National agency acted to prevent. The continuation of exports into B.C. remained an irritant for the B.C. Board which pressed for action. A further concern was the impact of the Alberta actions on the National Plan's position under GATT. Under Article XI of GATT, import controls in the form of import quotas could only be used only if there was a national supply management scheme.[74] An ongoing concern was that if too many provincial boards opted out this could impact on the right to impose import controls under GATT. This was essential to supply management in view of potential American imports.[75]

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[73]Deloitte Haskins and Sells Report.

[74]This had been one of the major incentives for the development of national marketing plans in supply managed industries particularly when American imports became a problem in Ontario and Quebec in the mid !970s displacing central Canadian product westward and impacting on the market in the western provinces.

[75]The threat of American imports has always been a major concern of the poultry and dairy industries. Under the GATT agreement it was possible to prohibit imports by establishing very low quotas for imports based on a national supply management plan supplying domestic needs. However, under the Uruguay round of the ongoing GATT discussions, concluded in December 1993, the right under Article XI to place import quotas on agricultural products subject to supply management was removed despite strong Canadian opposition. Import quotas were replaced in 1995 by tariffs which initially can be set high

The threat of withdrawals and actual withdrawals by various provinces who are dissatisfied with their market share remains a problem. Since 1989 B.C. has not been a member of the national plan although it has entered into a number of yearly contracts with the CCMA by which it agrees to certain production figures and to payment of overproduction penalties. Serious problems also arose with Ontario which was not satisfied that its allocation met the needs of its growing processing industry. This placed serious stress on the system and led to litigation between the Ontario Board and the CCMA in 1992 over penalties for Ontario overproduction which resulted in the Federal Court declaring invalid the penalty provisions in the national plan and a threat by the Ontario Board to withdraw issued in late 1993 and later rescinded in 1994. The industry experienced a severe crisis in 1994 and 1995 and was forced to come up with a new national allocation system which restored some degree of stability.[76] The issue of chicken production in the Northwest Territories which is outside of the national plan is also an outstanding issue. Therefore, the entry of the ACP into the national system did not resolve

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enough to make imports uneconomic but which must be slowly reduced over an extended period. Thus tariffs in poultry were set at 280% and must fall to 238.3% by 2001. However, the shift to tariffs raised an issue under the NAFTA which expands import quotas for American product and provides for the reduction of import restrictions over a 10 year period starting in 1989 and prohibits the introduction of new tariffs. The American Government challenged Canadian tariffs in poultry and dairy on the basis that these new tariffs were in violation of the NAFTA provisions. The Canadian position was that NAFTA recognized supply management and that the replacement of valid import quotas by tariffs as a result of the GATT agreements which created the World Trade Organization (WTO) were not a violation. The Canadian position was recently upheld by a Bi-National Panel under the dispute resolution provision of NAFTA. However, further American response is uncertain at this time and the issue of American imports remains a concern and the threat to poultry and dairy producers becomes a bargaining counter in other discussions such as wheat or soft wood. See *supra* chapter 4, notes 92-97 for a discussion of the position of the Alberta government, which alone among the provinces, supported the shift to tariffication.

[76]See *Ont. (Chicken Producers' Marketing Bd.) v. Can. (Chicken Marketing Agency),* [1993] 1 F.C. 116 (T.D.). See also *supra* chapter 4, note 76. The problem arose primarily because a growth in the processing and further processing industry in Ontario and in B.C. did not result in corresponding growths in production. As in the case of Alberta in the 1970s, the dynamic nature of these markets created an incentive for the B.C. and Ontario Boards to overproduce or to challenge the system. A detailed discussion of these issues is beyond the scope of this thesis. However, it should be noted that the threat of withdrawals no longer impacts the question of import controls, since Article XI of GATT, which required a national supply management system in order for import quota controls to be established, has been abolished. The ACP and other chicken marketing boards in this and in other areas such as quota transfer are now having to deal with the second generation of supply management issues.

all marketing issues. However, the ACP now deals with these issues within the structure of the national plan.

Alberta Chicken Producers - Roaster Factor

The single most contentious legal issue dealt with by the ACP was the issue of the regulation of the production of roaster chicken. This issue resulted in the bulk of the administrative appeals faced by the ACP over a period of some eight years and resulted in a major focus of the energy and legal and other resources of the ACP on a segment of chicken production which was less than 10% of total chicken production. The issue also provides an indication of how the legal administrative field shifted and adapted to changing economic conditions without any substantial change in the formal law.

When the ACP was formed, roaster chicken were not an issue and were not even mentioned in the regulations. Originally the ACP issued quota only for broiler chicken marketed through regular marketing channels.[77] It was for this reason the ACP was originally named the Alberta Broiler Producers Marketing Board.[78] While the definition of "broilers" under the original plan was "any class of chicken (including fryers) under six months of age and not raised or used for egg production"[79] the actual production and marketing system set up was designed for broilers. At that time quotas were allocated by weight range and the Board developed the practice of recognizing a separate class of

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[77]This essentially meant broiler chicken processed and sold through the major processors. It did not deal with farmers markets or door to door sales. As will be noted subsequently in relation to another issue which arose it also did not deal with the production of producers such as the colonies of the Hutterian Brethren who produced and marketed some chicken but did not do so through the major processors. This production initially remained unregulated.

[78]The name was changed in 1986 to the Alberta Chicken Producers Marketing Board as discussed in Chapter 2. During the discussion concerning roaster factor, I will refer to the ACP as the Board since this is how it was commonly referred to at the time and this is the term used in the Marketing Council and Appeal Tribunal decisions which will be referred to and quoted.

[79]The significance of this definition was that it would include all chicken including what are now called roasters and cornish because all of this production involved marketing chicken before they reached the age of six months.

heavier bird which was described by the industry as a "roaster" although this bird was still within the general definition of a broiler under the Plan. This division between types of bird was not reflected in changes to the regulation until 1986 but it was part of the practice of the Board and the industry almost from the inception of the Board.[80]

In the early 1970s there was limited demand for roasters but the Board had difficulty finding quota holders to satisfy even this limited demand. Roaster chicken was the one area in which processors continued to import chicken from outside the province to fill local demand. The major reason was that a combination of lower prices for roasters and production difficulties in raising them meant that the production of roasters was consistently less profitable than raising broilers. On several occasions the Board offered roaster quota to producers on the quota waiting list but as soon as these growers became eligible for broiler quota they discontinued their roaster production. This occurred several times during the 1970s because of the continued expansion and favourable market for broiler production in Alberta. In 1978 there was only one roaster quota holder left because the others had either converted to broiler production or had ceased operations and had their quota recalled. In 1979 the Board again offered six producers on the quota waiting list the opportunity to obtain a roaster quota. Once again these individuals chose to give up their roaster quota and take up broiler quota as soon as their names came up on the list.

From the inception of the Board in 1966, small numbers of roasters were marketed on a permit system up until 1972. At that time the Board had made a commitment to the packer that it prosecuted for illegal production of roasters that a stable supply would be obtained.[81] To deal with these unfulfilled market pressures the Board instituted a policy of granting a permit to anyone who could satisfy the Board that the they had a processor

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[80]Marketing of Agricultural Products Appeal Tribunal, *Wayne Lutgen and Jeanne Lutgen v. The Alberta Chicken Producers' Marketing Board,* at 10-11 [hereinafter the Lutgen decision]. This decision contains a detailed review of the history of roaster production in Alberta and the issues faced by the ACP.
[81]See discussion in chapter 4, at notes 66 and 67.

willing to purchase the roasters produced. This might be an individual who did not have quota and to whom this was an opportunity to market chicken or it might be broiler or turkey quota holders who had extra barn space. It was also used by the hatcheries as an outlet for surplus chicks. At this point in the early 1970s relatively unregulated production of roasters was not a substantial concern because roaster production amounted to less than 2% of broiler production. In fact, at times when the quota system did not respond quickly enough to meet the expanding broiler market, roaster permit holders were often allowed to market roaster permit birds as broilers. "This system allowed Alberta chicken production to increase markedly in the 1970's without the risk of producing surplus inventories."[82] The situation was different in Ontario which proceeded in the mid 1970s to formalize roaster production by means of quota system. This additional regulation prompted at least two major judicial challenges to the new roaster quota system.[83]

By the late 1970s, this system was beginning to break down. Demand for roaster chicken had increased significantly and by 1978 production was 6% of the provincial total. Almost all of this production was being done on permit which meant that it was always a temporary arrangement from production cycle to production cycle and there was no long term security for either the producer or the processor. Roaster chicken offered the one opportunity in the industry for new growers to become involved immediately without a long wait on the new grower waiting list and as production increased a significant number of permit growers were starting to become institutionalized within the system. They were regular roaster growers with an established market and many had constructed significant production facilities. A new breed variety and improved production techniques for roasters were being introduced which, combined with higher prices for roasters as a result of

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[82]Alberta Chicken Producers' Marketing Board, *1991 Annual Report* at 25.

[83]See *Bedesky v. Ontario (Farm Products Marketing Board),* (1975) 58 D.L.R. (3d) 484 (Div. Ct.), affirmed (1975) 62 D.L.R. (3d) 265 (C.A.), leave to appeal to S.C.C. dismissed (1975) 62 D.L.R. (3d) 266 (note) (S.C.C.); *Retmar Niagara Peninsula Developments Ltd. v. Ontario (Farm Products Marketing Board),* (1975) 58 D.L.R. (3d) 517 (Div. Ct.).

continuing strong demand, meant that roaster production was increasingly attractive and profitable. Demand for roasters continued to increase sharply and both the roaster growers and the processors were pressing for steps which would secure production and increased supply of roaster chicken. A relatively unregulated and informal market was facing increasing pressure to become formalized and regulated within the supply management system.

To meet this concern the Board instituted a policy in January 1981 where 12 non-quota growers with significant historical production of roasters were given a written commitment which allowed them to produce a set amount of roaster chicken based on each producer's previous average amount of permit production for each cycle until April 1983. This group became known as the "commitment growers." At this point roaster production was about 7% of the industry total and these 12 commitment growers produced a little over 50% of this amount with the balance supplied by other growers under permits. It was felt that the plan would help to improve roaster grades and would expand production to displace imports of roasters which were still required by processors by allowing the commitment growers sufficient security to invest in improvements to facilities and to increased production. At this point there was little opposition in the industry to this plan.

This attitude changed rapidly within the next two years. The combination of this commitment plan and the continued availability of permits where a processor could be found resulted in an explosive growth of roaster production which nearly doubled between 1980 and the end of 1982. By the end of 1982 there had been a significant downturn in the Alberta economy and demand for chicken had leveled off and was declining slightly. This meant that for the first time broiler and roaster production were beginning to compete for a limited market in which there was the real possibility of production cutbacks. The conflict became apparent when, in November 1982, the Board of Directors presented a

proposal to the annual meeting which asked for approval in principle for a plan to allow the Board to grant quota to the "commitment growers." After what the Appeal Tribunal in the Lutgen case characterized as "a good deal of heated debate" the proposal was rejected and the Board of Directors were specifically ordered not to proceed with the proposal but to continue to allow non-quota holders to produce roaster chicken under permit. While roaster permit growers and the commitment growers were involved in the meeting, they were clearly overruled by broiler growers who were the substantial majority.

This was the situation which existed when the CCMA began its action against Lilydale Co-operative in January 1983. As above, the outcome of the negotiations with the CCMA was an agreed percentage of national production allotted to Alberta which, although significantly higher than what Alberta would have received in 1978, was lower than current production and required production cutbacks for all producers. It was in this climate that the two year commitment to the 12 commitment growers expired in April 1983. This set the conditions for the most significant conflict in the Board's history which occupied a disproportionate share of Board time and resources for the next 10 years. It was also the issue on which the legal system began to impact most significantly on the Board operations and it marks a change in the nature of the regulatory system and of the legal administrative field within which the Board operated.

In May 1983 the Board suspended roaster permits and at its June meeting it instituted significant cutbacks to broiler quota holders and also determined that future roaster permits would be issued only on a significantly reduced basis on Board motion and based on a formula calculated on historic production. Roaster permits would no longer be issued based on request. "Simply put, the Board decided at this point in time to take control of and restrict roaster chicken production."[84] At this point roaster permit growers had

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[84]Lutgen decision at 17.

formed what was called the "ad hoc roaster committee" to meet with the Board and with the Marketing Council and the Minister of Agriculture to complain and to lobby about the failure to develop a quota program and the restriction on permits which roaster growers perceived as being more severe than the cutbacks imposed on broilers. There were also pressures developing from processors to secure roaster supply and to support the roaster growers.

The Board therefore faced pressure from an increasing number of sources. It was under severe pressure from both market conditions and the CCMA to reduce total production significantly. This meant cutbacks to broiler quota holders who had experienced nothing but production expansion for a period of over 10 years. These quota holders were unhappy with production cutbacks and not anxious to share reduced production totals with non-quota holders. The Board had a clear direction from the 1982 Annual Meeting that roaster growers should not be given quota but restricted to permits. However, the growth of roaster production and demand over the previous 10 years had created an organized group of non-quota producers of roaster chicken who were regular producers who had significant investment in facilities and had committed to the industry at a time when roaster production was not attractive. As well, processors continued to require roaster chicken and were supporting the roaster growers in their demand for a secure and stable production. The government and Marketing Council were being lobbied and there were some suggestions that a separate roaster board should be set up. However, to grant quota to roaster growers would be contrary to the position expressed by the majority of broiler growers and it would also mean that roaster growers received quota ahead of individuals who had waited up to 10 years on the new grower quota waiting list. This was a potentially explosive issue because given current market conditions the only possible point of entry into the chicken market without the purchase of quota and production facilities from an existing producer in the foreseeable future was through roaster

production. Given the production cutbacks in broiler production and the construction of facilities by roaster permit producers, there were more production facilities available for chicken in general, and roasters in particular, than there was available production.

Over the next year there were a series of meetings between the various parties and the Board. Considerable pressure was being placed on the Board by the Marketing Council to resolve the matter and approaches had also been made directly to the Minister of Agriculture by roaster growers. In April 1984 the Board requested written submissions from all interested parties and these submissions were considered at a special meeting in July, 1984. As a result of these meetings, the Board developed a comprehensive policy under which it offered quota of 12000 square feet of production facilities to 16 roaster permit growers who had been marketing roasters more or less continuously since January 1979. An additional 6000 square feet was also offered to the two existing roaster quota holders. Six eligible broiler quota holders were also offered roaster quota but on conditions which required adjustments between broiler and roaster quota which these producers held. The 12000 square foot figure was chosen because this was considered the minimum viable size of unit for economic operations. Various exceptions to the requirement of continuous production were also made in the offers which were made. After its decision in August, 1984, the Board immediately mailed offers of quota to the 16 permit growers and the quota holders involved.

The Board's policy was immediately appealed by various producers on different grounds. There were growers who were not included in the list of 16 who felt that they should be; there were broiler quota holders who felt that they were entitled to more roaster quota than the 12000 square feet offered; and there were existing roaster quota holders who felt that they were entitled to more roaster quota. The divisions in the industry over this point are highlighted by the fact that one of the appellants was a member of the Board of Directors which developed the policy. These appeals were heard en mass before the

Marketing Council in the fall of 1984. The Board initially appeared without legal counsel at the hearings but after the first round of hearings it appeared at the continuation of the hearings with legal counsel and with a amendment to its policy which sought to clarify the basis on which exceptions had been made to determine the list of 16 permit growers. Up to this point the Board had not considered it necessary to involve legal counsel in the process or to consider amendments to its regulations. It had proceeded on its usual basis of informal discussions and informal adjustments by way of Board resolution to meet current conditions and concerns within the industry. It perceived what had been done as clearly within its authority.

In its decisions delivered collectively in December 1984, the Marketing Council acting as the appellate body under the Act, took a very different view. It overturned the roaster quota program and directed that a new program be developed along very different principles. The Council viewed the Board of Directors' decisions as to who would receive an offer of quota as arbitrary and felt that only one of the 16 growers had qualified under the announced general policy while the others had qualified under exceptions to the policy. The Council felt that any policy developed in respect to quota must satisfy the following criteria: it must be comprehensive; it must be capable of general application; and it must be fair. In the Council's view where a qualifying period was established for the purposes of allocating quota every person who produced the commodity during the period was eligible to receive quota even if the quota amount was so small as to be commercially impractical. The amount of quota that each person was to receive should be based on historic production during the qualifying period taking into account the number of years in production during the qualifying period, the continuity of production and the volume of production. The Council added: "The Council would also indicate to the Respondent that it does not support any actions, by way of policy or otherwise, which are construed as regulatory involvement in any producers individual management decisions." The Council

was also severely critical of the Board's approach to the appeal process and of the accuracy and completeness of the information presented by the Board on the appeal.

The fairness or the merits of the Council decisions are difficult to discuss without a detailed review of the evidence, particularly in regard to the suggestion that the policy was completely arbitrary and that only one grower qualified under the expressed policy. What is clear is that there was a strong clash of regulatory philosophy between the Marketing Council and the Board. The Board had developed a policy based on its analysis of market conditions and the proposals and submissions that it had solicited. In arriving at this policy it exercised a broad degree of discretion by formulating a general policy and then looking at individual cases in relation to this general policy. This meant that the specific circumstances of each grower were considered and adjustments made on this basis. The Board made a clear decision that it wished to create new units of an economic size which were equal in size to what a new broiler grower would receive. This meant that some growers received less than their historic production on permit while others received more. The Board also emphasized continuous production over the period since 1979 but given the nature of permit production over that period there were very few growers who had produced in every cycle. This also meant that certain growers who had produced significant numbers for part but not all of the period were not included. The Board made these decisions and implemented them without further formal consultation with the interested parties and without approval from an annual meeting or from the Marketing Council. From the perspective of the Board of Directors, they had the authority to make these decisions and they felt that they had the necessary knowledge to balance the various factors involved and create viable roaster units which would provide for future roaster production and which would meet the requirements of the commitment growers. In proceeding in this relatively informal manner with a broad exercise of discretion and no

formal regulatory change, the Board was proceeding in its traditional manner and was reflecting its traditional habitus in resolving issues which arose.

Marketing Council had a very different view of the process. It started from the point of view that something was being taken away from roaster growers. Everyone who produced roasters during the qualifying period had a right to quota and this was being denied. It objected to any attempts at adjustment by the Board to determine and establish what a viable economic unit would be. It did not feel that the Board had any authority to distinguish or discriminate (depending upon your perspective) between any grower who might have produced roaster chicken no matter how small the potential application of quota might be. The Marketing Council also expressed the view that there had been inadequate consultation with the producers involved during the development and application of the policy. The Marketing Council was clearly opposed to any exercise of discretion in a matter that it considered to be a question of rights. There was also a clear difference in the conception of the nature of an appeal to Marketing Council from a Board decision. The Marketing Council approached the appeal process in a formal manner with production of documents and an onus on the Board to justify its actions. The Board had seen the process as informal to the degree that it had not involved legal counsel in the process until after the first stage of the hearings and had appeared simply to explain what it had done.[85]

As a result of the Marketing Council decision, the roaster quota policy was suspended and the Board attempted to develop a new policy in accordance with the Marketing Council directions. This involved two general growers meetings in April and July 1985 and various other discussions including consultation with Marketing Council until a policy was developed which was approved by growers at a further general meeting. The new policy

[85]The nature of the chicken industry prior to that time can be seen from the fact that these appeals were the first formal appeals that the Chicken Board had dealt with since its inception.

was incorporated in an amended regulation approved by Marketing Council and filed in April 1986. The new policy was complex but attempted to comply with the Marketing Council guidelines by establishing a roaster quota determined by a formula (Roaster Factor) based on historic marketings during the qualifying period from January 1 1979 to December 31, 1984. The result of this policy was to establish quotas that were based on the actual relative marketings of each grower during the period. This meant that certain growers received substantially more than they would have under the previous Board policy. Most of those who were offered quota in 1984 received less than the 12000 square feet that they had previously been offered. In several cases the new amount was substantially less. Many additional growers who had not been offered quota received some roaster factor quota because they had marketed some roasters under permit. In one or two cases the amount was substantial but in all cases it was below the 12000 square feet that the Board had considered to be the minimum commercially viable unit. In many cases the roaster factor amount was very small and completely impractical to produce. The quota established was subject to restrictions in respect to future quota increases. This was designed to recognize broiler grower concerns that roaster quota was new quota issued at a time when production had been cut back.[86]

The new policy resulted in a further series of appeals to Marketing Council by various individuals. One appeal was by an individual on the new grower waiting list who objected to quota being issued to roaster growers rather than to those at the top of the new grower list. Several were by growers who had been offered the 12000 square feet in 1984 but received a smaller quota based on historic marketings. At least one of these growers had constructed new facilities based on the offer. Another was by a grower who objected to the qualifying period and formula and suggested that it discriminated against growers who

[86]This type of quota was referred to as 'advance quota'. It could be produced as regular quota but it was not eligible for quota increases until the 'advance' element of the quota was used up.

had been significant roaster producers but who had not begun production until after 1979. This appeal also alleged that historic marketings as shown by the Board were not accurate and had been distorted by favoritism shown to certain growers. Other appeals objected to the calculation of their particular roaster factor. The outcome of these appeals, all of which were conducted with the assistance of legal counsel,[87] was that the Marketing Council upheld the policy developed by the Board as being in accordance with its guidelines but directed that in order to clear up any confusion on historic marketings an independent audit be conducted of all roaster marketings during the qualifying period. This audit was to be conducted at Marketing Council's expense and was completed in early 1988. The Marketing Council rejected the claim by the individual on the new grower waiting list and rejected any suggestion that it had a responsibility to compensate growers who had been offered quota in 1984, had constructed new facilities, and now had a much smaller quota. It suggested that any responsibility in this regard was that of the Board.

It was not until June 1988, that the Board was in a position to communicate final audited figures to all growers. At this point one of the commitment growers appealed this final determination and the decision of the Board that the grower had overproduced based on this figure. This appeal was heard by the new Appeal Tribunal established under the new Act in 1987 and it was this appeal which resulted in the Lutgen decision. Notwithstanding the previous Marketing Council appeal decisions and the fact that the final audited number for the grower was almost identical to the number initially determined from the Board records, the decision of the Appeal Tribunal was that the growers, Wayne Lutgen and Jeanne Lutgen, should receive an increase in quota to the equivalent of 11500 square feet. The basis for the decision was that an offer had been made by the Board in 1984 and accepted by the appellants who in reliance on this unconditional offer proceeded to

[87]It was during this round of appeals that I became directly involved in the roaster factor issue as counsel for the Board.

construct a new barn. The Appeal Tribunal held that making an unconditional offer was an error on the part of the Board which had been relied upon by the growers and that the growers must be compensated for this error. While the Marketing Council in 1986 rejected an appeal from a grower in a similar situation, the Appeal Tribunal held that the Board should issue additional quota to the appellant to reach the 11500 figure. Two different administrative appeal bodies had therefore made contradictory decisions on this point and the Appeal Tribunal rejected the position of the Board that it had been following the earlier ruling by its then appellate body, the Marketing Council.

The Appeal Tribunal was clearly aware that there would be other growers who would consider themselves to be in the same position. It attempted to limit its decision to the present appellants by noting the three factors on which compensation was based:

1. the appellants had appealed the final notification of Roaster factor within the required 60 day period.[88] No other person had done so.
2. The appellants were registered producers who had received the 1984 offer.
3. The appellants had made irrevocable financial commitments for the construction of new facilities to accommodate the offer prior to receiving notice that the program was suspended.

Based on these directions from the Appeal Tribunal, the Board allotted the additional quota to the appellants. When this decision became public virtually all the remaining individuals who had received the 1984 offer but ultimately received less than 12000 square feet made application to the Board to be treated on the same basis. In two cases the Board accepted these applications on the basis that the individuals had made irrevocable financial commitments prior to receiving notice that the offer was suspended. One of these individuals was the person whose appeal had been rejected by the Marketing Council in

[88]This refers to the 60 day period for a request for a review under s. 36 of the Act. See chapter 2.

1986. In all other cases, the Board rejected the applications as being out of time and not subject to the second and third circumstances set out by the Appeal Tribunal.

Eight appeals from these decisions of the Board were made to the Appeal Tribunal. In each case the Appeal Tribunal upheld the decision of the Board in determining that the appeals were out of time and that extenuating circumstances did not apply. It also responded to various other arguments which it referred to as "technical" and rejected them as well. In certain cases the Tribunal sought further evidence before making its decision and it rejected one application for reconsideration based on additional evidence. These decisions were rendered in June and November 1990.

As a result of this process the Board was left with a small group of roaster growers who felt that they had been unfairly treated. The situation was complicated by the fact that a number of these producers had overproduced for much of this period and were in serious overproduction situations which would mean not marketing chicken for extended periods in order to reduce the overproduction. Various producers had filed applications for judicial review of the Appeal Tribunal decisions but these applications did not proceed to a hearing by the court. In one instance the Board began legal proceedings for injunctive relief to force one producer to stop over marketing. This resulted in the filing of a legal challenge to the Board regulation (Alta. Reg. 152/86) which had established roaster factor. While there was an initial application concerning production of documents, this application did not proceed. As a result of various informal discussions in the industry, a committee was formed including some of the aggrieved producers and it recommended that additional recognition be given to historical producers for their early contribution to the industry. This proposal was presented to growers at meeting on April 6, 1991. It involved giving additional advanced quota (up to 3000 square feet based on 600 square feet per year for production prior to 1979) to certain historical growers. It was understood

that this adjustment was intended to resolve matters with the remaining commitment growers. This proposal was approved by a significant majority of growers.

However, as with all decisions concerning changes to roaster factor, this adjustment also generated two appeals. One was the second appeal by the individual on the waiting list again suggesting that this proposal discriminated against those on the new growers waiting list who were still waiting for quota.[89] The other was the third appeal by a grower who had commenced production in 1981 and felt that this new proposal was still discriminatory.[90] The Appeal Tribunal dismissed both of these claims in identical terms:

> The Appellant's claim, however, is not without merit, The Alberta chicken industry's ultimate resolve of this difficult and complex issue has left the Appellant with very real feelings as to being treated unfairly. The realities of the whole situation surrounding the quota for the production of roasters, unfortunately, have left many others also feeling that there is some unfairness in the final result. It remains our view that at a certain point it is preferable to have a well considered and workable result that allows an industry to move forward, rather than allowing matters to remain impossibly tied up in the search for perfection. It is time for the industry to move on.

The 1981 grower applied for judicial review of this decision alleging in part bias on the part of the Chicken Board. The Alberta Court of Queens Bench rejected the application and upheld the decision in an unwritten decision. After the dismissal of the appeal, the regulation was amended to give effect to the proposed changes.[91]

One remaining producer continued to overproduce and in November 1991 filed a Statement of Claim against the Board, the Marketing Council and the Crown. This was the same producer where the Board had previously sought injunctive relief. The Statement

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[89]This individual had been placed on the list in 1974 at which time he was number 245 on the list. Seventeen years later he was still on the list waiting for new quota.

[90]This corporate grower had also appealed in 1984 and again in 1986. It was this appeal in 1986 which resulted in the Marketing Council directing that an audit be conducted.

[91]Since the 1984, the Board adopted a policy of not implementing any changes to the regulations and policy concerning roasters until all appeals were resolved or the appeal period of 60 days had expired without any appeal. Of course during this period there was no change to the regulations or policy concerning roasters which did not generate an appeal.

of Claim purported to be a class action on behalf of roaster producers and contained various allegations of misconduct and bad faith. Portions of the claim relating to the class action and to the claim against Her Majesty were struck out and this litigation did not proceed. Instead a mediated settlement was reached where all legal actions were discontinued and the producer filed a plan to eliminate overmarketings by July 1995.[92]

Although roaster production constituted no more than 10% of chicken production, the resolution of the issue of roaster quota took over 10 years. It involved over 25 appeals to the Marketing Council or the Appeal Tribunal and at least 3 court applications.[93] The time and cost expended on this issue was clearly disproportionate and the Board was faced with a very difficult position. Every attempt it made to resolve the issue resulted in challenges; there was no proposal that would, or could, satisfy all the parties involved. Each step taken generated a series of appeals; often these amounted to an attempt to open the whole issue for review again; any change for one individual or group of individuals resulted in requests or appeals from other growers who felt that they were also entitled to something.

Unregulated Production

The experience of the ACP in this area provides an illustration of the way that the legal administrative field was capable of adaptation in circumstances where there was a willingness to cooperate between the ACP, producers in general, the Marketing Council and a group of unregulated producers, the colonies of Hutterian Brethren, or Hutterites,

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[92]There have been subsequent issues concerning this particular producer which extend beyond the period considered in this thesis. These continue to the present time. However, with the exception of this individual, the agreement reached seemed to gain widespread acceptance among the parties involved and there have been no other challenges or appeals to the roaster policy.

[93]Two of these applications were on preliminary issues on proceedings that did not proceed to a decision on the merits. The third was the application for review of the decision of the Appeal Tribunal denying an appeal which challenged the final settlement and as mentioned above, the Court of Queen's Bench dismissed this application.

who were producing chicken without quota in the Province of Alberta. These colonies had not been included within the original Plan which created the ACP in 1966. At that time there were only a limited number of colonies which produced chicken and they did not slaughter their product at federally inspected processing plants and did not market any significant amount of chicken in competition with the existing processors. The definition of 'regular marketing channels' for broiler chicken which defined the scope of regulation by the ACP therefore did not include any of the Colonies and they did not vote on the original Plan. Over time the number of colonies producing chicken and the nature of the production changed gradually. By the late 1980s many colonies were producing significant amounts of chicken and were selling into regular marketing channels. In addition, increasing amounts of this chicken were being slaughtered at new small federally inspected plants and this meant that this unregulated production was being counted as part of the ACP's national allocation. A significant new unregulated producer group had developed to a point where there was a strain on the system.

While there had been informal discussions with leaders of some of the Colonies at various times during the first 20 years of the ACP's operations, no steps had been taken to bring this unregulated production within the system. The regulations had been amended in 1986 to extend to all chicken production and not just regular marketing channels. This raised the possibility that the regulations now covered and prohibited the Colonies' production because it was unregulated production which did not have quota. However, the 1986 amendment had not been discussed with the Colonies and no steps were taken at that time to deal with the production of the Colonies.

When the ACP indicated its intention to take steps to deal with this unregulated production, the potential for a major legal and political confrontation existed. The Hutterite Colonies retained legal counsel and made various representations to the Government. They also attended 3 discussion meetings arranged by the ACP at various

areas within the Province and voiced their concerns. It was made clear that any unilateral attempt by the ACP to shut down existing production facilities would be resisted by court challenge, administrative appeals, and by political approaches by almost all the colonies acting in concert.[94] The ACP was faced with a situation in which economic circumstances, pressures from its own producers, and the growing impact of this significant unregulated production on the Alberta national allocation were forcing it to take steps to deal with the problem but it was faced by a group of Colonies who had developed significant markets and built extensive production facilities and who were organized to fight any attempt to shut down their production.[95]

A major confrontation did not ultimately develop. In this case there was a clear appreciation of the field of what was possible and a willingness on both sides to negotiate and resolve by consensus what could have been a long drawn out legal and political battle. The ACP recognized that neither the Courts nor the Marketing Council or the Government would allow it to shut down the significant Hutterite production which had developed.[96] The Hutterites recognized that they could not continue indefinitely on an unregulated basis particularly as a number of colonies wished to expand further into commercial production. This was again a situation where an informal solution could no

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[94]It was not coincidental that the Premier's executive assistant attended the information held in Edmonton. During this period the Premier was running in a by-election in the a rural constituency after losing his seat in the recent provincial election. A number of Hutterite colonies became very publicly involved in his election campaign within the constituency. Both of these facts were noted by the ACP.

[95]There were approximately 130 Hutterite Colonies in Alberta at this time. However, not all Colonies were involved in producing and marketing significant amounts of chicken and some wanted only slightly larger exemptions for personal consumption on the colony rather than quotas for commercial production.

[96]Indications to this effect were received from the Marketing Council. The legal position was unclear in that the regulation had been amended in 1986 to potentially include unregulated production such as that of the Hutterite colonies. However, this had been done without consultation or any vote on the part of the colonies despite the fact that it was clear that some, although the amount was not clear, historic production by various colonies had existed since prior to the inception of the ACP and it was also clear that the ACP had never previously taken steps to regulate this production although it knew that it existed. In this situation, and given the general experience that the courts, like the Marketing Council, are reluctant to shut down existing production operations except in the clearest cases, the legal situation was not clear.

longer apply as market conditions and the nature and amount of Hutterite production and marketings had changed. But after a period of almost two years of negotiations between the ACP and representatives of the Colonies, an agreement was reached on a method of bringing this unregulated production within the system at agreed amounts of advance quota for each colony and with a specific type of communal exemption for colonies which did not currently produce significant amounts of chicken. The one or two cases in which agreement could not be reached were submitted to arbitration by the Secretary Manager of Marketing Council and the changes to the regulatory system necessary to implement the agreement were incorporated in an extensive revision of the Plan and Regulations which were submitted to a producer plebiscite in 1993. The plebiscite was supervised by Marketing Council in accordance with the provisions of the Act and the Hutterite colonies were included in the voting in which the new Plan and Regulations were approved by a vote of 300 to 17. This brought the only significant amount of unregulated chicken in the province under the Plan.

Conclusion

This chapter has looked in considerable detail at certain issues which arose for the APPDC and the ACP within their respective legal administrative fields and at how these issues were resolved. The next chapter will analyze these issues in terms of the concept of the legal administrative field, and will discuss what conclusions can be drawn concerning the specific legal administrative fields of the APPDC and the ACP.

Chapter Six

Analyzing the Legal Issues of the APPDC and the ACP in Terms of the Legal Administrative Field

Introduction

A review of the issues discussed in chapter 5 makes clear that some of the most significant disputes and shifts within the legal administrative field do not take place in formal proceedings and do not generate a formal administrative record. Most of the disputes between the APPDC and the Marketing Council did not result in formal proceedings and there was no actual court proceeding between the two bodies, although the prospect of such litigation often existed. Yet the shifting relationship of the APPDC with Marketing Council and with the Minister of Agriculture over the period had a considerable impact upon the shape of the legal administrative field within which the APPDC functioned. The issues of the entry of the ACP into the national plan and the entry of the Hutterite colonies into the marketing system were both resolved without any formal proceedings although in both instances the threat of litigation was significant.[1]

It is also clear that major disputes in the legal administrative field seldom happen in only one forum or on one level. While an application for judicial review or a formal administrative hearing may be part of this conflict, it is usually part of a larger issue; one more battle or a particular tactical move in a larger struggle. Thus the legal challenges of Gainers Inc. in 1985 were part of a much larger campaign that involved: a media campaign; approaches and submissions to Marketing Council, the Minister and Department of Agriculture, and other politicians; appeal proceedings under the *Marketing*

[1]As noted in chapter 5, the CCMA commenced litigation against the major Alberta processor, but the action did not proceed to a hearing on the merits.

of Agricultural Products Act and attempts to deal directly with producers. While the decisions of the Courts in the *Gainers Inc.* and *Wayvel* cases were significant in the conflict, they were not decisive. By winning in court, the APPDC preserved its ownership of Fletchers and its selling system; but this did not end the conflict which was only resolved by a negotiated settlement. Similarly, the decision of the Court affirming the decision of the Appeal Tribunal in the roaster chicken case which was appealed, ended that particular proceeding but it did not resolve the ongoing issue which was resolved internally by further steps being taken to deal with the original commitment growers who felt aggrieved by the changes to Roaster Policy developed after the 1984 Marketing Council decisions. A formal administrative law approach which concentrates on legislative provisions and specific cases will not illuminate this broader context of many issues within the legal administrative field. Applying this point to a series of well known administrative law cases, it is interesting to note that victory in a judicial review proceeding does not necessarily mean success in the larger issue under consideration: Roncarelli never regained his liquor license; Nicholson was not retained as a constable after the hearing he obtained; the Minister of Agriculture did not follow the recommendations of the Committee of Investigation to which that he was compelled to refer the issue concerning the Milk Board in *Padfield.*[2]

Throughout this thesis, I have argued that political and economic fields have a major impact in shaping the parameters of the legal administrative fields of the ACP and the APPDC and in determining the outcome of particular issues within the fields. An analysis

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[2]*Roncarelli v. Duplessis,* [1959] S.C.R. 122. While damages were awarded, there was no order to reinstate the liquor license and Roncarelli did not get it back and ended up going out of business; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police,* [1979] 1 S.C.R. 311; *Padfield v. Min. of Agriculture, Fisheries and Food,* [1968] A.C. 997 (H.L.). For an interesting discussion on this issue see Law Society of Upper Canada, "The Futility of Judicial Review," *Administrative Law: Deflecting the Glacier,* I. Blue ed. (Toronto,1988) A-1 where the *Nicholson* case and a number of other major Canadian administrative law cases are discussed. For a discussion of *Padfield* see Harlow and Rawlings at 327-329 and Giddings at 88.

of the issues discussed in the previous chapter makes this point clear and I intend to begin by discussing the impact of the political and economic fields in relation to these issues and their resolution. I will then discuss the impact of the courts in relation to these two marketing boards and the issues that they faced. This discussion will illustrate some of the limitations and the complexities of judicial review as a focus of administrative law. This will be followed by a discussion of the impact of the Marketing Council upon the shifts which took place within the legal administrative fields of both boards. Finally, I want to discuss the impact upon the legal administrative fields of a shift in the habitus of producers in each industry. In each of these discussions, I will illustrate the superior heuristic value of the legal administrative field concept as opposed to an analysis based in formal administrative law.

The Impact of the Political Field

Clearly the most significant point which arises from this detailed study of the manner in which these particular issues were resolved is that it is impossible to isolate these legal administrative fields from the political field. There is an inherent element of the political within the field and none of these legal issues could be considered without reference to political considerations. The relative political habitus and capital of various agencies and individuals within the field have a significant effect on both the shape of the field and the outcome of particular issues; various entities and individuals within the government are significant agents within the field. In times of controversy the positions taken by the Minister and the cabinet can be decisive. However, very little of these relations take the form of formal proceedings or a direct exercise of legal authority.[3]

[3]This point was discussed in general terms in chapter 3 and related in a general sense to the Alberta context in chapter 4. The discussion in this chapter will relate to conclusions drawn from an analysis of the specific legal issues discussed in chapter 5.

In the case of the conflict between the APPDC and the processors and the Marketing Council, appeals to the Minister or to the Cabinet or Caucus virtually formed another level of appeal which was used on almost every occasion.[4] This was not a level of appeal established formally under the statute and it was unlikely to be used in routine matters, but it was clearly understood and used by all parties when the conflicts between them escalated and it was a level of appeal which was often decisive in resolving the issue within the field, at least for the particular moment at which the intervention occurred. Also when the field was unable to resolve such conflicts within the mechanisms provided under the statute, they often escalated into political issues that had economic and political consequences that could not be ignored by the Minister even when he would have preferred to do so.[5]

Even a brief review of interventions by the Minister of Agriculture, and in some cases, the Premier, illustrates the often decisive result of such interventions in resolving disputes within the legal administrative field. On several occasions during the 1970s and in 1980 the APPDC was successful in its attempts to change the selling system despite the opposition of the Marketing Council and the processors because it received the support of the Minister. After the Government of Alberta became involved in the ownership of Gainers Inc. in 1989, this situation changed and the Minister clearly supported the Marketing Council in the next series of disputes with the APPDC. The political capital of the APPDC relative to the Marketing Council had clearly diminished and so had the realm of the possible within its legal field. This importance is something which is vital in practice but which neither the *Marketing of Agricultural Products Act* nor the principles of formal administrative law focus upon. Several points can be made in this respect. First, most of

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[4]These interventions are discussed in detail in chapter 5. I do not propose to repeat that discussion here.
[5]All of the Ministers of Agriculture in this period were male. So were all the members of the Board of Directors of the APPDC and all but one of the members of the Board of Directors of the ACP. While there were a few female members of the Marketing Council during the latter part of this period, none were the Chairman of or on the Executive Committee of the Marketing Council.

these interventions did not use the legal mechanisms provided in the *Marketing of Agricultural Products Act*; they were much more informal and did not generate any form of formal administrative record. Second, the availability and the likelihood of such intervention is an important factor in determining the parameters of the legal field at any particular time. Yet changes in this factor are not something that would be apparent from a review of the statute or the regulations. A third point is that almost any significant dispute between agents within the field is likely to involve some degree of reference to the Minister even if it is only by Marketing Council on an informal basis. Finally, in crisis situations where relations between the Marketing Council and the APPDC had broken down, government intervention was much more common and direct and was required to restore the ability of the system to operate; the issues became too large for the formal mechanisms contained in the Act and the involved parties were not willing to leave the decision solely to these formal legal mechanisms.

There are some conflicts that are so fundamental and so complex that they are not easily resolved in either a bi-polar administrative proceeding or a court action. Fundamental changes to the APPDC selling system were one example of this. In both 1979 and in 1985 Marketing Council sitting as an appellate body chose to have the legal challenges to the authority of the APPDC determined by the Courts before it took any action. In both cases, the Court proceedings did not end the conflict between the APPDC and the processors involved because the parties were also using other tactics in an attempt to achieve their objectives and this larger conflict was not part of the court proceedings.[6] However, the references to the court deferred the need for the Marketing Council to make decisions on such fundamental issues and in each case, the Marketing Council was not ultimately called upon to make a decision in the appeals in question. In 1992 the Appeal Tribunal was not

[6]As noted in chapter 5, the 1979 proceedings did not proceed to a decision on the merits of the appeal although there were two preliminary actions which resulted in reported decisions.

prepared to order a fundamental change to the way that hogs were sold. These issues were so fundamental that neither the APPDC nor the processors were prepared to accept the authority of a decision by Marketing Council. When Marketing Council did choose to intervene in the issues concerning the selling system in 1980 and proposed to do so in 1985,[7] these interventions generated widespread producer protests which led to the involvement of the Minister of Agriculture and, in 1985, the Premier of Alberta. The ultimate resolution of the particular issues in these cases, as well as in the disputes of 1978, rescinded the actions of Marketing Council and ignored their input and recommendations.

Despite its successes in the conflicts with the Marketing Council and the processors, the legal administrative field changed substantially for the APPDC between 1980 and 1990, although there were virtually no substantive changes to the formal law. By late 1990, the APPDC became subject to a degree of supervision it had never before experienced. Regulatory initiatives that would previously have been routinely approved were rejected; any APPDC initiative was reviewed with suspicion by the Marketing Council and there were continuing allegations that Fletchers was being given favorable treatment to the detriment of Gainers. In 1980, the APPDC could obtain approval for the purchase of a packing plant including all necessary amendments to its Plan; in 1987, it could not get cabinet approval for delegated levy powers in respect to hogs produced in Alberta but sold outside the province - powers which were routinely exercised by virtually every similar board in other provinces. In 1980, a dispute with Marketing Council was resolved in the APPDC's favour; in late 1990, actions by Marketing Council to require the presence of a member of Marketing Council at all APPDC meetings and prior approval by Marketing Council of all APPDC actions were fully supported by the government. There was a

[7]In both cases Marketing Council had the support of the processors since it proposed changes that would have removed the APPDC's authority to act as a single desk seller.

realistic concern that the Government might use its powers under the Act to dissolve the APPDC. The APPDC was dealing with an entirely different regulatory environment and yet the formal law had remained virtually the same. The major difference was a shift in the position taken by the Minister of Agriculture and the Cabinet.

While relations between the APPDC and the Marketing Council were poor throughout this period from 1970 to 1989, the government remained initially supportive and subsequently neutral in respect to the conflicts which occurred. Hostility from Marketing Council and the processors was, to some degree, offset by the ability of the APPDC to obtain access to and redress from the Minister and, in 1980 and 1985, by its ability to mobilize its producers against the actions of Marketing Council, thereby involving the Minister and resulting in the actions of Marketing Council being reversed or negated. However, between 1987 and 1990, there was a change in the habitus of the Minister of Agriculture and the Cabinet to a point where the hostility and suspicion with which the Marketing Council was disposed to view the actions of the APPDC was also shared by the Minster of Agriculture and the Cabinet. The habitus of the government which was already shifting,[8] changed significantly when the government took over ownership of Gainers Inc. in October, 1989, and continued its processing operations. What in previous periods had been a conflict between Marketing Council and the APPDC or Gainers Inc. and the APPDC, was now perceived by the Minister and the Cabinet as also negatively affecting the policy, financial and political interests of the government. Now almost every proposed action by the APPDC and its continued ownership of the shares of Fletchers Fine Foods Ltd. were filtered through this perspective. This was a substantial shift in the legal

[8]The Government was far less supportive in the 1984-85 conflict than it had been in the 1970s or even in 1980. But it was not actively or publicly hostile and it supported the APPDC in the *Wayvel* and *Gainers Inc.* proceedings at least in so far as defending the validity of the challenged regulations. In its ultimate intervention which led to the 60 day truce and the negotiated contract, the Government agreed to "preserve the integrity of the system." It clearly provided major financial support for the industry through grants and through its guaranteed loans to both packers.

administrative field even if there had been no shift in the formal administrative law. Once the position and habitus of the Cabinet and the Marketing Council began to correspond, the political capital of the Marketing Council was enhanced while that of the APPDC was diminished and the Marketing Council had greater scope to use the extensive powers and the legal capital which it was given under the *Marketing of Agricultural Products Act.*[9] The capacity of the APPDC for innovation and independent action within the legal administrative field was severely restricted by the enhanced capital of the Marketing Council. The field had shifted substantially even though the formal law had not changed. Once this shift continued to the point where the APPDC was in direct conflict with Government policy, even its continued existence was in issue in late 1990 and in early 1991.

The experience of the ACP during this period was quite different. This board lacked the ongoing confrontations with processors and Marketing Council which characterized the operations of the APPDC and which, by their nature, attracted or required political intervention. Still there were a number of important ministerial interventions. During the period of the 'chicken and egg war' in the early 1970s, the Minister intervened informally and convinced retailers in Alberta to limit any attempts to bring in chicken produced outside the province thereby preventing the type of disruptions found in other provinces. The creation of small plant quota for new plants constructed in Northern Alberta occurred at a time when the then Minister of Agriculture was from a northern constituency and indicated a concern with the problems faced by these plants and the desire that special

[9]As noted in the detailed review of the conflicts of 1990, the political capital of the APPDC was also reduced by internal divisions between producers and the fact that it was being sued by some of its own producers. In earlier disputes, the unified protest of producers such as in 1980 at the protest meeting in Red Deer gave the APPDC significant political capital in its dispute with the Marketing Council. As this unity diminished, so did the APPDC's political capital. This will be discussed further at a later point.

arrangements be made to meet their needs.[10] Indications of the position of the Minister, usually conveyed through Marketing Council, were also significant in the ACP's decisions on a number of other issues.

One of these, quota transfer policy involved the most consistent areas of tension between the ACP and the Marketing Council. At one point this resulted in the Marketing Council directing the ACP not to approve any quota transfers without Marketing Council approval, but this direction was rescinded by Marketing Council after an internal review. Thereafter Marketing Council continued to monitor quota transfers and established a special committee to review the issue of quota transfers and the market value of quota. As in other matters, this issue was eventually resolved informally and the Minister's only intervention was an informal one conveyed through Marketing Council that restrictions on quota transfer should be eased.[11]

While the issue concerning roaster factor did not bring out the same degree of government intervention, it must be noted that it involved less than 10% of the total annual production of chicken and did not have a major impact on any area of government policy. Even so, there were various attempts by unhappy producers to involve the Minister directly. The initial offering of quota in 1984 was clearly in part as a result of pressure from Marketing Council and the concern that the government might create a separate roaster board. Even as late as 1993 when the issue had been resolved for most of the industry, it was still the subject of questions addressed to the Minister of Agriculture, Food and Rural

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[10]While this was not done in a formal manner, the Minister's wishes were made clear to the Board of Directors and the Board responded by creating small plant quota which addressed the needs of these processors and created a special class of quota.

[11]On the direction by Marketing Council see B.C. Select Standing Committee, vol. 5 at 28-30. Eventually, the ACP developed with Marketing Council a quota transfer policy which made quota more easily transferable. This process of easing restrictions on transfer of quota continues in the latest regulations. See Giddings for a discussion of the similar importance to marketing boards in Britain of informal expressions of the desires of the Minister.

Development in the legislature.[12] And in the case of the unregulated production of the Hutterite colonies, the position of the government, although expressed indirectly and not through any direct intervention, was a significant consideration. The Colonies clearly organized a campaign to solicit political support at a time when the Premier was running in a by election in a rural riding[13] and the concern of the Government was reflected by the information conveyed by the Marketing Council to the ACP and by the presence of the Premier's executive assistant at the one of the first information meetings held by the ACP. An awareness of the probable position of the government, together with the potential for legal action, formed important elements in the decisions of the ACP board of directors with respect to an approach to resolve the issue. In the case of the entry of the ACP into the national plan, the Marketing Council commissioned a study of the issue and the Marketing Council and the government were directly involved in the discussions which led to the ACP agreeing to comply with the national plan. The Minister was also involved on various further occasions in respect to the national supply management agreement and issues which arose under it, usually in a position supporting the interests of the Alberta board. Thus although the Minister's interventions were less dramatic and more indirect than in the case of the APPDC, they remained significant.

Even in the absence of direct ministerial intervention, the position of the Government and especially the position of the Minister and of the Cabinet remains crucial in the legal administrative field. Shifts in the habitus through which the Minster and the Cabinet regard a particular legal administrative field can have major consequences even where there is no direct intervention. This is seen most particularly in the relations between the various marketing boards and the Marketing Council. By the late 1980s, Marketing Council had become much more clearly aligned and integrated with the policy of the Department of

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[12]Alberta Hansard, October 26, 1993 at. 1045.

[13]He had been defeated in his Edmonton riding in the 1986 election. In the by-election campaign some members of Hutterite Colonies in the area actively campaigned and supported the Premier.

Agriculture and with the position of the Minister of Agriculture and the Cabinet. It had become less of an independent agency and more of an instrument of the Department of Agriculture's policy. This change substantially enhanced the political capital of the Marketing Council relative to the various Marketing Boards. It became harder for marketing boards to bypass the Marketing Council by a direct appeal to the Minister since the Minister was less inclined to entertain such appeals and it was less likely that Marketing Council's actions would be independent of and in conflict with the Minister's own position. When the Marketing Council changed its procedure after 1987, its new general approach to regulation and attempts to restrict the discretion of the board of directors of boards and commissions was clearly one which enjoyed the support of the government. While this change is most obvious in the case of the APPDC and its confrontation with the government, it was also faced by other boards such as the ACP which did not have the same confrontational relationship with Marketing Council.[14]

The Impact of the Economic Field

The impact of the economic field on the history and development of marketing boards has already been discussed at length in chapter 3 and chapter 4 looked at some of the economic constraints faced by the ACP and the APPDC in attempting to use their marketing and legal capital on behalf of producers. It was pointed out that there are clear economic limits to what can be accomplished in marketing legislation despite the apparent powers conferred under the Act. I do not propose to repeat those discussions. However, while the impact of the economic field may be less obvious than the impact of the political field in relation to the issues discussed in chapter 5, each of the disputes had important economic roots and there were important economic factors which influenced the course of the disputes. I want to briefly discuss some of these factors.

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[14]This change in approach of the Marketing Council will be discussed in greater detail below in a separate heading.

In relation to the dispute between the APPDC and the processors, an ongoing conflict was inherent to a marketing system where the APPDC sought to increase the marketing capital of producers through single desk selling in order to improve the hog price received in Alberta relative to other markets. However, the intensity of the conflict was increased because of the concentration in the retail sector and the relative inefficiency of the Alberta processing plants. These factors, together with the generally low margins in the processing industry, meant that any attempts by the APPDC to increase the hog price would be fiercely resisted by the packers. The conflict was also aggravated by the cyclical nature of the hog industry. When producers were faced with negative operating margins they found it particularly difficult to accept the concept that they needed to subsidize what they regarded as inefficient packing plants. Thus, conflicts between the APPDC and the processors became most intense when producers' margins were poor and producers were losing money. This placed pressure on both the APPDC and the government to take action.

During the first decade of its existence, the APPDC functioned in an extremely difficult market. A combination of high grain prices, low hog prices, and the growth of production in eastern Canada as a result of feed grain freight assistance programs and provincial subsidization programs, particularly in Quebec, meant that hog production in Alberta dropped by nearly half in the period between 1971 and 1976 and Alberta became a pork importer. Difficult conditions continued for most of the decade and into 1980 and 1981. This placed a great deal of pressure on the APPDC and on the Provincial Government to develop programs which would support producers and encourage growth and stability in the industry.[15] These extremely difficult economic conditions had a clear impact on the

[15]This was particularly so because it was unacceptable to both producers and the Government of Alberta that Alberta as a major barley producing region which should enjoy a comparative cost advantage over other regions would be an importer of pork rather than an exporter. The disputes in 1974, in 1978, in 1980, and in 1984 all occurred at times when the hog price had dropped substantially relative to other markets or when producer margins were poor.

habitus of the Ministers of Agriculture during this period in which they generally supported APPDC initiatives even when these were opposed by the Marketing Council and the processors. As the hog market recovered after 1981, and as provincial, and later federal, stabilization programs were instituted to protect producers from particularly difficult market periods, the provincial government's position shifted to a greater focus on assisting the processing sector which was marked by plant closures and rationalization which reduced the number of processing plants in Alberta to two by 1984. The provincial government provided grants to Gainers Inc. and major loan guarantees to both processors to expand their plants and develop export markets.[16]

After late 1989, when the Government of Alberta took over the ownership and operations of Gainers Inc. which was losing large sums of money,[17] this economic consideration helped to change the government habitus toward the APPDC significantly. The APPDC was perceived as directly affecting the economic interests of the Government through policies which increased the losses of Gainers Inc. and made it more difficult for the Government to dispose of its interest in the plant. This also made the APPDC's continued ownership of Gainers Inc.'s competitor, Fletchers Fine Foods Ltd. an increasing concern; the government increasingly began to reflect the positions which had been advocated by

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[16]In 1986 the Government made substantial grants to Gainers Inc. and paid $5.5 million to the APPDC to retire the balance of the purchase price of Fletchers Fine Foods Ltd. thereby allowing the APPDC to reduce its levy from $3.00 per hog to $1.00 per hog. In the next 2 years the Government of Alberta provided over $55 million in loan guarantees to Gainers Inc. for various acquisitions and plant upgrading and $20 million in loan guarantees to Fletchers Fine Foods Ltd. to enable Fletchers to acquire the assets of a packer located in California but with a major market presence in the Pacific Northwest, Hawaii, and parts of the Midwest.

[17]A report by the Auditor General completed in 1994 after the sale of the Gainers assets to Burns Limited determined that the total cost to the Government of Alberta pursuant to the loan guarantees and the subsequent costs of continuing to finance the operations of the plant to be $210 million. The government also lost the bulk of its $20 million loan guarantee to Fletchers when the US company ceased operations and went into bankruptcy in 1991. The last aspects of the Fletchers loan guarantee were resolved in 1995 but litigation between the Province and the former owner of Gainers Inc., Peter Pocklington, concerning the takeover and the losses incurred by the Province continues. The Government has since made clear that it has removed itself from all financial involvement in the pork processing industry and that no future loan guarantees will be forthcoming.

Gainers Inc. It also meant that the ongoing relationship between the APPDC, the Marketing Council, and the Provincial Government were complicated by the fact that the APPDC and the Government each owned one of the two packing plants who were buying hogs and competing with each other in Alberta.

Changes in economic conditions were also significant in the legal issues faced by the ACP. The entire national supply allocation plan in chicken is founded on the fact that individual provinces cannot isolate themselves from other markets through purely provincial legislation. By 1983, changes in economic conditions meant that the ACP no longer faced a growing Alberta demand for chicken which allowed it to ignore the CCMA. Also, the litigation of the CCMA was directed not at the ACP but at the producer owned co-operative, Lilydale Processors. These economic considerations forced a response from the ACP. The actions of the CCMA in restricting Alberta production and the effects of changes in the Alberta economy had a major impact on the ACP policies which led to the need to develop a more systematic roaster policy. In the case of roaster quota and the unregulated production of the Hutterite colonies, changes in economic circumstances meant that new groups of producers were created and as these groups developed and became significant in commercial markets, the system could no longer ignore them and had to respond. Groups of growers who had substantial investment and an ongoing presence in the industry had developed outside the legal system and the system had to adapt to deal with them.

In the case of the ACP, economic changes in the industry created a shift in the legal administrative field without any substantial change in the formal administrative law. This can be seen clearly in the discussion of the roaster factor issue in chapter 5. The underlying factor which made this issue intractable to the traditional consensus based approach of the Board was the value of quota and the change in the Alberta market as a result of developments in the early 1980s. For the bulk of this period, the only way to become a

chicken producer, or for an existing producer to increase production, was to buy an existing production facility from a producer and to apply for a transfer of quota with the production facilities. This was very expensive[18] and there were only a limited number of facilities on the market at any particular time. For an existing producer the quota transfer policy meant that purchasing new production facilities might not be practical if they were located too far away from the existing facilities. The only exception to this was the production of roaster and cornish chicken under permits.

As the roaster market grew and became more profitable it created a situation where the interests of broiler and roaster growers conflicted. A new group had been created and its interests and habitus did not conform to the rest of the industry. The field had become more complex and less uniform. When the Board began considering quota for roaster production, this was the only new quota likely to be created in the foreseeable future. No one who had a potential claim to a significant roaster production was prepared to give this up. The previous willingness to compromise and search for consensus which had characterized the industry was not present. While the attempt of the Board to rationalize roaster production made economic and technical sense, it attempted to informally balance too many antagonistic interests. As well, the industry had changed and expanded. There were a larger number of producers and less of the original sense of a fledgling industry where everyone knew one another. New producers coming into the industry had paid large amounts for their production facilities and quota and quota had become extremely valuable property.

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[18]Officially quota had no value but in fact there was a clear understanding of value. This issue of the capitalization of quota and the benefit to the initial quota holders with consequent high capital costs is a major objection that economists have to quota boards. It was also a concern of the Marketing Council which at one point in the 1970s restricted the ability of the Board to approve transfers of quota to purchasers of production facilities. See *supra* note 11. The Marketing Council was also very active in developing quota transfer policies for all quota boards and took a direct interest in the development of a quota exchange by the Chicken Board.

These factors meant that there had been a shift in the habitus of producers. This resulted in increasing pressure on the Board to formalize its policies regarding all aspects of quota. The increasing formalization of the actions of the ACP was guided more by economic changes within the industry and the value of quota, than by specific changes in the general law. There was less willingness among producers to accept an informal ad hoc decision by the Board and where any aspects of quota were concerned the relationship between a producer and the Board became very regulation and rights centered. This process was encouraged first by the Marketing Council and then by the Appeal Tribunal which took a very rights-oriented approach to appeals. Where producers and quota were concerned, both appellate bodies wished to see explicit regulations dealing with the issue. There was very limited appreciation of the need for discretion and no sympathy for Board policy which was not set out in regulation form. The evolution of this process can be seen in the current regulations which are extremely detailed and have attempted to incorporate Board policies developed over the years, into regulation form. This is partly in response to the decisions of the Marketing Council and the Appeal Tribunal and partly in response to the change in approach adopted by the Marketing Council after the passage of the 1987 Act, but also it is a response to the changing nature of the industry and producers. As the need for more formal procedures and more comprehensive regulations grew, the traditional response of the ACP which emphasized informal discussions, policy rather than regulatory changes, and a discretionary approach on a case by case basis was no longer able to deal with the issues which arose. The ACP experience with roaster chicken reflects this change; without any substantial change in the formal law, the legal administrative field had changed and it was necessary for the ACP to adapt.

In the case of the Hutterites, the system adapted well and with a minimum of conflict and disruption. Both parties recognized that some compromise was necessary. The effect of the growth in unregulated production meant that the Colonies could no longer continue

outside the system, but the ACP had to recognize that some accommodation had to made for the long standing production of some of the Colonies. It is an illustration of how a marketing system developed under the Act can be flexible enough to respond to significant economic changes in the industry provided that there is a willingness to cooperate between the stakeholders, the marketing board and the Marketing Council. What is also significant is that this issue was resolved without any formal proceedings of any kind. The new Plan and regulations were submitted to a vote of producers only after two years of negotiations and consultations and after a consensus had been reached. The formal approval and filing of the new Plan and marketing regulation then formalized a change in the structure of the legal administrative field that had already taken place. This can again be contrasted to the pork situation where the APPDC and the processors were never able to reach this degree of consensus on changes to the selling system.

The Impact of the Courts

Each of the issues reviewed in chapter 5 involved legal issues concerning the authority of either the ACP or the APPDC and there was actual or potential litigation in each case. However, the direct impact of the courts on either the APPDC or the ACP was limited in three respects: there were very few judicial decisions which considered challenges to the actions or authority of either board; those decisions which were made by the courts upheld the actions and authority of the boards; and even in the cases where judicial decisions were involved, the ultimate resolution of the issue did not depend upon those decisions.

In the course of 20 years of often protracted and intense disputes concerning the APPDC's authority concerning the selling system and the ownership of Fletchers, there were only two judicial proceedings in which the courts reviewed the legal authority of the APPDC.[19]

[19]While there were other legal proceedings in which the APPDC was involved, these were the only two Canadian cases in which its regulatory authority was reviewed. In a decision in California, the United States Court of Appeals for the Ninth Circuit reviewed the APPDC's Act, Plan and Regulations and

In the *Wayvel* case the authority of the APPDC to purchase the shares of Fletchers Fine Foods Ltd. was confirmed by both the Court of Queens Bench and the Court of Appeal. In the *Gainers Inc.* case the authority of the APPDC in respect to its authority to refuse offers for hogs was confirmed. In the case of the ACP, while there were nearly 30 appeals to Marketing Council or the Appeal Tribunal concerning roaster factor, only one of those appeals proceeded to a judicial review hearing and in that case the decision of the Appeal Tribunal, which had supported the decision of the ACP, was affirmed in an unwritten decision. While at least one further set of applications for judicial review and a separate, and later, Statement of Claim containing various allegations, were also filed, they did not proceed to a hearing on the merits. No actions proceeded to a hearing in respect to either the dispute with the CCMA or the unregulated production of the Hutterite Colonies.

While the direct impact of the courts was limited, this does not mean that the courts were insignificant. The *Wayvel* and the *Gainers Inc.* decisions were very important for the APPDC. The *Wayvel* decision removed any doubt about the right of the APPDC to acquire and own the shares of Fletchers. After this decision, it was not possible for Marketing Council, the government or dissident producers to question the legal authority of the APPDC's actions in acquiring the plant because the courts had definitively spoken on the point and their interpretation of the existing provisions was recognized by the parties within the field as authoritative. This did not preclude other challenges based on policy issues concerning the continued ownership or allegations that the shares should be transferred to individual producers, but it gave the APPDC significant symbolic and legal capital within the field when it dealt with increasing concerns on the part of government,

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determined that the APPDC was an agency or instrumentality of the Province of Alberta such that it fell within the provisions of the *Foreign Sovereign Immunities Act*, 28 U.S.C. ss. 1602-11 (FISA) and was immune from jurisdiction in a class action commenced against it and Fletchers' Fine Foods Ltd. by former employees of a plant closed by a wholly owned subsidiary of Fletchers'. The same immunity did not extend to Fletchers' as a company owned by the APPDC. *Gates et al. v. Victor Fine Foods, Golden Gate Fresh Foods, Inc., Fletcher's Fine Foods Ltd. and Alberta Pork Producers' Development Corporation*, (1995) 54 F. 3d 1457.

Marketing Council and some producers concerning the ownership of Fletchers. It made it much harder for these parties to suggest that there was any doubt that the acquisition of the shares by the APPDC was in conflict with the general intent of the Act, the Plan and the Regulations. Yet despite this judicial confirmation of its authority, the APPDC faced increasing pressures from various sources including Government, the Marketing Council, and some producers, to divest itself of its interest in Fletchers and these pressures were eventually successful in achieving this objective.

The *Gainers Inc.* decision also gave the APPDC important symbolic and legal capital within the field because it affirmed the essential elements of the selling system which had been questioned by both the processors and the Marketing Council since at least 1974. This decision made it very difficult for Marketing Council or Gainer Inc. to suggest that changes to the selling system to accommodate new marketing conditions or the use of direct negotiated contracts or other interventions by the APPDC in the market were beyond the authority of the Act and the Plan. However, the particular conflict of which this decision formed a part was resolved by a negotiated agreement and ongoing contract achieved through the direct intervention of the Premier of Alberta. The decision also did not preclude a subsequent attempt by Gainers Inc. to challenge hog allocation under the selling system in its major 1992 appeal to the Appeal Tribunal.

Judicial review did not act as a restraint on the operations or authority of the APPDC. The language of the Courts in each case supported a broad reading of the Act and the Plan which was in contrast to the far more restrictive position of the Marketing Council. These decisions remained important defenses for the APPDC against restrictive actions by the Marketing Council and challenges by the processors and it made the APPDC more confident in suggesting that any issues concerning its authority be referred to the Courts rather than being dealt with by Marketing Council or the Appeal Tribunal.

The significance of the decision rejecting the application for judicial review of the Appeal Tribunal's decision in relation to the appeal from the resolution of roaster factor issue by the ACP and roaster producers was on a less fundamental issue. The final resolution of the long standing roaster chicken quota issue did not result from this decision but rather from the series of Appeal Tribunal decisions flowing from the Lutgen decision and from the additional quota approved for the commitment growers by the ACP and its producers. However, the case provided judicial sanction for the decision of the Appeal Tribunal which approved the arrangement entered into and attempted to bring the long standing roaster chicken issue to an end. This increased the legal and symbolic capital of the decision, and of the Appeal Tribunal and the ACP in respect to this issue, and made the prospect of further appeals on the same issue unlikely. Once again, the decision of the court enhanced rather than inhibited the authority of both the ACP and the Appeal Tribunal.

The significance of the role of the courts cannot be measured solely by the direct impact of specific decisions concerning the two boards. For each of the three actions which proceeded to a judicial hearing, there were several more threatened or contemplated and, in a number of cases, actually filed. These potential actions had an influence on the actions of the agencies involved both in respect to policies and procedures. The action commenced by producers in 1990 concerning the shares of Fletchers did not proceed to a hearing on the merits, but its existence was one of the factors which led to the APPDC conducting producer opinion polls on the ownership of Fletchers.[20] In chicken, the action by the CCMA against Lilydale in 1983 did not proceed but the fact that it was commenced led to Alberta entering into an agreement which brought Alberta within the national plan

[20]This action and the appeal by the same group of producers to the Appeal Tribunal (which aside from a preliminary decision on whether the appeal was filed within time, also did not proceed) also significantly reduced the political capital of the APPDC in dealing with Marketing Council and the Government concerning issues relating to the ownership of Fletchers.

for the purposes of allocating national production. The possibility of litigation by the Hutterite colonies was a factor that the ACP was aware of in its approach to the resolution of the issue. Both Marketing Council, in its appellate role prior to 1987, and the Appeal Tribunal afterwards showed a concern for avoiding successful applications for judicial review and the appeals which were heard followed an increasingly judicialized model. Thus the ability to threaten court action, even if the prospects of success were limited or unclear, remained an important source of capital in the field and an important factor in the relations between the various parties in the field. The existence of judicial review even if it was infrequently used, remained an important factor in structuring the field and an awareness of the possibility of judicial review was a significant, although difficult to quantify factor, in the decisions of the agencies involved in the field.

A further indirect impact of the judicial field was in respect to decisions which did not directly involve any of the agencies within these legal administrative fields but which created indirect effects. Constitutional cases are an obvious example. Other cases which shape principles of administrative law which are then applied within the field and incorporated in the procedures or regulations of the agencies involved are another example. A third example is cases in other jurisdictions which have an impact on the legal administrative field in Alberta. Examples of this would include the ongoing American countervail actions in hogs and pork and various administrative reviews and Bi-national Panels which considered this matter. The outcome of these hearings had significant impact on the Canadian and Alberta pork markets. Similarly, the Ontario Chicken Board's legal actions with the CCMA and the potential of such action in the Northwest Territories was of considerable significance in Alberta even though the ACP was not directly involved in either action.[21] These indirect effects of the judicial field also illustrate the broader

[21]The current litigation between the Canadian Egg Marketing Agency and two producers in the Northwest Territories also is of potential relevance in view of the Charter arguments considered by the Court of Appeal. See *supra* chapter 4, note 76 and 77.

principle that shifts in other related economic, political and legal fields can have important, but indirect, effects on specific legal administrative fields such as those of the APPDC and the ACP.

The Impact of the Marketing Council

Most of the thrust of formal administrative law is directed toward external control of agencies through judicial review. However, as illustrated in chapter 5, the Marketing Council was a far more active agent within these legal administrative fields and exercised far more control over the activities of both marketing boards than the courts. As noted in chapter 2, while a review of the provisions of the *Marketing of Agricultural Products Act* can give some sense of the potential powers of the Marketing Council, it gives very little guidance as to how and when the powers will be exercised. There has been virtually no substantive change in the legislation which confers these powers since the creation of the Marketing Council in 1965.[22] There has been no judicial interpretation of the powers of the Marketing Council in relation to supervision of marketing boards or commissions. Despite the fact that there has been no change in the formal law, there has been a substantial change in the ability of the Marketing Council to use its powers under the statute and the manner in which those powers are exercised.

This change can be seen in the struggles between the APPDC and the Marketing Council. As noted above, the key element which shifted over time was the position and habitus of the Minister of Agriculture and the Cabinet concerning attempts by Marketing Council to use its powers to curb the authority and actions of the APPDC. In the 1970s the APPDC was able to have regulations passed with the support of the Minister over the objections of the Marketing Council. In 1980, mass protests by producers over the actions of Marketing

[22]The major exception was the creation of the Appeal Tribunal under the 1987 Act, but this was more in the nature of a splitting off of the adjudicative function to another body rather than a reduction of the Marketing Council's powers. The same appeal functions were performed but by a separate tribunal.

Council led the Minister to direct Marketing Council to rescind Alta. Reg. 99/80. In 1985 another proposal by Marketing Council to modify the selling system was ignored by the Minister and the settlement which was reached bypassed the Marketing Council. In 1990 the Marketing Council used its powers under s. 11 of the Act, with the full support of the Minister and the government, to place major restrictions activities of the APPDC. The legal administrative field had shifted significantly; the formal law had not changed but the realm of what was legally possible for the APPDC had been substantially reduced. This shift has been discussed in detail. At this point I wish to discuss a second shift which took place which affected all boards and commissions.

A Change in approach by the Marketing Council

The personality and approach of the Marketing Council changed markedly when a lawyer was appointed to the position of Secretary Manager after the passage of the new Act in 1987.[23] There was a major increase in emphasis on: the need for actions taken by marketing boards to be authorized by regulation; the need for a more formal process for regulation making; the need to standardize regulations and Plans to conform to the structure set out in the 1987 Act for new marketing boards and commissions; and the need for a more judicialized adjudicative model for the Appeal Tribunal which had been created by the 1987 Act. Some of this had positive impact: there was more regular communication with Marketing Council; some of the emphasis on standardizing the process for regulation making created the possibility of a greater degree of consultation and cooperation between the boards and producers or affected parties in the industry; there was greater conformity in the wording and form of the regulations; and valuable drafting assistance was came

[23]The individual appointed was the same person who had been the Minister's special representative in looking at the dispute regarding the proposed new Act. This appointment and a major turnover in the members of Marketing Council created an emphasis on attempts to develop a more positive relationship with the APPDC and other boards and commissions on the part of Marketing Council. It also resulted in a more legalistic approach in several fields by the Marketing Council. Regulatory review was one of these changes.

from the Office of the Legislative Counsel which assigned one lawyer to review all regulations made under the Act.[24] However, it also accompanied a more active intervention by Marketing Council to assert more control over the operations and policies of various boards and commissions and to restrict the amount of discretion exercised by a board or commission.

The pattern of increased involvement in regulation making started with the need to amend the regulations of existing boards and commissions to conform to the provisions of the new 1987 Act. The regulations of each board and commission were reviewed in detail and Marketing Council was very resistant to broad delegations of authority. It required that any powers sought should be specified in considerable detail in the Plan and opposed any broad or blanket delegations of authority. It required that definitions of most terms should be included in the Plan. This was a serious restriction on the ability of a board to respond to changing circumstances. If a definition had to be changed, it could not be done by regulation but instead required an amendment to the Plan. In the case of quota boards, this would generally require a producer plebiscite. Over time, Marketing Council modified this position as difficulties became apparent but its position remained highly restrictive. Another device for control was to require that regulations made by a board be approved by producers before Marketing Council would approve them. The statute is specific concerning the types of regulations which must be approved by producers in general meeting before they are effective. The Marketing Council by extending this obligation to all regulations, slowed a board's ability to respond to a new situation and made the regulation process much slower. This was particularly so because Marketing Council would not accept an approval by producers in principle of a change; it required that the specific regulation be reviewed with producers.

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[24]Over time this individual acquired a familiarity with the Act and the various Plans and ancillary regulations. It also meant that all Plans and regulations followed a standard drafting format.

In addition, Marketing Council would not necessarily approve regulations even if producers wanted and approved them. In order to be certain that regulations would be approved, it was first necessary to review them with Marketing Council to obtain its approval and then to obtain producer approval. The degree to which this was an onerous requirement varied from board to board and depended upon the nature of the changes proposed. Consultation with 300 producers for the ACP is easier than consultation with several thousand in the case of the APPDC; changes to a regulatory system can be implemented in detailed regulation more easily than marketing decisions which may have to be made on a daily basis and which require a broad degree of discretion on the part of the marketer. Marketing Council also exercised control by applying this requirement selectively; some regulations were not made subject to this requirement. Also, by imposing this general standard Marketing Council made boards come to it under an onus to justify any regulation which was needed quickly as an exceptional circumstance; no such requirement was found in the Act.[25]

The ostensible reasons for this new procedure involved the need to consult producers and the view that regulations should be passed by producers, not the board of directors. This standpoint based on 'producer rights' viewed regulation as an imposition on producers and not as something designed for their benefit. The often stated position was that nothing should be imposed on producers that they did not approve even though the changes were being made by a board of directors composed of producers elected by their fellow producers. Therefore the amendments which were designed to maintain the status quo and provide concordance with the new Act became, in effect, a second plebiscite on the existence of the board. The suggestion that producers had the opportunity to reflect their

[25]An example of this was the Countervail Contingency Fund established through an increase in the APPDC's levy as part of a national approach by pork marketing boards to deal with the potential impact of the American countervail actions on the Canadian hog market. This had to be implemented quickly and it required a series of meetings with Marketing Council staff and the Marketing Council itself.

position and change policies that they did not like through elections for the board of directors was not accepted. While this was in part a reflection of the general ideology of the members of Marketing Council, most of whom viewed any restrictions on either individual producers or upon the 'free market' with suspicion, it was also part of a general approach to restrict the broad discretion that many marketing boards, including the APPDC and the APC had previously exercised. This approach also clearly had the support of the Minister and of the Department of Agriculture.

A major shift in the regulative environment was therefore accomplished without any statutory change. It had been accomplished through changes in administrative procedures rather than changes in regulations but these changes in procedure had significant legal impact on the realm of the possible for both the APPDC and the ACP. This illustrates that changes in administrative procedure can often be more important than changes in the formal law. The manner in which Marketing Council changed its approach to regulations in the period after 1987 placed new constraints upon the regulation making powers of the marketing boards and commissions but this all resulted from a change in approach by the Marketing Council rather than through any change to the regulations themselves. In this period Marketing Council chose to take a more active role using powers that it had always possessed but not always exercised.[26] The support given to this process by the Department of Agriculture, the Minister, the Legislative Counsel's Office, and the legal expertise possessed by Marketing Council in having a Secretary-Manager who was also a lawyer, all meant that the capital of Marketing Council had increased relative to the boards. This significantly altered the legal administrative field but it did so without any change in the formal law.

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[26]The contrast to the procedure described in chapter 5 concerning changes to the APPDC's regulations made in the 1970s is obvious.

An interesting intersection of the law with this policy was one of the most frequent justifications offered by members of Marketing Council to members of the various boards when this new regulative approach was discussed. Members of Marketing Council were of the impression that they could be personally liable for actions taken by various boards if they did not exercise their supervisory function appropriately. In view of the protection from liability for anything done in good faith in carrying out duties under the Act which is provided by section 47, this position seems dubious. It would be difficult to imagine a situation where such liability would be imposed in the face of this section. The onus of establishing lack of good faith in a regulatory setting, particularly a general supervisory power, would be heavy. Despite this section, this concern appeared to be widely held by members of Marketing Council and it appeared to motivate at least two self-protective actions: all regulations were reviewed in detail and rather than approving the regulations, Marketing Council insisted on approval by producers rather than the board of directors. However, even with approval of producers Marketing Council insisted that the existence of a power of approval meant that this power must be exercised in the nature of a 'hard look'.[27] Law therefore became a threat, a motivation for a particular course of action and a justification for that action. Fear of the courts and of personal liability had a major effect on the Marketing Council taking a defensive posture. This was not the public posture of Marketing Council; it developed mission statements which emphasized cooperation and facilitation of marketing objectives. Yet in the regulatory sphere this was not the experience of the boards.[28]

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[27]Refer to American materials on the hard look doctrine of judicial review. See chapter 1 notes 24, 32, and 41 and chapter 3 notes 20 and 63.

[28]While this was one reason often given to justify the new approach, it can easily be overstated. Over a period of time it became clear that there was a definite intention on the part of Marketing Council, supported by the Minister and the Department of Agriculture to exert greater regulatory control over marketing boards in general and to restrict the number of wide discretionary powers held by such boards.

The potential for conflict was built into this change in approach by the Marketing Council because it undercut the role of the board of directors and implicitly challenged their ability to represent producer interests and to administer the Plan. Although some of these concerns were shared by a number of boards the degree of conflict which arose differed substantially between boards. This is one illustration of why it is so difficult to generalize in an administrative setting even in circumstances concerning boards established under the same Act. In the case of the APPDC, the type of issues involved in a detailed review and revision of the Plan and regulations touched on such fundamentally disputed issues as the single desk selling system and the ownership of Fletchers. These issues had been dealt with by the courts in the *Gainers Inc.* and *Wayvel* decisions respectively and this meant that the existing provisions had received judicial approval and the APPDC was reluctant to see any changes while these issues were still outstanding.[29] So long as no situation arose which required a change in the regulations, the new policy of Marketing Council had little immediate impact on the APPDC. The major confrontations with Marketing Council and the Government which arose in 1989 and continued for several years thereafter also delayed changes to the Plan. In contrast, the ACP adapted well to this change in the legal administrative field. Since 1987 there have been a number of extensive changes to the Plan and the regulations; these changes have taken place in a cooperative manner and the new procedures have helped to develop and maintain a good working relationship with the Marketing Council. The fact that major changes have been incorporated in changes to the regulations and the Plan and have been approved by producers has meant that the legal

[29]The difficulties in this regard were such that it is only in 1996, nine years after the 1987 Act was proclaimed, that a revised Plan has been prepared and submitted to producers for a vote. At this point the ownership of Fletchers was no longer an issue as the shares owned by the APPDC had been distributed to extra-levy producers (see chapter 5). In a vote held in April 1996 the revised Plan was approved by 85% of producers who voted and the producers voting represented over 70% of total hog production in the province. The Plan in question was flexible enough to either continue the existing single desk selling system or to move to a more open system of marketing. The decisions in respect to this process and any revisions to the regulations are still in the process of being formulated. The revised Plan has now been approved by the Lieutenant Governor in Council and filed as Alta. Reg. 141/96.

and symbolic capital of the ACP has been increased by this process. A change which in some circumstances could be seen as restrictive has been adapted to by the ACP in a way which has enhanced the operation and adaptation of the system. This process played a major role in the eventual resolution of the roaster quota issue and in the resolution of the unregulated production of the Hutterite colonies.

Conflict between Marketing Boards and their Regulators

The last chapter indicated how it is very hard for a marketing board such as the APPDC to resist a determined exercise of government policy for any prolonged length of time despite its fiscal independence, its election of board members, and its control over staff appointments. From the perspective of a marketing board lawyer, there are several implications which arise from this study in relation to the question of conflicts between a marketing board and the Marketing Council or the Government. The first is that a great deal depends upon whether what is in issue is considered within the context of the existing regulations or whether changes to the regulations are desired or needed by the marketing board. This is important because within its existing regulatory structure, a marketing board is named by the Act, the Plan and its Regulations as having certain powers to rule and within its generally established existing area of authority it has considerable autonomy and substantial legal, symbolic and political capital. Direct intervention by the Marketing Council or the Government to change existing regulations and to interfere with the regular daily operations of the marketing board is very rare. This type of intervention has the potential to arouse major resistance on the part of producers; this happened in both 1980 and 1985 when Marketing Council attempted to intervene to change the selling system of the APPDC and in both cases the attempt was ultimately unsuccessful. The Minister of Agriculture and the Cabinet are perhaps even more reluctant to become involved in a direct exercise of their powers under the Act for much the same reason. This provides a major incentive for the marketing board to attempt to justify any proposed action under

the existing Plan and Regulations thereby avoiding giving the Marketing Council a basis for intervening. The situation in late 1990 and early 1991 was rare because it had escalated to the point where the Minister and the Cabinet supported the use by Marketing Council of its powers under section 11 of the Act and also seriously contemplated the use of even more drastic powers of direct intervention. It is significant that even in this situation, the Government preferred to use informal methods to obtain what it required. Even at this point, the APPDC had some capacity to carry on existing operations and to present its position and attempt to negotiate, but once the Government was prepared to act, the realm for independent action was radically reduced. The position of the APPDC was further weakened because since there was division among producers and some of the actions taken by the Marketing Council could be presented as intended to protect producers and to enforce the existing system.

However, aside from the obvious threat of direct intervention by the Marketing Council or the Cabinet,[30] the scope the of marketing board's ability to respond to new situations is greatly restricted in times of conflict with the Marketing Council. To operate effectively over any extended period of time the legal administrative field requires some degree of cooperation between the marketing board and the Marketing Council So long as the system remains static with no need for regulatory changes and no serious challenges from a group of producers or from processors, the marketing board can operate fairly well without much cooperation from Marketing Council. Over time, however, this lack of cooperation becomes a serious impediment to any innovation or flexibility on the part of the marketing board and restricts the board's ability to respond to shifts within the field

[30]Like the intervention of the courts, this direct intervention is rare but the fact that the possibility exists has an impact on the field which is far greater than actual number of direct interventions would suggest. This possibility forms the iron fist inside the velvet glove of the more indirect approaches by both the Marketing Council and the Minister which are far more common. For similar conclusions in respect to the reluctance of British Ministers to use their direct powers in relation to marketing boards and the degree to which marketing boards were responsive to the indirectly expressed wishes of the Minister, see Giddings.

which impact on the agricultural marketing field for the product by making necessary regulatory changes. The situation with the APPDC is somewhat unusual in that for much of the 1970s and in the early 1980s, the APPDC was able to partially deal with the problem of its relations with Marketing Council by bypassing the Marketing Council and dealing directly with the Minister. However, as shifts occurred within the field and as the habitus of subsequent Ministers changed, this informal political alternative became less viable. As situations arose after 1987 which required regulatory change, the APPDC had to deal with the Marketing Council. As discussed above, the Marketing Council had by this time also become more sophisticated and interventionist in its procedures and approach to regulation and supervision. The additional intervention was indirect and did not present clear-cut issues such as the earlier threats to change the selling system. But these changes represented a form of indirect intervention which had the support of the Minister and the Department and which over time reduced the scope for new independent and unsupervised initiatives on the part of the APPDC. There had been a significant shift in the legal administrative field without any change in the formal law. One of the few examples of direct intervention occurred when the APPDC delayed sending minutes of its meetings to Marketing Council and modified the form of its minutes. These actions could be represented as direct defiance of the authority of Marketing Council and gave a reason for the direct intervention under section 11 which has already been discussed in detail in the previous chapter. Two important conclusions flow from this discussion: first, unless there is strong political capital which allows the marketing board regular access to the Minister and a willingness on the part of the Minister to bypass Marketing Council, it is essential for there to be a working relationship with Marketing Council;[31] second, while there is considerable scope for a marketing board to act independently within its existing

[31]The discussion of the successful experience of the ACP in respect to the change of approach by the Marketing Council discussed above, also illustrates how important this working relationship can be.

system and regular operations, any outright defiance of the Marketing Council or the existing regulations is likely to precipitate direct intervention.

In 1990 after the Marketing Council had issued its section 11 direction, the realm of the possible had shrunk to a very limited level for the APPDC and most of its efforts had to be directed into responding to challenges which could have led to its dissolution. While it still retained a certain sphere of autonomy in its ongoing daily operations, it was subject to a degree of supervision that made any initiatives difficult and which undermined its ability to respond to new situations or to deal with challenges from producers or processors. It had to be continually aware of avoiding any action which could be construed as a pretext for further intervention by the Marketing Council or the Lieutenant Governor in Council. The posture of the APPDC had to be very defensive because it was involved in a situation where the habitus of both the Marketing Council and the Government was hostile and further direct intervention was very possible in this altered field although once again there had been no change in the formal law. This was clearly an unstable system which could not have continued indefinitely even without the threat of further direct intervention.

A difficult relationship with the Marketing Council and the Minister or the Cabinet can also be significant in respect to legal challenges from processors or producers. Legal challenges by other parties become more significant and dangerous if there is serious doubt whether the Marketing Council and the Cabinet will approve changes to the Plan or to the regulations to deal with any defects found by the Courts. During the 1970s the legal challenges by the processors to the APPDC's changes to the selling system were significant as was the position that might be taken by the Marketing Council on processor appeals and on amendments to the Plan. But when it was apparent that the Minister supported the APPDC's position and was prepared to authorize amendments to the Act and the Plan to clarify the APPDC's authority, the danger of an adverse judicial decision

was diminished and the incentive to launch legal challenges was limited.[32] In 1985 when it was not so clear that the Minister would support statutory amendments or regulatory changes if the legal challenges to the APPDC's authority in respect to the ownership of Fletchers and the modifications to the selling system had been successful, the dangers to the APPDC of an adverse judicial decision increased. In the highly charged and restrictive situation in early 1991 an adverse legal decision might have been catastrophic for the APPDC. At this point the ability to avoid judicial challenges by changes to either the Plan or the regulations was virtually non-existent. It was also this factor that made the 1992 appeal by Gainers Inc. so significant. If the Appeal Tribunal had ordered a change to the selling system, the APPDC had very little scope to seek changes to the Plan or the Regulations to preserve its selling system.

However, this particular conflict also points out the fact that the courts and the prospect of judicial review can be a shield as well as a threat to marketing boards.[33] In this highly confrontational period where the Government was directly involved in the operations of Gainers Inc., the APPDC felt less threatened by potential judicial challenges and had more confidence in the impartiality of decisions by the courts than it had in any of the decisions of the Marketing Council or the Appeal Tribunal. During this period there was a serious prospect of litigation between the APPDC and the Marketing Council and Government of

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[32]The willingness of the Minister to amend the *Marketing of Agricultural Products Act* was particularly significant because it is generally much harder to obtain an amendment to a statute than to a regulation. After this period, the willingness of the Government to amend the Act to deal with particular problems diminished considerably. The actions by the Minister in amending the Act and in causing the 1979 amendments to the Plan were a major factor in the processors choosing not to proceed to a hearing on the merits in respect to their judicial review applications concerning changes to the selling system. The second factor was the change in Ministers, the actions of Marketing Council in early 1980 and the prospect that the Hog Marketing Review Committee might recommend major restrictions on the APPDC's single desk selling powers. The processors preferred to concentrate their effort before the Committee rather than proceed with the court challenges.

[33]I have also pointed out how favourable judicial decisions increased the legal and political capital of the APPDC in respect to the issues in question in further disputes with Marketing Council and Gainers Inc. Similarly, the favourable decision in the one application for judicial review on roaster factor decreased the likelihood of similar challenges from other roaster producers. At this point, I want to look at a different issue - the effect of the prospect of litigation between a marketing board and its regulators.

Alberta to challenge any further actions taken against the APPDC. From a marketing board perspective, the need to threaten, directly or impliedly, litigation against the marketing board's supervisory bodies, meant that a very serious crisis situation existed. This could only be a last resort defensive measure and it had to be implied rather than directly threatened since a direct threat could precipitate the very action the APPDC sought to deter. While the prospect of such litigation along with a wish not to provoke a confrontation with producers may have helped to defer any direct intervention, it would not likely have prevented it unless the issues which concerned the government were dealt with. It was not a situation which could have continued indefinitely and it is significant that the major factor in decreasing the intensity of the crisis and the confrontation was not the threat of litigation but a meeting between the Ministerial Task Force and the Board of Directors of the APPDC at which no lawyers, no staff of the APPDC and no staff or members of Marketing Council attended and at which no formal minutes were kept and at which the APPDC essentially deferred to the government's major concerns.

In comparison with the APPDC, the experience of the ACP with the Appeal Tribunal and with Marketing Council is almost a mirror image. Only one dispute in chicken involved a processor and this issue was ultimately resolved by discussions and a change in Board policy; in pork disputes with processors were a fundamental issue and the most significant area of legal dispute. Very few issues arose between the APPDC and individual producers;[34] this is one of the most significant areas of legal involvement with chicken.

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[34]Aside from an appeal by a southern Alberta producer in 1984 concerning levy on hogs sold out of province (it was this decision that prompted the APPDC regulation which was ultimately rejected by cabinet in 1990; see chapter 5 notes 25 and 53 and accompanying text) and a 1991 appeal by a producer who objected to the APPDC's grading procedure during a government inspector's strike, all APPDC appeals have involved appeals by packers. The other exception was the 1991 appeal initiated by the producers who objected to the continued ownership of Fletchers shares by the APPDC and wanted divestiture to producers but as noted except for a preliminary decision concerning whether the appeal was within time, this appeal did not proceed to a decision. There have been subsequent producer appeals dealing with issues concerning the divestiture of the Fletchers shares but these occurred in 1995 and are beyond the scope of this thesis.

Very few of the issues between the processors and the APPDC were ultimately resolved by the appeals process; the appeals were simply part of a much larger and more fundamental conflict. In the case of roaster factor, the decisions of the Marketing Council and subsequently the Appeal Tribunal did form the basis for changes in policy and regulation and did form a significant part of the basis for the way in which the roaster factor issue was resolved.

There were never the direct and bitter confrontations between the Marketing Council and the ACP which were so common in the pork industry. There was very little direct government involvement in the issue of roaster chicken which again contrasts to the degree that government became involved in the disputes which arose in the pork industry between the APPDC and the processors and between the APPDC and the Marketing Council. There remained in the chicken industry within the province a habitus to find ways to resolve issues short of court proceedings or appeals for government intervention;[35] the system became more formal and legalistic over time and the roaster factor issue generated a large number of appeals but this issue never placed the fundamental operation of the system in issue the way that conflicts in pork over the selling system did. While the ACP was not happy with some of the decisions of Marketing Council or the Appeal Tribunal, communication never broke down into outright conflict in the manner which has been discussed in pork. In matters such as the audit of historic roaster production performed for Marketing Council after the 1986 appeals, the intervention of Marketing Council was constructive and helped to bring credibility to the system created. With the exception of the continued opposition of one or two individuals, the appeal structure and the legal

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[35]The situation was far more confrontational on a national level with the various disputes between provinces over changes in annual allocations. The same habitus did not prevail at this level. Skogstad concludes that one of the problems in the poultry industry was the inability of the participants in the national agency to develop a national approach instead of purely provincial approaches. G. Skogstad, "Policy Under Siege: Supply Management in Agricultural Marketing" (1993) 36 Canadian Public Administration 1.

administrative field was able to adapt and resolve this issue although ultimate resolution took a period of nearly 10 years.

The Impact of Shifts in Producers' Habitus

The habitus of producers within an industry is not static. It shifts over time and those shifts have an impact on the legal administrative field of producer marketing boards such as the ACP and the APPDC. In the case of the ACP, I have already discussed how producers' habitus shifted as the industry grew and developed. The initial consensus and informal procedures of a small group of producers in a new industry shifted as quota became a valuable property right and new producers who had purchased their quota entered the industry. The development of the roaster industry created a new group of producers with an investment in the industry and a habitus different from the original broiler growers. On issues of quota, the early consensus and informality was no longer acceptable to producers. The economic changes in the industry had altered producers' habitus on this issue and the legal administrative field had to adapt. The dialogue in the legal administrative field of chicken marketing became very much concerned with 'rights'. Quota, although notionally something which has no value, is actually a valuable property right. The restrictions on production and marketing are such that a legal administrative field develops which is very regulation and formula driven. If changes are necessary, they require regulatory change and challenges to the system from producers tend to be based on questions of quotas and how they are treated.

A second aspect of the habitus of chicken producers is that there has remained a high degree of consensus among producers on the need for supply management. Also, the general habitus of the industry is far less confrontational and the relationship with processors is very different and more cooperative than in pork. This meant that there were not the same crises which led to political intervention. It also meant that there was more

willingness to cooperate with government and the Marketing Council and that in these dealings, producers tended to speak collectively, except in the case of roaster quota and even in that case, an internal consensus was eventually reached. This unity among producers and the cooperative approach of the industry in general enhanced the political capital of the ACP . Pressures in this case come from those outside the industry who do not have quotas or from other groups opposed to supply management or import quotas.[36]

The habitus of confrontation in the pork industry has been discussed at length. Because it does not restrict production or entry into the industry, there has not been the same type of pressure for the APPDC to develop detailed regulations in relation to its dealings with producers. However, this does not mean that the APPDC has not been affected by shifts in its producers' habitus. The habitus and ideology of both the provincial government and hog producers strongly identifies with the image of farmers as fiercely independent and able both to make their own production decisions and compete in international markets.[37] While this has always been the case, the initial habitus which supported the creation of a system of single desk selling and compulsory marketing has altered. With the passage of nearly 30 years since the inception of the APPDC and the changes which are occurring in the pork industry,[38] some of the producer habitus conditioned by the original market conditions which led to the creation of a marketing board has shifted and some producers are less concerned with the issue of market power. Most present producers have never experienced the marketing conditions which existed before the creation of the APPDC and there is less consensus among producers on the need for single desk selling to provide

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[36]Examples include consumer groups, many economists, and the American chicken industry which is prevented from importing chicken into Canada.

[37]The general habitus of the government was discussed in chapter 4 at notes 92-97.

[38]The reduction in the number of producers and the increasing trend to larger and larger production units where a limited number of farms produce the bulk of the hogs sold, the rationalization and concentration of the processing sector, the increase in Alberta production since the low point of the mid 1970s, and the APPDC's ownership of Fletchers Fine Foods Ltd. are some examples.

countervailing marketing capital for producers in dealing with processors.[39] The compulsory nature of the marketing structure has become a source of tension both with the government and with some hog producers who are opposed to single desk selling and want the option to market their own hogs. This position grew particularly strong in southern Alberta during the period after 1985 as greater volumes of hogs were marketed by producers directly into the US without going through the APPDC and without paying the per hog service charge to the APPDC.[40] The second major factor which shifted the habitus of many producers was the divisions among producers over the ownership and disposition of the shares of Fletchers Fine Foods Ltd. Producers were seriously divided on this issue which gained momentum at the same time that the ownership of Fletchers by the APPDC was becoming an increasing issue to the government. The APPDC's political capital was reduced by the lack of consensus among producers and by the shifts in producers' habitus. It could no longer mobilize producers as effectively as it did in 1980 and in 1985. When combined with the shift in the habitus of the provincial government in the late 1980s, this created a very different legal administrative field in which to operate even though the there had been no major changes in the regulations or the legislation.[41]

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[39]This is the case despite the fact that there are now only two major processors in Alberta as opposed to 9 when the APPDC was first established.

[40]Producers in District 1, which comprises Southern Alberta, had always been the least supportive group of producers partly for ideological and cultural reasons and partly because they had alternative markets in the US which were not as easily available to other producers located further away. As this practice became more regular and the volume of hogs increased, it resulted in a situation where a specific group of producers had economic interests and a habitus that opposed that of the APPDC and those producers who supported it.

[41]The effects of this change in the legal administrative field continue. As discussed in chapter 2, the proposed changes to the Marketing Regulation which are currently being discussed with producers, will remove single desk selling and give producers and buyers the option to deal directly rather than through the APPDC.

Chapter Seven

The Legal Administrative Fields of the APPDC and the ACP: The Perspective of the Marketing Board Lawyer

Introduction: An Internal Perspective

To this point, the approach of this thesis has been primarily structural in that it has focused on agencies and institutions and on the larger political and economic factors which shape the fields rather than on the actions of individual agents. The perspective adopted has been primarily an external, third party, descriptive perspective although it has clearly emphasized the producers and their marketing boards rather than other agents in the fields. In this concluding chapter, I intend to shift this focus to a different and more internal perspective, that of a lawyer retained by these two marketing boards to deal with issues which arose within the legal field. This perspective clearly has a personal aspect which must be acknowledged.

For over 18 years a considerable part of my legal practice has been within the two legal administrative fields which have been described in this thesis as a lawyer for both the APPDC and the ACP.[1] This experience situates me as a participant with a particular situated knowledge[2] of many of the incidents which I described in the preceding chapters

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[1]I was called to the Alberta Bar in 1978. While I was always involved with both marketing boards to some degree and was aware of the major legal issues being dealt with, my extensive involvement with the APPDC began in 1980 and my extensive involvement with the ACP began in 1985. From these dates onward I was directly involved in virtually all issues upon which legal representation was sought. Between 1986 and 1992 I was the primary lawyer for both boards. After that time, I have continued to do extensive work for the APPDC and a more limited amount of work for the ACP. I remain associated with the firm which does the legal work for both boards.

[2]The term 'situated knowledge' is taken from the work of Sandra Harding and Donna Haraway which makes the point that any knowledge is situated knowledge perceived from and conditioned by a particular social, historical, cultural, economic and gendered location. S. Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press, 1986); D. Harraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991).

and clearly conditions my more general comments as well. While I have attempted to avoid an overly partisan position in the thesis, I acknowledge that a work written by a lawyer for the Marketing Council or one of the processors would be presented from a very different perspective which would alter both the presentation of the material and the conclusions reached. However, given the objectives of this thesis, I suggest that my personal knowledge and my situated perspective, as long as it is acknowledged, is an advantage rather than a limitation. In saying this, I reject any suggestion that any position can be presented from a fully neutral position unconditioned by a particular cultural context and innumerable implicit assumptions. Even while acknowledging the limitations inherent in any attempt to adopt the 'view from nowhere' described by Thomas Nagel, I accept his point that there remains an important value in attempting to adopt this form of 'objectivity.'[3] Thus the approach that has been followed in the previous chapters, although influenced by my perspective and my detailed knowledge of the fields in question, has been more structural and more external than I originally anticipated when I wrote my first draft of the introduction to the thesis.

I want to use the theoretical structure adapted from Bourdieu and the work of the previous chapters in order to evaluate some of the assertions made in chapter 1 and in order to reflexively examine certain aspects of my own perception of legal practice within these fields. Out of this discussion will come some thoughts on the gap between the theory of formal administrative law and the practice of administrative law within these legal

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[3]Like Sandra Harding or Richard Bernstein or Thomas Nagel, I do not believe that valid critiques of the ostensibly neutral perspective of positivist or 'objectivist' definitions of objectivity preclude the need to make choices and present arguments which attempt to transcend the purely subjective viewpoint or the relativist position that all arguments are equally valid. For a more complete discussion of these issues see the works by Haraway, Harding, Benhabib, Bernstein, Nagel, Eagleton, Fraser and Bauman in the bibliography. For alternative perspectives on this point see the works by Foucault and Rorty. Bourdieu is also clear in his position that there is a value in 'objective' empirical and theoretical work although he also rejects the concept of some neutral, detached perspective and advocates a reflexive form of sociology in which the sociologist also examines his or her own habitus, capital and position within various fields.

administrative fields. I will also develop a concept of the legal habitus of a marketing board lawyer which is an extension beyond Bourdieu's use of the term.

Limitations of this Study

Despite the detail and length of this thesis, there are a number of important limitations to this review of the legal administrative fields of the ACP and APPDC which are particularly apparent to me from my situated knowledge of the field. Of course a full discussion of either field and the many factors and entities which impact on them is impossible within the bounds of this thesis. The complexity of the relationships which structure and influence the fields and all the agents within it makes it difficult to describe them in a way which does not distort the description by leaving out significant factors.[4] This thesis is only a partial overview designed to make visible some important political and economic aspects of the legal administrative fields in which each of the boards function. Of necessity it selects some factors to discuss and neglects others which are also important.

For example there is very little discussion of the relationship between the agricultural field and other economic fields in the Alberta, Canadian, North American, and world economies. The politics of international trade in agricultural products and the position of Canada as a major agricultural exporter competing with the US and the European Economic Community are not discussed and the vital significance of trade relations with the US is discussed only in passing.[5] The impact of regional differences in Canada in

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[4]Thus Eagleton quotes Jacques Derrida to the effect that when one emphasizes, one always overemphasizes. (T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983) at 36). This is a problem in any work which describes social action. The social institutions and actions examined result from many more factors than can be dealt with in any model or approach used. This over determination means that some form of selection process must be followed, which inevitably leaves out significant factors and emphasizes some factors at the expense of others. I do not think that this problem can ever be avoided, but it must be acknowledged. For discussions of this problem in the context of sociology, see the works of Giddens, Lemert, Alexander, Bourdieu, Habermas, and the collection by Giddens and Turner cited in the bibliography.

[5]For a more detailed discussion of Canada - US agricultural trade relations prior to the NAFTA, see T. Cohn, *The International Politics of Agricultural Trade: Canadian-American Relations in a Global*

relation both to agricultural production and the politics of agricultural policy on a regional and national basis are not dealt with.[6] In the Alberta industries, there is very little description of the impact of demographics, the transportation system, the geographic location of major consumption areas to the agricultural production areas, and the impact of climatic conditions. The location of processing plants relative to the major areas of hog production is not discussed although it is a significant factor.[7] There is almost no discussion of gender, class, or ethnic issues and yet these clearly have an impact within the fields.[8] It was also not possible in this framework to provide a detailed description of the

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Agricultural Context (Vancouver: University of British Columbia Press, 1990). In previous chapters, I briefly referred to the effects of the American countervail actions in hogs and pork and the decisions of various Bi-national panels on the issue. While the major alleged subsidization program which was subject to countervail has been terminated, administrative actions for previous periods proceed and there are suggestions that American producers will seek to initiate further reviews. I also briefly referred to the potential effect of the NAFTA agreement and the recent GATT agreement for the chicken industry and the American challenge under NAFTA to the high import tariffs in the supply management sector which replaced the import quotas which were no longer permitted under the GATT agreement. While the most recent Bi-national panel has rejected the American argument in chicken, the issues of cross-border trade in agricultural products and its effect on the future of producer marketing boards continue to grow in importance.

[6]For a discussion of this issue in relation to the debates leading to the enactment of the *Farm Products Marketing Agencies Act* see the works by Skogstad cited in the bibliography. Issues concerning the division of national quotas in the supply managed industries such as chicken are an ongoing issue which was only referred to in passing in the thesis. They remain a serious problem today and the national chicken marketing system has been under major strain for most of the 1990s. Similar strains are occurring in other industries. Examples include the problems of the Canadian Egg Marketing Agency and the ongoing dispute between the British Columbia Milk Marketing Board and a group of non-quota producers of industrial milk which has extended over 10 years and gone to the Court of Appeal on at least 5 occasions.

[7]The Fletchers plant is located in Red Deer and the Gainers Inc. (now Burns) plant is located in Edmonton. 60% of the hogs produced in the province are produced south of Red Deer and the area within 90 miles of Red Deer is also a major hog producing region. This gives the Fletchers plant a location advantage that formed part of the basis for the 1992 Gainers Inc. appeal which asked that the APPDC be ordered to direct its producers to ship hogs to Gainers Inc. sufficient to account for 4/7 of the total Alberta production. This request was rejected by the Appeal Tribunal but the tensions caused by this geographic factor remain.

[8]For example, all the producer directors of both boards have been male with only one exception in chicken. The managers of both boards and the Marketing Council have always been male as have all Ministers of Agriculture and senior staff in the Department. Yet producer directors will often acknowledge that their activities are possible only because of the support and work of their spouse and while women are in the minority at producer meetings, a significant number do attend and they are clearly an important, though generally unacknowledged, part of both industries. The role of the Hutterite colonies in chicken was discussed but the approximately 130 colonies presently also produce nearly 25% of the hogs produced in Alberta. There is also a strong Mennonite heritage among many chicken producers

development and trajectory of the various types of capital and habitus held by the major participants in each field. All of these factors are important in the development and operation of the fields in question; they add to the complexity of the fields and make any discussion of events underdetermined. However, these limitations do not invalidate the approach taken.

The same complexity which makes any description underdetermined makes the model of a field with its sense of various forces and entities in shifting relationships with each other and with other fields an important model. More rigid structural models fail to convey this complexity and create a more ordered and static image of what is occurring. They also imply an ability to see an entire structure and order from a detached perspective which is misleading in that it suggests a degree of understanding and ability to predict and control outcomes which does not reflect the actual experience. The concept of the field does not solve the problems of complexity, but it does provide a better metaphor for examining the process that is occurring even if that examination remains incomplete in that it cannot concentrate on all relevant factors or agents.

There are two limitations which, from my perspective, are serious enough to warrant separate comment and to require further analysis. These are the impact of specific individuals on the shifting relations which structured the fields and the fact that even the detailed descriptions of the issues in chapter 5 seriously under emphasize the importance and prevalence of informal communications and the role of interpretation.

The Problem of Agency

As I review the previous chapters, one of my strongest senses is that they convey very little sense of the personalities and approaches of the individuals involved in the events

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which I believe has influenced the habitus of the industry toward consensus rather than confrontation and legal proceedings.

described. There is very little recognition of the fact that the agencies and agents described: the marketing boards; the Marketing Council; the Appeal Tribunal; the Department of Agriculture; the cabinet; the producers; and the processors, are all made up of individuals and do not form single unified entities. In practice, it matters who the Minister of Agriculture is. The attitudes and approaches of Marketing Council may alter significantly when different individuals occupy the position of General Manager or Chairman. Personal hostility between the staff of a marketing board and the staff of Marketing Council or the Department of Agriculture can make ongoing relations difficult. The same can be said of the marketing boards. Knowledge of who the members of a particular Appeal Tribunal are can be significant just as lawyers are aware in a particular legal proceeding that it can matter which judge hears the case. An important part of legal practice within these fields involves appreciating the importance and role of these individuals and relating to them in ongoing interactions.

Yet viewed from a slightly greater distance, what happens within the field is not simply a matter of personal idiosyncrasies; a great deal can be said about what to expect from an individual occupying a particular position within the field even without knowing the individual personally; while different individuals may handle particular conflicts in different ways, most basic conflicts and their outcomes have important structural components which may, or may not, be apparent to the participants. One of the most difficult problems in trying to discuss practice in any legal administrative field is how to account for the question of the agency of individuals. Without in any way questioning the importance of political, economic and legal structures, it is also apparent that in a particular field, at a particular time, it does matter what individual occupies a particular position in the field. The problem is to develop some concept of the relation between the role of social structures and the role of individual agency.

This problem is not unique to the law. It forms one of the central problems in sociology: the relationship between the effect of the actions of agents and the impact of social structures on agents.[9] The actions of individual agents make a difference but those actions are conditioned and perhaps determined by the social structures of the culture in which the agent is situated. As discussed in chapter 1, Bourdieu attempts to transcend this problem through his concept of the field and the relationship between the habitus and capital of agents, including individuals, within the field.[10] In Bourdieu's terms an agent does make choices and employ strategies which can never be fully determined before hand. But those choices and strategies are limited by the capital possessed by the agent; without sufficient capital or capital of the right kind many options are closed. In addition the agent's personal and social history has created various dispositions and certain ways of seeing the world which make it likely that the agent will have a feel for the rules of the game and act in particular ways in particular situations; these dispositions and world view and the sense for the rules of the game within the field constitute the agent's habitus.[11] The relationship

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[9]Problems of this nature arise in any discipline which studies human activity whether it is history, psychology, philosophy, political science, or anthropology to cite only some obvious examples. Numerous examples can be found in the works cited in the bibliography particularly in the sociological and philosophical texts.

[10]Three other examples of attempts to transcend this problem in sociology can be found in the work of Giddens, Habermas, and Luhmann. Giddens (*The Constitution of Society: Outline of the Theory of Structuration* (Berkeley and Los Angelos: University of California Press, 1984)) develops a theory of 'structuration' where social structures and individual agents have a reciprocal effect on each other. Agents are born into a social structure but social structures are composed and created by individual agents whose actions can over time alter the social structure. Habermas (*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996); *The Theory of Communicative Action (Volume One) Reason and the Rationalization of Society* (Boston: Beacon Press, 1984); *The Theory of Communicative Action (Volume Two) Lifeworld and Systems: A Critique of Functionalist Reason* (Boston: Beacon Press, 1987)) seeks to find a solution to the issue of social determination in a theory of communicative action as an ideal foundation for social interaction and a theory of law and social structures as the foundation for a social discourse founded on these principles. Luhmann (*A Sociological Theory of Law* (London: Routledge & Kegan Paul, 1985); *Social Systems* (Stanford: Stanford University Press, 1995)) develops a theory of interaction of autopoietic systems in which individual agents are subsumed into social systems. For an alternative perspective which I find suggestive, see the works by Z. Bauman, especially *Postmodern Ethics* (London: Blackwell, 1993) and *Life in Fragments: Essays in Postmodern Morality* (London: Blackwell, 1995).

[11]In the sense that it is used by Bourdieu, habitus clearly has a strong affinity to some of the uses made of the concept of ideology by many Marxist theorists. While Bourdieu shares Foucault's distaste for the term

between agents, each of whom have a certain habitus and possess certain kinds and amounts of capital, is what constitutes the dynamics of the field in question.

In chapter 1, I indicated that while I found this approach suggestive, I questioned whether it provided a means to transcend the problem of structure versus agency. After working with the concept of habitus throughout this thesis, these reservations remain. Habitus, as Bourdieu discusses it, and as I have used it to this point in the thesis, seems to me to remain a very structural concept which emphasizes the social conditioning and trajectory of an individual or social group. As such, I am not sure it provides as much scope for an analysis of what is individual in a particular agent's actions as some of Bourdieu's general statements suggest. This does not mean that I do not find the concept very useful. It is simply that I do not think that it has proved a theoretical framework which succeeds in transcending what is a foundational issue in the study of human social dynamics whatever disciplinary approach is chosen.[12]

While I have reservations about whether this approach goes as far as Bourdieu suggests in providing a means to transcend the problem of structure versus agency, I find the concept, particularly the notion of a sense of the rules of the game and a certain set of dispositions very useful in looking at the dynamics of a legal field. In the case of the legal administrative fields created by marketing legislation I see a tension which exists between two forms of habitus which are possessed in varying degrees by almost all the individuals in the field. The interaction of these two types of habitus with the concept of collective

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'ideology' and would likely reject the suggested affinity, it seems to me that there are strong parallels in his use of habitus to some Marxist use of ideology and to the related Gramscian concept of 'hegemony.' For the development of the use of hegemony in the context of Thatcherism, see S. Hall, *The Hard Road to Renewal: Thatcherism and the Crisis of the Left* (London: Verso, 1988) and S. Hall and M. Jacques eds., *New Times: The Changing Face of Politics in the 1990s* (London: Lawrence & Wishart, 1989). See also A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) [hereinafter Hunt].

[12]The same point is made as part of a more exhaustive critique by J. Alexander, *Fin de Siècle Social Theory* (London: Verso, 1995). See also the various discussions in C. Calhoun, E. LiPuma and M. Postone eds., *Bourdieu: Critical Perspectives* (Chicago: University of Chicago Press, 1993).

action by producers to enhance their marketing capital is what fuels many of the conflicts which arise within the field. I have termed these two types of habitus as the 'good farmer' paradigm and the 'free market' and 'individual rights' paradigm.

Habitus and Conflicting Ideologies

Part of my thesis is that in the agricultural marketing field there is a complex, ongoing tension and intricate interrelationship between a number of ideologies or paradigms:[13] an ideology that sees the individual farmer, the farm family and the farm community as 'good', important, morally exemplary, and strategically and symbolically important entities whose welfare must be fostered and developed; an ideology which supports the 'democratic' right of farmers to organize to create a countervailing marketing power against the oppressions and distortions of the agricultural market created by the monopolistic and monopsonistic practices of large corporations with whom they must deal; a 'free market' economic and political ideology which espouses individual choice, free markets and atomistic competition as the best means to foster efficiency and productivity; and an 'individual rights' ideology which seeks to protect the freedom and rights of individual producers to manage their own farms and make their own economic decisions free from government interference. These ideologies have a major impact of the habitus on many agents within the field and they create a tension and a potential for conflict which is inherent in the system. These ideologies and the habitus of particular individuals who occupy various

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[13]In the context of this work, I am using the concepts of ideology and paradigm as nearly synonymous. Given its long, complex and controversial intellectual genealogy, I embark on any discussion of 'ideology' with some trepidation. In the context of this thesis, I use it in the limited sense of "a set of ideas and beliefs (whether true or false) which symbolizes the experiences of a specific, socially significant group or class" (analogous to a 'world view') and "a discursive field in which self-promoting social powers conflict and collide over questions central to the reproduction of social power as a whole." T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991) at 29. For further discussion of the concept of ideology see: Eagleton; Hunt; V. Kerruish, *Jurisprudence as Ideology* (New York: Routledge, 1991); and J. B. Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Stanford: Stanford University Press, 1990). For a review of the concept of paradigms, see T. Kuhn, *The Structure of Scientific Revolutions* 2nd ed. (Chicago: University of Chicago Press, 1970).

positions within the field can have a major impact on how particular issues are resolved and upon the relations between the agents in the field and some of the complexity of the agricultural marketing field arises because many of these ideologies are held simultaneously by many participants in the field.

The good farmer paradigm fits with an image of a simpler, better, self-sufficient past and the image of the family farm remains a powerful symbol. But in this sense it also fits the image of farmers as an independent individuals producing what they choose and engaging in a competitive market where they are free to make their own decisions. Despite a tradition of prairie populist movements, in Alberta the 'good farmer' ideology is not a radical image in either a moral or a political sense.[14] Almost all individuals within the legal administrative fields described accept the good farmer ideology and the 'democratic right' of producers. Yet they also accept the "free market" and "individual rights" ideologies.

Marketing boards occupy a potentially conflicted place within these ideologies or paradigms. As producer initiated and controlled organizations, they benefit from the good farmer paradigm and the political capital held by farmers and farm organizations. However, as statutory entities with compulsory marketing and regulatory powers they conflict with the 'free market' and 'individual rights' paradigms. When there are producers within the industry who oppose compulsory marketing controls, those individuals can draw on both paradigms. Even those producers who support the marketing board concept have a habitus that is deeply imbued with the 'free market' and 'individual rights' paradigm. While these producers support the need for marketing boards, they remain very concerned with the autonomy of individual producers. Compulsory marketing action by farmers

[14]There has never been the tension between government and farm organizations that exists between government and organized labour; the family farm is a positive symbol in a way that has never been approached by the trade union at least in the Alberta setting. But aside from the early attempts of the Social Credit movement to radically change monetary policy, the populist impulses described in chapter 3, while significant, have been less radical than in some other provinces such as Saskatchewan.

therefore creates tensions not only with processors but also among producers themselves. It also creates a major tension with the Marketing Council and the Minister of Agriculture and the Cabinet all of whom have a habitus which strongly predisposes them toward concepts of individual rights and the free market. Therefore, despite its statutory origins and sanction, compulsory collective action by producers is in a continual state of tension with these forms of ideology. An additional tension is created in that marketing boards as self-financed and producer elected regulatory bodies are truly heretics among the heretics in relation to the forms of bureaucratic habitus which are also held by the Minister, the Marketing Council and the Department of Agriculture. At times this makes them appear to government and the bureaucracy as unruly and independent minded impediments to the efficient and controlled development of agricultural policy.

The legal system also becomes involved in this tension both in the manner that the legal framework which is established and administered reflects these tensions and in the recourse made to the legal system when these tensions lead to disputes. This in turn creates a tension between a system of judicial review where the duty of the courts is to constrain government action and to preserve individual liberty and a system of judicial deference in which government intervention and mandatory collective action, so long as they are properly authorized, are accepted and supported by the courts as a matter of policy. Even where the courts are able to reconcile these principles, they may remain an issue for other agents in the field, such as the Appeal Tribunal or the Marketing Council who are given the power to review the actions taken by a marketing board. In many cases these administrative bodies have a habitus more closely attuned to classical liberal economic and political theory than do the courts who have come to more of an accommodation with the administrative state.[15]

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[15]The Courts in both the *Wayvel* and the *Gainers Inc.* decisions had no difficulty in interpreting the Act and the Plan and regulations in a broad manner. In *Wayvel*, the Court of Queen's Bench pointed out the "breadth and generality necessary to accomplish the purpose." [of the Act] *Wayvel* at 446. The Court of

The ironic effect of these overlapping and potentially conflicting ideologies was that the APPDC, a marketing board whose producers, staff and directors all had a habitus which was closely aligned with the 'free market,' individual rights, free trade, export oriented habitus of the provincial government and the Marketing Council had a far more confrontational relationship than did the ACP which as a supply management board would seem to be far less in tune with the dominant ideology. Many of the factors which created this situation have been discussed in previous chapters. Here, from my own perspective, I want to focus on two which relate specifically to the habitus and ideologies of the individuals involved.

The APPDC's staff and board of directors saw the corporation as a producer organization designed to market hogs and get the best price possible for producers. Their habitus was very oriented toward private enterprise. Many of the staff had worked for the organization almost from its inception and had developed expertise in issues of hog marketing. They were flexible, innovative and aggressive when it came to marketing hogs and improving the price received by producers. They did not market by regulation; they worked by contract and they handled thousands of hogs and millions of dollars per week with very

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Appeal affirmed the decision and indicated substantial agreement with the reasons of the learned chambers judge. It dealt with and specifically rejected the additional argument that the change to the Plan made by Alta. Reg. 99/81 authorizing the purchase of the shares of a processor, required a producer plebiscite. In *Gainers Inc.* the Court of Queens Bench reviewed in detail the provisions of the Act, the Plan, and the selling system as it evolved in the period between 1970 and 1985. It quoted the Dickson J.A. (as he then was) in *Gershman Produce Co. v. Manitoba Marketing Bd.,* (1971) 22 D.L.R. (3d) 320 at 330-331 (Man. C.A.):

> The word 'control' is of broad import and does not lend itself to fine distinctions. When the Lieutenant-Governor in Council chooses by Regulation properly passed to entrust control of marketing to a marketing commission the limit of authority so entrusted is not to be determined by drawing fine lines.

O'Leary J. pointed out that the plan was created "at the instance of hog producers and primarily for their benefit" and that the "board in effect represents the collective economic power of the producers" in negotiating with the processors. A power to decline to sell at unacceptable prices was not inconsistent with the Plan and did not amount to setting the price.

The Marketing Council had expressed and tried to implement exactly the positions that the courts rejected. Its view of the intent of the Act and the realm of potential action for the APPDC was far more restrictive.

little reference to either regulation or legal input in these daily operations. The APPDC was involved in a major agricultural business which dealt in continental and even broader concerns. They did not perceive of themselves as a public body which required regulation and they considered themselves accountable to producers rather than to the general public or processors.

The approach of the APPDC to regulation was to look for a broad delegated power with wide discretion. Essentially what was sought was the ability and flexibility to act as a private marketer able to respond to market conditions. The APPDC tended to rely on broad delegation powers, taking a commercially necessary action and seeking to justify it retrospectively if necessary. The rules which were important to staff were the operational rules for the daily marketing activities, not the statutory regulations. These regulations were seen as a necessary evil - they were not a priority issue and there was very little reference to them in daily operations unless a major change in selling procedures was contemplated.[16] Contacts with producers and with processors involved very few references to specific regulations.

In contrast, the staff and members of Marketing Council saw the APPDC as a public agency which imposed regulatory restrictions on producers and processors and favoured an approach which required specific regulatory sanction for every action and which interpreted the APPDC's Plan narrowly. They saw the APPDC as having responsibilities to the industry at large and to processors in particular and they perceived Marketing Council's role as that of a supervisory body which must make certain that these responsibilities were met by the APPDC. The habitus of the staff and some of the members of Marketing Council was a curious combination of the bureaucratic attitudes of a government administrator and an ideological resistance on the part of some members and

[16]An example is the fact that the APPDC had, with the approval of producers, switched from daily to weekly pooling several years before the regulation was amended to reflect this change.

staff to the idea of marketing boards interfering in the operations of the "free market".[17] Marketing Council evaluated actions in terms of a regulatory environment and wished to see discretion confined and actions validated by formal regulations. In any issue which arose, it wanted to see formal regulations to deal with and authorize any action. It wanted to be involved and consulted in these actions and it was very concerned with the rights of both processors and producers. Any restriction on the freedom of processors and of individual producers was regarded with suspicion.

Leaving aside any questions of bias, personalities or government economic or political interests, these points of view were bound to lead to conflict.[18] Marketing Council, and to a degree, the Appeal Tribunal saw their role as representing all interests in the agricultural industry and as trying to achieve consensus and peace between various interests. As in most regulatory agencies, they did not like conflict and wanted accommodation between the parties in the industry. The easiest party to seek accommodation from was the one over which they had regulatory power, the marketing board. This position was bound to conflict with the APPDC's perception of its role as a marketer trying to negotiate the best

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[17]While the bureaucratic approach was limited to Marketing Council, the ideological support for the 'free market' and 'good farmer' paradigms discussed in the previous chapters was much more widespread within the industry. An interesting element of the conflict between the Marketing Council and the APPDC was that both agencies and the individuals who comprised them generally thought in terms of these paradigms. The difference was in how they interpreted the activities of the APPDC within the context of these paradigms. This points out the danger of any overly simplistic application of ideological concepts within a particular legal administrative field.

[18]This is not to suggest that these issues did not exist or were not important. Throughout most of the period the level of trust and personal communication between the staff and members of Marketing Council and the staff and directors of the APPDC was virtually nil. However, while different individuals might have handled the specific conflicts differently, the basic conflicts would remain. This point is illustrated by a comparison of the two works which deal with the early history of the Ontario Hog Marketing Board: W. Bishop, *Men and Pork Chops: A History of the Ontario Hog Marketing Board* (London, Canada: Phelps Publishing Company, 1977) writes from the perspective of a long time hog producer and member of the Board of Directors of the Marketing Board; G. Perkin, *Marketing Milestones in Ontario 1935-1960* (Parliament Buildings, Toronto: Ontario Department of Agriculture, 1962) writes from the perspective of the long time Chairman of the supervisory board (Ontario Farm Products Marketing Board). The same type of conflicts and difference in habitus can be found in these accounts of events occurring in Ontario at an earlier period. Both works also show the importance of all these factors in the operation of the legal administrative field within which they and their respective organizations functioned.

possible price for producers. Because such a position was almost bound to lead to conflicts with processors, and because the APPDC was aggressive and not passive in its attempts to change the marketing system to enhance competitive bidding and remove what it saw as advantages held by the processors, it was seen by Marketing Council as the major cause of unrest in the industry. It was also perceived as the body with the monopoly power which could and which must be restrained[19] and it was also perceived by Marketing Council as secretive, independent and out-of-control. This perception was increased by the fact that many of the members of Marketing Council had a strong ideological attachment to the free market paradigm and regarded all activities of marketing boards with considerable suspicion.

At a deep level the habitus of the APPDC is not that of a public agency; its disposition is as a producer organization attempting to promote markets for Alberta hogs and to get the best price for producers. It did not regard government as an integral partner in its activities. It did not feel that it needed guidance from Marketing Council and they did not perceive the members or staff of Marketing Council as being knowledgeable concerning the pork industry. The APPDC became regarded by the Marketing Council and the Department of Agriculture and later by the Minister of Agriculture and the Cabinet as something of a renegade - out of control and unwilling to accept direction. Of course, this attitude in the Department of Agriculture and in the Marketing Council became far more pronounced, or at least vocal, when government interests become directly involved with Gainers.

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[19]As noted in chapter 5, Marketing Council considered any issues concerning collusion by the processors or the oligopolistic nature of the market with a limited number of buyers to be matters that were not part of its mandate to deal with. They preferred to focus their concern on the activities of the APPDC and were not prepared to look at the activities of the processors or the entire structure of the marketing system. Both the court in the *Gainers Inc.* case and The Hog Marketing Review Committee were much more willing to accept the implications of the oligopsonistic nature of the packing industry.

In the case of the ACP, the fact that the market was regulated in terms of supply and price and that there was already significant linkage between production and processing because the dominant processor was a producer-owned co-operative, meant that there were not ongoing confrontations with processors who would rely on the 'free market' ideology to challenge the ACP's actions. As well, although producers clearly identified with the good farmer and individual rights ideologies, there was clear recognition among the bulk of producers that it was the supply management system which made the industry viable in Alberta without the need for vertical integration which would remove the independence of growers. While the Government orientation toward export and the grain, beef and pork industries meant that the degree of support that could be expected from it in international trade issues involving supply management was suspect, at times this relative indifference provided an area of operation where the ACP's policies did not conflict with the overall thrust of the government's policy. In general, the ACP showed an awareness of the need to foster good relations and communications with the various individuals and agencies within the Department of Agriculture and with the Marketing Council. As a regulator rather than a marketer, and with no organized group within Alberta attacking its policies,[20] it conformed more easily to the bureaucratic habitus of Marketing Council and the Department, and the national aspect of supply management meant that the Government was always sensitive to not wanting to have Alberta's relative position to other provinces deteriorate.

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[20]I leave aside the general criticisms of supply management from various national consumer organizations and individual complaints from individuals who wanted to produce chicken but did not have quota. The only three instances of organized groups who had significant commercial interests in chicken production but were outside of the quota system were the roaster producers, the Hutterite colonies, and small plant processors who required product. In each case the system was forced to adapt to these interests. The problems of the B.C. Milk Marketing Board and its protracted ongoing litigation with Bari Cheese and a group of non quota industrial milk producers illustrates how difficult it is for a system to deal with an organized group which has a significant commercial interest in the product but operates outside the system.

Perhaps the most pervasive impression from legal practice in this area is that while all of the ideologies described above intersect in individuals in varying degrees of complexity, the free market and individual rights paradigms are dominant for most individuals within the field. They are part of the doxa; common sense which does not even have to be put in issue and is not really debatable.[21] Even supporters of marketing boards usually discuss the boards in the context of a corrective to market failure in what is acknowledged as the preferred alternative, a competitive free market. A large processor or a dominant retailer may be the most dominant economic power in the province and it may create an oligopolistic or oligopsonistic market boarding on monopoly. Yet the effects of oligopoly or monopoly seem increasingly to be of less concern to the Provincial Government and government regulators such as Marketing Council than the potential effects of marketing boards as "impediments" to a free and efficient market and a healthy export industry.

Marketing boards are commonly attacked by economists, in what Warley describes as a 'pavlovian reaction,' on the basis that they impair the competitiveness and the economic efficiency of the industry. Economists do not deny the lack of marketing capital of producers but they argue that direct subsidies as opposed to the indirect subsidization of

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[21]There is no discussion of the fact that the entire concept of the 'market' is founded on concepts and a legal system which are not neutral. Under the legal system and in the habitus of many participants in the field a large corporation which may dominate the industry is still regarded as a single individual entity. Governments and regulators remain much more concerned with regulating collective action by groups of producers or workers than they do with regulating oligopolies or monopolies which develop in agricultural markets. The indifference of Marketing Council to continued allegations of anti-competitive practices on the part of the packers and the difficulty of the Federal Government in achieving a successful prosecution of the packers in Alberta even after some had plead guilty to the conduct (see *R. v. Canada Packers,* (1979) 19 C.P.R. (3d) 133), are simply obvious examples of this situation. In an interesting twist of legal logic, the existence and activities of the APPDC which was created in part because of a lack of competition and which attempted to increase price competition among packers, was cited by the court in *R. v. Canada Packers* as one basis on which a reasonable doubt existed that an offense had been committed. The existence and activities of the APPDC became a defence for the packers involved. A new twist on this legal logic is the defence raised by Peter Pocklington in his defence and counter-claim against the Province of Alberta in its ongoing action to recover some of the losses incurred in the takeover of Gainers Inc. One basis for the defence and counter-claim is that the government failed to restrain the APPDC which obtained higher hog prices, thus causing damages to Gainers Inc. This action has not yet come to trial.

marketing controls would have a less distorting effect on the 'market.' Supporters of marketing boards have counter-arguments which emphasize the anti-competitive failures of the market, system, the devastating impact of low prices and price instability, and the fact that social choices such as the preservation of the family farm are also important.[22] The intent here is not to debate whether marketing boards are 'good' or 'bad' *per se*; opinions and arguments on this point vary and depending upon the assumptions and criteria used, arguments can be made for either point of view. What is important is that marketing boards operate in a context in which the paradigm of economic analysis and market efficiency is very prevalent and is becoming more powerful as the society's habitus shifts from the position of the 1960s to the more economically driven neo-conservative positions of the 1990s.[23] To the degree that marketing boards come to be perceived by important agents within the field, particularly government agents, as an impediment to economic efficiency and competitiveness in a global market, their political capital declines. In the shifted field of the 1990s, emphasis increasingly shifts to the perspective of the processor and of integrated operations rather than the perspective of producers; emphasis is less on preservation of the family farm and more on what is needed to develop or attract processors large enough and integrated enough to compete in global markets. It is beyond the scope of this thesis to discuss this process in detail. However, its effects can clearly be seen in the latest proposed changes to the regulations of the APPDC which reflect, in regulatory form, the shift which has occurred.[24]

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[22]Positions taken against supply management have been referred to in chapter 3, see notes 5 and 6. See the detailed analysis of the B.C. Select Standing Committee in vol. 4 for an excellent detailed summary of the arguments for and against supply management. Similarly see Gilson, chapter 14 for a detailed discussion of the various marketing alternatives presented by marketing boards. See also the B.C. Federation of Agriculture submission to the Standing Committee for a defense of marketing boards by a farm group and Coffin for a defence from an economic point of view.

[23]See G. Skogstad, "Policy Under Siege: Supply Management in Agricultural Marketing" (1993) 36 Canadian Public Administration 1.

[24]As mentioned in previous chapters, the major effect of the proposed changes to the APPDC's marketing regulation will be to remove the requirement for single desk selling. There are major divisions among producers on whether this is desirable, but the need to make these changes without a clear indication of producer support and the rapid implementation of the changes is clearly and expressly mandated by the

This discussion of habitus and intersecting ideologies has not solved the problem of individual agency which I have identified. All it can do is point out that in specific contexts, these interactions are complex and the outcomes cannot simply be assumed. Aside from these comments, I do not suggest that I have found a way to transcend the issues of structure and agency which I have raised. The best that can be done in the context of this thesis is to acknowledge the problem and the limitation in what has be done and to reassert the fact that in particular areas of practice, the actions and habitus of particular individuals do matter. In part this is based on personal experience within the field. But it is also based on the importance of informal communications which I have mentioned as a second important limitation in the treatment of the legal administrative fields in this thesis.

The Role of Informal Communications

From my perspective as a participant in the legal administrative fields in question, I find that even the detailed discussions of specific issues in chapter 5 seriously understate the role and prevalence of informal communications. Informal communications[25] form the least visible, yet perhaps the most important, element of legal practice in the legal administrative fields of the APPDC and the ACP. For the marketing board lawyer, these communications take many forms: discussions at organized meetings, telephone conversations, letters or memorandums, casual conversations, or informal discussions at unrelated social or political gatherings. The degree of formality may vary from formal written opinions prepared by the lawyer to oral reports of second or third hand conversations in which the lawyer was not directly involved. The communications may be

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Government. The ACP's new regulations also show an increased awareness of this habitus by including special provisions for processors who can identify and develop export markets, an area which has not been within the traditional concern of supply management systems. This is an example of the willingness of the ACP and its producers to respond to what they perceive as the priorities of the government.

[25]When I refer to informal communications I am referring to communications which do not form part of a legal or administrative record or a public ruling, decision or position of an agent within the field.

with the staff or directors of the clients or with any other individuals involved in some manner in the field. Such communications form the bulk of the practice of the lawyer for the farm marketing board and yet this process is largely invisible and undocumented other than in legal files or correspondence covered by legal privilege. Most of it never becomes a matter of public record. Yet any analysis which does not consider this type of communication misses much of what is essential in the operation of the legal administrative field.[26] It is part of my thesis that the existence and the importance of this form of communication is a major factor in the gap between formal administrative law and the practice of administrative law within a particular legal administrative field.

Informal communication is essential for the operation of the legal administrative field. Most communications which take place within the field are of this nature. It is the main source of the information that flows within the field and the main means by which agents within the field communicate with and influence each other. For complex regulatory and marketing systems such as those in which the ACP and APPDC are involved, there must be a significant degree of cooperation between the various agents within the field in order for the system to operate. As discussed in chapter 3, the marketing of agricultural products requires a large degree of coordination and integration between the various parties involved. Thousands of marketing decisions and transactions are made on a daily basis by producers, processors, marketing board staff, and other participants in the field. Although a statutory marketing system can be established and the possibility of coercion is important, it is very difficult to enforce any regulatory system unless most of the

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[26]For obvious reasons, this assertion is difficult to document although it was clearly recognized in the articles by Huff and Steele cited in the first chapter. Aside from these articles by experienced American and Canadian practitioners, the basis for my statements are my own experience in over 18 years of practice in the legal administrative fields which are the subject of this thesis. I think that the point is also illustrated by the discussion of the operation of these legal administrative fields developed in the preceding chapters although even those discussions understate the role and significance of informal communications and of how much of the practice of administrative law within these fields consists of this type of communication..

enforcement is self-imposed.[27] Informal communications play a major role in maintaining the information exchange and ongoing relationships upon which this cooperation and coordination depends. They also provide the major and most effective means by which the parties in the field attempt to influence each other. This is especially critical for the marketing boards in their relations with the Marketing Council, the Minister and the Department of Agriculture, and the Cabinet.[28] Once policy decisions are made at a ministerial or cabinet level they are very hard to change and so it is essential that when issues arise, the marketing board have access and input to the process before the decisions are made.[29] While occasionally major confrontations, legal action, or mass demonstrations can alter these decisions, these are crude methods which cannot be employed on a regular basis and which are poor protection against a determined exercise of government policy and statutory and regulatory power. Also there are very few ongoing issues which arise

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[27]Thus in Bourdieu's terms, any legal field depends to a considerable extent on the participants sharing a habitus which inclines them to participate in the game and to recognize the rules even as they contest with each other and perhaps even seek to change the parameters of the field and the rules themselves. To enter into the game is to accept a large number of dispositions which are seldom directly expressed but which are essential for the operation of the field. For Bourdieu the habitus of the players is a major source of this necessary disposition. The concept of legitimacy plays a similar role in Weber's work on law. See also Luhmann on systems and Habermas on legitimation. It is for this reason that an organized group who are outside the system but have an existing (as opposed to potential) commercial interest in the production of an agricultural product is so difficult for the system to deal with strictly through enforcement mechanisms. Foucault makes a similar, if more negatively tinged, observation in respect to the way in which institutional power operates by internalizing in the subject disciplinary norms such that to a large degree the individual subject disciplines herself. See *Discipline and Punish* and other works cited in the bibliography. For a Marxist influenced critique on the role of law in relation to issues of power see Hunt.

[28]This discussion does not deal with the communications that the marketing boards have with their producers through various informal methods of communication. This type of ongoing communication is vital in maintaining producer support and cooperation. It can also be used to mobilize producer opinion and consolidate support when issues arise. I focus less on this type of communication, not because it is not important, but because the level of involvement of the marketing board lawyer is lower in this area unless an issue arises with a specific producer or group of producers or unless some form of presentation is required at producer meetings (this is rare except when producers are being asked to vote on some major issue or on changes to the Plan).

[29]This is not the only level at which such concerns arise. Similar concerns and complaints about lack of consultation were made by the processors concerning changes to the APPDC selling system and by some of the individual producers in the roaster factor appeals. The potential inclusion of the Hutterite Colonies' chicken production within the system by an amendment to the regulations in 1986 without any consultation with the various affected colonies was another example of this type of concern. The successful integration of the Hutterite Colonies into the ACP's regulatory system was an example of consultation and discussion before final decisions were put into regulatory form.

that are so fundamental that they justify the expenditure and risk of large amounts of legal, political, economic and symbolic capital that major confrontations require. It is much more effective to have input and influence while changes are being made than to respond to them after the fact. This is why issues of informal communication and access are such an important part of the assessment of the capital of each marketing board and of the other agents within the field.

To be effective, the marketing board lawyer must be part of this flow of information and have a chance to contribute input in this informal fashion. Without access to this information, it is very hard to develop a feel for the shifting parameters of the field and for how important agents and individuals, such as the Marketing Council or the Minister, will react to particular issues which arise. Thus the informal communications which are important are not only those in which the lawyer personally participates, but also those of which he or she receives second or third hand information. While the staff and board of directors of the marketing board are major sources of this information, communications with other parties, particularly the staff of Marketing Council and various representatives of the government are also important. The nature of these agricultural marketing fields and the habitus of most of the parties within them is such that there is a great deal of informal communication between the parties within the fields at many levels up to and including contacts by various producers and members of the board of directors with the Minister or other politicians.[30] Even individuals on opposite sides of particular conflicts often discuss them informally in the context of other ongoing business contacts. Information obtained as a result of these communications is significant in making assessments of what is within the

[30]For example, even during the period in 1990-91 in which the Marketing Council had implemented the section 11 direction, the Chairman of the APPDC on a number of instances phoned the Minister of Agriculture at his home and had extended conversations concerning outstanding issues. Portions of these conversations were later reported to the staff and the Board of Directors and to myself as legal counsel. This type of accessibility on the part of the Minister varied from Minister to Minister but it was not rare. In general, unless there was some degree of personal relationship, the Minister would be far less open to having these types of conversations with a lawyer representing a marketing board.

realm of the possible for a marketing board in a particular situation.[31] Access to this information and the ability to communicate informally with the various parties within the field, particularly the Minister and, in times of major crises, other members of the Cabinet,[32] are an important elements of the political and legal capital possessed by agents within the field and the marketing board lawyer is no exception to this.

Previous chapters have discussed how important the habitus of the Minister of Agriculture and the Cabinet are to the resolution of issues within the fields. The habitus of the Minister and of the Cabinet has a influence far beyond the times where there is direct intervention; like the courts the possibility of this intervention, even though actual instances may be rare,[33] influences the actions of all agents within the field and has a particular impact on the habitus and the actions of the staff and members of Marketing Council who, as noted in chapter 2, have a major regulatory and supervisory role within the field . Furthermore, this type of intervention, unlike that of the courts, is frequently decisive in resolving particular issues even though it is done in an informal and often indirect fashion. This makes information concerning the habitus and position of the Minister, and, in more rare but serious situations, the Cabinet extremely important.

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[31]The degree of credibility which can be attached to any information received from second or third hand sources is difficult to determine. However, the fact that the reliability of this information may be suspect does not mean that its receipt and assessment is not an important part of the process particularly in a legal administrative field in which so many of the parties right up to the Minister of Agriculture have various forms of informal discussions on a regular basis which become circulated among various institutions and agents within the field.

[32]The general level of Cabinet involvement is low. The situation in 1991 in which the APPDC had extensive dealings with the Ministerial Task Force for Gainers was very unusual as was the intervention by the Premier in 1985. Such interventions are not always welcome to the Minister who may wish to deal with most issues without involving the Cabinet.

[33]Despite what may appear from the discussion of the APPDC's experience in the last chapter, direct intervention by the Minister or the Cabinet, whether using formal powers or simply by becoming involved by making a decision on a point in issue, is rare. However, indirect intervention where the Minister or the Cabinet make their concerns known through members of the Department of Agriculture or through the Marketing Council is not. On most potentially contentious issues, most of the parties are concerned about what the Minister's position would be and whether some form of indirect intervention will occur. Giddings makes the same point in relation to the British experience.

Because direct contacts with the Minister are limited, very little of this information is conveyed directly to the marketing board and even less is conveyed directly to the marketing board's lawyer. Therefore, indirect sources of information on these points become very important. Because of the nature of its role, Marketing Council can play an important function as a conduit for this type of information to the marketing boards since the Marketing Council generally has greater access to the Minister than individual marketing boards. Marketing Council can also function as the major mechanism by which the Minister and the Cabinet's policies are enforced in the agricultural marketing field.[34] Therefore, it is significant whether or not issues can be discussed frankly with representatives of Marketing Council and whether there is a basis for ongoing communications which can provide the basis for an ongoing relationship and an avenue for a two-way exchange of information and positions. It matters who the Chairman and Secretary Manager of the Marketing Council are and whether they are respected by and can work with the various marketing boards and commissions. All of these factors concerning both the Minister and the Marketing Council are significant in any assessment made by the marketing board lawyer on issues of interpretation which arise even if only as a background consideration. Yet none of them play a significant role in assessments using methods of formal administrative law.

Informal Communication and Conflict Resolution

Informal communication is also important in that it reduces the number of conflicts in which there is resort to the formal mechanisms which exist for resolving conflicts such as appeals or applications for judicial review. Formal procedures are often poorly suited for

[34]A good relationship with the Minister and regular access to the Minister and his senior advisors is an important element in the legal and political capital of the Marketing Council. When its legal authority under the Act is buttressed with support from the Minister, the Marketing Council is in a strong position and can act as a major agent in implementing the government's policy within the field. Some of the ramifications of the shifts in this relationship were explored in relation to the APPDC in the last chapter.

dealing with complex, multi-party agricultural marketing issues which do not fit easily within a bi-polar, adversarial system of dispute resolution. Formal proceedings result in the parties to the conflict adopting rigid adversarial positions and they restrict communication between the parties to the hearing. Such proceedings are resource intensive, time consuming, and where major issues are concerned, they may be very slow. They are not well adapted to making agricultural marketing and policy decisions. Informal discussions allow the parties involved to be more flexible and to exchange positions and information in a less rigid, less hostile, and less public setting. Such discussions often lead to changes without the need for any formal proceedings and they enhance the flexibility of the legal administrative field. They can also lead to situations in which potential problems are recognized and dealt with before they become situations of open conflict. The manner in which the unregulated production of the Hutterite colonies was dealt with is an example of this point. The positions of each party would have been quite different in formal proceedings than what developed in the informal discussions and negotiated resolution.

The most difficult times within the field are when this flow of informal communication breaks down. When this happens, it becomes difficult for the field to function and a crisis situation develops.[35] This process was discussed in detail in regard to the APPDC and its relations with processors and with the Marketing Council. As indicated, such crisis situations are seldom resolved in formal proceedings although formal proceedings may be an important tactical part of the conflict.[36]

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[35]Even in these times of crisis, there is a significant amount of informal and routine communication between the parties in conflict. Thus except in very isolated circumstances, each of which prompted government intervention, the disputes between the APPDC and the processors did not interfere with the regular daily communications by which hogs were assembled, sold, delivered, slaughtered, settled for, and paid for. The system continued to market hogs even while the parties fought about the form that this marketing should take. The bulk of the marketing activities continued on a regular daily basis even while major conflicts were taking place. In the case of the ACP and roaster quota, the various appeals did not disrupt deliveries of roaster chicken to the processors.

[36]As discussed in the previous chapters, the appeal provisions under the Act work best where there is a discrete issue with a single producer which does not have major ramifications for the larger operation of the system. In such cases, the appeal procedure may work well to resolve the issue. As discussed in

This does not mean that formal proceeding are insignificant. Because judicial proceedings are time consuming and resource intensive and because they may create an authoritative interpretation of a particular issue, they are given a great deal of attention by all parties within the field. They may delay the implementation of unpopular decisions or regulations and in some cases the use of judicial proceedings can be used to delay or defer appeal proceedings for extended periods of time.[37] The commencement of judicial proceedings is a major symbolic indication of the seriousness of the challenge being made by a party. At all levels within the field those agents with the power to rule are aware of the possibility of judicial challenges and are interested in minimizing these challenges even though there have been very few successful challenges in the agricultural marketing field in Alberta. Like direct intervention by the Minister, the potential of judicial review often has an impact far beyond the actual cases which occur. This applies not only to relations between marketing boards and producers or processors, but also to the relations between marketing boards and their regulators when conflicts arise.

Perhaps one of the major points that becomes apparent in this study is that the importance of the availability of judicial review is important not only in relations between individuals and statutory agencies but also between different levels of agencies themselves. From my perspective within these fields, the potential for litigation between the APPDC and the Marketing Council or the Government of Alberta was, at times, a significant consideration for all parties although it did not occur. Instead of being perceived as a threat, the courts came to be perceived by the APPDC as a potential shield against actions by the Marketing Council and the Government. Although the limitations of this shield are apparent in this study, its existence was a significant consideration.

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chapter 5, roaster factor was not one of these issues because any decision in one case had implications for the entire program.

[37]Examples of this were discussed in the context of the APPDC and the Marketing Council in chapter 5.

While conflicts can be resolved in either a formal or informal manner, the form in which the conflict is resolved has important implications for the field. Too frequent resort to formal proceedings is evidence of a field in state of crisis or flux. These proceedings are slow, confrontational and unsuited to resolving complex issues affecting multiple parties. None of the conflicts discussed in the previous chapter were resolved completely within formal proceedings. However, the complete absence of respect for, or recourse to, such procedures is also a different form of crisis. Allegations of bias and of improper influences frequently arise if all decisions are perceived to be made in private and as a result of 'improper' political influence;[38] in such situations the respect, self-discipline and cooperation necessary for the operation of any regulatory system deteriorates of the formal structures and procedures are perceived as a sham. No precise or general balance can be drawn in these matters. It is important to maintain procedures such as the appeals to the Appeal Tribunal and the possibility of judicial review but it is unrealistic to assume that these procedures will, or can, resolve fundamental structural issues within the field. It is also unrealistic to expect that the parties to a conflict within the field will always confine the conflict to the formal proceedings and not seek informal avenues of appeal to the Marketing Council, the Minister of Agriculture and the Cabinet. The existence of these procedures and habitus among the parties which directs conflicts toward these formal procedures may reduce the frequency of resort to informal political appeals, but on important or fundamental issues the parties will likely pursue any approach which they perceive may give them an advantage. The best that can be hoped for is a balance between informal and formal mechanisms for dispute resolution that is widely accepted within the

[38]I place the word 'improper' in quotations since I would suggest that some degree of politics is involved even in decisions which are presented as 'legal' decisions. However, obvious displays of this type of influence in the system creates the risk of a loss of legitimacy and willingness to comply among the agents within the field. For an example of a criticism of a marketing board for seeking to rely on influence with the Minister rather than working within the framework of the marketing system, see the comments of the B.C. Legislative Assembly Select Standing Committee on Agriculture concerning the B.C. Chicken Board in vol. 3 at 95.

field. Within such a balance, law is created, interpreted, applied and practiced in both formal and informal settings by both lawyers and non-lawyers. Formal administrative law, unlike legal practice within these legal administrative fields, concentrates on only limited aspects of this balance and thus fails to deal with much that is part of the legal habitus within these fields.

Formal Administrative Law and Informal Communications

There is very little recognition of informal communications in formal administrative law. In part this is a practical problem. It is hard to review or control communications which create no formal record and which often, as in the case or oral discussions, create no record at all. In my introduction I addressed this issue as a problem of methodology faced by academic work on administrative law. Part of the focus on the courts and on tribunals of record is precisely because they generate public records which are available for study and critique. Access to internal and informal documentation is restricted and many important communications generate no record at all. In the course of a legal issue that extends for any period of time within the field there are likely to be hundreds or thousands of such communications in one form or another. Even if unlimited access were available, the volume of the information would be difficult to analyze and it would still miss many conversations which may have had an impact but which generate no record. The same point is illustrated in this thesis. Even with a participant's perspective in relation to many of the issues in question, I have still made extensive reference to more formal sources and have marked the progress of particular issues by their more public outcomes rather than the many informal communications which were part of the process. My approach still leaves the bulk of these communications invisible. In part, this is unavoidable. It would be both impossible and impractical to refer to each meeting, discussion, or informal communication which was part of the interactions that I have described in more general terms. Even as a participant in the events described, I would have access to only a limited

number of these communications.[39] There is therefore an almost irresistible pressure toward using more formal records in any kind of study even where the resources exist to conduct extensive personal interviews. The difficulties faced by a court or tribunal reviewing a particular administrative decision or exercise of discretion are similar although in some instances these bodies have a greater ability to compel production of such internal documents as exist. Even with this type of power of production, most of the informal communications which occur are never considered by the during the review. The focus of formal administrative law is therefore on formal decisions which can be reviewed or restrained and which generate some type of record. But this focus on more formal communications does not arise simply because it is difficult to obtain access to informal communications.

The failure to consider the bulk of informal communications in formal administrative law is not so much a defect of formal administrative law as a difference in focus and purpose. Many informal communications are informal precisely because they are intended to be off the record and private rather than a formal public statement of a position. Statements can be made and positions can be taken that could not be taken if the communications were public. When a formal statement of position is required, it is usually drafted with some sense that it may form part of the record of a more formal proceeding or become widely distributed;[40] this makes it a very different kind of communication than private informal discussions. The bulk of communications within a particular legal administrative field are

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[39]I ,or any other participant in the field, would never have access to the bulk of the informal communications which occur. The number of communications of which I would have had even second hand knowledge would be a relatively small fraction. This does not diminish the importance of these communications but it emphasizes the importance of the concept of habitus. What a practitioner develops is not some omnipotent knowledge of all that is occurring within the field but a sense of the general dispositions (habitus) of some of the major individuals and agencies within the field and a sense of their relative power (capital) in relation to particular issues.

[40]A major aspect of legal practice within the field is drafting communications for the marketing board which are formal statements of position and which are drafted with a view to the fact that they may form part of the record in some type of formal proceeding or some form of struggle of interpretation over a particular issue.

never intended to form part of the record in a formal proceeding; the field would not be able to function if they were. Formal administrative law is directed toward formal decisions and the mandated procedures to be followed in reaching those decisions. Except for cases where it is alleged that there have been prohibited types of informal communication,[41] the courts are not generally interested in informal communications which may have been part of the process which led to the decision that is being reviewed. The threshold for what decisions can be reviewed and for what information and communications the courts will consider in conducting a review, forms a significant part of the substance of formal administrative law. As I indicated in the first chapter, my critique of formal administrative law is not that this process is flawed; formal administrative law has a significant and important role in any legal administrative system. My critique is that any approach which focuses solely on formal administrative law leaves much of the practice of law within any particular administrative system invisible and beyond the scope of consideration. Formal administrative law is only part of the legal field for any particular agency; thus there exists the gap noted by practitioners between how formal administrative law treats a particular legal field and the experience of practice within that field. I believe that this thesis has demonstrated the importance and value of an expanded and pluralistic approach to what constitutes law and has shown the value of the concept of the legal field in examining the less visible areas of legal practice within two particular legal administrative fields. For the purpose of this discussion, the point that I wish to establish is that the difference in the importance and treatment of informal communications in formal administrative law and in legal practice within the farm marketing legal administrative

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[41]Obvious examples would include: issues of bias or the appearance of bias; communications which breached various portions of the rules of natural justice; and allegations of improper interference or attempts to influence the performance of a public office. The question of irrelevant considerations is more complex because these may or may not appear on the record. If they do not, various questions of an evidentiary nature arise as to how to establish that irrelevant matters were considered. Similar questions can arise concerning various form of breaches of the rules of natural justice which may include the review of allegedly improper informal communications.

fields is a major factor in the gap between the theory and the practice of administrative law within these fields. Communications which are not significant for the purposes of formal administrative law may be vital to a marketing board lawyer practicing within the field and vital to the operation of the legal administrative field. It is in this sense that I suggest an extension of Bourdieu's concept of legal habitus.

An Extended Form of Legal Habitus

Part of the process of this thesis is the attempt to give a structure to and to consciously and reflexively examine a process that in practice is primarily invisible and inarticulate even to the practitioner (in this case, myself). Bourdieu's work and the concepts of habitus, capital and the field provide a means and a structure for doing this. In this chapter I want to use the concept of habitus to develop an explanation of the experience of legal practice as a marketing board lawyer within these fields. The sense of habitus that I am interested in is the sense for the 'rules of the game,' of knowing what the "realm of the possible" is in relation to certain legal issues which is an important part of the logic of legal practice within a particular legal administrative field.[42] A sense for the realm of the possible within a particular legal administrative field depends on many factors: a sense of the rules of the game; a sense of what is within the realm of the possible in relation to certain legal issues at particular point in time; and a sense of how to expand or defend the current realm of the possible for a particular client such as a marketing board. In the sense

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[42]The reference to a sense for the 'rules of the game' is drawn from Bourdieu's discussion of habitus in relation to 'practical sense' or the 'logic of practice'. As discussed in Chapter 1, Bourdieu uses the term "game" to refer to the field as a site of struggles or competitions between agents within the field. These competitions and struggles are governed by the rules and structures of the field (game) but the outcome of these struggles and the shifts in the capital possessed by the agents involved can also alter the structure and parameters of the field or game. The term ' realm of the possible' is my own term to refer to the horizon of understandings perceived by an agent located at a specific point and time within the fields. See H. Gadamer, *Truth and Method* 2ed rev. (New York: Continuum, 1995) and D. Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics* (Berkeley and Los Angelos: University of California Press, 1978) for a discussion of the use of the term 'horizon of understandings' in hermeneutics from which I derive my term.

that it is used by Bourdieu, habitus is an acquired or ingrained disposition or practical sense rather than specific theoretical knowledge consciously articulated and applied by the agent involved, in this case the lawyer.[43] I accept the importance of this type of habitus, but I also want to expand the concept to include a greater degree of individual agency than I find in Bourdieu's work. In the sense that I am using it, habitus is not simply the ingrained dispositions that the lawyer brings to the field; it also includes a sense of the practice of the field that is acquired over time within the field and the use made of this practical knowledge.[44] Out of this practice and my involvement in the particular legal issues which arose for each board, I developed my sense or feel for how these particular legal administrative fields functioned, my sense or feel for what was possible, and what was not, for the boards in relation to particular legal issues, and my sense of how to approach particular issues which arose; I developed a particular store of practical knowledge and a particular legal habitus.[45]

This is not intended to discount the importance of legal training and knowledge of formal administrative law which precede any exposure to these particular legal fields.[46] Clearly

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[43]See the discussion in Chapter 1 at 25-26. Bourdieu uses habitus in a sense that is primarily pre-conscious and ingrained. It does not alter easily and it is these ingrained dispositions that condition agents to act in certain ways.

[44]While this in itself is not contrary to some of the ways in which Bourdieu talks of habitus being developed over a historical trajectory, it introduces a greater degree of individual agency and self-reflexivity than how the term is commonly used in Bourdieu's work where hâbitus refers to general dispositions related to structural determinants such as class and culture. My use of the feel of or sense for the rules of the game extends to an ability to sense the parameters of the field and of what is possible within the struggles between agents and institutions which occur within the field. While this sense cannot be fully articulated, it does involve an individual element of conscious agency and sense for the operation of the field which may not be fully compatible with the sense that habitus is used by Bourdieu. Unless otherwise specified, from this point forward when I use the term 'legal habitus' I am using it in my expanded sense.

[45]This summary description is not intended to ignore the effect of my prior legal education nor the effects of my cultural and professional position as a white, male, lawyer practicing in Edmonton, Alberta, during this period. Nor is it intended to ignore the many social, economic and cultural factors, including gender, which created the particular habitus and the cultural and legal capital with which I entered these fields. However, my focus in this thesis is on those aspects of habitus that were developed by practice within these particular legal administrative fields.

[46]The importance of the continued acquisition of legal knowledge and socialization in legal culture does not end once a lawyer becomes involved in these fields. This is an ongoing process. This thesis is not an

knowledge of the principles of formal administrative law and of the provisions of the Act and the relevant Plans and regulations discussed in chapter 2 is important since these form important elements in the structuring the parameters of the field and the rules of the game; also important is a sense of the evolving positions of the judiciary in respect to issues which arise in administrative law and in respect to the availability of judicial review for issues which arise within the field. These forms of knowledge and an ability to formulate arguments and to advocate positions are part of the legal habitus of the lawyer retained and are an important element of the service offered to the client. But more than this traditional legal habitus is involved in the sense of habitus that I wish to look at in relation to legal practice within these particular legal administrative fields.

Aside from formal legal knowledge, the marketing board lawyer needs to develop a feel for the operation of the legal administrative field in which the marketing board exists and for the shifts which occur within the field. The practical knowledge, or habitus, acquired must extend beyond knowledge of formal administrative law into a sense of the shifting relations between the various parties within the field and a sense of the larger historic, cultural, economic and political factors which impact on the field and which, over time, create the habitus and varying forms of capital which are important within the field. It must also extend to a knowledge some of the individuals involved in the field because the various agencies are not abstract entities; at any particular point in time they are made up of specific individuals. The attitudes and approaches of these individuals and the relations between them can have a significant impact on what happens within the field. While much of the structure of and many of the shifts that occur within the field are shaped by complex interactions between larger structural economic, political and cultural factors, in specific situations, the individual agents involved also have an impact.

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examination of how legal habitus is inculcated, nor is it a critique of the class, cultural, and gender implications of this habitus. The fact that it is not does not mean that I do not acknowledge the importance of such critiques; however, to focus on them would mean a different thesis.

I do not suggest that in each case either the marketing board or its lawyer has complete and accurate information concerning these matters nor do I suggest a marketing board lawyer consciously assesses each of these factors before providing legal advice on a particular issue. But as a participant within the field, the lawyer has a sense of these factors and a practical knowledge that they are significant in making decisions regarding how to deal with legal issues which arise and how to influence the outcome of those issues. Although this practical knowledge is not always consciously articulated, it forms an important part of the lawyer's feel for the realm of the possible within the legal administrative field. It is therefore appropriate to consider this type of practical knowledge as part of the lawyer's habitus.

While many of these questions may seem to be within the political or administrative fields, rather than the legal field, I hope that the previous chapters have shown how it is impossible to fully separate these fields when dealing with issues faced by the APPDC or the ACP within their legal administrative fields. There is no fine line between legal and administrative decisions within these fields. To practice law effectively within these fields requires this expanded form of legal habitus. In practice, a marketing board lawyer performs many roles some of which are as follows:

1. advising on specific issues that arise and on what responses are permitted to the marketing board under the Act, the Plan and the Regulations and on potential challenges to those responses;

2. providing legal arguments justifying and supporting actions taken or proposed to be taken by the marketing board;

3. providing advice concerning changes in marketing board policies, drafting new regulations as required or responding to proposed legislative or regulatory changes initiated by other parties within the field;

4. defending the position and authority of the marketing board in formal proceedings;

5. providing advice concerning the marketing board's relations with the Marketing Council, the Minister of Agriculture, the Government of Alberta and other relevant regulatory bodies and representing and advocating the marketing board's positions in ongoing contacts with these bodies;

6. maintaining ongoing communications with the staff and board of directors of the marketing board and with other individuals, agents and agencies within and outside the legal administrative field whose activities impact on the marketing board;

In the next two sections of this chapter I want to examine this expanded form of legal habitus further by looking at two particular issues, the role of interpretation and the role of the notional court, for legal practice within these legal administrative fields.

The Role of Interpretation Within the Legal Administrative Field

Chapter 2 described the process by which a marketing board is created under the *Marketing of Agricultural Products Act* and described how a Plan developed and approved by producers and the regulations made by the marketing board can be tailored to a particular industry. It described how these provisions establish some of the parameters of the relevant legal administrative field. As a creation of these legislative and regulatory provisions, a marketing board must have reference to them when decisions are being made concerning whether it can take a proposed course of action or when there is a challenge to its authority. Interpretation is central to the operation of the legal administrative field. What is generally at issue is what Bourdieu in his discussion on the legal field refers to as the power of law in *naming*. In his terms, the Act, the Plan and the Regulations are law as "the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone."[47] In this context, the power of naming includes the power to make

[47]While I have chosen to use Bourdieu's approach to the legal field, these points are not unique to him. This discussion of the nature of law shows considerable similarity to Weber's discussion of the issue of legitimacy in relation to his definition of law. M. Weber, *From Max Weber: Essays in Sociology* trans. and ed. by H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946). Similar points have been made by other legal theorists and by other sociologists in discussing and defining the nature of law and the manner in which it is accepted as legitimate by those who are subject to it. See Luhmann and

and enforce regulations, or as Bourdieu describes it, the power to *rule* via legislation, regulations and administrative measures. The legislation, the Plan and the Regulations purport to *name* who has the power to rule. These statutory instruments name those agents within the field who can speak in the name of the law and who can create and change the law. Those agents, such as a marketing board, who are named as having the power to rule can create law in the form of an "active" discourse which is able by its own operation to create its effects. This power forms a significant form of both symbolic and legal capital within the field which may be converted into other forms of capital such as marketing capital. This legal and symbolic capital names the marketing board as able to make and enforce certain rules within the field and gives it a power of active discourse to alter its own powers relative to other agents in the field. Possession of this form of symbolic and legal capital is a major defining feature of the board's position within the legal administrative field and in its interactions with other agents within the field. The question of when, and in what circumstances, the marketing board will be able to draw upon this legal capital is almost always relevant. The answer to this question is complicated by fact that the marketing board is not the only agent within the field who has this form of legal capital.

As chapter 2 made clear, there are other agents within the field such as the Marketing Council and the Lieutenant Governor in Council who also possess this power of naming and the power to rule and who, along with the Appeal Tribunal and the Minister of Agriculture, have powers which can restrict or negate attempts by a marketing board to exercise its power to rule and its resulting legal capital. The legal capital of the board is therefore determined not only by the power conferred by the Act, the Plan, and the Regulations, but also by the interactions between the marketing board and these other

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Habermas *supra* note 10; Hall and Hunt *supra* note11; also various writers in the works on legal realism, Marxism, critical legal studies, feminist legal studies, and critical race studies referred to in chapter 1.

statutory agents who are given the power to constrain it. In all of these interactions, questions of interpretation are significant. The legislation and the regulations purport to establish who has the power to rule. A sense of this is essential for a marketing board but the statute or the courts provide only limited, general, and abstract guidance. While they are the starting point for interpretation of what is possible within the field in relation to a particular issue, they do not make clear when this power to rule can be exercised, what constraints there are upon it, and when those constraints will be used to restrict the power of the marketing board.

In addition to the other statutory agencies who are given the power of naming and the power to rule under the Act, the Plan, and the regulations, there are other agents within the field such as producers or processors who may challenge the board's legal capital and its power to rule. These challenges can take various forms: appeals to the Appeal Tribunal; applications to the courts for judicial review; constitutional challenges; informal appeals to the Marketing Council, the Minister or the Cabinet asking them to invoke their powers; or refusal to comply with rules established by the board for the production and marketing of the regulated product.[48] In most of these cases the opposing parties seek to establish an interpretation of the power of naming conferred in the regulatory structure

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[48]The attempt by Gainers Inc. in 1985 to bypass the APPDC and to buy directly from producers was this type of challenge. It clearly violated the existing regulations and Gainers was asking producers to also violate the regulations. This was a direct and fundamental challenge to the existing system and to the authority of the APPDC as the sole authorized marketer for hogs sold for slaughter in the Province. It raised questions of how the APPDC should proceed to enforce its authority and in what forum. It also raised the question of whether the APPDC would be permitted by Marketing Council and by the Government to respond in such a way that it would use its powers if this raised the risk of forcing Gainers Inc. out of business.
Overproduction by roaster growers who were not satisfied with the roaster quota that they received was also an example of this type of challenge, although its scale was much smaller. The ACP had to look at the best method of proceeding to enforce its powers and this did result in legal action against at least one grower. The situation with the Hutterite colonies was less clearly a direct defiance of the system and more a case of a growing area of unregulated production which had been previously ignored but which had grown to a size where it had to be brought within the system. However, as noted in chapter 5, one factor in the approach of the ACP was a clear sense of the difficulties of simply trying to prohibit any of this production.

which supports the position that they are advocating and they seek to obtain the support of those statutory agents who may have the power to enforce or make authoritative, the interpretation which they are advocating. The outcome of the struggles initiated by these challenges can alter the legal capital of the marketing board and reshape the legal administrative field within which it operates.

A major element in these struggles within the legal administrative field is therefore the determination of who can provide or impose an authoritative interpretation of the marketing board's powers to rule in a particular instance which will be accepted or which can be imposed on other agents within the field. Such a determination is in itself an act of naming which further defines or alters the parameters of the legal field and the respective capital of various agents involved in the struggle. Struggles of interpretation involve both the question of determining who can provide an authoritative interpretation and the process of attempting to persuade the individual or agency who is determined to have this power of naming that a particular interpretation is to be preferred. The marketing board lawyer is generally directly involved in such struggles of interpretation and it is central to the role that he or she performs for the marketing board.

As in all matters of interpretation, there is a spectrum within the legal administrative fields within which the APPDC and the ACP operate between matters which are widely accepted as beyond dispute and matters which are the subject of conflicting interpretations.[49] Some of the legal parameters of the field and the realm of the possible

[49]The determinacy or indeterminacy of the law in general and of principles or canons of interpretation in particular is a subject which has generated many theoretical approaches and countless debates. There is no scope for a full discussion of this issue. My own approach, coloured by both my experience in practice and my own philosophical and political leanings (which themselves are influenced by a trajectory involving elements of: Legal Realism - see *American Legal Realism* and in particular K. Llewellyn on Canons of Construction for Statutes at 228; Critical Legal Studies - see Kelman, Kairys, Boyle; Legal Pragmatism - *Pragmatism in Law & Society;* Sociology of Law (including Marxist critiques and Hunt in particular); and Feminist Legal Studies - see Smart, MacKinnon, Minnow; is that there can be conflicting legal interpretations on almost any issue but that this does not mean that any legal interpretation offered is necessarily equal credible. In particular historical, social, political legal and cultural contexts some areas

are broadly accepted within the interpretive community[50] and are therefore 'clear' within the field. Thus no one within the field would suggest that the APPDC has the power to

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of the law will be accepted as relatively clear while others will be a matter of contestation and struggle within which choices must be made and justified by the parties involved. The fact that the contexts, the choices and the justifications may alter over time and are influenced by factors not recognized by a strict legal formalism does not mean that this process is a sham or that it is unimportant but it does mean that any universal claims must be viewed with scepticism and that law must be recognized as a social construct and not a fully objective search for some underlying truth. Thus any interpretation is influenced by factors which extend beyond those typically recognized by the law in its public discourse, and any position taken can be challenged, but the internal habitus and procedures of the law are also important and perform a significant function in the process of interpretation. For further discussion on this point from a less distinctly legal perspective see the works on objectivist and situated perspectives cited *supra* notes 2 and 3.

[50]I take this term from the work of Stanley Fish ("Is There a Text in This Class?" in H. Adams & L. Searle, eds., *Critical Theory Since 1965* (Tallahassee: Florida State University Press, 1986) 52 and *There's No Such Thing As Free Speech: And It's A Good Thing, Too* (New York: Oxford University Press, 1994). Fish suggests that any act of interpretation takes place within a particular local structure or community which has a current horizon of understandings or a set of shared assumptions or meanings. Within such communities, Fish suggests that the following occurs:

> We see then that (1) communication does occur, despite the absence of an independent and context-free system of meanings, that (2) those who participate in this communication do so confidently rather than provisionally (they are not relativists), and that (3) while their confidence has its source in a set of beliefs, those beliefs are not individual-specific or idiosyncratic but communal and conventional (they are not solipsists). (*Is There a Text in this Class?* at 532-533).

Therefore within a particular context and community where certain interpretive conditions are accepted, there will be some uproblematical instances of interpretation in which all members of the community agree. What is 'true' becomes what is accepted as true by a particular interpretative community. If the horizon of understandings of an interpretative community undergoes a shift, the conclusions of the community as to what is 'true' may also alter.

Fish is not concerned by the relativistic implications of this "inherent indeterminacy of interpretation" because he sees it as without practical consequences:

> It may be that at a *general* level interpretation and language are radically indeterminate because every interpretation (decision, specification of meaning) rests on ground that is itself interpretive and therefore changeable; but since life is lived not at the general level but in local contexts that are stabilized (if only temporarily) by assumptions already and invisibly in place, the radical indeterminacy of interpretation is without the practical consequences both feared and hoped for it.
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> That is, although the logic of a decision can always be undone by a deconstructive analysis of it or by the elaboration of a more powerful logic, until that happens (and in some cases it may not happen for a very long time, long enough to feel like forever) the decision is a determinate as one would like and has all the consequences of a decision that was absolutely determinate. People will act on it, be influenced in their calculations by it, cite it, invoke it, believe it.... To put it another way, everything is always determinate and indeterminate at the same time: interpretation is always determinate in that within the context of its occurrence the meanings it yields will seem obvious and inescapable; and interpretation is always indeterminate because meanings thus yielded can always be dislodged by successfully re characterizing the context in which they emerged. (*There's No Such Thing As Free Speech: And It's A Good Thing Too* at 190)

Fish also suggests that the existence of a shared horizon of understanding does not mean that there is no room for debate or change within the interpretive community since every horizon of understanding bears within itself the dynamics of its own alteration:

issue quota or that either the ACP or the APPDC can control the activities of retailers. Many other parameters are also relatively clear to the parties within the field, although their specific application to a particular situation may still give rise to controversy. At a particular point in time within the field, there is an existing and generally accepted sphere of activity where the marketing board enjoys considerable autonomy in the exercise of its power to rule. Most daily transactions will occur within this generally accepted area. However, where there is less consensus within the field about other legal parameters or where new situations or challenges arise which have not been dealt with before, the issues of interpretation become more complex and more subject to struggles of interpretation. It is in these struggles of interpretation and in the shifts which occur in what is accepted or imposed in respect to the power to rule that many of the major dynamics of relations within the field occur and it is an area in which lawyers play a significant role. One aspect of this role of lawyers and law in these struggles of interpretation that I want to consider is the role of the "notional court."

> What this means is that there is never a situation in which there is "no room for hermeneutics" (Dallmayr quoting Gadamer), that is, no room for the interpretive maneuvering that produces change; since the structure of any situation or of any system of ideas is one of layered dependencies and coordinations, there are innumerable nodal junctures at which a shift in emphasis and pressure can lead to systemwide readjustments or even a systemwide breakdown. As I have put it elsewhere, (*Doing What Comes Naturally*), a horizon of understanding is not a monolithic unity of which one asks, how can it change? Rather, it is itself an *engine* of change, a complex mechanism whose every exertion is simultaneously a self-alteration. (*There's No Such Thing As Free Speech: And It's A Good Thing Too* at 189)

In quoting Fish extensively I do not mean to suggest that I accept his position uncritically. The attempt to define what constitutes and interpretive community has its own problems as does a consensus based concept of truth. In using Fish, I make only the relatively weak assertion that despite the fact that it may be impossible to establish philosophical foundations for what constitutes the 'true' interpretation, in particular historic and social contexts, there is a considerable degree of consensus on some issues of interpretation. Although this can perhaps always be problematized, in practice it is not. Once again, this does not discount the value of attempts to problematize what is accepted as obvious or apparent; I simply accept that in particular situated perspectives and interpretative communities, this is more of a philosophical exercise, than a daily practical experience.

The Importance of the Notional Court

A significant part of the role of the marketing board lawyer is the ability to apply the principles of formal administrative law and statutory interpretation to situations which are unlikely to ever result in judicial proceedings but in which statutory instruments are being interpreted. The central importance of the role of interpretation to the practice of administrative law is noted by Graham Steele in his article referred to in the first chapter. Steele notes that in many cases, administrative lawyers seek to invoke a concept which he calls the 'notional court.' Steele develops this term to emphasize the importance of interpretation in administrative law and suggests that the test is often expressed in terms of what a notional court would likely decide in interpreting the words of a particular statutory instrument. I find this term very useful in several respects: first, it points out that in the context of a particular agency, the perceptions that the participants in the field have of the position of a notional court often has far greater impact than actual interventions by the courts; second, it shows that even though very few administrative actions actually are reviewed by the courts, the influence of the courts extends far beyond the few cases which are actually decided; third, it conveys something of the sense that within many struggles of interpretation the possibility that one of the parties might seek judicial intervention and thereby translate the notional court into an actual court remains a factor of considerable weight;[51] and fourth, it gives some sense of why lawyers have a certain degree of legal and symbolic capital in such struggles even in the absence of any formal proceedings - they are recognized as having a training and an association with the courts which makes them privileged interpreters of the position of the notional court. This gives them a form of legal and symbolic capital in respect to struggles of interpretation which is not possessed by agents who are not lawyers. The use of legal interpretations offered by lawyers becomes

[51]These first three points have all been discussed in chapter 6 where various specific issues faced by the APPDC and the APC were discussed.

an important, although seldom conclusive, part of struggles of interpretation within the field.

Most agency lawyers spend far more time invoking the notional court than they do appearing before actual courts. This was clearly the case within the legal administrative fields of the ACP and the APPDC. When an actual court speaks on an issue of interpretation of the words of a statutory instrument, its power is significant and its interpretation forms an act of naming which is highly authoritative within the field.[52] The court ranks high in the hierarchy of interpretation within the field but while it is always in the background in the form of the notional court, its actual presence is seldom invoked. Very few issues of interpretation actually proceed to court; almost all such issues are dealt with inside the field without any intervention from the courts. Therefore, most decisions on contested interpretations are not being made by judges or by individuals trained as lawyers and most are not made in any type of formal proceeding. Although lawyers and the concept of the notional court have a major role where there are issues of statutory interpretation, most of this function is not carried out within a traditional judicial or quasi-judicial field and considerations other than those recognized in formal administrative law are important in determining the outcome of these issues.[53]

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[52]I do not suggest by this that issues of interpretation do not arise over what the court may have meant. However, where the court makes a choice on conflicting interpretations of words in a statute, this may resolve a particular dispute and establish an authoritative interpretation for the issue under consideration. The decisions of the courts in *Wayvel* and in *Gainers Inc.* which were described in the last chapter, significantly increased the legal capital of the APPDC by affirming positions which had been taken by the APPDC but which were questioned by various processors and by the Marketing Council. The increased legal capital afforded by the decisions made it much harder for Marketing Council to suggest that the APPDC was acting outside its authority under the existing Plan and regulations.

[53]This does not mean that concepts associated with formal administrative law have no impact in these non-judicial situations. Non-lawyers often reflect what are commonly discussed in administrative law as 'lawyers values.' (See J. Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351; H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall Law Journal 43; and the general discussion and critique of formal administrative law in chapter 1). As the example of the APPDC and its relations with the Marketing Council indicated, the Marketing Councils of the 1970s and 1980s had a restrictive view of the scope of the discretion conferred upon the APPDC that would have made Dicey or Lord Hewart proud. When these provisions were considered by the courts in the *Wayvel* and *Gainers Inc.* decisions, the courts found a much greater degree

Who Interprets "the Law"?

Lawyers may have a significant influence in disputes concerning interpretation within the legal administrative field,[54] but the power to make decisions concerning such disputes resides primarily with agencies such as the Marketing Boards, the Appeal Tribunal, the Marketing Council, and the Minister and Department of Agriculture. The individuals who occupy these positions or who comprise these agencies are not, for the most part, legally trained, and have, at best, ambivalent feelings concerning lawyers, courts, and the legal system.[55] Yet these individuals and agencies are often faced the need to take action and make decisions in situations where there are competing interests and conflicting legal opinions on issues of interpretation. The decisions made and the actions taken by these individuals and the agencies to which they belong, determine many of the parameters of what is within the realm of the legally possible within the particular legal administrative fields of the APPDC and the ACP. These decisions are therefore "legal" and are "law" in the sense used by Bourdieu even though the persons involved are neither lawyers nor judges and even though the decisions made are often not made in formal proceedings of

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of discretion conferred by the Act and the Plan than the restrictive perspective favoured by the Marketing Council. On a similar point, the Appeal Tribunal has often shown a concern for the rights of individual producers and a restrictive attitude toward general exercises of discretion by marketing boards which again clearly reflects legal centralist assumptions and an approach to the rule of law which is closer in spirit to Dicey than to the positions which are now taken by the courts.

[54]This power is greatest in relation to the agency which is a client of the lawyer. It diminishes in force when the opinion is given to other agents who are often receiving advice and opinions from their own lawyers. Various lawyers within the field will be recognized by agents within the field as having greater or lesser legal capital but this relationship is complex and few generalizations can be made. Generally, in any struggle for interpretation, conflicting legal opinions can be found. This increases the cynicism and distrust felt by many non-lawyers for both lawyers and legal opinions. Once again the situation is complex because this distrust co-exists with the significant legal and symbolic capital possessed by lawyers on matters of statutory interpretation. It also interacts with the fact that many of the non-lawyers are even more hostile to legislative intervention in the market than a typical legal centralist position. Lack of legal training does not mean that the assumptions held can be assumed to be 'bureaucratic' or 'administrative' rather than 'legal' to use the dichotomy which is often established.

[55]An example of this attitude was discussed in chapter 5 when a major meeting between the Ministerial Task Force and the Board of Directors of the APPDC was held without staff or legal counsel on the direction of the Ministers involved. While legal counsel had undoubtedly been involved on both sides in preparing for the meeting, their presence at a meeting intended to reach resolution of various issues was perceived as undesirable.

any kind[56] and even though some of the factors which lead to or which influence these decisions would not be recognized as legally relevant in court.[57] A sense of how these individuals and agencies will respond to the issues of interpretation which arise within the legal administrative field is therefore essential to any attempt by a marketing board lawyer to assess what is within the realm of the possible for the marketing board in relation to a particular issue. Legal knowledge and skills and the ability to invoke the notional court may be important parts of the lawyer's legal and symbolic capital, but they are not sufficient in themselves to predict how many of these struggles of interpretation will be resolved or to influence the outcome of the struggle. Interpretation and advocacy in this context requires more than formal legal knowledge and this additional knowledge forms part of the habitus acquired by the lawyer acting within the fields for an extended period of time.

In making these assessments and in taking action based upon them, questions of the habitus of and the various forms of capital possessed by the individuals, agents or agencies being considered are often of greater significance than particular principles of statutory interpretation or arguments concerning the position that would be taken by the notional court. It matters who has access to the Minister and who does not. It matters who the Minister takes advice from in relation to farm marketing issues.[58] The habitus of the

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[56]Proceedings before the Appeal Tribunal (or before 1987, the Marketing Council sitting as an appellate body) are formal administrative proceedings. But as the previous chapters have indicated, most of the specific issues dealt with by the APPDC or the ACP either do not end up in formal proceedings or are not ultimately resolved in the formal proceedings (either judicial or administrative) which are initiated.

[57]The major point is that law in an expanded pluralistic sense is being made and practiced by non-lawyers as well as lawyers and that some of this law is determined and practiced based on factors and assumptions which may not fully correspond with the principles of formal administrative law.

[58]This of course raises the question of what relationship exists between the Minister and the employees of the Department of Agriculture. Since the tenure of many senior civil servants exceeds that of particular Ministers, the attitudes and approaches of these individuals is also important. In Alberta throughout the period discussed there has been very limited sympathy for marketing boards within the Department of Agriculture and, as discussed in the previous chapter, in the case of the APPDC relations with many senior members of the Department were poor in relation to marketing issues as opposed to research or production or product promotion issues where there was a somewhat greater degree of cooperation.

Marketing Council and the Minister of Agriculture when they are faced with a dispute involving the marketing board or a request for regulatory change can be critical.[59] So, too, can the various forms of capital which are possessed by the agencies and agents involved in the dispute.[60] As pointed out in chapter 2, the Act provides little guidance on how decisions concerning a particular issue of interpretation will be made or on how generally worded statutory provisions will be applied to specific factual situations; it provides a framework which can be very flexible or rigid depending upon how the supervision of Marketing Council is exercised. In addition to the habitus of the staff and members of the Marketing Council concerning the marketing legislation, this will depend upon what formal or informal instructions the Marketing Council receives from the Minister, upon the nature of the relationships between the marketing board and the Marketing Council, and upon whether the marketing board can obtain access to and redress from the Minister when it has disputes with the Marketing Council.[61] Information concerning the attitudes (habitus) and relative power (capital) of the individuals and agencies involved is therefore a critical element in assessing the possibilities and consequences of proposed actions. As

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[59]In making this statement, I am not suggesting that the analysis is actually performed by the lawyer using Bourdieu's terms. What I am suggesting is that part of the administrative lawyer's practice is making these assessments of the potential reactions of the staff and members of Marketing Council and of the Minister of Agriculture and his or her advisors. These assessments can be usefully described in terms of making assessments of habitus, even though the term itself and Bourdieu's work in general, are unknown to the lawyer and the agents involved.

[60]The nature and importance of various types of capital possessed by agents within the field has been discussed at length in previous chapters. Some of the types mentioned have included: political capital, marketing capital, legal capital, symbolic capital, and economic capital. I do not intend to repeat this discussion. The point made here is that an assessment of the relative capital held by the various parties to the dispute is part of the practice of legal interpretation within the field. The comments in the previous footnote concerning habitus are also relevant in relation to this discussion of capital.

[61]Of course these factors will be influenced and shaped by the larger historical, economic and political factors described in the preceding chapters. The habitus and the capital of the agents within the legal administrative field are to a large extent the product of these factors considered over a period of time. However, in this chapter I am concentrating less on the source of these elements and more on the practical assessment of the habitus and capital which exists at a particular point in time and that forms part of the legal practice of the marketing board lawyer. In relations with Marketing Council, my experience was that considerations of the type described had a greater effect on the approach of Marketing Council than did specific legal arguments. In this sense, political capital mattered more than legal capital in the form of particular arguments or threats of litigation.

discussed, in this process of assessment, informal communications have a major, although often unrecognized, role. Such information is part of the political capital possessed by various agents within the legal administrative field but it is also an important element of legal capital and of the sense of the possible developed by the marketing board lawyer.

Conclusion

This chapter has made use of a modified form of Bourdieu's concept of habitus to examine certain aspects of the legal administrative fields of the APPDC and the APC from the perspective of a lawyer acting for these marketing boards. In the discussion of the importance of the role of interpretation within the legal administrative fields I have tried to show how this process is central to the dynamic of the field and that lawyers have a significant but not exclusive or determinative role in this process. In examining the struggles for interpretation which occur within the fields I have illustrated some of the relationship between the formal administrative legal habitus that a lawyer brings to the field and the additional aspects of this habitus that must be developed in practice to acquire a sense for the realm of the legally possible within the fields in relation to particular issues. This analysis also establishes some of the limitations of a formal administrative law approach for analyzing and predicting the resolution of legal issues which arise within the field. I have also tried to illustrate the vital, yet often invisible, role of informal communications in the relations which structure the fields and in legal practice as a participant within the fields. I have suggested that the importance of informal communications is one of the major reasons for the gap which exists between the theory of formal administrative law and the experience of practitioners. I have also looked at the importance of the habitus of individuals within the field and their relations with other individuals and have examined some of the issues which arise from the perspective of a practitioner in relation to conflicts between a marketing board and its regulators and the effects of such a conflict on the realm of the legally possible for the marketing board in

question. This discussion of practice within these fields from the perspective of a marketing board lawyer and the specific issues discussed in chapter 5 illustrate some of the aspects of the fact that legal practice within these fields involves far more than the application of the principles of formal administrative law. In Arthur's terms much of the law which is practiced is practiced "Without the Law" and a legally pluralist perspective provides a more effective means of analyzing the dynamics of the operation of these legal administrative fields than does a legally centralist approach.

For me, the use of Bourdieu's concepts of field, habitus and capital helps to articulate and give a theoretical structure to a process and a series of practices that are otherwise hard to identify or study. What is significant for the marketing board lawyer is that the process of interpretation and practice within the field involves all of the elements that have been discussed in this chapter and in the preceding chapters even though this process may not be articulated or consciously developed by the lawyer in the fashion used in this thesis. This is where the sense of habitus is so significant. But a greater sense of the larger structural parameters of the fields discussed in the earlier chapters is also significant even if it is seldom articulated in these terms by the parties. The impact and shifts of these larger economic, political and social fields have a major influence in structuring the fields in question and in creating and shifting the habitus and capital of the various participants in the field. The intersection of the principles and habitus of formal administrative law, the structure provided by the relevant Act, Plan and regulations, and the respective capital and habitus of all the individuals, agents, and agencies within the field all interact to form the legal administrative fields in question and these complex interactions are what structure the fields and shape the shifts which occur within them. In these fields a clear demarcation between the practice of law by lawyers and the administration of the system by administrators is not only inadequate, it is misleading because it implies that such a clear separation can be made. In the struggles of interpretation which occur within these legal

administrative fields, such an approach simplifies and renders invisible much of the complex series of interactions in which the legal practitioner is a participant and which create the field in which he or she practices.

The legal practitioner who represents a marketing board within one of these legal administrative fields develops a sense of practice in which he or she makes assessments of the nature suggested by Bourdieu's approach on a daily basis although without being conscious of the theoretical structure that Bourdieu has developed or without necessarily having a sense of an overall structural framework for this practical knowledge or art. A major purpose of this thesis has been to develop a framework for considering that practice in terms of such a broader theoretical framework. While this process can only be partial within the confines of this thesis, the approach used does capture some of the aspects of legal practice within these fields that are ignored by an approach based on formal administrative law. The heuristic value of this approach in relation to the legal issues faced by the APPDC and the ACP and in relation to the internal perspective of a lawyer acting for these marketing boards, provides a useful perspective and a valuable supplement to a more traditional approach.

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Appendix

Marketing Boards in Canada: A Legislative and Constitutional Chronology

Date	Event
1922	The first Australian marketing legislation, the Queensland Primary Products Act of 1922 is passed. In the next several years various statutes are passed by both the Commonwealth and various states in Australia and similar legislation is also passed in New Zealand.[1]
1927	The *Produce Marketing Act,* Statutes of B.C. (1926-27), c. 54 is passed. This is the first compulsory marketing legislation passed in Canada (aside from temporary war measures regarding wheat taken by the Federal government during World War I) and it is patterned on the Australian and New Zealand legislation. Its intention is stated to be to protect the economic interests of producers by ensuring "orderly marketing" of their products and it provides that once a marketing regulation for a product was introduced, it was compulsory for all producers. The Act established a Committee of Direction for a particular local area of the province which had the power to regulate all aspects of the marketing of "all tree fruits and vegetables (including tomatoes and melons)," to set prices, and to collect levies to cover operating costs and to establish an equalization fund to equalize returns to producers selling into different markets at different periods of the year.
1929	The *Dairy Products Sales Adjustment Act,* Statutes of B.C. (1929), c. 20 is passed. This Act is intended to provide a means to pool the returns from sales of fluid and manufactured or industrial milk among all producers in the Vancouver area milkshed. It is designed to relieve congestion in the fluid milk market which had been an ongoing concern. An Adjustment Committee is created for the specified region which has the authority to equalize returns to dairy farmers by means of an "adjustment levy" which is taken from producers who sell a higher proportion of their milk in the fluid market and paid to producers who sold more milk into the industrial market at lower prices. The Adjustment Committee is also given the authority to impose and 'expenses levy' on all dairy farmers to finance its operating costs.

[1]See Hoos, Appendix 305-306 for a brief description and history of both State and Commonwealth marketing legislation in Australia. See Veeman, in Hoos at 101 for a description of the New Zealand experience.

1931 *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction,* (1931) S.C.R. 357. The Supreme Court of Canada nullifies the *Produce Marketing Act* on the grounds that it interferes with interprovincial trade and is therefore beyond the legislative authority of the province. The evidence established that in the case of the tree fruit produced in the interior region of B.C. a substantial portion, perhaps as high as 90%, of the product was marketed outside the province. The Supreme Court held that the Act invaded the Federal jurisdiction in respect to trade and commerce by attempting to control the interprovincial marketing of the regulated product. It also held that the legislation was ultra vires because the equalization levy and the operational levy were both a form of indirect taxation and therefore beyond provincial jurisdiction.

In re The Grain Marketing Act, 1931, [1931] 2 W.W.R. 147 (Sask. C.A.). The Court held that *The Grain Marketing Act, 1931* Statutes of Saskatchewan 1931, c. 87 was ultra vires. This statute attempted to turn the Saskatchewan Wheat Pool into a compulsory grain marketing cooperative to be called the Saskatchewan Grain Co-operative. This entity was placed in possession of all the assets, rights and liabilities of the Saskatchewan Wheat Pool and it was given the exclusive right and power to sell as 'agent' for the growers and destined to be marketed in the province or elsewhere. All growers were made members of the co-operative and were required to deliver all grain to the co-operative to be sold by it. The Court of Appeal had no difficulty in determining that since the vast majority of the grain was sold in export markets, the Act was ultra vires. While the *Lawson* case was referred to, it is clear that the Court would have had no difficulty in reaching the same conclusion in the absence of the case.

Agricultural Marketing Act, 1931 (21 & 22 Geo. V), c. 42 establishes the first compulsory marketing legislation in Great Britain. Under the provisions of the Act, compulsory marketing schemes can be established for an agricultural product provided that they are approved by a vote of the producers of the product.

1932 *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.,* [1933] 1 D.L.R. 82 (P.C.). The Judicial Committee of the Privy Council determines that the *Dairy Products Sales Adjustment Act* is ultra vires because both the adjustment levy and the expenses levy impose an indirect tax.

Manitoba enacts a Dairy Control Act which establishes a provincial dairy control board following the public utility model. This legislation contemplated a more direct government intervention in appointing the members of the dairy control board, establishing milk prices, controlling the number of milk distributors and exercising general supervisory powers . In provinces, such as Alberta, which followed this model, milk marketing regulation evolved on a similar but separate path from other farm products which were covered under the general marketing legislation. Milk prices were regulated more in the manner of a public utility and in Alberta and Manitoba milk prices for consumers were set by the Public Utilities Board.

1933 *Agricultural Marketing Act, 1933* (23 & 24 Geo. V), c. 31 amends and extends the 1931 legislation linking marketing schemes established under the Act to import controls. All but one of the British Marketing Boards is established under this Act.

1934 *The Natural Products Marketing Act, 1934* Statutes of Canada 1934, c. 57 is passed. This is the first Federal marketing legislation and it was patterned on the British Marketing Acts of 1931 and 1933. A Dominion Marketing Board was created to administer the Act and this Board had wide powers to regulate the marketing of natural products including the time and place of marketing and control of the quantity and quality marketed and the ability to form pools and the power to levy equalization fees. The Dominion Board was authorized to delegate its powers to local commodity boards organized in defined areas. These local boards through the Federal authority were authorized to interprovincial and export trade in their product and, through Provincial authority, they were to be authorized to regulate and control intraprovincial trade. To be approved under the Dominion Act, the principal market for the product was to be outside the province or some part of the product produced was to be exported. The Dominion Board was further authorized to regulate or control imports although this power was never actually used.

All nine provinces pass legislation giving effect, in their respective jurisdictions, to the provisions of the Dominion Act and its regulations. The marketing schemes established operated in specific local areas to deal with commodity programs affecting specific groups of producers in these areas. Approximately 22 natural product marketing schemes are approved in the next one and a half years, primarily in Ontario and British Columbia.

1935 The Canadian Wheat Board is formed as a voluntary agency, to offer a marketing alternative for wheat farmers at a guaranteed minimum price. This is seen by the Federal government as a temporary measure.

1936 *Reference re the Natural Products Marketing Act, 1934,* (1936) S.C.R. 398. The Supreme Court held that the Act was ultra vires because it infringed upon Provincial jurisdiction over matters of property and civil rights and over individual forms of trade and commerce confined to a province. The Federal power over trade and commerce and over export and interprovincial trade could not be used to regulate trade which is entirely local and of purely local concern.

The day after the announcement of the Supreme Court decision, British Columbia declares in force its 1934 Act, *The Natural Products Marketing (British Columbia) Act, 1934* Statutes of British Columbia 1934, c. 38 as amended by the *Natural Products Marketing (British Columbia) Act Amendment Act* Statutes of B.C. 1936, c. 34 and the *Natural Products Marketing (British Columbia) Act Amendment Act (Second Session)* Statutes of B.C., 1936, (Second Session) c. 30. The general format of the legislation is very similar in structure, terms and procedures to the Dominion Act it was intended to complement, taking into account necessary changes to confine jurisdiction to the confines of the province and deleting references to the control of export trade and to equalization levies.

The general structure of the Act permitted the Lieutenant-Governor-in-Council to establish a central marketing board to establish or approve schemes for the control and regulation in the Province of the transportation, packing, storage, and marketing of any natural products, to constitute marketing boards to administer such schemes and to vest in the boards any powers considered necessary or advisable to exercise these functions. "Marketing" and "natural product" were defined terms under the Act and the Act provided in s. 5 for a series of powers which could be delegated by the Lieutenant-Governor-in-Council to the boards created.

1937 *A.G. B.C. v. A.G. Can.*, [1937] 1 D.L.R. 691 (P.C.). The decision of the Supreme Court was considered and approved by the Privy Council. B.C. had specifically appeared before the Privy Council to defend the legislation and to point to its own 1934 legislation designed to create an effective regulatory scheme through Federal - Provincial co-operation. The Privy Council recognized this concern but stated at 694-695:

> The Board was given to understand that some of the Provinces attach much importance to the existence of marketing schemes such as might be set up under this legislation; and their attention was called to the existence of provincial legislation setting up provincial schemes for various provincial products. It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be achieved by co-operation. But the legislation will have to be carefully framed and will not be achieved by either party leaving its own sphere and encroaching on that of the other.

The Dominion Act was repealed by the House of Commons in the spring session of 1937 and no legislation was introduced to take its place. Most of the provincial legislation enacted to complement the Federal Act died with the repeal of the Federal Act. New Acts are passed in Ontario and New Brunswick modeled on the legislation previously passed in British Columbia. The intent of the provincial legislation is to preserve many of the marketing schemes created under the Federal Act chiefly in specific sectors of the fruit and vegetable industry and in the dairy industry where a separate act was not established.

1938 *Shannon v. Lower Mainland Dairy Products Board,* [1938] 4 D.L.R. 81 (P.C.). The Privy Council approves a decision of the British Columbia Court of Appeal (*Re Natural Products Marketing (B.C.) Act,* [1937] 4 D.L.R. 298) which dismissed a challenge to the B.C. marketing legislation. These cases, particularly the Court of Appeal decision, reviewed the provincial legislation in considerable detail. They held that the regulation of a particular trade within the confines of the province is within provincial jurisdiction. They also distinguished the raising of revenue by licenses or service fees from the levies found to be ultra vires as indirect taxation in earlier cases. The Privy Council specifically differed from the more narrow position taken by Duff, J. in the *Lawson* case on the issue of using licenses for the purposes of raising revenue to finance the operation of the regulatory scheme holding that such fees could be justified under either the licensing power of s. 92(9) of the B.N.A. Act or as service fees under the more general powers of s. 92(13) and (16). Both the Court of Appeal and the Privy Council rejected suggestions that the Act contemplated improper delegation of powers to a subordinate body. Both levels of court expressly noted the close similarity between the Act and the corresponding statutes in Great Britain and Northern Ireland and referred to a decision of the House of Lords on the Northern Ireland statute (*Northern Ireland Milk and Milk Products Act, 1934 (c. 16); Agricultural Marketing Act, 1931 (Imp.) c. 42; Agricultural Marketing Act, 1933 (Imp.) c. 31; Gallagher v. Lynn,* [1937] 3 All E.R. 598).

Although the *Shannon* decision recognized the validity of licensing and service fees to raise revenue, the precise distinction between valid license or service fees and invalid levies as indirect taxation was difficult to draw. The absence of any power to regulate product in which a significant portion of the market was interprovincial or export meant that the provincial legislation was only enforceable in cases where the market was purely intraprovincial.

1940 *Re Sheep and Swine Marketing Scheme (P.E.I.)* [1941] 3 D.L.R. 569 (P.E.I. S.C. in banco). An attempt by the province to establish a scheme to regulate the marketing of sheep and swine under an act virtually identical to the B.C. Act upheld in *Shannon* was held to be ultra vires. While the Act itself was not challenged, the scheme developed was ultra vires because the court held that its major concern was the control of the marketing of live hogs to markets outside the province; there was only one packing plant in the province and it handled only a very small proportion of the hogs produced in the province.

1941 *Lower Mainland Dairy Products Board et al. v. Turner's Dairy Ltd.,* [1941] S.C.R. 573. A series of Orders made by a Local Board established under a milk marketing scheme established in B.C. by Order-in-Council in 1939 (after the *Natural Products Marketing (B.C.) Act, 1934* as amended had been upheld by in the *Shannon* case) were declared ultra vires by the Supreme Court. The orders had appointed a specially established corporate body as the sole 'agency' through which all milk produced in the lower mainland could be marketed and this company was given the sole power to sell to dairies and manufacturers. The manner of calculating returns to producers had the effect of equalizing returns between the fluid and industrial milk markets for all producers. All levels of courts rejected this scheme as a colourable device designed to avoid the effect of the *Crystal Dairy* decision which had prohibited the equalization of returns as indirect taxation. A useful history of the dairy problem in B.C. is given by Taschereau J. at 578-580.

While fluid milk (milk for human consumption in fluid form) could clearly be regulated provincially, the situation was less clear for industrial milk (milk produced for use in the manufacture of milk products such as butter, cheese, powdered or evaporated milk or other milk products) which could clearly be transported longer distances and exported or traded interprovincially. Because the fluid milk market operated at a local price which was substantially higher than the price paid for industrial milk which trades at world, rather than local, prices, the premium paid for fluid milk has meant that there is always a surplus of fluid milk available for the local market. Attempts to deal with this surplus issue and the relationship between the two milk markets have shaped the development of the Canadian Dairy Industry. Provincial attempts to regulate or control the industrial milk market and to develop plans to equalize returns for producers who sold surplus fluid milk, either to local processors or into the export market remained an area fraught with constitutional difficulty. Yet such efforts were necessary to avoid disruption of the fluid milk market.

1943 In what the Federal government considers a temporary wartime measure, the Canadian Wheat Board is made a mandatory monopoly marketing agency to purchase and sell all wheat produced in a specifically defined region comprising the prairie provinces and the Peace River block of British Columbia. The Wheat Board is the first compulsory marketing board operating across provincial boundaries although it is regional rather than national in scope. It is involved in all aspects of grain marketing (barley and oats are added to its authority in 1949). It operates price pools to equalize returns to producers on an annual basis and it establishes a quota system controlled through permit books which allow it to regulate the type and quantity of grain entering the system. The Board also controls grain transportation and railcar allocation in consultation with the railways. It negotiates all sales of wheat into the export market either directly or using private companies as export agencies.

Unlike other marketing legislation, the constitutional validity of the Canadian Wheat Board was not immediately challenged or made the subject of a constitutional reference. This was likely due to a number of factors: the bulk of the grain trade was clearly concerned with export; the mandatory powers were first established in wartime; previous cases and the federal use of the general declaratory power in relation to grain elevators and the *Canada Grain Act* had established the Federal authority in relation to the regulation of various aspects of the grain trade; and there was widespread industry support for the establishment of the Board from producers, their marketing organizations (the Wheat Pools), and the provincial governments involved. When the constitutionality of the Canadian Wheat Board was subsequently challenged, its jurisdiction was upheld by the Supreme Court.[2]

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[2]*Murphy v. C.P.R.,* [1958] S.C.R. 626 at 642. See also *R. v. Klassen,*(1959) 20 D.L.R. (2d) 406 (Man. C.A.); leave to appeal refused [1959] S.C.R. ix; *R. v. Thumlert,* (1959) 28 W.W.R. 481 (Alta. C.A.). The Alberta Barley Commission and the Western Wheat Growers Association together with various individual producers are currently challenging the constitutionality of the Wheat Board monopoly in Federal Court under various heads of the Charter of Rights. The trial which is anticipated to last several weeks commenced in Federal Court in mid October, 1996. There have also been numerous instances of prosecutions in the last several years of farmers trucking their own grain across the border into the US. to market in violation of the Wheat Board's monopoly. The Alberta government has also announced its intention to challenge the monopoly by using the power of the provincial crown to assist producers in marketing grain in the US. but the announced court action to determine the validity of this procedure has not yet been commenced. In late September, the Federal Minister of Agriculture announced that although certain modifications in the structure and mandate of the Wheat Board would be made, the monopoly position for export sales would be maintained. In addition to domestic challenges, there have been indications that the Americans intend to raise the issue of the Wheat Board as an unfair trade practice under NAFTA and the World Trade Organization.

1949 *The Agricultural Products Marketing Act* (Canada) Statutes of Canada 1949 (1st Sess.), c. 16 is passed. This Act provided for the delegation of federal powers to provincial marketing boards to authorize the provincial marketing boards to regulate marketing in interprovincial and export trade in relation to product produced in the province within the area to which a marketing scheme applied. The form of authorization contemplated by the statute authorized the provincial boards to exercise the same powers that were granted under their provincial legislation in respect to product produced and marketed in the province, in respect to product produced in the province but marketed in interprovincial or export trade.

1952 *P.E.I. Potato Marketing Board v. Willis,* (1952) 2 S.C.R. 392. While direct delegation of a power from one level of government to another was held to be ultra vires in *A.G. N.S. v. A.G. Can.,* (1951) S.C.R. 31 (the Interdelegation case), the procedure followed under the *Agricultural Products Marketing Act* (Canada) was held to be valid. The procedure approved involved the Federal and Provincial governments authorizing the delegation of their powers to a single board established under provincial legislation, thereby achieving uniform regulation of intraprovincial and interprovincial and export trade for product produced in the province.

In the *Willis* decision, although the delegation of powers was upheld, orders of the Potato Board imposing levies based on the volume of product marketed were held to be ultra vires as indirect taxes. This meant that marketing boards continued to have difficulty in establishing a basis to raise the revenues necessary to operate the marketing schemes without being challenged on the basis that they were involved in indirect taxation.

There were also serious doubts about the ability of provincial boards, even with the federal legislation, to conduct pools or to equalize returns. This was a serious issue for boards who wished to institute single desk marketing because otherwise a producer's returns would vary depending upon who the sale was made to or when the sale was made. Inequities between producers would result and the system would break down. The *Turner's Dairy Ltd* case had held that it was unconstitutional for provincial boards acting under provincial legislation to "equalize returns" since this involved indirect taxation. This raised doubts about pooling as well and the situation was unclear concerning a delegation under the Federal Act since there was no reference to pooling or to the equalization of returns in the *Agricultural Products Marketing Act* (Canada).

1957 *Reference re The Farm Products Marketing Act, R.S.O. 1950, c. 131, as Amended,* [1957] S.C.R. 198. This case was a constitutional reference made to the Supreme Court by the Governor-General in Council at the request of the Ontario Government in order to determine a series of eight questions concerning the constitutionality of the Ontario Act as amended and three marketing schemes (hogs, peaches for processing and vegetables for processing) and regulations relating to them. This case is significant because the Ontario Act which was very similar to the B.C. and P.E.I. Acts which had previously been upheld by the Supreme Court is substantially the form of Act used by most Provinces from this point forward.

The Court made a series of decisions in answer to the questions posed:

> The Court upheld a section of the Act which permitted the Farm Products Marketing Board to authorize a marketing agency to conduct a pool or pools for the distribution to producers of monies received from the sale of the regulated product. The effect of this provision was to authorize the operation of a single selling agency which would sell all of the regulated product and pool returns to the producers. However, a majority of the Court restricted their decision to cases where all sales were clearly intraprovincial transactions.
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> The Court upheld a regulation providing for the compulsory licensing of all processors and shippers and creating a marketing agency through which all hogs must be marketed. A majority of the Court made clear that this applied only to intraprovincial transactions and the licensing of processors who operated within the province. Exactly how an intraprovincial transaction was to be defined was left open, but several of the decisions suggested that it could only apply to the sale of hogs to plants within the province or to packing plants who slaughtered hogs within the province and produced products for consumption in the province. The export or import of live hogs or processed product was not covered.
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> The Court upheld the right of a marketing agency to set and collect a "service charge" on a per hog basis and rejected suggestions that this was an indirect tax, holding instead that it was a fee for services. The Court also upheld license fees for the marketing of peaches for processing and vegetables for processing on a per ton basis. The license fees and charges were service charges and not taxation and did not need to satisfy the requirements of a direct tax.

> The Court upheld the provisions of a proposed amendment to the Act which would permit a local board to: (i) determine the amount of surplus of a regulated product; (ii) purchase or otherwise acquire the whole or part of the surplus; (iii) market any surplus; and (iv) require processors who receive regulated product from producers to deduct and pay to the local board any service charges or license fees payable to the local board. However, it held that further provisions which would: (v) allow the use of license fees or service charges to pay for the expense and potential losses in marketing the surplus; and (vi) use license and service fees to equalize or adjust returns to producers of the regulated product, were ultra vires and could not be distinguished from the *Crystal Dairy* case. License fees or service charges could be used to pay the expenses of the local board but not to equalize returns or to pay for surplus removal as a levy on all producers for these purposes would be invalid as indirect taxation.

The Federal government responded to this decision by amending the *Agricultural Products Marketing Act* (Canada) to add a new section permitting the delegation of the power to equalize returns and to use license fees and service charges to equalize returns and to pay for surplus removal. The definition of "marketing" was also expanded and clarified. This amendment to the Federal Act together with the decision of the Supreme Court concerning the validity of the Ontario legislation and the marketing schemes established under it provided the framework for the major expansion in the number and type of marketing boards and commodities covered which occurred in the 1960s.

While the Supreme Court did not specifically overrule the earlier cases on indirect taxation and pooling in the Ontario Reference, it clearly had a different, less restrictive attitude toward these issues and marketing in general. While areas of concern remained in relation to indirect taxation for any levies that could not be characterized as service charges or license fees, and while the scope of the provincial power in respect to intraprovincial transactions which had an interprovincial aspect was unclear, sufficient certainty had been established so that the constitutional framework for workable marketing schemes had been established. With this framework, it was possible to contemplate federal-provincial co-operation which would provide constitutionally valid marketing regulation for agricultural products produced in a province even where some of the product was marketed outside the province.

1960 *Reference re Milk Industry Act of British Columbia; Crawford et al v. A.G. B.C.*, (1960) 22 D.L.R. (2d) 321 (S.C.C.). On a constitutional reference the Supreme Court upheld the provisions of the *Milk Industry Act* and an order made thereunder as being matters under s. 92(13) and (16) of the B.N.A. Act. The Court held that in dealing with the sale of milk for consumption within the province the Legislature could provide for the operation of a pool by a designated body to which all milk produced should be delivered and by which it would be sold and the net proceeds divided among producers of milk of equal quality in proportion to the quantity of milk of that quality sold by each producers. The blended payment in respect to fluid and surplus milk was not an indirect tax. The Court distinguished the *Crystal Dairy* and *Turner's Dairy* cases. The Court was not asked to rule on whether the legislation and the scheme trespassed upon the federal trade and commerce power and made its decision subject to this reservation.

1963 *Milk Board v. Hillside Dairy Farm Dairy Ltd. et al.*, (1963) 40 D.L.R. (3d) 731 (B.C.C.A.). The Court of Appeal found that the *Milk Industry Act* and the scheme of regulation did not encroach on the federal trade and commerce power. The marketing scheme was designed to permit only licensed producers to sell and licensed vendors to buy fluid milk and subjected them to standards of purity and cleanliness and to price control. The Act may incidentally effect purchasers who buy surplus fluid milk which is manufactured into milk products which may be marketed interprovincially does not invalidate the provincial legislation which does not attempt to give control over milk and milk products moving in the course of interprovincial trade but is concerned essentially with the sale of fluid milk in the Province. The Court noted that the effect on interprovincial trade was only a remote and incidental effect since only a small percentage of the milk produced in the province was ultimately exported in some processed or manufactured form. The portion of the legislation deeming a producer vendor to have sold product to his or her self was also valid.

1965 *Robbins et al v. Ontario Flue-Cured Tobacco Growers' Marketing Board,* (1965) 52 D.L.R. (2d) 96 (S.C.C.) affirming 43 D.L.R. (2d) 413 (C.A.) which affirmed 41 D.L.R. (2d) 107. The Supreme Court in a two page decision affirmed the decision of the Ontario Courts that regulations under which the applicants were refused a license to produce tobacco and regulations which imposed production controls which substantially cut back production of tobacco were valid. There had been specific amendments to the Ontario *Farm Products Marketing Act* providing for production controls through production quotas in addition to marketing controls and marketing quotas. The legislation also specifically authorized the Ontario Flue-Cured Tobacco Growers' Marketing Board to restrict production in view of an existing surplus either by the refusal of a license for the production of tobacco or the refusal to allot a tobacco acreage or other production quota for any reason that the local board might deem proper. The case was considered on administrative, rather than constitutional, grounds. In view of the specific amendments to the statute and the requirement by the Ontario Government that the local board deal with the massive surplus which existed, the Courts were not inclined to intervene.

1967 The Canadian Dairy Commission is created under the *Canadian Dairy Commission Act* S.C. 1966, c. 34. to establish and coordinate a comprehensive approach to the regulation of the provincially regulated fluid milk market and the federally regulated industrial milk market. This consolidated various federal price support programs for industrial milk under one agency.

1968 *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board et al,* (1968) 67 D.L.R. (2d) 1 (S.C.C.). The Court revisited the question considered in the "Ontario Reference" as to when a transaction might take place within a province but not be an intraprovincial transaction subject to provincial control. Carnation challenged the authority of the Quebec Board to set a minimum price for milk delivered for processing to its plant on the basis that the bulk of the milk, after processing, would be used for export out of Quebec to Ontario and it placed reliance on the reasons of four members of the Court in the Ontario Reference. The Court reviewed the decisions in the Ontario Reference as well as the *Lawson, Reference re Natural Products Marketing Act,* and *Shannon* decisions. It held that each transaction must be examined in relation to its own facts. Neither the fact that a transaction was completed in a province nor the fact that a transaction incidentally had some effect on a company engaged in interprovincial trade was conclusive. In the present case, the Court held that there was no attempted or actual control or regulation of interprovincial trade and the incidental effect on a company engaged in interprovincial trade was not sufficient to make the Orders invalid.

1970 The *Carnation* case highlighted a serious problem faced by provincial marketing boards. There were very few commodities where the market was strictly confined to the province for all aspects of production, processing and consumption. None of the markets could operate in isolation and the flow of product across provincial borders prevented local boards from stabilizing their home markets. There was no power for local boards to control imports into their province and no system for coordinating activities of local provincial boards in a particular commodity at the national level.

This led to increasing tensions between producer groups and the provincial governments which supported their local producers. This led to what was called the "Chicken and Egg War" which erupted in 1970 between groups of producers in Ontario, Quebec and Manitoba and involved the respective provincial governments erecting regulatory barriers and retaliatory measures. Some of these measures were challenged in the Courts.

1971 *A.G. Man. v. Manitoba Egg and Poultry Association et al.,* (1971) 19 D.L.R. (3d) 169 (S.C.C.). Manitoba erected regulatory barriers against eggs from other provinces and this legislation was then reviewed in a reference which was really an attempt by Manitoba to challenge identical Quebec legislation. The Manitoba legislation was held to be ultra vires by the Supreme Court. The Court held that the Orders in question aimed to establish a marketing plan for the purpose of regulating (for the maximum advantage of local producers) the sale in Manitoba of all eggs, wherever produced, and that this plan not only restricted the free flow of interprovincial trade in eggs but was intended to do so. Accordingly it was an invasion of the exclusive legislative authority of the Federal government under s. 91(2) of the *B.N.A. Act, 1867.*

In the dairy industry a federal provincial agreement is implemented between the federal government and Ontario and Quebec and their producers groups for a Comprehensive Milk Marketing Plan. Other provinces join in subsequent years and national market share quotas are allocated between provinces. This is the first national supply management agreement.

1972 *The Farm Products Marketing Agencies Act* S.C. 1970-71-72, c. 65 is passed after one of the longest debates on record in the House of Commons. The Act was amended several times during the three year period from its first introduction to its final passage and, after bitter and lengthy opposition, livestock producers primarily from western Canada were successful in having hogs and cattle deleted from the provisions of the Act. During the following six years three national agencies were created: The Canadian Egg Marketing Agency (1972); the Canadian Turkey Marketing Agency (1974) and the Canadian Chicken Marketing Agency (1978).

1973 *Burns Foods Ltd et al v. A.G. Man. et al,* (1973) 40 D.L.R. (3d) 731 (S.C.C.). An order of the Manitoba Hog Producers' Marketing Board which required that no processor of hogs in the province could slaughter hogs in the province unless they were purchased through the Board, and that hogs brought into the province would be subject to the same provisions as hogs produced in the province, was ultra vires. The Court held that the effect of this provision was an attempt to regulate interprovincial trade in hogs. The *Carnation* case was distinguished.

The effect of this case and the Manitoba Egg Reference case meant that local boards had no ability to restrict or control imports from other provinces.[3] The delegation of federal power under the *Agricultural Products Marketing Act* was of no assistance because it related to the power to regulate interprovincial and export trade in relation to product grown or produced within the province. No power to regulate or restrict imports was contemplated under this Act. It was this problem which led to the introduction and passage of the *Farm Products Marketing Agencies Act.*

1978 *Reference re Agricultural Products Marketing Act and Two Other Acts,* (1978) 84 D.L.R. (3d) 257 (S.C.C.). (the "1978 Egg Reference"). This case looked at the constitutional validity of the legislation and arrangements under which the national egg plan was established. The decision confirmed, with one minor exception, the validity of the legislation and of the arrangements entered into. It therefore becomes the starting point for any constitutional question relating to supply management and to national plans and agencies. It is also the most recent and authoritative statement of the Supreme Court on the standard constitutional challenges to marketing legislation:

i. attacking levies, license fees or service charges or any attempt at pooling or equalization of returns as indirect taxation and beyond provincial power;

ii. raising the constitutional distinction between intraprovincial marketing and interprovincial or export marketing to attack particular plans based on either the provincial or the federal power depending upon the circumstances.

A detailed review of the decision is beyond the scope of this summary.[4] However, certain principles can be summarized and formed the basis for the constitutional position of the marketing legislation considered in this thesis.

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[3]This case and the Manitoba Egg Reference case have both been subject to considerable academic criticism. See Hogg at 21-16 to 21-21 and Weiler, *In the Last Resort* chapter 6 for a discussion of the cases and, in Weiler, a background to the Egg Reference case and the Chicken and Egg War.
[4]Refer to the standard constitutional texts: Hogg; White and Lederman; Laskin.

The principles established or confirmed by the Supreme Court in this decision include:

i. the delegation of federal power under the *Agricultural Products Marketing Act* to a provincial board or agency in order to allow it to regulate an agricultural product produced in the province but marketed in interprovincial or export trade is valid and so is the delegation to the local board of the power to impose levies or charges in respect to the marketing of the agricultural product in interprovincial and export trade. These funds can be used for creating reserves for surplus removal, payment of expenses or losses relating to surplus removal and the equalization or adjustment of returns among producers;

ii. Levies and charges for surplus removal and equalization or adjustment are valid under provincial powers and such levies, whether they are expense levies or adjustment levies, are not taxes when they are used for purposes authorized under the provincial act and are confined to intraprovincial operations. The *Crystal Dairy* and Ontario reference cases were expressly overruled on this point;

iii. *The Farm Products Marketing Agencies Act* and orders based thereunder are constitutionally valid and can deal with surplus removal and quota. Provincial delegation of its powers in respect to intraprovincial marketing to the Federal Agency were valid;

iv. Production control restrictions in a province were valid even though some or all eggs might be intended for export. This power was not unlimited but an impact on interprovincial trade is permissible where the intent is not to regulate that trade and where the production quotas are complementary to the federal plan;

v. Provincial marketing legislation was not to be read as going beyond its expressed intent which was to confine its operation to marketing in Ontario without a specific factual background showing the extra-provincial operation of the marketing controls;

vi. While legislation must be carefully framed to accomplish federal provincial cooperation, "when after 40 years a sincere co-operative effort has been accomplished, it would be really unfortunate if this were all brought to nought" [by a formal and restrictive reading which made impossible federal provincial cooperation to arrive at a "practical scheme for the orderly and efficient production and marketing of a commodity which all Governments concerned agree requires regulation in both intraprovincial and extra-provincial trade.]"

While there have been subsequent cases which deal with constitutional issues, this is the most recent Supreme Court of Canada decision on the constitutional principles of marketing legislation and it remains the main reference point.[5]

[5]It should be noted that the decision of the Supreme Court that service charges or levies imposed for authorized purposes under provincial marketing statutes are valid and are not indirect taxation has not entirely precluded challenges based on the question of indirect taxation. Challenges on this basis accept the principle but suggest that the particular levies or service charges in question are not authorized under the statute or are for purposes which are beyond provincial powers and are therefore not protected by the principle. The two most recent marketing cases in Alberta where levies and service charges were attacked both used this argument. See *Wayvel Farms Ltd v. Alberta Pork Producers' Marketing Board* (1987), 46 D.L.R. (4th) 72 (C.A.); and *Alberta Cattle Commission v. Butterfield* (1993), 15 Alta. L.R. (3d) 81 (Q.B.).