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Canada Grain Act amended by stealth via Bill C-4, *the Canada–United States–Mexico Agreement Implementation Act*

Bill C-4, the *Canada–United States–Mexico Agreement Implementation Act*, amended certain existing laws to bring them into conformity with Canada's obligations under the CUSMA Agreement. A review of witness statements shows that neither MPs nor witnesses delved into the actual text of Bill C-4, but assumed it was consistent with the CUSMA text. When the National Farmers Union (NFU) undertook a close reading of Bill C-4's *Canada Grain Act (CGA)* amendments (Sections 59 to 69), we discovered it enacts substantive changes to Canada's grain system not negotiated as part of the trade deal, and not debated during Committee hearings. These include extending American access to our grain exporting system beyond wheat to include all grains, as well as changes to the operations and authority of the Canadian Grain Commission that are not in the interests of grain producers and which undermine control over the quality standards of Canada's grain exports.

The NFU has longstanding expertise on how the *Canada Grain Act* (CGA*)*, the Canadian Grain Commission (CGC), and the *Seeds Act* operate together to safeguard the quality of our grain exports and the interests of our grain producers. This knowledge has allowed us to recognize the danger to our grain farmers and grain export system posed by unwarranted amendments to the CGA.

- Bill C-4 contains measures that were not negotiated in CUSMA:
  - Treating all American-grown grain - not just wheat - the same as Canadian-grown grain
  - Enabling grain from outside of Canada and USA to be assigned Canadian Grades
  - Making CGC Export Certificates optional
  - Weakening CGC's authority over contaminated grain
  - Enabling elevators to refuse delivery on grounds other than condition or infestation
  - Requiring variety declaration
  - Reducing CGC's authority over grain transport within Canada
  - Enabling incorporation by reference of 3rd party documents
- Debate in the House of Commons was rushed and focussed on CUSMA, not on the actual text of Bill C-4, allowing unnecessary amendments to *Canada Grain Act* to pass without proper democratic oversight
- Implications of Bill C-4 amendments are far-reaching, affecting integrity of Canada's grain exports and the livelihoods of Canadian grain farmers
- *Canada Grain Act* and Canadian Grain Commission have a mandate to regulate in the interests of Canadian grain producers and to uphold the quality standards of Canada's grain exports
- Unnecessary amendments should be repealed and replaced

Canada signed the new Canada-United States-Mexico Agreement (CUSMA) on November 30, 2018. On December 10, 2019 Canada signed an agreement on amendments to the new North American Free Trade Agreement (NAFTA). Bill C-4, the *Canada–United States–Mexico Agreement Implementation Act* was introduced for First Reading in Parliament on January 29, 2020. It received Second Reading on February 6, and on February 27 the Standing Committee on International Trade (CIIT) reported to Parliament recommending it be passed without amendment. On March 13, before completing Third Reading in the House of Commons and without any review by the Senate, both the House and the Senate passed motions deeming Bill C-4 passed when Parliament

was adjourned due to the COVID 19 pandemic. The Bill received Royal Assent later the same day. The Bill is expected to come into force on June 11, 2020 when CUSMA comes into force (90 days after the last country (Canada) ratifies the deal).

The government has announced a review of the *CGA*, scheduled for April 1 – June 30, 2020. This public review of the Act was the proper place to propose substantive changes. Sections 59 – 69 of Bill C-4 should be repealed so they may be considered during the public consultation process, and if desired, introduced into a new bill to amend the *Canada Grain Act* and properly debated. Amendments to the CGA prior to completion of that review should be the minimum necessary to conform with CUSMA.

Overview Canada's grain export system

The CGA is the primary legislation governing Canada's grain sector. The CGC is the agency responsible for implementing the Act. The Act mandates the Commission to "in the interests of the grain producers, establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets." (Section 13)

The CGA defines "grain" as "any seed designated by regulation as a grain for the purposes of this Act" (Section 2). Section 5 (1) of the CGA Regulations states: "The following seeds are designated as grain for the purposes of the Act: barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, soybeans, sunflower seed, triticale and wheat."

The CGA defines "foreign grain" as "any grain grown outside Canada and includes screenings from such a grain and every grain product manufactured or processed from such a grain" (Section 2). Inspection certificates for grain that was grown outside Canada must state the country of origin of the grain or identify it as foreign grain (Section 32 (1) (b)). There is currently no provision for assigning a Canadian grade to foreign grain, so by default US-grown wheat is segregated and assigned the lowest grade.

The CGC's responsibilities include recommending and establishing grain grades and standards for those grades and implementing a system of grading and inspection for Canadian grain to reflect adequately the quality of that grain and meet the need for efficient marketing in and outside Canada; and establishing and applying standards and procedures regulating the handling, transportation and storage of grain and the facilities used therefor.

The CGA also gives the CGC broad regulatory authority, including among other matters, the ability to make regulations governing handling and treatment of grain in elevators; respecting the receipt, inspection, handling and storage at elevators of foreign grain; requiring licensed elevators and grain dealers to submit to the Commission such information relating to the conduct and management of their affairs; respecting cancellation of inspection certificates; prescribing any matter that under the CGA is to be prescribed; and generally for carrying into effect the purposes and provisions of the CGA.

The CGC also provides binding determination when properly requested by a farmer in the event of a dispute over grades and/or dockage when grain is delivered to a licenced elevator. It has a role in regulating rail transportation of grain. It also provides final inspection of grain shipments destined for export from Canada's ports, and issues a "certificate final" to the exporting company that verifies the content and quality of the shipment.

The CGA and the *Seeds Act* intersect in the matter of grades and classes of grain. The *Seeds Act* ensures that most of Canada's commercial crops are sown with registered varieties of seed that have met various quality,

performance and disease-resistance standards. The *Seeds Act* is an important part of Canada's quality control system, both for ensuring the value of our products and the protection of farmers against unscrupulous seed dealers. The CGA discourages delivery of unregistered varieties, and the CGC inspection process allows enforcement of correct designation of grain by grade and class.

Under the CGA, the Canadian Grain Commission has the authority to designate the class of grain for which new grain varieties are eligible. Canada has 18 different classes of wheat (7 Eastern and 11 Western), two classes of flax (Western and Eastern) and eight classes of barley (4 Eastern and 4 Western). Varieties cannot be registered unless they have the end-use quality characteristics required for a specific class. The variety registration process requires multi-year trial data that demonstrates its performance in Canadian conditions, and final evaluation by panels of plant scientists, farmers and industry experts.

C-4 extends CUSMA measures beyond American-grown wheat to include all American-grown grains

Canada has no restrictions on wheat (or any other grain) from other countries being imported by end-users such as a flour mills, bakeries, or pasta plants. However, if grain from another country is delivered to a grain elevator as a commodity for potential export though Canada's licenced grain handling infrastructure, it must be segregated, identified as "foreign grain" and is only eligible for the lowest possible grade.

Article 3.A.4 (Grain) of CUSMA requires Canada to treat wheat grown in the USA the same as wheat grown in Canada in regard to grading. It also requires that USA-grown wheat no longer be identified as to its country of origin when delivered into Canada's grain system. The effect of this Article is that it commits Canada to provide access to Canada's grain handling system for American-grown wheat – and only wheat -- allowing it to be treated the same as if it were Canadian-grown wheat and exported in shipments identified as Canadian.

Clause 62 (3) of Bill C-4 amends the CGA so that <u>all grain</u> – not just wheat – originating in the USA is eligible for the highest possible grade, and is not segregated nor identified by country of origin. Bill C-4 thus overreaches CUSMA, giving all US-grown grains access to Canadian grades – and thereby to Canada's entire grain handling system, including elevators, rail transportation system, and port facilities. While CUSMA requires us to treat US-grown wheat the same as Canadian-grown wheat, Bill C-4 also requires Canada to treat US-grown barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, soybeans, sunflower seed, and triticale as if they were Canadian, and would apply to any grains added in the future.

Under Bill C-4, American-sourced grains would be admixed with Canadian-sourced grains in shipments destined for export. Bill C-4 does nothing to prevent deliveries of large shipments of US-originated grain to Canadian terminal elevators and exported as if they were Canadian. Bill C-4 gives grain companies a

CUSMA Article 3.A.4: Grain

1. Each Party shall accord to originating **wheat** imported from the territory of the other Party treatment no less favorable than that it accords to like wheat of domestic origin with respect to the assignment of quality grades, including by ensuring that any measure it adopts or maintains regarding the grading of wheat for quality, whether on a mandatory or voluntary basis, is applied to imported wheat on the basis of the same requirements as domestic wheat.
2. No Party shall require that a country of origin statement be issued on a quality grade certificate for originating **wheat** imported from the territory of the other Party, recognizing that phytosanitary or customs requirements may require such a statement.
3. At the request of the other Party, the Parties shall discuss issues related to the operation of a domestic grain grading or grain class system, including issues related to the seed regulatory system associated with the operation of any such system, through existing mechanisms. The Parties shall endeavor to share best practices with respect these issues, as appropriate.
4. Canada shall exclude from the application of the Maximum Grain Revenue Entitlement, established under the Canada Transportation Act, or any modification, replacement, or amendment thereof, movements of agricultural goods originating in Canada and shipped via west coast ports for consumption in the United States.

green light to use US-sourced grain to weaken prices paid to Canadian farmers. Licenced elevators will be able to source American wheat, corn, soybeans, barley, etc., at lower prices as a result of US Farm Bill subsidies and other price supports not available to Canadian farmers, then export the grain as if it originated in Canada. Problems resulting from admixture of US-grown grain in Canadian shipments, such as dockage contaminated by herbicide-tolerant noxious weed seeds (such as palmer amaranth) that are not found in Canada, are more likely to occur and will be more difficult, costly or even impossible to address. The many years of work by Canadian trade delegations and institutions to develop and promote Canadian grain, its quality, reliability and the positive brand identity for Canadian grains that has allowed it to obtain premium prices, is threatened by Bill C-4.

Including all US-grown grain, instead of wheat only, in Bill C-4 can also be expected to have an impact on our rail transportation system and its regulation. By giving access to all types of US-grown grain, the volume transported would no longer be strictly related to the size of Canadian crops.

Grain transportation is regulated under Division VI of the *Canada Transportation Act* through the Maximum Revenue Entitlement (MRE), also known as the "revenue cap". The MRE annually regulates freight rates, guaranteeing a healthy profit for the railways and capping the rate charged per loaded mile. Canada has enacted regulated freight rates for grain to prevent railways from holding grain shippers hostage, since grain destined for export ports has no alternative to rail transport. In contrast, the USA railway system is unregulated, forcing grain shippers to bid against other commodities for access. It is likely that American shippers would prefer Canada's regulated system instead of the more expensive US system, particularly as climate change makes the Mississippi barge system less reliable. This would put pressure on our railways' capacity, and lead to demands by the railway lobby replace the MRE with the American system. We are certainly concerned about the impact of US-grown wheat using our transportation system, but unnecessarily adding all other US-grown grains as well would be highly irresponsible.

While all of these problems will affect Canadian wheat once CUSMA commitments regarding US-grown wheat come into effect, there is no need to multiply the risks, losses and costs to Canada's farmers, international reputation and markets involved by unnecessarily and voluntarily extending access to our system to US-grown barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, soybeans, sunflower seed, and triticale as well.

We believe that CUSMA requirements would be met by amending the definition of "foreign grain" and the requirement to record the location where non-foreign grain is grown on inspection certificates issued when grain is received by a licensed elevator. This would be accomplished by simple amendments to the CGA, such as:

The definitions ***foreign grain, eastern grain*** and ***western grain*** in section 2 of the Act are replaced by:

- ***foreign grain*** means any grain grown outside Canada <u>except for wheat grown in the USA</u> and includes screenings from such a grain and every grain product manufactured or processed from such a grain; (*grain étranger*);
- ***eastern grain*** means grain, <u>other than foreign grain, delivered into</u> ~~grown in~~ the Eastern Division; (*grain de l'Est*);
- ***western grain*** means grain, <u>other than foreign grain, delivered into</u> ~~grown in~~ the Western Division. (*grain de l'Ouest*)

Section 32(1)(a) of the Act before subparagraph (i) is **replaced by the following:** (a) if the <u>grain is not foreign grain</u>,

Difficulty protecting integrity of grades when US wheat is delivered into Canadian system
Allowing US-grown wheat into our export system is complicated by the challenges involved in ensuring that Canadian grades are not assigned to varieties of wheat grown in the USA that are not registered in Canada. Bill C-4's Clause 67 requires farmers and elevators to make a truthful declaration as to variety being delivered, with the format to be defined by regulation. Implementation of this measure could have adverse effects on Canadian farmers' livelihoods if it results in restrictions on the use of farm saved seed.

Bill C-4's Clause 65 **allows** licensed elevators to refuse delivery of grain that is produced from seed of a variety that is not registered under the *Seeds Ac*t for sale in or importation into Canada. While at first glance this may seem to be a mechanism to protect our system from unregistered varieties, the decision to accept or reject unregistered varieties will be put in the hands of the elevator. There is nothing to stop an elevator from accepting American-grown unregistered varieties. Currently, if there is space in the facility, grain elevators may only refuse grain that is out of condition (too damp to be safely stored) or infested with a pest. Grain of unregistered varieties may be delivered, but must be kept separate and assigned the lowest grade. This discourages delivery of unregistered varieties, but does not prohibit it.

The significance of Clause 65 is heightened in the context of recent changes to the *Plant Breeders Rights Act*. Since February 2015, newly introduced varieties are entitled to protection under the UPOV '91 Plant Breeders Rights (PBR) intellectual property rights regime. The PBR Act enables regulations to be passed that would prevent farmers using new varieties to plant farm saved seed unless they pay a royalty to the PBR holder annually. In 2019 the federal government began moving towards introducing regulations that would establish such a system. Due to massive farmer opposition, that initiative has been put on hold. Varieties already on the market before 2015 are not subject to the new royalty collection provisions, however amendments to the *Seeds Act Regulation* made in 2013 allow seed companies to de-register older varieties at will. Clause 65 introduces a strong incentive for plant breeders to de-register older varieties in order to force farmers to purchase new varieties and pay royalties every year.

Clause 65 also **allows** licensed elevators the right to refuse delivery of grain if it is contaminated with a pest control product that is not registered in Canada. While this appears to be a way to protect the quality of Canada's exports against heightened risks from accepting grain grown in the USA, it does not compel elevators to refuse pesticide-contaminated grain. Under the current Act the CGC does have the authority to define such grain as contaminated and to refuse delivery.

Allowing American-grown wheat into our system through CUSMA creates a major challenge for the CGC to solve: how to protect our Canadian exports from adulteration by unregistered American wheat varieties and wheat with residues of pest control products that have not been approved in Canada -- without conferring undue power on grain companies and/or undue costs on Canadian farmers. The CGC's mandate is to regulate in the interests of producers AND maintain standards of quality for Canadian grain. Bill C-4's Clauses 65 and 67 fall short of providing the CGC with the necessary regulatory tools to carry out this mandate.

Bill C-4 amendments not necessary for CUSMA implementation should be repealed
Bill C-4 contains other harmful measures not in CUSMA:

- Enabling grain from outside of Canada and USA to be assigned Canadian Grades
- Making CGC Export Certificates optional
- Weakening CGC's authority over contaminated grain
- Reducing CGC's authority over grain transport within Canada

- Enabling incorporation by reference of 3rd party documents

Enabling grain from outside of Canada and USA to be assigned Canadian Grades
Bill C-4 Clause 68 enables the CGC to introduce regulations to permit inspectors to assign Canadian grades to grain imported from countries other than the USA. This clause suggests the government is considering using access to our system as a bargaining chip in future trade deal negotiations, or voluntarily allowing grain companies to use our licenced handling system to "grainwash" shipments from countries with weak or non-existent quality control mechanisms and export it as if it were grown in Canada by Canadian farmers. This is clearly not in the interests of producers and is in conflict with the CGC's mandate.

Making CGC Export Certificates optional
Currently the CGC issues a "certificate final" as a last step in the official inspection process for export shipments. Bill C-4's Clause 63 would make issuance of an official CGC export certificate optional, and would allow the CGC to issue other documentation in place of export certificates. This amendment creates the opportunity to water down our quality control system, and is not required by CUSMA

Weakening CGC's authority over contaminated grain
Bill C-4's Clause 61**,** amends the definition of *Contaminated grain*, reducing the CGC's autonomy to define and deal with contaminated grain than what this clause would provide. This authority should be maintained in light of greater risks resulting from deliveries of US-grown wheat.

Reducing CGC's authority over grain transport within Canada
Bill C-4's Clause 67 eliminates existing restrictions on moving grain between Eastern and Western Canada without CGC permission. This weakens the CGC's capacity to protect export shipment quality. Canada's grain grading system works hand in hand with the seed variety registration system in order to provide buyers with reliable end-use characteristics organized by "class". Due to differences in growing conditions between the Prairies and Eastern Canada, we have two sets of classes: Western and Eastern. By eliminating the restriction on transport between east and west, Bill C-4 introduces the opportunity for grain companies to improperly blend Eastern and Western wheat classes and misrepresent the shipment to export customers.

Unneeded enactment of authority to add quality characteristics to grades
Bill C-4's Clause 66 enacts the CGC's authority to include additional quality characteristics to grain grades, which is not required for CUSMA compliance and is redundant. The CGC already has the authority to define grades under Section 16 (1) of the CGA, which states: "The Commission may, by regulation, establish grades and grade names for any kind of western grain and eastern grain and establish the specifications for those grades and set out a method or methods, visual or otherwise, for determining the characteristics of the grain for the purposes of meeting the quality requirements of purchasers of grain."

Enabling incorporation by reference of 3rd party documents
Bill C-4's Clause 69 enables the CGC to create regulations that incorporate by reference any document, regardless of its source, either as it exists on a particular date or as it is amended from time to time. This is not required by CUSMA. When documents that belong to third parties are incorporated by reference, the connection between regulation and the democratic process is severed. This clause enables unelected third parties to create rules that have the force of law, simply by amending a document that has been incorporated by reference.

Proponents of incorporation by reference suggest that it is efficient, since the proposed regulation does not have to go through regulatory analysis and public review. We believe the time taken for democratic processes is well-spent, and often reveals significant aspects of the regulation that were not considered by the regulator. The CGC has been heavily lobbied by multinational grain companies and seed companies that would like to operate in Canada with few constraints. These companies have deep pockets and many channels to access decision-makers. There is a clear risk that a future CGC could be swayed by these lobbyists, and incorporation by reference could be improperly used to hand over public regulatory authority to these companies by allowing them to develop and manage documents that govern farmers.

The mistakes of Bill C-4 must be corrected

Canada's international reputation as a provider of top quality grain has been built and earned as a result of well-designed public institutions and farmers working together in the public interest for decades. The investment of time, expertise, knowledge and commitment that has delivered billions of dollars into Canada's economy is at stake. Allowing Bill C-4's amendments to the Canada Grain Act to stand will squander the benefit of these efforts and would be contrary to the CGC's mandate.

On March 13, both the House of Commons and the Senate passed motions that deemed Bill C-4 passed 3rd Reading without amendment, when Parliament was adjourned until April 20, 2020 due to the COVID 19 pandemic. The Bill received Royal Assent later the same day. The NFU had attempted to get the Bill amended by the House of Commons, and had asked for time during the Senate Trade Committee hearings on Bill C-4 before the unprecedented passage of the Bill without any involvement of the Senate. The following outlines the NFU's concerns. We believe they are serious enough to warrant extraordinary action to reverse the undemocratic imposition of unnecessary and substantive changes to the Canadian Grain Act and the Canadian Grain Commission which disadvantage Canadian farmers and Canada as a whole in the international grain trade.

Bill C-4 https://www.parl.ca/DocumentViewer/en/43-1/bill/C-4/royal-assent

Canada Grain Act https://lois-laws.justice.gc.ca/eng/acts/G-10/

CUSMA text, Agriculture Chapter https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/r-cusma-03.pdf