Court File Number:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

INDEPENDENT JEWISH VOICES, AMNESTY INTERNATIONAL CANADA, CENTRE FOR FREE EXPRESSION, PROFESSOR MICHAEL LYNK (UN Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied since 1967), ARAB CANADIAN LAWYERS ASSOCIATION, TRANSNATIONAL LAW AND JUSTICE NETWORK, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS and AL-HAQ

Applicants
(Proposed Interveners)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant)

- and -

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL

VOLUME I OF II

(Filed pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26)

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

INDEPENDENT JEWISH VOICES, AMNESTY INTERNATIONAL CANADA, CENTRE FOR FREE EXPRESSION, PROFESSOR MICHAEL LYNK (UN Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied since 1967), ARAB CANADIAN LAWYERS ASSOCIATION, TRANSNATIONAL LAW AND JUSTICE NETWORK, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS and AL-HAQ

Applicants
(Proposed Interveners)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant)

- and -

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents
(Respondents)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(Filed pursuant to Section 40 of the *Supreme Court Act,* RSC 1985, c S-26)

TAKE NOTICE that INDEPENDENT JEWISH VOICES, AMNESTY INTERNATIONAL CANADA, CENTRE FOR FREE EXPRESSION, PROFESSOR MICHAEL LYNK (UN Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied since 1967), ARAB CANADIAN LAWYERS ASSOCIATION, TRANSNATIONAL LAW AND JUSTICE NETWORK, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS and AL-HAQ apply for leave to appeal to the Supreme Court of Canada, under section 40 of the

Supreme Court Act, RSC 1985, c.S-26 from the judgment of the Federal Court of Appeal (File number A-312-19) made October 6, 2020, and for an order granting leave to appeal or such further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1) The applicants for leave to appeal raise matters of national importance as the Federal Courts apply inconsistent tests on motions for leave to intervene that do not align with the jurisprudence of the Supreme Court of Canada and other appellate courts, which results in uncertainty for potential interveners and the exclusion of important perspectives that may assist the court on important public issues;

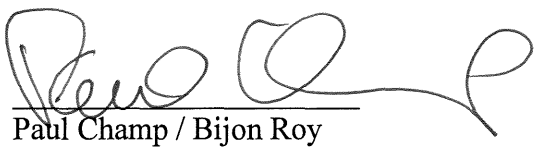
2) The Federal Court of Appeal judge in this case improperly predetermined the merits of arguments that were to be raised on the appeal in the Court below, regarding them as "doomed to fail";

3) The applicants for leave to appeal raise matters of national importance in that the Federal Courts have primary responsibility for the supervision of federal tribunals and government officials and routinely deal with public law issues that affect all Canadians;

4) It is a matter of national importance that the role of public interest organizations as interveners in the Federal Court system not be stifled, and the basic criteria for granting interventions be affirmed.

Dated at Ottawa, ON this 4th day of December, 2020.

SIGNED BY:



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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20201006

Docket: A-312-19

Ottawa, Ontario, October 6, 2020

Present: STRATAS J.A.

ATTORNEY GENERAL OF CANADA

Appellant

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents

ORDER

WHEREAS League for Human Rights of B'Nai Brith Canada, Independent Jewish Voices, Centre for Israel and Jewish Affairs, Psagot Winery Ltd., Centre for Free Expression, Amnesty International Canada, Professor Eugene Kontorovich, Professor Michael Lynk (U.N. Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967), The Arab Canadian Lawyers Association, the Transnational Law and Justice Network, Canadian Lawyers for International Human Rights and Al-Haq move for leave to intervene in this appeal;

AND WHEREAS Psagot Winery Ltd. also moves to be added as a party respondent in this appeal;

AND WHEREAS, for reasons issued contemporaneously, the motions for leave to intervene should be dismissed;

AND WHEREAS, for reasons issued contemporaneously, Psagot Winery Ltd.'s motion to be added as a party respondent should be granted, it should have an opportunity to file evidence and submissions relating to procedural fairness issues in the Federal Court as described in paragraph 50 of the reasons issued contemporaneously, and the other parties should have an opportunity to respond;

AND WHEREAS the appellant and the respondent, Dr. David Kattenburg, have agreed that the appellant should be afforded an opportunity to make submissions on the effect of the Supreme Court's judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and the respondent should be permitted an opportunity to respond;

AND WHEREAS some provision must be made for scheduling these matters;

THIS COURT ORDERS that:

1. The motions for leave to intervene are dismissed.

2. Psagot Winery Ltd.'s motion to be added as a party respondent is granted. Psagot Winery Ltd. may address only the issue relating to procedural fairness issues in the Federal Court as described in paragraph 50 of the reasons issued contemporaneously. The style of cause is amended to reflect the addition of Psagot Winery Ltd. to this appeal as a party

respondent. The amended style of cause, as appears on this Order and the contemporaneously issued reasons, shall be used in all further documents in this appeal.

3. The following procedural steps are scheduled as follows:

(a) Evidence of Psagot Winery Ltd. only on the procedural fairness issue shall be served within 20 days of this Order;

(b) Any evidence of the other parties on the procedural fairness issue shall be served within 20 days of the filing under (a) or the expiry of the time therefor;

(c) Any cross-examinations on the evidence shall be completed within 20 days of the filing under (b) or the expiry of the time therefor;

(d) Psagot Winery Ltd. shall file a supplementary appeal book containing the evidence and transcripts under (a), (b) and (c) and its memorandum of fact and law on the procedural fairness issues both within 20 days after the cross-examinations under (c) or the expiry of the time therefor;

(e) The appellant shall file a supplementary memorandum of no more than 10 pages concerning the effect of *Vavilov* and Psagot Winery Ltd.'s procedural fairness issues within 20 days of the filing under (d);

(f) The respondent, Dr. David Kattenburg, shall file a supplementary memorandum of no more than 10 pages responding to the appellant's submissions concerning the effect of *Vavilov* and Psagot Winery Ltd.'s procedural fairness issues within 20 days of the filing under (e);

(g) The appellant shall file the requisition for hearing within 10 days after the filing in (f).

4. There shall be no costs of the motions.

"David Stratas"
J.A.

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 6 day of October A.D. 2020

Dated this 1 day of December 20 20

E. RABOUIN
REGISTRY ASSISTANT
ADJOINTE AU GREFFE

Federal Court of Appeal | Cour d'appel fédérale

Date: 202001006

Docket: A-312-19

Citation: 2020 FCA 164

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 6, 2020.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20201006

Docket: A-312-19

Citation: 2020 FCA 164

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] An appeal has been brought from a judicial review in the Federal Court: 2019 FC 1003 (*per* Mactavish J. as she then was). The appeal is pending in this Court.

[2] Before the Court are multiple motions for leave to intervene under Rule 109 and one motion by Psagot Winery Ltd. to be added as a party respondent.

A. The intervention motions

[3] The underlying judicial review is a review of whether an administrative decision-maker, here the Canadian Food Inspection Agency, interpreted and applied certain legislative requirements concerning the labelling of a food product, here wine, in a defensible and acceptable way, *i.e.*, within the constraints discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. There is nothing more to it. It appears to be a standard judicial review of a regulatory decision.

[4] But twelve separate parties now line up to intervene: League for Human Rights of B'Nai Brith Canada, Independent Jewish Voices, Centre for Israel and Jewish Affairs, Centre for Free Expression, Amnesty International Canada, Professor Eugene Kontorovich, Professor Michael Lynk (U.N. Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967), The Arab Canadian Lawyers Association, the Transnational Law and Justice Network, Canadian Lawyers for International Human Rights, Al-Haq, and Psagot Winery Ltd. Many of them say this judicial review is something more than standard: the label described the wine as a "product of Israel" and it n the West Bank.

[5] As a result, a number of these moving parties seek to intervene to speak to the issue of Israel's occupation of the West Bank, including the status of the West Bank, the territorial sovereignty of Israel, human rights and humanitarian concerns, issues of international law, and other related issues. Many of them appear to want this Court to rule on the merits of these issues.

[6] But there is one basic problem. This appeal does not raise the merits of these issues. As I shall explain, it is narrower.

[7] That is not all. Some of the moving parties seek to intervene on other issues, such as the international trade law dimensions lying behind the labelling requirements and issues arising under section 2(b) of the Charter.

[8] Under Rule 109, the Federal Courts' rule governing intervention, the central part of the test for intervention is whether a moving party's submissions will be useful to the panel determining the appeal.

[9] This requires four questions to be asked. In some intervention motions, such as the ones presently before the Court, it is useful to consider them separately. The four questions are as follows:

(1) *What issues are live before the panel determining the proceeding*? The issues are set by the originating document, here the notice of appeal, as explained by any memoranda of fact and law that have been filed: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 at paras. 54-56. Here, the Court must determine the "real essence" and "essential character" of the proceeding and disregard those matters that are doomed to fail: *Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50. In doing so it must understand its role in the

proceeding. For example, in the context of judicial review, often the Court is only in a reviewing role of the administrative decision-maker's decision on the merits and the administrative decision-maker is the only one entitled to decide on the merits: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189; *Robbins v. Canada (Attorney General)*, 2017 FCA 24; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 at paras. 26-28; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 87 and 97. And to avoid disguised correctness review, the Court must not consider the merits itself: *Vavilov* at para. 83; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28.

(2) *What does the moving party intend to submit in the proceeding*? The Court must not be taken in by tricky drafting by skilful pleaders. Instead, it must determine the "real essence" and "essential character" of what the prospective intervener intends to say. It does this by reading the motion materials "holistically and practically without fastening onto matters of form". See *JP Morgan Asset Management*, above at paras. 49-50.

(3) *Are the moving party's submissions doomed to fail*

intervention motion, the Court should not venture too deeply into the merits of issues that are for the panel. That being said, the panel should not have to deal

with submissions of an intervener that are doomed to fail or that are inadmissible. This includes submissions that are indisputably wrong in law or irrelevant to the live issues before the Court. Issues that require new evidence and new evidence itself are also not admissible: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 at paras. 17 and 36; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at para. 19; *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 14; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 11. Similarly submissions and academic articles that, in reality, contain new evidence intertwined with the legal discussion are prohibited: *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88 at para. 14; *Zaric* at para. 14.

(4) *Will the moving party's arguable submissions advance the determination of the panel determining the appeal*? The Court should exclude submissions that duplicate those of others. It should also exclude those that make political points without law, pronounce freestanding policy positions untethered to law, or offer submissions irrelevant to the legal task the Court must perform.

[10] I will now consider these questions.

(1) What issues are live before the panel determining the proceeding?

[11] Before us is an appeal from an application for judicial review. The appeal panel's job will be to consider whether the decision of the Agency about two particular wine labels is acceptable and defensible, *i.e.*, within the constraints discussed in *Vavilov*. Nothing more.

[12] In particular, the panel will focus on the administrative decision-maker's interpretation and application of the legislation that governs it. The administrative decision-maker in this case, the Agency, had to interpret and apply a country of origin labelling requirement under the *Food and Drug Regulations,* C.R.C., c. 870, s. B.02.108 to two particular wines produced in the West Bank and decide whether their labels were false or misleading under subsection 5(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 and subsection 7(1) of the *Consumer Packaging and Labelling Act,* R.S.C., 1985, c. C-38.

[13] What do country of origin and misleading mean in the legislation? To answer that question, the Agency had to examine, explicitly or implicitly, the text, context and purpose of the provisions in which those terms appear: *Vavilov* at paras. 115-124; and see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[14] In reviewing the legislative interpretation reached by the Agency, the panel hearing this appeal will be engaging in reasonableness review. I acknowledge that the respondent intends to

argue that the standard of review for the administrative decision-maker's interpretation of the relevant legislation is correctness on the ground that the issue is of public significance. But on the authority of *Vavilov* at paras. 53-72, this is doomed to fail and so I do not consider it a live issue. The panel hearing this appeal will be conducting reasonableness review on the issue of legislative interpretation, not correctness review.

[15] When conducting reasonableness review, the panel will not be allowed to reach its own interpretation of the legislation and impose it on the Agency: see *Vavilov* at para. 83; *Delios* at para. 28.

[16] The panel will also determine whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation and whether it offered sufficient justification in support of its decision: see, generally, *Vavilov*.

[17] Another issue for the panel will be whether the Federal Court was correct in law in holding that the Agency should have considered issues under section 2(b) of the Charter. This is a live issue. Note, however, that it is not for this Court to decide how section 2(b) might affect the interpretation and application of the legislative provisions. That will be for the Agency if this matter is sent back to it for redetermination.

(2) What do the moving parties intend to submit in the proceeding?

[18] The true essence or essential character of the submissions of the interveners are three-fold:

- Many of the interveners intend to submit that Israel's occupation of the West Bank is illegal. They rely on plenty of international instruments. Further, some interveners wish to make submissions about human rights and humanitarian concerns of those in the West Bank.

- Some of the interveners, in particular Independent Jewish Voices, the Centre for Free Expression, B'nai Brith, the Centre for Israel and Jewish Affairs and Amnesty International, intend to argue that section 2(b) is engaged in this case. Some intend to address the substantive content of section 2(b), including how international law might inform its interpretation and application.

- Professor Kontorovich intends to submit mainly that there are international law understandings under the GATT and the WTO, including the importance of non-tariff barriers such as labelling rules. He submits that these bear upon the interpretation of the legislation in this case.

(3) Are the moving parties' submissions doomed to fail?

[19] The submissions on Israel's occupation of the West Bank are doomed to fail on the legislative interpretation issue.

[20] Quite properly, none of the moving parties contend that the provisions of the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act* are aimed at furthering or implementing Canada's international obligations or dealing with the Israel/West Bank issue. There is nothing to suggest that these provisions were enacted to address state occupation of territories and, in particular, Israel's occupation of the West Bank.

[21] Rather, these provisions are of general application, appearing amongst similar provisions, aimed at regulating, often in exacting detail, food products and the public's interaction with those products through, among other things, labels on containers. The purpose seems to be, at a broad level of generality, consumer protection, quality assurance and safety. The exact purpose will be for the appeal panel to consider.

[22] In support of their submissions, the moving parties offer many international instruments, opinions and understandings. Their submissions assume they enter the process of legislative interpretation automatically, almost as if they are some sort of super-Charter that can be used to supplement, amend or displace the provisions of domestic law. They do not.

[23] Certain authorities of this Court concerning the use of international law, heavily based on authorities from the Supreme Court, will bind the panel hearing the appeal. The moving parties' proposed use of international law is contrary to these authorities. It is doomed to fail.

[24] International law enters into the interpretation of domestic law such as, in this case, the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, only in certain limited ways: see *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 at paras. 69-92 and the many Supreme Court authorities cited therein (including the most recent Supreme Court authority, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, 443 D.L.R. (4th) 183); see also *Brown v. Canada (Citizenship and Immigration),* 2020 FCA 130 at paras. 54-59. None of these limited ways are available here. The requirement that domestic law be interpreted in accordance with international obligations cannot be used to amend domestic legislation: *Entertainment Software Association* at paras. 89-91; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704.

[25] International law is irrelevant to the discernment of legislative purpose in a case like this: *Gitxaala Nation* v. *Canada*, 2015 FCA 73 at paras. 11-18; *Ishaq* at para. 27. Legislative purpose is discovered from the words of the provision, related provisions, and, with some caution, legislative history and regulatory impact or official explanatory statements: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 25-27 and 35; *Williams v. Canada (Public Safety and Emergency Preparedness),* 2017 FCA 252, [2018] 4 F.C.R. 174 at -51. Sometimes it is clear from these things that the purpose of a legislative provision is to implement some or all of an international instrument: *Entertainment Software Association* at

paras. 73-74 and 82. Sometimes international law can be used to resolve ambiguities: *Entertainment Software Association* at paras. 83-84.

[26] But aside from those instances, as far as the discernment of legislative purpose is concerned, international law is not like a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please. Legislative purpose is the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is "best for Canadians" or what they consider to be , "right" or "fair": see *Hillier*, *Williams* and *Ishaq*; and see also *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 and *Michel v. Graydon*, 2020 SCC 24 and, in particular, the rejection of the dissents in these cases; and see also M. Mancini, "The 'Return' of 'Textualism' at the SCC[?]" (9 April 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/04/09/the-return-of-textualism-at-the-scc/>. Thus, interveners' policy preferences and the policies they want the legislation to pursue are irrelevant to the Court's discernment of legislative purpose: *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120 at paras. 5-9.

[27] The detailed consumer-oriented and product-oriented provisions at issue in this case were enacted without regard to issues concerning Israel's occupation of the West Bank. Specifically, they were enacted without regard to the specific international instruments the moving parties wish to insert into this appeal. These include the United Nations advisory opinions entitled *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) Notwithstanding Security Council Resolution 276* and *Legal Consequences of the*

Construction of a Wall in the Occupied Palestinian Territory; United Nations General Assembly resolutions entitled *The Right of the Palestinian People to Self-Determination, Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the Occupied Syrian Golan over their Natural Resources, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Peaceful Settlement of the Question of Palestine* and resolutions numbered 2435, 2649, 3236, 43/177, 48/94 and 73/158; United Nations Security Council Resolutions entitled *The Situation in the Middle East, including the Palestinian Question*, *Territories Occupied by Israel* and resolutions numbered 446, 465, 476 and 2334 and other U.N. documents such as *Territories Occupied By Israel*, *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources, Peaceful Settlement of the Question of Palestine*, *Settlements and Creeping Annexation*, the *Agreement on the Gaza Strip and the Jericho Area*, and various U.N. resolutions affirming the Palestinian peoples' right to self-determination. The same can be said for more general documents such as the *Charter of the United Nations*, the *Articles on Responsibility for States for Internationally Wrongful Acts*, the *Vienna Convention on the Law of Treaties*, the *Declaration of Principles on Interim Self Government Arrangements*, the *Regulations Annexed to the Hague Convention No. IV respecting the Laws and Customs of War on Land,* the *International Covenant on Economic, Social and Cultural Rights,* the *International Covenant on Civil and Political Rights,* the *Rome Statute of the International Criminal Court,* the *2019 Concluding Observations of the United Nations Committee on Economic, Social, and Cultural Rights*, the *2019 Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination*, the *League of Nations, Covenant of the League of Nations,*

the *Israeli-Palestinian Agreement on the West Bank and the Gaza Strip (Oslo III)* and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*.

[28] Quite apart from interpreting the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, many of the moving parties suggest that international law is part of the process of applying this legislation to the facts of this case. They say that this legislation must be applied in a way that implements the obligations and requirements found in international instruments.

[29] This too is doomed to fail.

[30] First, this misconceives this Court's task in the appeal. This Court will not be applying the legislative provisions to the facts of this case. Rather, it is only conducting reasonableness review of the Agency's decision to examine whether it is acceptable and defensible and supplies adequate justification under *Vavilov*. Under reasonableness review, it is for the administrative decision-maker, here the Agency, to apply the authentic meaning of the legislation to the facts of the case, not this Court: see *Association of Universities* and related authorities in paragraph 9(1) above.

[31] As well, the moving parties are again using international law improperly in a manner that is doomed to fail. Once a court or administrative decision-maker arrives at a definitive legal interpretation of a provision—including, where proper, the content of international law—its job

is to apply the provision's authentic meaning dispassionately and objectively to the facts of the case. To decide a case, a court or administrative decision-maker cannot reach out to other standards, such as those in international law, to supplement, modify or oust the authentic meaning of domestic law; international law is not a directly binding source of substantive law that supplements, modifies or ousts the authentic meaning of domestic law: see *Entertainment Software Association* at paras. 78-79 and the numerous authorities cited therein, including many from the Supreme Court. The meaning of domestic law is not to be amended by international law: see *Entertainment Software Association*, above at para. 85; see also *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 35; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 54; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 50; *Tapambwa v. Minister of Citizenship and Immigration*, 2019 FCA 34, 69 Imm. L.R. (4th) 297; *Gitxaala Nation* at para. 16.

[32] Many of the moving parties' proposed submissions are doomed to fail for another reason. Many rely on evidence that is not before the Court. Some of the moving parties supply us with hyperlinks to find reports, opinions, news articles and informal articles to buttress their claims about the content of international law and the illegality of Israel's occupation of the West Bank. But as far as facts are concerned, judges can act only on evidence, matters of judicial notice or statutory deeming provisions: *Canada v. Kabul Farms*, 2016 FCA 143, 13 Admin L.R. (6th) 11 at para. 38; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 483 N.R. 275 at paras. 79-80. They cannot act on the basis of personal assumptions: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548. As well, the normal rule in judicial reviews is that evidence is to be adduced before the administrative decision-maker, not in reviewing courts:

Association of Universities, above. Finally, at no time do we supplement the proper evidentiary record with whatever we can scrounge from the Internet.

[33] I do not doubt for a moment that international law, when properly used, can play an important role in the interpretation of legislation and the discernment of the authentic meaning of legislation: see, *e.g.*, *Entertainment Software Association* at para. 92. But this is not one of those cases.

[34] Some moving parties ask this Court to award a remedy that the applicant for judicial review does not seek. This is doomed to fail. The case remains that of the applicant for judicial review; others cannot commandeer it and ask for remedies the applicant does not seek: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 at paras. 55-56; *Teksavvy Solutions* at para. 11; *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261 at para. 50. In any event, on these facts, the relief sought by some interveners—non remittal to the Agency and a positive pronouncement on the merits by this Court—is not available: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 and *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency)*, 2017 FCA 45, 411 D.L.R. (4th) 175 at paras. 51-56 and 84, as discussed in *Vavilov* at para. 142.

[35] Some of the prospective interveners appear to want to argue that the labels on the wines violate the section 2(b) rights of some of those who read them. The panel hearing this appeal will not be considering that issue. Rather, it will be considering whether the Federal Court was correct in law in holding that the Agency should have considered issues under section 2(b) of the

Charter. That issue, a purely legal one, is already before the Court and the interveners have nothing to add that will help the Court determine it.

[36] If this Court agrees with the Federal Court that the Agency should have considered section 2(b) of the Charter, it will be for the Agency to consider and determine it, not this Court. Thus, this Court does not need to receive submissions on the content of section 2(b) of the Charter.

(4) Will the moving parties' arguable submissions advance the determination of the panel determining the appeal?

[37] I note that a number of the submissions the moving parties propose to make in this appeal are already made by the respondent, Dr. Kattenburg. Thus, their involvement is not necessary. The panel hearing the appeal will determine for itself the relevance and effect of the submissions of Dr. Kattenburg.

[38] The panel hearing this appeal may have to consider whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation. The panel will identify what the Agency considered in making its decision. It will know that the Agency received and relied upon advice from Global Affairs Canada. Whether the Agency was mindful of and considered other advice is for the panel to decide. But the panel will know, as the Federal Court did (at para. 125), that the Israel/West Bank issue is a controversial one, with many differing views and deeply-felt opinions on all

sides. To consider these points, it is not useful for the panel to receive the submissions of the moving parties.

[39] In many respects, the submissions of the moving party, Professor Kontorovich, are different from those of most of the other interveners. They are closer to the mark. He proposes to make submissions on international trade understandings of country of origin as well as Canada's international trade obligations. But the Court is not persuaded that these submissions are useful or necessary. To a large extent, the submissions of the respondent, Dr. Kattenburg, address these issues: see Dr. Kattenburg's memorandum of fact and law on the merits of the appeal at paras. 77-83. As well, this Court will have the reasons of the Agency before it. It will be able to assess whether the Agency should have considered these issues and, if not, whether its decision is unreasonable for not doing so. If it is unreasonable for that reason, it will be for the Agency to reinterpret the legislation and consider these issues on their merits.

[40] This appeal turns on how the Agency applied domestic labelling requirements in legislation to specific imported food products, namely wine. Yet many of the moving parties seek to advocate for a specific foreign policy to be adopted by the Government of Canada. Rather than helping us in our task of conducting reasonableness review of the Agency's decision, they want us to make findings that further their causes.

[41] We are only a court of law, not a policy forum, and still less a department of foreign affairs pronouncing on controversial international issues. We are suited to law, not free-standing policy or ideology. are just lawyers who happen to hold a judicial commission: *Canada v.*

Cheema, 2018 FCA 45, [2018] 4 F.C.R. 328 at para. 79 and *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 at para. 30. We are not a roving commission of inquiry able to investigate whatever we wish. We are not policymakers empowered by huge budgets to decide what is best for millions. Nor are we high priests who can arbitrate values, judge what is "just", "right" and "fair" and give benediction to our personal beliefs.

(5) Concluding observations concerning the intervention motions

[42] I do not want to be too hard on the moving parties. I suspect that some of them have been lured to this appeal by torqued-up press reports distorting what the Federal Court decided. And once one group applies to intervene on a controversial issue like this, others feel they also have to apply.

[43] But many of these intervention motions illustrate a growing, regrettable tendency in public law cases in Canada: the tendency of those seeking political and social reform to see courts as unfettered decision-making bodies of a political or ideological sort that can give them what they want. What accounts for this? Alas, I fear that in part some courts and some judges may be to blame.

[44] Some courts admit into an appeal just about anyone who wants to offer any views, even political or ideological ones oblivious to the legal doctrine that binds the Court: see observations in *Teksavvy Solutions* at para. 11; *Ishaq* at paras. 25-27; at paras. 4-12. And sometimes upwards of twenty or more special interest or political advocacy groups are allowed

to pile in, giving appeals the appearance of a sprawling Parliamentary committee hearing or an open-line radio show, and often a one-sided one at that: *Gitxaala Nation* at paras. 21-24; *Zaric* at para. 12; *Teksavvy Solutions* at para. 11; *Atlas Tube* at para. 12. So much of their loose policy talk, untethered to proven facts and settled doctrine, can seep into reasons for judgment, leading to inaccuracies with real-life consequences: see examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 D.L.R. (4th) 381.

[45] As for judges, some give the impression that they decide cases their own personal preferences, politics and ideologies, whether they be liberal, conservative or whatever. Increasingly, they wander into the public square and give virtue signalling and populism a go. They write op-eds, deliver speeches and give interviews, extolling constitutional rights as absolutes that can never be outweighed by pressing public interest concerns and embracing people, groups and causes that line up with their personal view of what is “just”, “right” and “fair”. They do these things even though cases are under reserve and other cases are coming to them.

[46] They should not act in this way. They should stay in their proper place. Their place is not in the public square amongst the partisans and the politicians, participating in the fray. Instead, their place is inside their courthouses, hearing each side, weighing and assessing the admissible evidence and discerning and applying the relevant legal doctrine, all in a rational, open-minded and neutral way, both in appearance and actual fact.

B. The motion by Psagot Winery Ltd. to be added as a party respondent

[47] Psagot Winery has moved to intervene or to be added as a party respondent. It should be a party respondent. But, for the following reasons, its participation must be limited.

[48] Psagot Winery produced one of the two wines at issue before the Agency but was never invited to participate in its proceedings. It says that the Agency should have brought the issue to its attention and invited it to participate. It says it first learned of the Agency's proceedings after the media attention surrounding the Federal Court's decision.

[49] The proper way for Psagot Winery to attack the Agency's alleged omission was to bring its own application for judicial review. It did not and the time to do so has expired. Through this motion, it cannot bring a disguised judicial review.

[50] However, there is another dimension to Psagot Winery's motion. It can be taken to be arguing that the Federal Court should have notified it and invited it to participate in Dr. Kattenburg's judicial review. This is an arguable position and supports Psagot Winery's addition to these proceedings as a party respondent. It is entitled to file evidence to support this procedural fairness position in the Federal Court and to file a short memorandum on that issue alone: *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, 156 C.P.R. (4th) 289 at para. 58 and authorities cited therein. The other parties should be given an opportunity to respond and, if necessary, cross-examine on that evidence and file responding submissions.

C. Another procedural issue

The appellant filed its memorandum of fact and law on the merits of the appeal, including submissions concerning the standard of review, before the Supreme Court's decision in *Vavilov*. The respondent, Dr. Kattenburg, filed his memorandum after *Vavilov*. By direction, the Court asked the parties whether the appellant should be given the opportunity to make submissions on *Vavilov*. The parties agreed that the appellant should be given that opportunity and Dr. Kattenburg should be permitted to respond. These parties should also have the opportunity to respond to Psagot Winery's evidence and memorandum.

D. Disposition

[52] Therefore, for the foregoing reasons, the motions for intervention will be dismissed. Psagot Winery's motion to be added as a party respondent will be granted. The style of cause will be amended to reflect this and will appear as it does on these reasons. An order will issue giving effect to all of these things and related procedural matters.

[53] The Attorney General of Canada was largely successful on the motions. But it did not seek costs and so none will be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-312 19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. DR. DAVID KATTENBURG *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	OCTOBER 6, 2020

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David Elmaleh Aaron Rosenberg	FOR THE PROPOSED INTERVENER/RESPONDENT, PSAGOT WINERY LTD.

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

INDEPENDENT JEWISH VOICES, AMNESTY INTERNATIONAL CANADA, CENTRE FOR FREE EXPRESSION, PROFESSOR MICHAEL LYNK (UN Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied since 1967), ARAB CANADIAN LAWYERS ASSOCIATION, TRANSNATIONAL LAW AND JUSTICE NETWORK, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS and AL-HAQ

Applicants
(Proposed interveners in the
Federal Court of Appeal)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in the
Federal Court of Appeal)

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents
(Respondents in the
Federal Court of Appeal)

APPLICANTS' MEMORANDUM OF ARGUMENT
(Pursuant to s.40(1) of the *Supreme Court Act* and
Rule 25 of the *Rules of the Supreme Court of Canada*)

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The Applicants sought to intervene before the Federal Court of Appeal in a case relating to the labelling of wines produced in settlements in the West Bank, an area that forms part of the Occupied Palestinian Territories [OPT]. The issue on appeal in that Court concerns the accuracy of labelling these settlement wines for sale in Canada as products of Israel. In an expansive and

sharply worded judgment, a single judge of the Federal Court of Appeal denied all the Applicants' leave to intervene in the appeal by applying a new modified test for intervention. The Motions Judge went further and determined the merits of certain arguments that were to be heard on the appeal and disparaged the role of interveners generally.

2. The Applicants are before this Honourable Court seeking to appeal from the judgment denying them leave to intervene in the Court below. While courts have wide discretion to grant or deny motions for leave to intervene, courts must apply reasonable and predictable criteria and respect the important and useful perspectives that interveners can provide on public issues. The Federal Court of Appeal has developed multiple and inconsistent tests for intervention that create uncertainty for potential interveners across the Federal Court system. The Motions Judge in the present case expressed yet another new test for intervention that departs from the basic principles enunciated by this Honourable Court and other appellate courts across Canada.

3. The Applicants recognize that it is exceptional to seek leave to appeal an interlocutory and discretionary decision. However, such decisions cannot be immune from appellate scrutiny in appropriate cases. The Applicants submit that the Federal Court of Appeal's jurisprudence on interventions is inconsistent and, in the present case, unprincipled. As statutory courts that have primary responsibility for the supervision of federal administrative tribunals and government officials, the Federal Courts routinely deal with public law issues that affect all Canadians. It is a matter of national importance that the role of interveners in the Federal Courts not be stifled, and the basic criteria for granting interventions be affirmed.

Underlying Case and Federal Court Judgment

4. Dr. David Kattenburg filed a complaint in 2017 with the Canadian Food Inspection Agency ["CFIA"] about the "Product of Israel" labels on two wines made in a West Bank settlement. In his complaint, Dr. Kattenburg asserted that these labels were incorrect as the Canadian government and the international community do not regard the West Bank as part of Israel and consider Israeli

settlements in the OPT to be unlawful.[1]

5. The CFIA initially agreed with Dr. Kattenburg's complaint: the "Product of Israel" labels violated federal laws that require accurate origin labels on wines. However, the CFIA then abruptly reversed its decision, finding that the wines could be sold as currently labelled.[2]

6. Dr. Kattenburg appealed this decision to the CFIA's Complaints and Appeals Office [CAO], which concluded that wines produced in the West Bank could be imported and sold in Canada labelled as "Products of Israel". The CAO rooted its determination in the wording of Article 1.4.1(b) of the *Canada-Israel Free Trade Agreement*, Can TS 1997 No 49 [CIFTA], which defines the territory to which the agreement applies as being where Israeli customs law apply. It includes the West Bank.

7. Dr. Kattenburg challenged the CAO's decision on judicial review in the Federal Court. Independent Jewish Voices of Canada (one of the Applicants herein) and B'Nai Brith were granted intervener standing before the Federal Court.[3]

8. On July 29, 2019, Justice Mactavish of the Federal Court (as she then was) allowed the application for judicial review.[4] Upon reviewing the relevant provisions in the *Food and Drugs Act*, R.S.C., 1985, c. F-27 and the *Consumer Packaging and Labelling Act*, R.S.C., 1985, c. C-38, the Federal Court found that the purpose of this legislation was to ensure "full and factual information" on food labels and to prohibit "false, misleading or deceptive" advertising. Given that there was agreement among the parties that the West Bank was not part of Israel, the Court held that the CAO's decision was unreasonable as the labels were inaccurate and misleading.[5]

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[1] Respondent's Memorandum of Fact and Law, Dr. Kattenburg [Kattenburg Factum], Applicants' Application for Leave to Appeal [ALA], Vol. II, Tab 5 at 301, paras 2-3
[2] Kattenburg Factum, ALA, Vol. II, Tab 5 at 301-302, paras 3-4
[3] Federal Court Order permitting IJV to intervene, April 18, 2019, ALA, Vol. II, Tab 5 at 61. Also permitted to intervene was the League for Human Rights of B'nai Brith Canada.
[4] Federal Court Judgment and Reasons, 2019 FC 1003 [FC Reasons], ALA, Vol. II, Tab 5 at 65
[5] FC Reasons, ALA, Vol. II, Tab 5 at 90-92, 97, paras 97-98, 100-101 and 128-129

9. Justice Mactavish was also satisfied that freedom of expression issues and values underpinning s. 2(b) of the *Canadian Charter of Rights and Freedoms* were relevant to the CAO decision. Relying on the argument advanced primarily by the intervener Independent Jewish Voices, the Federal Court observed that consumers have long expressed their political views through their purchasing choices. Accordingly, in the Court's view, freedom of expression issues were implicated in the statutory provisions that promoted full and factual information in labelling and the avoidance of misleading advertising.[6] Justice Mactavish concluded:

> [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*.

10. Dr. Kattenburg had also made arguments before the Federal Court that the Israeli settlements in the OPT were in violation of international human rights law and international humanitarian law, and that Canada should not permit the importation of settlement wines labelled as "Product of Israel". Justice Mactavish held that it was unnecessary to determine this issue as the case could be decided on other grounds:

> [70] …[T]he 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

[6] FC Reasons, ALA, Vol. II, Tab 5 at 94-95 and 97, paras 114-117 and 124

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.

Federal Court of Appeal

11. The Attorney General of Canada appealed the decision of Justice Mactavish to the Federal Court of Appeal. The Attorney General maintains that the legislative objectives of the *Food and Drug Act* and the *Consumer Packaging and Labelling Act* do not include providing consumers with information on public international law issues to enable them to "buy conscientiously". The Attorney General also asserts that the Federal Court was wrong to find that the CAO ought to have considered freedom of expression in making its decision.[7]

12. Dr. Kattenburg argues that the Federal Court judgment should be upheld because the legislative prohibitions against false, deceptive and misleading labelling precludes the labelling of settlement wines as "Products as Israel" as the West Bank is not part of Israel and conveying incorrect information impedes the rights of consumers under the *Charter* to express their views on a matter of conscience by not buying settlement wines.[8] In the alternative, Dr. Kattenburg maintained his arguments from the Federal Court that Israeli settlements in OPT are illegal, and it was contrary to international law to allow the importation of wines from OPT to be labelled as products of Israel.[9]

13. The Applicants herein – Independent Jewish Voices, Amnesty International Canada [AI], the Centre for Free Expression [CFE], Professor Michael Lynk, Arab Canadian Lawyers Association [ACLA], Transnational Law and Justice Network [TLJN], and Canadian Lawyers for International Human Rights [CLAIHR], and Al-Haq – sought leave to intervene before the Federal Court of Appeal pursuant to Rule 109 of the *Federal Courts Rules*. Other parties who sought leave to intervene were the League for Human Rights of B'Nai Brith Canada, Centre for Israel and Jewish Affairs, Psagot Winery Ltd., and Professor Eugene Kontorovich.

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[7] AGC Memorandum of Argument, ALA, Vol. II, Tab 5 at 259
[8] Kattenburg Memorandum, ALA, Vol. II, Tab 5 at 299
[9] Kattenburg Memorandum, ALA, Vol. II, Tab 5 at 299

14. The Applicant interveners sought to intervene on the following grounds:

a. **Independent Jewish Voices** [IJV], a national grassroots organization grounded in Jewish tradition that advocates for a just peace in Israel-Palestine and social justice at home, was permitted to intervene in the Court below. It sought to intervene in the Court of Appeal to address the engagement of s. 2 of the *Charter* – the intersection between controls on commercial speech and consumers' purchasing choices. It sought to situate its engagement in the broader context of consumer choice informed by different contexts, including environmental, labour organizing, and state repression. IJV would press for an interpretation of the legislative provisions that accords with the rights under s. 2 of the *Charter*.[10]

b. **Amnesty International** [AI], a well known and highly respected international human rights organization, sought to make submissions concerning the authoritative nature of the primary organs of international law that confirm the illegality of Israeli the settlements in the OPT. It also sought to address the interpretation of freedom of expression in international law and the impact of this on the domestic interpretation given to s. 2 of the *Charter*.[11]

c. **Centre for Free Expression** (CFE), an organization at Ryerson University which is involved in research and advocacy in support of freedom of expression, sought to intervene to reaffirm the doctrinal connection between consumer rights and *Charter* rights. It asserted that negating the impact of s. 2 of the *Charter* on the interpretation of the legislative provisions weakened consumer protection. It sought to establish the importance of the interrelationship between the free exercise of consumer choice and of the public's right to know, maintaining that the appeal was one where the outcome would either affirm an important judicial recognition of conscientious and expressive freedoms in the context of consumer rights or potentially roll back the protective scope of s. 2 of the *Charter*.[12]

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[10] Independent Jewish Voices (IJV) Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 112; IJV Reply Submissions, ALA, Vol. II, Tab 5 at 251

[11] Amnesty International (AI) Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 117; AI Reply Submissions, ALA, Vol. II, Tab 5 at 255

[12] Centre for Free Expression (CFE) Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 138

d. **Professor Michael Lynk, in his capacity as United Nations Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967**, has particular expertise in relation to the international legal status of the OPT and the resulting legal obligations on Canada. He sought to make submissions addressing the elements of public international law that inform the legality of the OPT settlements and the concomitant obligations of Canadian public bodies like the CFIA, taking this Court's reasoning in *Vavilov* and *Nevsun Resources* as a starting point.[13]

e. **Arab Canadian Lawyers Association (ACLA) and Transnational Law and Justice Network (TLJN)** made joint submissions. The ACLA is the only national organization representing the perspectives and legal interests of the Arab community, which includes Canadian Palestinians. The TLJN is a research hub at the Faculty of Law, University of Windsor that engages in scholarship and sponsors knowledge and capacity building about international law, transitional justice, global governance and transnationalism. The ACLA and TLJN sought to provide an interpretive analysis of the Protocol on Economic Relations and related Israeli-Palestinian agreements, specifically relied upon by the agency, the CFIA and CAO. They wished to address the constraints on decision making imposed by domestic legislation, such as the *Crimes Against Humanity and War Crimes Act*.[14]

f. **Canadian Lawyers for International Human Rights (CLAIHR) and Al-Haq** also made joint submissions. CLAIHR's mandate is to promote the protection of international human rights and their domestic implementation. Al-Haq's mandate is the protection and promotion of human rights and the rule of law in the OPT. They sought to provide guidance – a methodology – as to how the agency ought to have accounted for the *Canada Israel Free Trade Agreement* as well as international human rights and humanitarian law and breaches thereto in reaching the decision. They sought to situate the decision-making in the context of the constraints arising from Canada's international obligations. They raised a particular concern as to the impact of mislabelling in

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[13] Professor Michael Lynk, in his capacity as United Nations Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967, Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 153

[14] Arab Canadian Lawyers Association (ACLA) & Transnational Law and Justice Network (TLJN) Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 170

legitimizing the otherwise unlawful situation in the OPT, including the ongoing violations of international human rights law.[15]

15. Independent Jewish Voices was already an intervener in the Federal Court on this case, as was B'Nai Brith. The Attorney General did not oppose the interventions of Independent Jewish Voices, B'Nai Brith or the CFE before the Federal Court of Appeal.

16. Justice Stratas of the Federal Court of Appeal dismissed the Applicants' respective intervention motions, without addressing the fact that two of the herein applicants' respective motions for leave to intervene were unopposed by any party, on the basis of a new test consisting of four questions that he developed in the context of this case. Justice Stratas described the four-part test as follows:[16]

> (1) ***What issues are live before the panel determining the proceeding?*** Justice Stratas noted that the Court must determine the "real essence" and "essential character" of the proceeding and "disregard those matters that are doomed to fail."
>
> (2) ***What does the moving party intend to submit in the proceeding?*** As Justice Stratas put it, "The Court must not be taken in by tricky drafting by skilful pleaders. Instead, it must determine the "real essence" and "essential character" of what the prospective intervener intends to say."
>
> (3) ***Are the moving party's submissions doomed to fail?*** He noted that this question required a determination of whether the submissions are "indisputably wrong in law or irrelevant to the live issues before the Court."
>
> (4) ***Will the moving party's arguable submissions advance the determination of the panel determining the appeal?*** In addressing this question, he noted that the Court should not only exclude submissions that duplicate others but should also exclude, *inter alia*, those that "make political points without law."

17. In addressing the third element of the test, the Motions Judge pronounced on the role of international law to the case at bar, noting that it is irrelevant to the discernment of legislative

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[15] Canadian Lawyers for International Human Rights (CLAIHR) and Al-Haq Submissions on Motion to Intervene, ALA, Vol. II, Tab 5 at 184

[16] Reasons for Order of the Federal Court of Appeal, Oct. 6, 2020 (2002 FCA 164) [FCA Reasons], ALA, Vol. I, Tab 3 at 14-16, para. 9

purpose in the appeal, and observing that

> [I]nternational law is not like a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please. Legislative purpose is the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is "best for Canadians" or what they consider to be "just", "right" or "fair".[17]

18. The Motions Judge found that the Applicant's proposed arguments were all "doomed to fail" because, in the view of the Motions Judge, international law issues were irrelevant to the appeal:

> I do not doubt for a moment that international law, when properly used, can play an important role in the interpretation of legislation and the discernment of the authentic meaning of legislation. But this is not one of those cases.[18]

19. Under the fourth element of his new test, the Motions Judge added that many of the proposed submissions by the Applicants were already being made by the respondent, Dr. Kattenburg. "Thus," the Motions Judge concluded, "their involvement is not necessary." [19] The Motions Judge did not elaborate how similar arguments that were "doomed to fail" if made by the Applicants had any more force if delivered by the respondent alone.

20. Under the heading "**Concluding observations concerning the intervention motions",** the Motions Judge engaged in a wide-ranging critique of public interest interveners, some judges and the courts. The Motions Judge expressed his disdain for the concept of interventions, and scolded judges who granted them:

> [M]any of these intervention motions illustrate a growing, regrettable tendency in public law cases in Canada: the tendency of those seeking political and social reform to see courts as unfettered decision-making bodies of a political or ideological sort that can give them what they want. What accounts for this? Alas, I fear that in part some courts and some judges may be to blame.
>
> Some courts admit into an appeal just about anyone who wants to offer any views, even political or ideological ones oblivious to the legal doctrine that binds the Court: see

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[17] FCA Reasons, ALA, Vol. I, Tab 3 at 22, para. 26
[18] FCA Reasons, ALA, Vol. I, Tab 3 at 26, para. 33
[19] FCA Reasons, ALA, Vol. I, Tab 3 at 27, para. 37

> observations in *Teksavvy Solutions* at para. 11; *Ishaq* at paras. 25-27; *Atlas Tube* at paras. 4-12. And sometimes upwards of twenty or more special interest or political advocacy groups are allowed to pile in, giving appeals the appearance of a sprawling Parliamentary committee hearing or an open-line radio show, and often a one-sided one at that: *Gitxaala Nation* at paras. 21-24; *Zaric* at para. 12; *Teksavvy Solutions* at para. 11; *Atlas Tube* at para. 12. So much of their loose policy talk, untethered to proven facts and settled doctrine, can seep into reasons for judgment, leading to inaccuracies with real-life consequences: see examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 D.L.R. (4th) 381.
>
> As for judges, some give the impression that they decide cases based on their own personal preferences, politics and ideologies, whether they be liberal, conservative or whatever. Increasingly, they wander into the public square and give virtue signalling and populism a go. They write op-eds, deliver speeches and give interviews, extolling constitutional rights as absolutes that can never be outweighed by pressing public interest concerns and embracing people, groups and causes that line up with their personal view of what is "just", "right" and "fair". They do these things even though cases are under reserve and other cases are coming to them. [20]

21. The Applicants seek leave to appeal the order of the Motions Judge dismissing the interveners' motions for leave to intervene.

[20] FCA Reasons, ALA, Vol. I, Tab 3 at 29-30, paras 43-45

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

22. The Applicants submit there are three issues warranting this Court's attention:

a. What is the proper test for interventions before the Federal Courts?

b. Can judges hearing intervention motions determine the merits of arguments of either party on the appeal as a mean of assessing the assistance that interveners can bring to the case?

c. To what extent should courts be open to the diverse perspectives of interveners on public issues?

23. The Applicants submit that clarifying the basic test for interventions in the Federal Courts is a matter of national importance because the current jurisprudence is inconsistent, leads to uncertainty and a waste of resources, and insulates the courts from hearing important perspectives on public issues. As statutory courts that have primary responsibility for the supervision of federal administrative tribunals and government officials, the Federal Courts routinely deal with public law issues that affect all Canadians. The approach taken to decision making by the Motions Judge in this case is antithetical to the development of the rule of law and access to justice in Canada.

PART III – STATEMENT OF ARGUMENT

A. Appeal Raises Matter of National Importance

24. Interventions have long been an integral part of legal proceedings in Canada. Interveners provide useful perspectives and expertise to the Court in public interest cases and cases which may have a broad impact on the public. Since the entrenchment of the *Canadian Charter of Rights and Freedoms*, courts have been called upon to decide difficult issues impacting on the human rights of individuals beyond the litigants before the Court. In the context of these developments, interventions have become more common place.

25. The vital role of interventions in legal practice in Canada is so firmly established that the rules of civil procedure in nearly all the provincial superior courts, as well as the Federal Courts and the Supreme Court, recognize the courts' discretion to grant standing to interveners.[21]

26. The core elements of the test for intervention, as it has been applied in Canada, were articulated by this Honourable Court in *Reference re Workers' Compensation Act, 1983*. The basic criteria are whether the applicant has an *interest* in the matter and can provide submissions that *will be useful and different* than the parties.[22] Under this test, a public interest organization must show that they have a special expertise or interest in the legal issues raised in the case. To make useful and different submissions, an organization needs to demonstrate that it I can shed light or provide "a fresh perspective on an important constitutional or public issue."[23]

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[21] *Rules of the Supreme Court of Canada*, SOR/2002-156, Rule 57; *Federal Courts Rules*, SOR/98-106, Rule 109; *Alberta Rules of Court*, AR 124/2010, Rule 2.10; Saskatchewan *Queen's Bench Rules*, Rules 2-12 and 2-13; Manitoba *Court of Queen's Bench Rules*, MBReg 553/88, Rule 13.02; Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 13.02 and 13.03; Quebec *Code of Civil Procedure*, Article 211; New Brunswick *Rules of Court*, NB Reg 82-73. Rule 15.03; *Prince Edward Island Rules of Civil Procedure* Rules 13.02 and 13.03; *Nova Scotia Civil Procedure Rules*, Rules 35.10 and 90.19; and *Rules of the Supreme Court*, SNL 1986, c 42, Sched D, Rule 7.06

[22] *Reference re Workers' Compensation Act, 1983 (Nfld)*, 1989 CanLII 23 (SCC), [1989] 2 SCR 335 [*Re Workers' Compensation*]

[23] *Re Workers' Compensation, supra* at 340; and *R v Finta*, 1993 CanLII 132 (SCC), [1993] 1 SCR 1138 at 1142-1143

27. There are similar iterations of the *Re Workers' Compensation* test that are deployed by courts across Canada.[24] As per the teachings of this Honourable Court, these courts look to an applicant's interest in the matter and whether their submissions will be useful and different to those put forward by the parties. Different provincial jurisdictions have added some nuances. For example, some courts look to the consideration of potential prejudice against directly affected parties[25] or the importance of receiving a diversity of representations reflecting the wide-ranging impact of the decision to be made.[26]

28. While provincial jurisprudence over the years has aligned with this Court's test for interventions, the Federal Court of Appeal has wrestled with its framework for considering intervention motions, and there are now inconsistent tests being applied.[27]

29. The Federal Court of Appeal developed a six-part test for interventions in *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*.[28] This test has come under strong criticism within the court itself, with the last full panel of the Court to consider it finding that it remains good law, provided it is applied flexibly.[29]

30. In the case at bar, the Motions Judge ignored *Rothmans* completely and developed yet another test. In considering the interveners' motions for leave, the Motions Judge engaged in a detailed consideration of the merits of the issues on appeal, dismissing the majority of the issues as being "doomed to fail", and then concluded that there was no role for interveners to engage in

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[24] *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 at paras 8-9; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29 (CanLII) at para. 8; *Munyaneza v R*, 2012 QCCA 1829 at paras 9-10; *AB v Bragg Communications Inc.*, 2010 NSCA 70 (CanLII)

[25] *R v Watson and Spratt*, 2006 BCCA 234 at para 3; *PHS Community Services Society v Attorney General of Canada*, 2008 BCCA 441 at para. 14

[26] *Trinity Western University v Law Society of Upper Canada*, 2014 ONSC 5541 at para. 9

[27] *Sport Maska Inc. v Bauer Hockey Corp.*, 2016 FCA 44 [*Sport Maska*] at para. 40; *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 [*Pictou Landing*] at para. 11

[28] *Rothmans, Benson & Hedges Inc. v Canada (Attorney General)*, [1990] 1 FC 74 (FC TD) [*Rothmans*] at para. 12

[29] *Pictou Landing*, *supra* at paras 6-7; and *Sport Maska*, *supra* at paras 37-43

the one legal issue left for the appellate panel to consider. The Motions Judge created a sterile framework for the consideration of the motions, eliminating the context within which the decision was made and negating from the outset any consideration of the broader impact of the decision on the freedom of expression of consumers and Canada's international legal obligations. In short, he developed a new test for interveners which also served to decide the merits of the appeal.

31. The issue raised is a pressing one. Significant issues with broad public impact regularly come before the Federal Courts for determination because they are statutory courts with primary jurisdiction over federal administrative tribunals and government officials. Obviously, most cases decided by the Federal Court of Appeal never reach this Honourable Court, and so the input of public interest interveners will be lost completely on the application of the newest test for intervention.

32. The role of the court articulated by the Motions Judge is antithetical to the purpose of having an independent and impartial judiciary. The court's role is not to cut itself off from understanding the contextual reality of the case before it, or the perspectives of those who may be impacted. Judges do not sit in ivory towers. Rather, a court ought to hear the submissions of public interest organizations, especially on human rights matters, and then render an independent and impartial decision. Public interest groups, moreover, are entitled to a clear and consistent test in deciding whether to seek leave to intervene in the Federal Courts.

B. Test for Interveners Before the Federal Court & Federal Court of Appeal

33. Rule 109(2)(b) of the *Federal Courts Rules* requires that a party explain how it wishes to participate in a proceeding and how that participation will assist the determination of a factual or legal issue related to the proceedings. In 1990, the Federal Court of Appeal developed a six-part test for interventions under this rule in *Rothmans*. The Federal Court of Appeal recognized the test as being flexible, with no requirement that consideration be limited to only those six factors,[30] or that all the factors need be present in any given case.[31] The relevant factors are:

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[30] *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120 at paras 5-6
[31] *Sport Maska, supra* at para. 37

1. The proposed intervener is directly affected by the outcome;

2. There is a justiciable issue and a veritable public interest;

3. There are other reasonable or efficient means to submit the question to the Court;

4. The position of the proposed intervener is adequately defended by one of the parties to the case;

5. The interests of justice are better served by the intervention of the proposed third party and;

6. The Court can hear and decide the cause on its merits without the proposed intervener.[32]

34. There are problems with the *Rothmans* test. The 'flexibility' of the test leads to inconsistencies, with judges applying some factors and ignoring others. The Federal Court of Appeal has been critical of the test as being "divorced from the real issues at stake in intervention motions that are brought today."[33] In *Pictou Landing* for example, Justice Stratas explained that he could "purport" to apply the *Rothmans* factors, but that this would be "intellectually dishonest" because some of the factors did not make sense to him. In this context, Justice Stratas reformulated the test to address the motion before him, setting out a modified five part test, with an emphasis on securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?[34]

35. In *Sport Maska*, Justice Nadon disagreed with the reasoning in *Pictou Landing*. He noted that while some of the criticisms of the *Rothmans* factors were warranted, the Motions Judge could have reached the same result by applying and ascribing little or no weight to irrelevant factors.[35] Justice Nadon believed that the minor differences between the *Rothmans* and *Pictou Landing* factors did not warrant modification of the test, and held that *Rothmans* remained good law provided it was applied flexibly.[36]

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[32] *Rothmans, supra* at para. 12
[33] *Pictou Landing, supra* at para. 6
[34] *Pictou Landing, supra* at paras 6-7 and 11
[35] *Sport Maska, supra* at para. 40
[36] *Sport Maska, supra* at paras 41-42

36. In the case at bar, the Motions Judge formulated and applied yet another test, different from both *Rothmans* and *Pictou Landing*, and omitting to reference either. In this instance, the Motions Judge asked: 1. What issues are live before the panel determining the proceeding? 2. What does the moving party intend to submit in the proceeding? 3. Are the moving parties doomed to fail? 4. Will the moving parties' arguable submissions advance the determination of the panel?

37. Subsequent to the decision herein, Justice Rennie in *Montejo v Attorney General of Canada*,[37] permitted several public interest organizations to intervene in an appeal involving a review of a decision of the Public Sector Integrity Commissioner. The Commissioner had refused to investigate allegations that officials in the Canadian Embassy in Mexico City failed to follow Government of Canada policies regarding the protection of human rights advocates, one of whom was murdered shortly after a protest at the Canadian embassy. A judicial review application was denied in the Federal Court.

38. In the Court of Appeal in *Montejo*, the Applicants AI, CFE and CLAIHR were all granted leave to intervene to speak to international law issues, weeks after being denied leave and disparaged in the present case. Justice Rennie noted that the interveners "propose to present arguments on the impact of international law on both the statutory interpretations and administrative law principles at the heart of this proceeding". He applied the *Rothmans* test, but concluded that the sixth factor was of doubtful utility.[38]

39. Justice Rennie distinguished his decision to permit intervention on international law issues for the purpose of interpreting a domestic statute from that of Motion Judge in this case:

> [25] There is a distinction to be made between public interest issues determined on the basis of the application of settled jurisprudence, established doctrine and cases where, as described by Stratas JA in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164, "interveners advance too much policy talk, untethered to the facts and legal doctrine," and cautions that this may seep into the Court's consideration of legal issues."
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> [26] This is not the case before me. Here, while the interventions arise in the context

[37] *Montejo v Attorney General of Canada*, 2020 FCA 198 [*Montejo*]
[38] *Montejo, supra* at para. 10

> of a broader policy question of Canada's role in relation to the advancement of human rights abroad, the interventions do not seek to engage the court in the merits of that discussion. All focus on the proper interpretation of a statute. All draw on authoritative legal sources of international law. All the arguments pivot on questions of legal doctrine. Unlike *Kattenburg*, they do not directly bring geo-political considerations to the table.[39]

40. The Applicants submit that this distinction is illusory. While intervention motions are discretionary decisions, the reality is that there is no consistent test being applied in the Federal Courts on motions to intervene. Consistency is core principle of the rule of law, as established by this Court in *Dunsmuir* and more recently in *Vavilov*.[40] The interests of justice are not advanced when results on motions depend on which test a particular judge decides to apply. Lacking clarity on the legal rules applicable to interventions before the Federal Courts, counsel for potential interveners are unable to provide legal advice to prospective clients. Given the jurisdictional purview of the Federal Court and the significant range of issues that come before it, varying from immigration to Indigenous Peoples and their treaty relationships with Canada, a consistent test for interveners must be developed in line with this Courts jurisprudence and the role of courts in Canadian society more broadly.

C. Intervention Motions not Opportunity to Pre-Determine Merits

41. Some of the factors applied by the Motions Judge in the case at bar are antithetical to the purpose of including interveners, which is to assist the Court in its understanding of the issues before it. It is not appropriate to use intervention motions as an opportunity to engage in a determinative assessment of any issues raised in the appeal. Using the intervention motion as a quasi motion to strike is inappropriate, premature and unfair to the parties.

42. In this case, two of the questions posed by the Motions Judge require such an assessment. For example, the question of what issues are "live" ones and are the moving parties "doomed to fail" before the Court require an assessment of the merits. The Motions Judge conducted an analysis akin to that of a motion to strike, although no party had filed a motion to this effect. In

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[39] *Montejo, supra* at paras 25-26

[40] *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]

that regard, he dismissed out of hand the international law arguments that the respondent Dr. Kattenburg had raised with CFIA at the outset.

43. Moreover, the Motions Judge deemed international law issues and arguments as meritless without a proper hearing, despite the fact that this Honourable Court has recently emphasized the importance of international law in administrative decision making.[41]

44. The Motions Judge also minimized and redefined issues that are, in fact, central to the Federal Court's decision. In particular, Justice Mactavish found that freedom of expression issues and section 2(b) of the *Charter* were relevant factors that ought to have been considered by the CAO. Yet the Motions Judge even rejected the intervention motions of those parties that raised freedom of expression issues, deeming such arguments to have limited application in the appeal.[42]

45. It is an important legal principle that judges hearing interlocutory motions strictly avoid predetermining central issues to a case. The Applicants submit that the proposed appeal would afford this Court an opportunity to elaborate on and affirm this principle.

D. Courts Should Be Open to Diverse Perspectives on Public Issues

46. The case before the Court of Appeal engages a controversy that has not been settled yet. This is the reality of this litigation. The wines were made in settlements in the territories occupied by Israel. They were not made in Israel. Consumers want accuracy in the labelling of these wines so that people who wish to exercise their purchasing power in accordance with their own particular beliefs can know that they are not products of Israel, made in the country itself. This type of consumer rights is no different than other historical instances of consumer choice rooted in matters of conscience, as the Federal Court noted in allowing the judicial review application. The desire to act in accordance with his beliefs and conscience motivated Dr. Kattenburg to complain.[43]

47. While consumer protection is significant, there are other elements to this case. For instance,

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[41] *Vavilov*, *supra* at paras 58-60, 114
[42] FCA Reasons, ALA, Vol. I, Tab 3 at 18, 26-27, paras 17, 35-36
[43] FC Reasons, ALA, Vol. II, Tab 5 at 94-96, paras 116, 121

are the international instruments on which the administrative decision-makers are said to have relied supportive of their conclusions? Did they wrongly omit other international or domestic laws from their decision making? These are the live issues that the Motions Judge characterized as policy questions and, dismissed without the merit of full submissions.

48. The Motions Judge resiled from having the appellate panel address the full case on appeal, in advance of hearing arguments on these issues. He did this improperly on a preliminary motion by deciding the issues himself, as submitted above, and he did it directly by indicating that the court simply would not address issues which were rooted in political controversy. The caustic remarks of the Motions Judge that interveners make "political or ideological" arguments and do no more than engage in "loose policy talk, untethered to proven facts and settled doctrine" reflects a parochial understanding of the law and the importance of the courts hearing different perspectives on public issues. The Motions Judge's narrow perception of the role of interveners and the Court in a modern democracy tainted his decision making.

49. It is submitted that the approach taken to decision making by the Motions Judge in this case is antithetical to the development of, and respect for, human rights, the rule of law and access to justice in Canada. With the entrenchment of the *Charter*, this Court recognized early on that judges would have to be involved in deciding contentious political and social issues. Indeed, some of the most important ones for Canadian society have come before this Court.[44]

50. The Court has also recognized that access to justice is one of the most pressing issues in our society today. It has offered guidance on the relationship between access to justice and public interest standing.[45] This case offers the opportunity to consider the role of interveners in facilitating access to justice where a public interest litigant is faced with the resources of the AGC.

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[44] E.g., see *R v Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 SCR 30 – abortion; *Rodriguez v British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519 – right to die; *Vavilov*, *supra* - standard of review; *United States v Burns*, 2001 SCC 7 (CanLII), [2001] 1 SCR 283 – extradition to face the death penalty.

[45] *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 (CanLII), [2018] 1 SCR 6

51. It is therefore submitted that it is in the interests of justice and is a matter of national importance that the role of the Court in an intervention motion by a public interest agency or individual be clarified by this Court.

PART IV – SUBMISSIONS CONCERNING COSTS

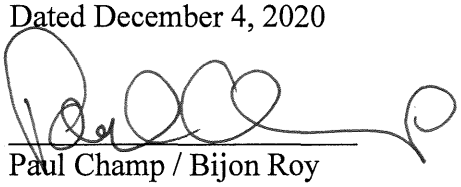
52. This case raises important questions regarding the role of public interest organizations in developing the law as interveners. No costs are sought by the Applicants and none should be granted to any adverse party.

PART V – ORDERS SOUGHT

53. The Applicants request that they be granted leave to appeal from the order of Justice Stratas of October 6, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated December 4, 2020



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PART VI: TABLE OF AUTHORITIES

Source	Cited at Para No.
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