EDITOR'S NOTE: This document is subject to editorial revision before its reproduction final form in the *Federal Courts Reports*.

T-1620-17

2019 FC 1003

David Kattenburg (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: KATTENBURG V. CANADA (ATTORNEY GENERAL) KATTENBURG V. CANADA (ATTORNEY GENERAL)

Federal Court, Mactavish J.—Toronto, May 21 and 22; Ottawa, July 29, 2019.

Food and Drugs — Labelling — Judicial review of Canadian Food Inspection Agency (CFIA), Complaints and Appeals Office (CAO) decision concluding no reason to request CFIA reconsider its decision to permit wines produced in Israeli settlements in West Bank (settlement wines) to be labelled as "Products of Israel" — Applicant asserting those wine labels incorrect, violating CFIA regulations — CFIA initially concluding that "Product of Israel" label misleading pursuant to Food and Drugs Act, s. 5(1) — Later reversing decision — CAO noting that CFIA not competent in questions relating to Canadian foreign policy, may seek advice from competent federal authority (in this case Global Affairs Canada or GAC) — CFIA reconsidering original decision after Global Affairs Canada drawing its attention to definition of "territory" in Free Trade Agreement Between the Government of Canada and the Government of the State of Israel (CIFTA) — Whether CAO erring in upholding CFIA's second decision — More specifically, whether CAO's recommendation that settlement wines be labelled as "Products of Israel" reasonable in light of fact settlements not in State of Israel — Labels contravening Consumer Packaging and Labelling Act, s. 7(1), Food and Drugs Act, s. 5(1) — Provision of full, factual information one principle underlying Food and Drugs Act — While Food and Drug Regulations, s. B.02.108 requiring clear indication of country of origin, having to be read with Consumer Packaging and Labelling Act, s. 7(1), Food and Drugs Act, s. 5(1) regarding false, misleading representations — Identifying settlement wines as "Products of Israel" false, misleading, deceptive — Unreasonable to rely on CIFTA definition of "territory" for purposes of Canadian product labelling requirements — No suggestion in CIFTA that its definition of "territory" applying outside of CIFTA context or having any application to Canada's domestic laws — CAO recommendation set aside, matter remitted to CAO — Application allowed.

This was an application for judicial review of a decision by the Complaints and Appeals Office (CAO) of the Canadian Food Inspection Agency (CFIA) concluding that there was no reason to request that the CFIA reconsider its decision that wines produced in Israeli settlements in the West Bank (the settlement wines) could be imported and sold in Canada labelled as “Products of Israel”.

The applicant asserted that the settlement wines were labeled “Made in Israel”, when they had in fact been produced entirely from grapes grown and processed in Israeli settlements in the West Bank, which settlements were not within the State of Israel. The applicant further asserted in his complaint that labelling the settlement wines as Israeli in origin violated CFIA regulations, and asked the CFIA to instruct the Liquor Control Board of Ontario to replace the country of origin labels with a statement that the origin of the settlement wines was the Occupied Palestinian Territories. The CFIA initially concluded that the “Product of Israel” label would be unacceptable and misleading pursuant to subsection 5(1) of the Food and Drugs Act. The CFIA later reversed its decision. The applicant filed an appeal of the CFIA’s decision with the CAO respecting, inter alia, the regulatory application of the country of origin labelling legislation. The CAO noted that while the CFIA “is the responsible regulatory body to consider food labelling questions”, questions relating to Canadian foreign policy are “outside its mandate”. The CAO went on to state that the CFIO “seeks advice when necessary from the competent federal authority”, which, in this case, it identified as Global Affairs Canada (GAC). The CAO further stated that after the CFIA made its initial decision, GAC had drawn the CFIA’s attention to the definition of the term “territory” in the Free Trade Agreement Between the Government of Canada and the Government of the State of Israel (CIFTA), causing the CFIA to reconsider its original decision. The CAO concluded that there was no reason to request reconsideration of this second decision.

The main issue was whether the CAO erred in upholding the CFIA’s second decision.

Held, the application should be allowed.

The labels contravened the requirements of subsection 7(1) of the Consumer Packaging and Labelling Act and subsection 5(1) of the Food and Drugs Act. The question was whether the CAO’s recommendation that settlement wines could continue to be labelled as “Products of Israel” was reasonable, in light of the fact that the settlements where the wines were produced are not within the territory of the State of Israel. While one of the objectives of the Food and Drug Regulations is the safety of the consumer, another objective of the Canadian labelling legislation is allowing consumers to make informed decisions about the products that they purchase in order to allow them to “buy conscientiously”. One of the principles underlying the Food and Drugs Act was noted by the responsible Minister as “the provision of full and factual information on labels”. While section B.02.108 of the Food and Drug Regulations requires that there be a clear indication of the country of origin shown on the principal display panel of wines sold in Canada, this provision cannot be read in a vacuum. Regard must also be had to subsection 7(1) of the Consumer Packaging and Labelling Act and to subsection 5(1) of the Food and Drugs Act regarding false and misleading representations. Given that there was no dispute about the fact that the Israeli settlements in the West Bank are not part of the territory of the State of Israel, identifying settlement wines as being “Products of Israel” was false, misleading and deceptive. It was unreasonable to rely on the CIFTA definition of “territory” for the purposes of Canadian product labelling requirements. There is no suggestion in CIFTA that its definition of “territory” has any application outside of the CIFTA context, or that it has any application to Canada’s domestic laws.

While this finding was sufficient to dispose of the matter, the CAO’s decision on the product

labelling issue could arguably engage Charter values. While it was apparent that freedom of expression issues were implicated in the applicant's appeal, the CAO did not address them in its decision, buttressing the conclusion that the CAO's decision was unreasonable. The recommendation made by the CAO was set aside, and the matter was remitted to the CAO for redetermination.

STATUTES AND REGULATIONS CITED

Access to Information Act, R.S.C., 1985, c. A-1.

Canada--Israel Free Trade Agreement Implementation Act, S.C. 1996, c. 33.

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 2(b).

Canadian Food Inspection Agency Act, S.C. 1997, c. 6, Preamble.

Consumer Packaging and Labelling Act, R.S.C., 1985, c. C-38, ss. 2(1) "dealer", 3(1), 7.

Consumer Protection from Unfair Trading Regulations 2008 (U.K.), SI 2008/1277.

Cosmetic Products (Safety) Regulations 2008 (U.K.)<, i></i>SI 2008/1284.

Criminal Justice and Public Order Act 1994 (U.K.), c. 33, s. 68.

Customs Tariff, S.C. 1997, c. 36, s. 50(1).

Food and Drugs Act, R.S.C., 1985, c. F-27, s. 5(1).

Food and Drug Regulations, C.R.C., c. 870, s. B.02.108.

Geneva Conventions Act, R.S.C., 1985, c. G-3.

Regulations Defining Certain Expressions for the Purposes of the Customs Tariff, SOR/97-62, s. 1 "Israel or another CIFTA beneficiary".

TREATIES AND OTHER INSTRUMENTS CITED

Charter of the United Nations, June 26, 1945, [1945] Can. T.S. No. 7.

Free Trade Agreement Between the Government of Canada and the Government of the State of Israel, July 31, 1996, [1997] Can. T.S. No. 49, Art. 1.2, 1.4, 4.2.

Geneva Convention relative to the Protection of Civilian Persons in Times of War of August 12, 1949, being Schedule IV of the *Geneva Conventions Act*, R.S.C., 1985, c. G-3.

Global Affairs Canada. *Joint Canadian--Palestinian Framework for Economic Cooperation and Trade Between Canada and the Palestine Liberation Organization on Behalf of the Palestinian*

Authority, February 27, 1999.

Israeli--Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex V, Supplement to the *Protocol on Economic Relations*, Washington, D.C., September 28, 1995, online: https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20V.aspx.

Protocol on Economic Relations between the Government of the State of Israel and the Palestine Liberation Organization, Paris, April 29, 1994.

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190; Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708.

DISTINGUISHED:

Richardson and another v. Director of Public Prosecutions, [2014] UKSC 8, [2014] All E.R. 20.

CONSIDERED:

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31, [2018] 2 S.C.R. 230; Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77; R. v. Guignard, 2002 SCC 14, [2002] 1 S.C.R. 472; R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45; Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395; Loyola High School v. Quebec (Attorney General), 2015 SCC 12, [2015] 1 S.C.R. 613; Law Society of British Columbia v. Trinity Western University, 2018 SCC 32, [2018] 2 S.C.R. 293.

REFERRED TO:

McLean v. British Columbia (Securities Commission), 2013 SCC 67, [2013] 3 S.C.R. 895; Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654; Nor--Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59, [2011] 3 S.C.R. 616; Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467; Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61, [2015] 3 S.C.R. 909; Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, 2016 SCC 8, [2016] 1 S.C.R. 29; Barreau du Québec v. Quebec (Attorney General), 2017 SCC 56, [2017] 2 S.C.R. 488;Canadian National Railway Co. v. Canada (Attorney General), 2014 SCC 40, [2014] 2 S.C.R. 135; Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario, 2002 FCA 218, [2003] 1 F.C. 331

APPLICATION for judicial review of a decision by the Complaints and Appeals Office of the Canadian Food Inspection Agency (CFIA) concluding that there was no reason to request that the CFIA reconsider its decision that wines produced in the West Bank could be imported and sold in Canada labelled as "Products of Israel". Application allowed.

APPEARANCES:

A. Dimitri Lascaris for applicant.

Gail Sinclair and Negar Hashemi for respondent.

Barbara Jackman for intervener Independent Jewish Voices Canada.

David Matas for intervener League for Human Rights of B'nai Brith Canada.

SOLICITORS OF RECORD:

A. Dimitri Lascaris Law Professional Corporation, Montréal, for applicant.

Deputy Attorney General of Canada for respondent.

Jackman & Associates, Toronto, for intervener Independent Jewish Voices Canada.

David Matas, Winnipeg, for intervener League for Human Rights of B'nai Brith Canada.

The following are the reasons for judgment and judgment rendered in English by

[1] MACTAVISH J.: Wines produced by Israeli settlers in the West Bank are sold in Canada labelled as "Products of Israel". Dr. David Kattenburg, a wine lover and activist, filed a complaint with the Canadian Food Inspection Agency (CFIA), asserting that such labels are incorrect as the wines in question are produced in Israeli settlements in the West Bank, or what Dr. Kattenburg calls "the Occupied Palestinian Territories".

[2] The CFIA initially agreed with Dr. Kattenburg's position. However, it subsequently reversed its decision, concluding that the wines could be sold as currently labelled. Dr. Kattenburg appealed this latter decision to the CFIA's Complaints and Appeals Office (CAO). His appeal raised concerns with respect to the quality of the service that had been provided to him in the course of the complaints process, as well as with the application of the country of origin labelling requirements.

[3] The CAO determined that the service-related component of Dr. Kattenburg's complaint was justified, as the CFIA had failed to keep him informed while his complaint was being processed. Insofar as the substance of Dr. Kattenburg's complaint was concerned, the CAO noted that the Canada-Israel Free Trade Agreement, [*Free Trade Agreement Between the Government of Canada and the Government of the State of Israel*, July 31, 1996], [1997] Can. T.S. No. 49 [CIFTA], defines Israeli "territory" as including areas where Israel's customs laws are applied. As Israel's customs laws are applied in the West Bank, the CAO concluded that there was no reason to request that the CFIA reconsider its decision, affirming that wines produced in the West Bank could be imported and sold in Canada labelled as "Products of Israel".

[4] Dr. Kattenburg seeks judicial review of the CAO's decision, asserting that it erred in determining that "Product of Israel" labels on wines produced in Israeli settlements in the West Bank complied with Canadian law.

[5] While there is profound disagreement between those involved in this matter as to the legal status of Israeli settlements in the West Bank, I do not need to resolve that question in this case. Whatever the status of Israeli settlements in the West Bank may be, all of the parties and interveners agree that the settlements in issue in this case are not part of the State of Israel. Consequently, labelling the settlement wines as "Products of Israel" is both inaccurate and misleading, with the result that the CAO's decision affirming that settlement wines may be so labelled was unreasonable.

I. The Parties

[6] Dr. Kattenburg describes himself as the Jewish child of Holocaust survivors. In addition to being an oenophile, he states that he is also a "science educator, a journalist and web publisher, and a human rights activist".

[7] Dr. Kattenburg says that he has travelled to the West Bank and has seen first-hand that Palestinians live under what he describes as "permanent military occupation and apartheid". He states that he initiated his CFIA complaint and this application for judicial review "to help ensure respect for Canada's consumer protection and product

labelling laws, to help ensure that I and other Canadian wine consumers be provided truthful and accurate information about the wine products that they purchase and consume, and to ensure both Canada's and Israel's respect for international human rights and humanitarian law".

[8] Dr. Kattenburg explains that he believes that Canadians "should be able to make informed choices, based on truthful product labelling, about whether they wish to purchase settlement wines and other settlement products". He further submits that "the labeling of settlement wines on Canadian store shelves as 'Product of Israel' facilitates Israel's *de facto* annexation of large portions of the West Bank", and that this is "an affront to [his] conscience as a Jewish person and to [his] commitment to the rule of law as a citizen of Canada".

[9] The CFIA was created by the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6 as a regulatory body responsible for overseeing the safety of Canada's food supply by enhancing "the effectiveness and efficiency of federal inspection and related services for food and animal and plant health". Its mission is to safeguard food, animals and plants, thereby enhancing the health and well-being of Canadians, as well as the economy and the environment. At the relevant time, the CFIA was responsible for administering and enforcing some 13 federal statutes and 38 sets of federal regulations, including the *Food and Drugs Act*, R.S.C., 1985, c. F-27 [FDA], the *Consumer Packaging and Labelling Act*, R.S.C., 1985, c. C-38 [CPLA], and the *Food and Drug Regulations*, C.R.C., c. 870.

[10] The CAO was created in 2012 as part of the CFIA's ongoing efforts to enhance transparency and accountability within its operations. Created by CFIA policy, the CAO serves as "an impartial single window office within the CFIA to provide stakeholders with a redress mechanism" that considers and responds to complaints brought by those who have had direct dealings with the CFIA. The CAO deals with complaints related to the quality of the service provided by the CFIA, as well as complaints relating to the performance of its regulatory functions. Insofar as regulatory complaints are concerned,

the CAO may affirm the CFIA's decision or recommend that it be reconsidered or amended.

II. The Interveners

[11] Two organizations were granted leave to intervene in this application.

[12] Independent Jewish Voices Canada (IJVC) is supportive of Dr. Kattenburg's position. It describes itself as "a national grassroots organization grounded in Jewish tradition that advocates for just peace in Israel-Palestine and social justice at home". The organization describes its work as seeking "a just peace in Israel-Palestine based on principles of equality and human rights", stating that its mission is "to create a public presence for the voices of Canadian Jews in support of justice in Israel/Palestine and at home". IJVC asserts that its mission "is intricately grounded in the right of free expression, in particular to voice principled criticisms of Israeli state policy and to promote justice and equality for Palestinians and Israelis alike".

[13] The League for Human Rights of B'nai Brith Canada (the League) opposes Dr. Kattenburg's application for judicial review. It describes itself as an agency operating within B'nai Brith Canada. B'nai Brith Canada is a member of B'nai Brith International, which is an internationally recognized charitable organization dealing with human rights and issues relating to Israel.

[14] In the affidavit of the League's National Director, B'nai Brith Canada is described as a charitable, membership-based service organization, active in Canada since 1875. B'nai Brith Canada's mandate is to expose and combat racism and bigotry, and to preserve and enhance human rights. The National Director further states that while the parent B'nai Brith organization deals with international issues, the focus of B'nai Brith Canada, including the League, is on Canada-specific issues. He further describes B'nai Brith Canada as "one of the pre-eminent human rights organizations in Canada".

III. Dr. Kattenburg's Complaint to the CFIA

[15] Dr. Kattenburg states in his affidavit that he visited the Psâgot winery in June of 2017. The winery is one of the two wineries that produce the wines in issue in this case. It is located in the Psâgot settlement, just east of Ramallah in what Dr. Kattenburg refers to as the “Occupied Palestinian Territories”. While he was there, Dr. Kattenburg confirmed that the wines that were sold at the Psâgot winery had in fact been produced in the West Bank. Also at issue in this proceeding are wines produced in the Shiloh settlement, which Dr. Kattenburg notes is also in the West Bank.

[16] Prior to visiting the West Bank, however, Dr. Kattenburg had sent a letter to the Liquor Control Board of Ontario (LCBO) on January 6, 2017, stating that two wines sold in Ontario were falsely labelled as being products of Israel, when they had in fact been produced in Israeli settlements in the West Bank. The wines in question are Shiloh Legend KP 2012 and Psâgot Winery M Series, Chardonnay KP 2015 (the Settlement Wines). A copy of Dr. Kattenburg’s letter was also sent to the CFIA.

[17] Not having received a satisfactory response to his complaint, Dr. Kattenburg complained directly to the CFIA about the labelling issue on March 31, 2017.

[18] In his complaint to the CFIA, Dr. Kattenburg asserted that the Settlement Wines were labeled “Made in Israel”, when they had in fact been produced entirely from grapes grown and processed in Israeli settlements in the West Bank, which settlements were not within the State of Israel. Dr. Kattenburg observed that wines may claim to be wines of a country if they are made from grapes at least 75 percent of which are grown in that country, and if they are fermented, processed, blended and finished in that country, or, in the case of wines blended in the country in question, at least 75 percent of the finished wine is fermented and processed in that country from the juice of grapes grown in that country.

[19] Dr. Kattenburg stated that as the Settlement Wines were produced from grapes grown and processed entirely outside of Israel’s sovereign borders, they should not be identified as having been “Made in the Judean Hills, Israel”, as is the case on the LCBO’s website. Dr. Kattenburg then suggests how, in his view, the wines should be labelled. His suggestions included “Made in Ma’ale Levona settlement, Occupied

Palestinian Territories" (in the case of the Shiloh wines), or "Made in Psâgot settlement, Occupied Palestinian Territories" (in the case of the Psâgot wines). Other possible labels for the Settlement Wines suggested by Dr. Kattenburg included "Product of the West Bank", "Product of the Occupied Palestinian Territories", "Product of Palestine" or "Product of the Psâgot Settlement" or "Product of the Shiloh Settlement", as the case may be.

[20] Dr. Kattenburg further asserted in his complaint that labelling the Settlement Wines as Israeli in origin "flagrantly violates CFIA regulations, and compromises the trust that Canadian consumers have in product labelling". He therefore asks the CFIA to instruct the LCBO to replace the country of origin labels with "a more truthful" statement that the origin of the Settlement Wines was the Occupied Palestinian Territories.

IV. The CFIA's Response

[21] Following receipt of Dr. Kattenburg's complaint, the CFIA gathered information from sources within the Agency and consulted with Global Affairs Canada (GAC). The CFIA initially concluded that the "Product of Israel" label "would not be acceptable and would be considered misleading as per subsection 5(1) of the *Food and Drugs Act*". Subsection 5(1) of the *Food and Drugs Act* provides that no one shall "label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."

[22] In accordance with instructions from the CFIA, on July 11, 2017, the LCBO sent a letter to its vendors, advising them that it was not appropriate to label the Settlement Wines as "Products of Israel". Dr. Kattenburg was not advised of the CFIA's decision at that time.

[23] Following media inquiries, the CFIA President held two meetings with senior CFIA management in order to better understand the issue giving rise to the CFIA's decision. At the second meeting, held on July 13, 2017, new information provided by GAC was reviewed. This included provisions of the Canada-Israel Free Trade

Agreement (CIFTA), Article 1.4.1(b) of which defines the "territory" to which the agreement applies as including the territory where Israeli customs laws apply. As will be discussed further on in these reasons, Israeli customs laws apply in the West Bank.

[24] On July 12, 2017, Dr. Kattenburg saw a post on the B'nai Brith Canada website stating that "while advocating on behalf of the grassroots Jewish community, B'nai Brith discovered that the decision targeting Israeli wines in LCBO stores will soon be reversed". That same day, Dr. Kattenburg emailed the CFIA, asking that it stand by its original decision. The following day, Dr. Kattenburg retained counsel who then wrote to the CFIA, urging that it not reverse its original decision. Counsel also asked how it was that B'nai Brith Canada was aware of the CFIA's intention to reverse its decision when Dr. Kattenburg himself had not been so advised.

[25] The CFIA announced that it was reversing its original decision on July 13, 2017. It further advised the LCBO that its initial decision had not fully considered the implications of CIFTA, and posted a statement to this effect on its website. Dr. Kattenburg states that he learned of the CFIA's new decision from press reports, and that he had not been informed of the decision by the CFIA itself.

[26] Dr. Kattenburg emailed the CFIA on July 17, 2017, expressing his strong objection to the reversal of the CFIA's earlier decision. He asked to be provided with all of the documents that were relevant to the matter, including copies of the CFIA's two decisions. Dr. Kattenburg also asked that the CFIA provide him with detailed written reasons explaining why it had decided to reverse its original decision. Dr. Kattenburg received no response to this request.

[27] Approximately one week later, a letter was sent to the CFIA by Dr. Kattenburg's counsel advising that Dr. Kattenburg intended to pursue the matter. Counsel also reiterated Dr. Kattenburg's request that he be provided with copies of the CFIA's decisions and reasons for those decisions, together with an explanation as to how it was that advocacy groups such as B'nai Brith Canada were aware of the CFIA's intention to reverse its earlier decision before Dr. Kattenburg was informed of that

decision. Once again, Dr. Kattenburg and his counsel received no response to this request.

V. Dr. Kattenburg's Appeal to the CAO

[28] Dr. Kattenburg then filed an appeal of the CFIA's July 13, 2017, decision with the Complaints and Appeals Office of the CFIA. His appeal raised concerns regarding the quality of the service that had been provided to him by the CFIA, and with respect to the regulatory application of the country of origin labelling legislation.

[29] The CAO contacted the relevant CFIA branches to request material pertinent to Dr. Kattenburg's appeal, including information with respect to the CFIA's consultations with GAC. After reviewing the relevant documentation, the CAO determined that there was no reason to ask the CFIA to reconsider its decision. The CAO then circulated a draft letter within the CFIA setting out its decision and seeking feedback from some of its departments. The CAO also sought feedback from GAC with respect to its draft decision. GAC proposed that certain changes relating to CIFTA be made to the letter "for technical accuracy", which suggestions were subsequently incorporated into the CAO's decision.

[30] On September 28, 2017, CAO officials spoke to Dr. Kattenburg and his counsel, advising them of the results of the review process. The CAO subsequently confirmed its decision in writing.

[31] The CAO upheld the service-related component of Dr. Kattenburg's complaint, finding that the CFIA had failed to provide him with a response to his complaint.

[32] Insofar as the regulatory aspect of his complaint was concerned, however, the CAO noted that while the CFIA "is the responsible regulatory body to consider food labelling questions", questions relating to Canadian foreign policy are "outside its mandate". The CAO went on to state that the CFIA "seeks advice when necessary from the competent federal authority", which, in this case, it identified as GAC.

[33] The CAO further stated that after the CFIA made its initial decision in relation to Dr. Kattenburg's complaint, GAC had drawn the CFIA's attention to the definition of the term "territory" in CIFTA, causing the CFIA to reconsider its original decision. The CAO concluded that there was no reason to request reconsideration of this second decision.

[34] The effect of the CAO's decision was to affirm that Settlement Wines imported for sale in Canada may be sold with the "Product of Israel" label to meet Canadian domestic "country of origin" labelling requirements.

[35] Dissatisfied with this response, Dr. Kattenburg then commenced this application for judicial review in which he requests orders:

a. declaring unlawful the decision to permit the importation and sale in Canada of Settlement Wines labelled as "Product of Israel";

b. declaring that neither CIFTA nor the CIFTA Act [*Canada-Israel Free Trade Agreement Implementation Act*, S.C. 1996, c. 33] authorizes products made in the Occupied Palestinian Territories to be labelled as "Product of Israel";

c. declaring that, insofar as Settlement Wines are labelled as "Product of Israel," the Settlement Wines violate subsection 5(1) of the FDA;

d. declaring that, insofar as Settlement Wines are labelled as "Product of Israel", the Settlement Wines violate section 7 of the CPLA;

e. declaring that the decision to permit the importation and sale in Canada of Settlement Wines labelled as "Product of Israel" violates the *Geneva Conventions Act* [R.S.C., 1985, c. G-3], as well as Canada's obligations as a party to the Fourth Geneva Convention [*Geneva Convention relative to the Protection of Civilian Persons in Times of War of August 12, 1949* [being Schedule IV of the *General Conventions Act*, R.S.C., 1985, c. G-3], and the *Charter of the United Nations* [June 26, 1945, [1945] Can. T.S. No. 7]; and

f. granting the applicant his costs of this application.

VI. Issues

[36] There are two issues that have to be decided in this application. The first is the appropriate standard of review to be applied to the CAO's decision. The second is whether the CAO erred in upholding the CFIA's second decision.

VII. Standard of Review

[37] Dr. Kattenburg submits that there are no material facts in dispute in this case with respect to the events that transpired or the fact that the West Bank is not part of the State of Israel. He contends that this application turns entirely on the CAO's interpretation of Article 1.4.1(b) of CIFTA, and whether it permits products produced in the West Bank to be labelled and sold in Canada as "Products of Israel". As such, Dr. Kattenburg submits that the appropriate standard of review is that of correctness.

[38] The respondent contends that the appropriate standard of review is that of reasonableness. The CAO was applying its own statutory scheme to the facts of this case, with the result that reasonableness is the presumptive standard of review, and none of the circumstances in which correctness is the appropriate standard apply in the present case.

[39] None of the parties have identified any decisions of this or any other court addressing the standard of review to be applied to recommendations made by the CAO. Consequently, it is necessary to carry out a standard of review analysis in order to identify the appropriate standard of review: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], at paragraphs 57 and 62.

[40] The starting point for this analysis is the rebuttable presumption that reasonableness will be the applicable standard of review.

[41] That is, the Supreme Court has stated that where an administrative body is interpreting and applying its own statutory scheme—in this case, the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act* and the *Food and Drug Regulations*—there is a rebuttable presumption that reasonableness is the applicable standard of

review: see, for example, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 [*McLean*], at paragraphs 21 and 22; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 [*Alberta Teachers*], at paragraph. 39; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at paragraph 27.

[42] There are, however, exceptions to this rule. The correctness standard of review will apply with respect to (1) issues relating to the constitutional division of powers; (2) true questions of *vires*; (3) issues of competing jurisdiction between tribunals; and (4) questions of central importance to the legal system that are outside the expertise of the decision maker.

[43] Exceptionally, the presumption may also be rebutted where a contextual inquiry shows a clear legislative intent that the correctness standard be applied: *Dunsmuir*, above, at paragraphs 55, 58–59 and 60–61.

[44] There is no suggestion that this case involves questions relating to the constitutional division of powers or true questions of *vires*. Nor is there any suggestion that the case involves issues of competing jurisdiction between tribunals.

[45] However, Dr. Kattenburg contends that the presumption that the standard of reasonableness applies is rebutted in this case because what is at issue is a question that is of central importance to the legal system that is outside the expertise of the decision maker. He submits that the issue here is not the interpretation of the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act* and the *Food and Drug Regulations*—matters with which the CFIA has expertise—but rather the interpretation of CIFTA—something that is outside the expertise of both the CFIA and the CAO. Consequently, Dr. Kattenburg contends that the correctness standard should apply in this case: *Dunsmuir*, above, at paragraph 55.

[46] The Supreme Court has held that questions of law that are of "'central importance to the legal system ... and outside the ... specialized area of expertise' of the

administrative decision maker will always attract a correctness standard": *Dunsmuir*, above, at paragraph 55, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paragraph 62.

[47] The Supreme Court has, however, repeatedly stated that a liberal application of the "questions of central importance" category of exceptions is to be avoided: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [cited above], at paragraph 42, citing *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paragraph 38; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paragraph 168; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at paragraph 44; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at paragraph 34; *Alberta Teachers*, above, at paragraph 32; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at paragraph 18; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at paragraphs 60 and 62; *McLean*, above, at paragraph 28. The Supreme Court has further stated that a question of law that does not rise to this level may be compatible with a reasonableness standard where other factors so indicate.

[48] What is at issue in this case is not a pure question of law, but rather a question of mixed fact and law, involving the application of Canadian product labelling legislation to the facts of this case. This involves the application of the CFIA's regulatory scheme, supporting a finding that reasonableness is the appropriate standard of review to be applied to the CAO's decision. Consideration of the elements of the standard of review analysis leads to a similar conclusion.

[49] One of the elements to be considered in a standard of review analysis is whether there is a privative clause in the enabling legislation. Privative clauses constitute statutory directions from Parliament indicating the need for deference. Given that the CAO is entirely a creature of CFIA policy, it follows that there is no statutory privative

clause regarding its recommendations, and thus no statutory direction from Parliament indicating the need for deference to CAO recommendations.

[50] The second consideration in the standard of review analysis is whether there is a discrete and special administrative regime in which the decision maker has special expertise. The Supreme Court cites labour relations as an example of this. The CFIA (and thus the CAO) have expertise in product labelling, which would suggest the need for deference to its decisions on these issues.

[51] That said, the CFIA has itself acknowledged that it does not have expertise in deciding what constitutes a "country" for the purpose of identifying a product's country of origin in accordance with product labelling legislation. Indeed, guidelines promulgated by the CFIA state that "it is not the role of the CFIA to decide what a 'country' is or is not". The guidelines explain that the CFIA "aligns its assessment of country of origin claims with Global Affairs Canada's position in assessing country of origin declaration[s]".

[52] The CAO further advised Dr. Kattenburg that it had not engaged in a fresh analysis of Article 1.4.1(b) of CIFTA, suggesting that it too had deferred to Global Affairs Canada's position on this issue. Indeed, the respondent acknowledges that the CAO did not conduct a substantive review of the issue, deferring instead to GAC's advice on this matter, given its expertise in matters relating to CIFTA.

[53] Global Affairs Canada clearly has expertise in matters of international geopolitics, once again suggesting the need for deference in this case.

[54] Consideration of all the relevant factors thus leads to the conclusion that the reasonableness standard should be applied in reviewing the CAO's recommendations. The Court must thus consider "the existence of justification, transparency and intelligibility within the decision-making process", and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47; *Newfoundland and Labrador Nurses' Union v.*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708. at paragraph 14.

VIII. The Legislative Regime

[55] Before considering whether the CAO's decision was reasonable, however, it is first necessary to have regard to the statutory regime governing the issue of product labelling in Canada. I will briefly summarize the relevant statutory provisions, the full text of which is set out as an appendix to these reasons.

[56] Subsection 7(1) of the *Consumer Packaging and Labelling Act* provides that "[n]o dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product." Subsection 2(1) of the Act defines "dealer" as being persons who are "retailer[s], manufacturer[s], processor[s] or producer[s] of a product, or a person who is engaged in the business of importing, packing or selling any product".

[57] The legislation goes on to define what will constitute a "false or misleading representation", with paragraph 7(2)(c) of the Act stating that such representations include "any description or illustration of the … origin … of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated."

[58] Subsection 3(1) of the *Consumer Packaging and Labelling Act* further provides that (subject to certain exceptions that do not apply here) "the provisions of this Act that are applicable to any product apply despite any other Act of Parliament."

[59] As noted earlier, subsection 5(1) of the *Food and Drugs Act* provides that "[n]o person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."

[60] Section B.02.108 of the *Food and Drug Regulations* further requires that there be "[a] clear indication of the country of origin" shown on the principal display panel of wines sold in Canada.

[61] With this understanding of the legislative regime, I turn now to consider whether the CAO's decision was reasonable.

IX. Was the CAO's Decision Reasonable?

[62] Dr. Kattenburg submits that the "core question" in this application is whether Article 1.4.1(b) of CIFTA authorizes the producers of goods in Israeli settlements in the West Bank to label the products that they sell as "Products of Israel", even though the products in question were not in fact produced in the State of Israel.

[63] In contrast, the respondent says that what is at the heart of this dispute is the mandatory requirement in section B.02.108 of the *Food and Drug Regulations* that there be a clear indication of the country of origin shown on the principal display panel of wines sold in Canada.

[64] The respondent does not suggest that "Product of Israel" is the only language that could reasonably be used on the labels of Settlement Wines, accepting that such wines could, for example, also appropriately state that they were "Products of Israel (West Bank)". The respondent submits, however, that in the absence of the West Bank being part of a recognized country, labelling Settlement Wines as "Products of Israel" is within the range of possible, acceptable outcomes that are defensible in light of the requirements of the relevant legislation and the facts of this case.

[65] The respondent does not claim that CIFTA is determinative of this matter, or that it actually has anything to do with product labelling in Canada. However, where the territory in which wine is produced does not constitute a "country", as is the case here, the respondent says that it is reasonable to have regard to other appropriate indicia, including international instruments such as CIFTA and related documents, in order to determine how to meet Canada's country of origin labelling requirements.

[66] Before addressing the merits of the applicant's arguments, there are three matters that should be addressed.

[67] The first relates to the alleged involvement of B'nai Brith in having the CFIA's initial decision rescinded. The second relates to the parties' arguments with respect to the status of the Israeli settlements in the West Bank. The third relates to the admissibility of the various emails that are appended to Dr. Kattenburg's second affidavit.

[68] Insofar as the first issue is concerned, the applicant has raised concerns with respect to the fact that, unbeknownst to him, B'nai Brith had allegedly lobbied the CFIA to have it reverse its initial decision prohibiting the labelling of Settlement Wines as "Products of Israel". Dr. Kattenburg raised this as a concern in his appeal to the CAO, asserting that he had been denied procedural fairness in the CFIA process, as he was not informed of the submissions that were made by B'nai Brith and he was not afforded the opportunity to respond to them. It will be recalled that the CAO upheld Dr. Kattenburg's appeal to the extent that it raised issues with respect to the quality of the service that had been provided to him.

[69] Although Dr. Kattenburg discussed B'nai Brith's actions in his submission to this Court, he has not suggested that he was denied procedural fairness in the CAO process, or that its recommendations should be set aside because of B'nai Brith's actions. Consequently, it is not necessary to address this issue in this decision.

[70] With respect to the second issue, the parties and the interveners provided the Court with extensive international law arguments with respect to the legal status of Israeli settlements in the West Bank. Dr. Kattenburg also provided expert evidence addressing this question. While I have carefully considered this evidence and these arguments, I have determined that it is not necessary to decide this issue. Both parties and both interveners agree that, whatever the legal status of the settlements may be, the fact is that they are not within the territorial boundaries of the State of Israel.

[71] Insofar as the third issue is concerned, after he had filed his record in this matter, Dr. Kattenburg received a number of documents from the CFIA in response to a request he had made under the *Access to Information Act*, R.S.C., 1985, c. A-1. Included in these documents were a series of emails from within the CFIA, as well as emails between representatives of the CFIA and GAC.

[72] Pursuant to an order of Prothonotary Aalto, Dr. Kattenburg was granted leave to file a further affidavit including these emails as part of the record. Leave was granted without prejudice to the right of the respondent to argue that the documents are irrelevant to the issues in this case and should not be considered by this Court.

[73] There is no suggestion that any of these emails were before the CAO when it dealt with Dr. Kattenburg's appeal. He has also failed to establish that the emails in question come within any of the recognized exceptions to the principle that applications for judicial review ordinarily proceed on the basis of the record that was before the original decision maker: *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331, at paragraph 30. As a consequence, I decline to have regard to the contents of the emails in question.

[74] The question, then, is whether the CAO's recommendation that Settlement Wines continue to be labelled as "Products of Israel" was reasonable, in light of the fact that the settlements where the wines were produced are not within the territory of the State of Israel.

[75] Given that the *Food and Drug Regulations* require that there be "[a] clear indication of the country of origin" shown on the principal display panel of wines sold in Canada, and given that the Government of Canada has not recognized Palestine as a country, the respondent says that Israel was the only country that could be identified on labels as the source of the Settlement Wines.

[76] The respondent further contends that international instruments involving Canada, Israel and the Palestinian Authority are a reasonable source of indicia to be considered by the CFIA in determining how best to comply with the "country of origin" labelling

requirements. The respondent identifies three such instruments as being relevant to this case.

[77] The first such instrument is CIFTA, which has been implemented into Canadian law by the *Canada-Israel Free Trade Agreement Implementation Act*, S.C. 1996, c. 33. CIFTA creates preferential tariffs for goods traded between Canada and Israel, and extends this preferential tariff treatment to "another beneficiary" to which Israeli customs laws apply.

[78] Subsection 50(1) of the *Customs Tariff*, S.C. 1997, c. 36 further provides that goods originating from Israel or another CIFTA beneficiary are entitled to the benefit of Canada–Israel Agreement Tariff customs duty rates. Regulations that Canada has promulgated as part of its implementation of CIFTA define "Israel or another beneficiary" as meaning "the territory where the customs laws of Israel are applied".

[79] The *Customs Tariff* definition further states that this includes "the territory where those laws are applied in accordance with Article III of the Protocol on Economic Relations set out in Annex V of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, dated September 28, 1995, as that Protocol is amended from time to time": *Regulations Defining Certain Expressions for the Purposes of the Customs Tariff*, SOR/97-62, 30 December 1996, section 1. As previously noted, Article 1.4.1(b) of CIFTA also defines "territory" for the purposes of the agreement as being "the territory where [Israel's] customs laws are applied".

[80] The Protocol referred to in the previous paragraph is the second instrument cited by the respondent. It specifically provides that Israeli customs laws apply to the West Bank and the Gaza Strip: *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Annex V, Supplement to the *Protocol on Economic Relations*, Article III: https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20V.aspx

[81] The third instrument relied on by the respondent is the 1999 agreement between Canada and the Palestine Liberation Organization (acting on behalf of the Palestinian Authority). In this agreement the parties acknowledged the application of these provisions: *Joint Canadian-Palestinian Framework for Economic Cooperation and Trade Between Canada and the Palestine Liberation Organization on Behalf of the Palestinian Authority* (the "Joint Canadian-Palestinian Framework").

[82] The Joint Canadian-Palestinian Framework is not legally binding. However, it acknowledges the existence of the 1994 *Protocol on Economic Relations between the Government of the State of Israel and the Palestine Liberation Organization* in its Preamble. The Protocol declares that the Palestinian Authority has powers and responsibilities in import and customs policy and procedures with respect to specified categories of goods, and that, for other categories of goods, Israel's customs rates will serve as the minimum basis for the Palestinian Authority.

[83] The respondent contends that, in the absence of a recognized country denomination for the territory in which the Settlement Wines are produced, and given the customs arrangement entered into by Israel and the Palestinian Authority, it was reasonable for the CFIA and the CAO to conclude that wines produced in the West Bank could be labelled as "Products of Israel" for the purpose of Canada's labelling laws.

[84] The respondent further contends that there is nothing in the legislative history of the *Food and Drugs Act* and Regulations or the *Consumer Packaging and Labelling Act* that indicates that parliamentarians were concerned that product labelling should inform Canadians about issues of public international law in their selection and purchase of food products.

[85] According to the respondent, this legislative history discloses that the focus of the legislation at issue in this case was instead on health and safety concerns. Parliamentarians were concerned about prohibiting false, misleading or deceptive labels, wanting to ensure that Canadian consumers would have accurate information with respect to the contents, qualities and characteristics of food products. This was

meant to protect consumers from injurious food or fraud by helping them make knowledgeable decisions in the marketplace. Also of concern was how the wording on product labels would be understood by the “average reasonable consumer”.

[86] Seen in this light, the respondent submits that there is nothing false, misleading or deceptive about the labels at issue in this case, in view of the purpose of the *Food and Drugs Act* and Regulations and the *Consumer Packaging and Labelling Act*, and the information that the average reasonable consumer is entitled to expect.

[87] Noting that there is nothing in the legislation that refers to matters of international law, the respondent also submits that the wording of labels on products sold in Canada cannot address every issue of concern. Product labels are, moreover, not intended to provide Canadian consumers with information with respect to sensitive geopolitical issues. According to the respondent, if consumers had concerns with respect to where the Settlement Wines were produced, “they can just Google the name of the wineries”.

[88] The respondent notes that the United Kingdom Supreme Court had to deal with a similar issue in a case involving comparable British labelling legislation: *Richardson and another v. Director of Public Prosecutions*, [2014] UKSC 8, [2014] All E.R. 20 [*Richardson*]. In *Richardson*, the defendants objected to a shop in London selling beauty products manufactured in an Israeli settlement that were derived from mineral materials from the Dead Sea. The goods in question were labelled “*Made by Dead Sea Laboratories Ltd., Dead Sea, Israel*”: at paragraph 7 [emphasis in original].

[89] After mounting a non-violent protest, the defendants were arrested and charged with aggravated trespass contrary to the provisions of section 68 of the *Criminal Justice and Public Order Act 1994* [(U.K.), c. 33]. This provision makes it an offence to trespass on land, where a person or persons lawfully on the land are engaged in, or are about to engage in a lawful activity, and the person charged with the offence does an act on the land that is intended to intimidate all or some of those engaged in the activity from engaging in that activity, or to obstruct or disrupt that activity.

[90] The defendants contested the charge, arguing that the activities carried on in the shop in question were not lawful, as they involved the commission of criminal offences. One such alleged offence was the sale of products labelled in a way that was false or misleading, because the Occupied Palestinian Territories were not recognized internationally or by the United Kingdom as part of the State of Israel, thus contravening the *Consumer Protection from Unfair Trading Regulations 2008* [U.K.] (SI 2008/1277) and the *Cosmetic Products (Safety) Regulations 2008* [U.K.)] (SI 2008/1284).

[91] With respect to the labelling of cosmetic products from the Dead Sea, the Court found in *Richardson* that the legislative intent behind the labelling legislation in question was consumer safety, and not accuracy relating to the political status of the territories in question. Nor was it intended to inform consumers about public international law issues: at paragraph 23.

[92] I do not accept the respondent's arguments.

[93] Dealing first with the significance of the *Richardson* decision, the United Kingdom Supreme Court held in that case that the objective of the labelling legislation at issue in that case was the safety of the consumer, rather than disputed issues of territoriality: at paragraph 23. The Court further found that there was no basis for finding that the average consumer would be misled with respect to the origin of the products in issue because the source was described as being politically or constitutionally Israel when it was in fact the Occupied Palestinian Territories. This was because the origin of the products "was after all correctly labelled as the Dead Sea" [at paragraph 22].

[94] There is no comparable statement on the labels on the Settlement Wines. They do not identify the source of the Settlement Wines as being "Israeli settlements in the West Bank", "the West Bank" or "Occupied Palestinian Territories". Rather they are identified only as coming from the State of Israel – something that the parties agree is simply not the case.

[95] There is a second point of distinction between the situation that confronted the United Kingdom Supreme Court in the *Richardson* case and the present situation. In

Richardson, the Court concluded that the objective of the labelling regulations in issue in that case was "clearly safety of the consumer": at paragraph 23. While the same may be said of the Canadian *Food and Drug Regulations* at issue here, it is evident from a review of the legislative history of the country of origin requirements that consumer safety was not the only objective of the labelling legislation. As will be discussed in greater detail below, I have found as a fact that another objective of the Canadian labelling legislation was allowing consumers to make informed decisions about the products that they purchase in order to allow them to "buy conscientiously".

[96] While it is true that the extracts from Hansard relied upon by the respondent describe the purpose of the *Food and Drugs Act* as being the protection of Canadians "in matters of health", the Minister of the day was clear that the Bill was also concerned "with the prevention of deception in the manufacture and sale of goods consumed by the public".

[97] Insofar as the debates surrounding the enactment of the *Consumer Packaging and Labelling Act* are concerned, the responsible Minister noted that one of the principles underlying the proposed legislation was "the provision of full and factual information on labels". The Minister further observed that the provision of such information "is a fundamental requirement of the consumer movement".

[98] The Minister went on to state that it is a "fundamental axiom" of the consumer movement that "consumers ought to be able to exercise a rational choice". In order to be able to "buy conscientiously", consumers had to have the information necessary "to make well informed decisions and well informed and rational choices".

[99] Moreover, as the respondent's affiant acknowledged in his cross-examination, "accurate food labelling is important as it ensures that products are not being misrepresented to Canadians. The label provides consumers with information that helps them make informed decisions about the food that they purchase for themselves and their families".

[100] It is true that section B.02.108 of the *Food and Drug Regulations* requires that there be a clear indication of the country of origin shown on the principal display panel of wines sold in Canada. This provision cannot, however, be read in a vacuum. Regard must also be had to subsection 7(1) of the *Consumer Packaging and Labelling Act* which provides that no one shall "sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product". Consideration must also be given to subsection 5(1) of the *Food and Drugs Act*, which prohibits the sale or advertising of any food "in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."

[101] Given that there is no dispute about the fact that the Israeli settlements in the West Bank are not part of the territory of the State of Israel, identifying Settlement Wines as being "Products of Israel" is false, misleading and deceptive. Moreover, as will be discussed further on in these reasons, labelling Settlement Wines as "Products of Israel" interferes with the ability of Canadian consumers to make "well informed decisions and well informed and rational choices" in order to be able to "buy conscientiously".

[102] In addition, while the *Food and Drug Regulations* do require that there be a clear indication of the country of origin shown on the labels of wines sold in Canada, the respondent acknowledges that exceptions are made to the labelling requirements in certain circumstances.

[103] That is, guidelines promulgated by the CFIA state that wines produced in the United States do not have to state that they are "Products of the United States". According to these guidelines, it will be sufficient if the labels on American-produced wines include a statement such as "Blush Merlot of California", rather than identifying the wine in question as being a "Product of the United States".

[104] The CFIA guidelines explain that identifying a wine as being a "Product of California" will fulfill the requirement that a country of origin be identified on the wines'

labels “as the requirements do not specify the wording of the country of origin statement; … and it is unlikely that anyone would be misled regarding the origin of the product”. That is, consumers would know that California is part of the United States.

[105] The rationale cited by the respondent for allowing an exception to be made to the country of origin labelling requirements for American-produced wines is thus that it is unlikely that anyone would be misled regarding the origin of California wines, as consumers would know that California is part of the United States.

[106] That should be contrasted with the situation here. There is no suggestion that most Canadians would know that the Psâgot and Shiloh settlements are in the West Bank. This makes it all the more likely that consumers would be misled by labelling wines produced in these settlements as “Products of Israel”.

[107] Insofar as the CFIA’s and CAO’s reliance on the definitions provided for in CIFTA is concerned, according to its preamble, CIFTA was intended to establish a “free trade area between the two countries through the removal of trade barriers” to “strengthen economic relations and to promote economic development”. It thus creates a customs union between Canada and Israel, addressing barriers to trade between the two countries, and setting the tariffs to be applied to goods imported from Israel.

[108] Barriers to trade typically involve matters such as tariffs, quotas and subsidies. Domestic consumer protection legislation of general application requiring that product labels be true and non-misleading is not a barrier to trade. It is, rather, a legislative measure intended to inform and protect Canadian consumers.

[109] The objectives of CIFTA are clearly set out in Article 1.2 of the Agreement. This states that the purpose if the agreement “is to eliminate barriers to trade in, and facilitate the movement of, goods between the territories of the Parties, and thereby to promote conditions of fair competition and increase substantially investment opportunities in the free trade area.”

[110] The wording of Article 1.4.1(b) is, moreover, clear that the definition of “territory” provided for in CIFTA is intended to apply only to matters coming within that Agreement.

There is no suggestion in CIFTA that its definition of "territory" has any application outside of the CIFTA context, or that it has any application to Canada's domestic laws relating to consumer protection and product labelling.

[111] Indeed, Article 4.2 of CIFTA specifically excludes its application to standards-related matters, providing that "[t]he rights and obligations of the Parties relating to standards-related measures shall be governed by the *Agreement on Technical Barriers to Trade* [of the World Trade Organization]".

[112] Reliance on the CIFTA definition of "territory" for the purposes of Canadian product labelling requirements also leads to a false and misleading result. It is thus unreasonable.

[113] While this finding is sufficient to dispose of this matter, mention should also be made of the fact that a decision on the product labelling issue also arguably engages "Charter Values", as this is something that may have to be addressed when this matter is re-determined. This will be discussed next.

X. The CAO's Decision and "Charter Values"

[114] Paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], declares that everyone has certain fundamental freedoms, including "freedom of conscience and religion" and "freedom of thought, belief, opinion and expression".

[115] As was noted earlier, and as IJVC observes, a primary purpose of the legislation at issue in this case is to ensure that consumers are provided with accurate information so as to allow them to make informed decisions about the products that they choose to buy.

[116] IJVC notes that consumers have long expressed their political views through their purchasing choices. Examples of this cited by IJVC include the boycott of California grapes in the 1960s and 1970s as an expression of solidarity with farm

workers, and the pre-1994 boycott of South African wines as an expression of support for the Anti-Apartheid Movement.

[117] In a similar vein, IJVC further notes that some individuals opposed to the creation of Israeli Settlements in the West Bank express their opposition to the settlements and their support for the Palestinian cause through their purchasing choices, boycotting products produced in the Settlements. In order to be able to express their political views in this manner, however, consumers need to have accurate information as to the origin of the products under consideration. Identifying Settlement Wines incorrectly as "Products of Israel" inhibits the ability of such individuals to express their political views through their purchasing choices, thereby limiting their Charter-protected right to freedom of expression.

[118] In *R. v. Guignard*, 2002 SCC 14, [2002] 1 S.C.R. 472 [*Guignard*], the Supreme Court stated that it attaches great weight to freedom of expression, emphasizing "the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law": at paragraph 19. The Court further noted that freedom of expression plays a critical role in the development of Canadian society, making it possible for individuals to express their views on any subject relating to life in society: *Guignard*, above, at paragraph 20.

[119] The Supreme Court also observed that freedom of expression protects not just accepted opinions, but also those that are "challenging": *Guignard*, above, at paragraph 19, citing *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paragraph 21.

[120] Moreover, in decisions such as *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 [*Loyola*]; and *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, the Supreme Court has held that where a discretionary administrative decision engages the protections enumerated in the Charter, the decision maker "is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the

applicable statutory objectives that she or he is obliged to pursue": *Loyola*, above, at paragraph 4.

[121] While Dr. Kattenburg did not make specific reference to the implications that the CFIA's reversal decision had for his Charter-protected right to freedom of expression in his complaint, he did state in his appeal to the CAO that "many [consumers] would elect not to purchase these wines" if they were aware that they "profit individuals who are complicit in a war crime". Moreover, his submissions to both the CFIA and the CAO were replete with references to political issues, including his views as to the illegality of the Israeli settlements in the West Bank.

[122] For example, Dr. Kattenburg states in his letter of appeal to the CAO that "[l]ike many other members of the Jewish community in Canada, [he] objects to the State of Israel's disregard for international law". He goes on to clearly identify the political issues that are associated with the labelling of wines produced in the Israeli settlements.

[123] Dr. Kattenburg further stated in his submissions to the CAO that an individual lobbying the CFIA to have it reverse its initial decision "acted contrary to the interests of Canadian consumers, and contrary to the values of Canadians of conscience". His counsel also cited Charter jurisprudence in his submissions to the CAO in connection with Dr. Kattenburg's appeal.

[124] It is thus apparent that freedom of expression issues were implicated in Dr. Kattenburg's appeal. The CAO did not, however, address these issues in its decision, buttressing my conclusion that the CAO's decision was unreasonable.

XI. Conclusion

[125] There are few things as difficult and intractable as Middle East politics, and the presence of Israeli settlements in the West Bank raises difficult, deeply felt and sensitive political issues.

[126] One peaceful way in which people can express their political views is through their purchasing decisions. To be able to express their views in this manner, however,

consumers have to be provided with accurate information as to the source of the products in question.

[127] In addition, Canadian federal legislation requires that food products (including wines) that are sold in Canada bear truthful, non-deceptive and non-misleading country of origin labels.

[128] The effect of the CAO's decision was to affirm the CFIA's conclusion that it is permissible to label wines produced in Israeli settlements in the West Bank as "Products of Israel" when that is not in fact the case. These labels are thus false, misleading and deceptive. As such, they contravene the requirements of subsection 7(1) of the *Consumer Packaging and Labelling Act* and subsection 5(1) of the *Food and Drugs Act*.

[129] A decision that allows Settlement Wines to be labelled as "Products of Israel" thus does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is, rather, unreasonable.

[130] As a consequence, Dr. Kattenburg's application for judicial review is allowed. In accordance with the agreement of the parties, no order will be made as to costs.

[131] Finally, it is not appropriate for this Court to determine how the Settlement Wines should be labelled. That is a matter for the CFIA. Consequently, the recommendation made by the CAO is set aside, and the matter is remitted to the CAO for redetermination.

JUDGMENT IN T-1620-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is remitted to the CAO for re-determination.

Appendix

Consumer Packaging and Labelling Act, R.S.C., 1985, c. C-38

INTERPRETATION

Definitions

2 (1) In this Act,

…

dealer means a person who is a retailer, manufacturer, processor or producer of a product, or a person who is engaged in the business of importing, packing or selling any product; (*fournisseur*)

…

APPLICATION OF ACT

Application despite other Acts

3 (1) Subject to subsections (2) and (3) and any regulations made under section 18, the provisions of this Act that are applicable to any product apply despite any other Act of Parliament.

…

Representations relating to prepackaged products

7 (1) No dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product.

Definition of *false or misleading representation*

(2) For the purposes of this section, ***false or misleading representation*** includes

…

(c) any description or illustration of the type, quality, performance, function, origin or method of manufacture or production of a prepackaged product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.

Food and Drugs Act, R.S.C., 1985, c. F-27

PART I

FOOD, DRUGS, COSMETICS AND DEVICES

…

Deception, etc. regarding food

5 (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

…

Food and Drug Regulations, C.R.C., c. 870

DIVISION 2

ALCOHOLIC BEVERAGES

…

WINE

…

B.02.108 A clear indication of the country of origin shall be shown on the principal display panel of a wine.

Free Trade Agreement Between the Government of Canada and the Government of the State of Israel, July 31, 1996, [1997] Can. T.S. No. 49

CHAPTER ONE - OBJECTIVES

…

ARTICLE 1.2: OBJECTIVE

1. The objective of this Agreement, as elaborated more specifically in its provisions, is to eliminate barriers to trade in, and facilitate the movement of, goods between the territories of the Parties, and thereby to promote conditions of fair competition and increase substantially investment opportunities in the free trade area.

…

ARTICLE 1.4: DEFINITIONS OF GENERAL APPLICATION

1. For the purposes of this Agreement, unless otherwise specified:

…

• Territory means:

…

(b) with respect to Israel the territory where its customs laws are applied;

…

CHAPTER 4 – NATIONAL TREATMENT AND OTHER BORDER MEASURES

…

ARTICLE 4.2: TECHNICAL BARRIERS TO TRADE

1. The rights and obligations of the Parties relating to standards-related measures shall be governed by the *Agreement on Technical Barriers to Trade*, part of Annex 1A of the *WTO Agreement*.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

…

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Regulations Defining Certain Expressions for the Purposes of the Customs Tariff, SOR/97-62

EXPRESSIONS DEFINED

1 For the purposes of the *Customs Tariff*, the following expressions are defined.

…

Israel or another CIFTA beneficiary means the territory where the customs laws of Israel are applied and includes the territory where those laws are applied in accordance with Article III of the Protocol on Economic Relations set out in Annex V of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, dated September 28, 1995, as that Protocol is amended from time to time. (*Israël ou autre bénéficiaire de l'ALÉCI*)

Canadian Food Inspection Agency Act, S.C. 1997, c. 6

PREAMBLE

WHEREAS the Government of Canada wishes to enhance the effectiveness and efficiency of federal inspection and related services for food and animal and plant health by consolidating them;

Customs Tariff, S.C. 1997, c. 36

CANADA–ISRAEL AGREEMENT TARIFF

Application of CIAT

50 (1) Subject to section 24, goods that originate in Israel or another CIFTA beneficiary are entitled to the Canada–Israel Agreement Tariff rates of customs duty.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1620-17
STYLE OF CAUSE:	DAVID KATTENBURG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 21, 2019 and May 22, 2019
JUDGMENT AND REASONS:	MACTAVISH J.
DATED:	JULY 29, 2019

APPEARANCES**:**

A. Dimitri Lascaris	For The Applicant
Gail Sinclair	For The Respondent
Negar Hashemi	

Barbara Jackman	FOR THE INTERVENER INDEPENDENT JEWISH VOICES OF CANADA
David Matas	FOR THE INTERVENER LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH

SOLICITORS OF RECOR:

A. Dimitri Lascaris Law Professional Corporation Barristers and Solicitors Montréal, Quebec	For The Applicant
Attorney General of Canada Toronto, Ontario	For The Respondent
Jackman and Associates Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER INDEPENDENT JEWISH VOICES OF CANADA

David Matas

Barrister and Solicitor

Winnipeg, Manitoba

FOR THE INTERVENER

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH