

T-1620-17

FEDERAL COURT

BETWEEN:

DR. DAVID KATTENBURG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW - APPLICANT

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PART I: FACTS

A. The Applicant

1. The Applicant, Dr. David Kattenburg, is a science educator, a journalist and a human rights activist. He is also an oenophile: for many years, he has purchased wine at outlets of Manitoba Liquor Mart and other wine vendors in Canada.¹ Dr. Kattenburg is Jewish and the child of Holocaust survivors. He has travelled to the occupied West Bank and has witnessed the oppressive conditions under which Palestinians live.²

B. The Canadian Food Inspection Agency ("CFIA")

2. The CFIA is the federal regulatory body that is responsible for overseeing the safety of Canada's food supply. It develops program requirements, conducts inspections and delivers other services to contribute, *inter alia*, to consumer protection.³
3. A key part of protecting Canadian consumers is ensuring that they are enabled to make informed decisions about food products. As the CFIA acknowledges:

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 they purchase for themselves and their families.⁴

¹ Affidavit of Dr. David Kattenburg, sworn February 19, 2018 ("Kattenburg Affidavit"), para. 3 [Applicant's Application Record ("AAR"), vol. 1, Tab B, p. 21].

² Kattenburg Affidavit, paras. 4-8 [AAR, vol. 1, Tab B, pp. 21-22].

³ Affidavit of Eric Jeaurond, sworn May 18, 2018 ("Jeaurond Affidavit"), para. 7.

⁴ Transcript of the Cross-Examination of Eric Jeaurond, held on August 10, 2018. ("Jeaurond Transcript"), question 52, p. 13; question 55, p. 14 [AAR, vol. 4, Tab F, pp. 704-705]. In a draft of a letter that was addressed to the Applicant but which was never sent to him, the CFIA's President Paul Glover wrote that "The Government of Canada takes the issue of Country of Origin labelling very seriously, and recognizes the

4. The CFIA also acknowledges the importance of regulatory independence, which includes enforcement of the applicable laws and regulations, even when their enforcement attracts the ire of high-ranking members of the government.⁵
5. Along with specific statutes and regulations pertaining to certain food commodities, the CFIA is responsible for the enforcement of all provisions and regulations under the *Food and Drugs Act* ("FDA") and the *Consumer Packaging and Labelling Act* ("CPLA") related to "food", as defined by the FDA.⁶

C. The Applicant's Complaint to the CFIA⁷

6. By letter dated January 6, 2017, the Applicant wrote to the Liquor Control Board of Ontario ("LCBO") to complain of two wines sold by the LCBO that are produced in Israel's West Bank settlements. Those wines are Shiloh Legend KP 2012 and Psâgot Winery M Series, Chardonnay KP 2014 (the "Settlement Wines").
7. As long acknowledged by Canada's government, the West Bank is not part of Israel and is Occupied Palestinian Territory ("OPT"). Global Affairs Canada ("GAC") states:

Canada does not recognize permanent Israeli control over territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip). The Fourth Geneva Convention applies in the occupied territories and establishes Israel's obligations as an occupying power, in particular with respect to the humane treatment of the inhabitants of the

importance of providing Canadians with truthful and accurate information to assist in their purchasing decisions." Certified Tribunal Record ("CTR"), p. A232 [AAR, vol. 3, Tab E, p. 618]

⁵ Jeaurond Transcript, question 64, pp. 16-17 [AAR, vol. 4, Tab F, pp. 707-708].

⁶ Jeaurond Affidavit, paras. 6-9.

⁷ Part VI of this Memorandum of Fact and Law consists of a detailed Chronology of the Applicant's complaints to the LCBO and the CFIA.

occupied territories. As referred to in UN Security Council Resolutions 446 and 465, Israeli settlements in the occupied territories are a violation of the Fourth Geneva Convention. The settlements also constitute a serious obstacle to achieving a comprehensive, just and lasting peace.⁸

8. In his January 6, 2017 letter, the Applicant advised the LCBO that labels on the Settlement Wines stated that they were "Product of Israel", but that the wines were produced in Israel's West Bank settlements. He thus requested that the LCBO take corrective action as to the country-of-origin declaration on the Settlement Wines.⁹
9. The LCBO and CFIA Toronto office received the Applicant's letter on January 13, 2017. From January 13 to February 20, 2017, the CFIA Toronto office requested additional information from the LCBO and verified applicable regulatory requirements. On February 21, 2017, the CFIA Toronto office engaged the CFIA's Food Operational Guidance and Expertise Section ("Food OGE") for advice on the issue. From February 21 to July 5, 2017, the Food OGE consulted with the Consumer Protection and Market Fairness Division in the Policy and Programs Branch.¹⁰
10. In response to the Applicant's letters to the LCBO and, later, to the CFIA, the CFIA gathered information from different areas within the Agency: its Food Operations Guidance and Expertise Section, its Consumer Protection and Market Fairness

⁸ Kattenburg Affidavit, para. 68, Exhibit "45" [AAR, vol. 1, Tab B, p. 38; vol. 2, Tab C, pp. 226-229].

⁹ Kattenburg Affidavit, paras. 11-12 [AAR, vol. 1, Tab B, pp. 23-24].

¹⁰ Jeaurond Affidavit, paras. 23 and 37-40, Exhibit "S".

Division in the Policy and Programs Branch and with the CFIA International Affairs and Market Access Directorate.¹¹

11. From February 20 to July 5, 2017, at least seven CFIA employees evaluated the Applicant's complaint, including a Policy and Program Specialist (Labelling Organic and Packaging, Consumer Protection and Market Fairness Division), and five National Operations Specialists. During this period, CFIA staff reviewed the *Canada-Israel Free Trade Agreement* ("CIFTA"), including art. 1.4.1b thereof.¹²
12. Based on their extensive evaluation, CFIA staff concluded that "Product of Israel" labels on Settlement Wines were not compliant with Canadian law. On July 6, 2017, CFIA staff notified the LCBO that the country-of-origin labels on the Settlement Wines were not acceptable and requested a corrective action plan from the LCBO.¹³

D. The CFIA's Sudden Reversal of its Initial Wine Labelling Decision

13. As of July 12, 2017, the Applicant had received no communication from the CFIA of its determination that "Product of Israel" labels on the Settlement Wines did not comply with Canadian law. On that date, the Applicant discovered from a post on the Facebook page of B'nai Brith Canada ("B'nai Brith") that the LCBO had sent a letter on July 11, 2017 to its vendors advising that, on July 6, 2017, the LCBO had

¹¹ Jeaurond Affidavit, para. 38.

¹² Jeaurond Affidavit, para. 22, Exhibit "O"; Jeaurond Transcript, questions 151-165, pp. 42-47 [AAR, vol. 4, Tab F, pp. 733-738; Answers to Undertakings given at the cross-examination of Eric Jeaurond ("Jeaurond Answers to Undertakings"), Items 4-6 [AAR, vol. 4, Tab G, pp. 756-757].

¹³ Jeaurond Affidavit, paras. 38-40.

received a "notification" from the CFIA advising the LCBO that "Product of Israel" would not be "an acceptable country of origin declaration" for Settlement Wines.¹⁴

14. The post from which the Applicant learned of the initial CFIA decision was posted on B'nai Brith's Facebook page at 11:42 a.m. According to that post, the LCBO had directed its vendors to discontinue the sale or importation of the Settlement Wines and any other wines from the OPT or the Golan Heights that were labelled as "Product of Israel." B'nai Brith's July 12 Facebook post included a complete copy of the LCBO's July 11, 2017 letter to Ontario wine vendors. Until then, the Applicant had never seen this letter. B'nai Brith stated that it was "shocked" by the CFIA decision. It further stated that B'nai Brith would provide updates on that decision.¹⁵

15. B'nai Brith describes itself as a "staunch defender of the State of Israel."¹⁶

16. At 7:53 p.m. on July 12, 2017, a second post regarding the initial CFIA decision was posted on B'nai Brith's Facebook page. It stated 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." Before reading that post, the Applicant was not aware that the CFIA intended to reverse its initial decision.¹⁷

¹⁴ Kattenburg Affidavit, paras. 19-21, Exhibit "7" [AAR, vol. 1, Tab B, p. 26 and 64].

¹⁵ *Ibid.*

¹⁶ Kattenburg Affidavit, para. 22, Exhibit "8" [AAR, vol. 1, Tab B, pp. 27 and 66].

¹⁷ Kattenburg Affidavit, paras. 23-26, Exhibits "9" - "11" [AAR, vol. 1, Tab B, pp. 27-28 and 68-70].

17. On July 12, 2017, B'nai Brith also posted on its website a statement entitled "B'nai Brith Expects Disturbing Canadian Food Inspection Agency Decision Against Israeli Wines to Be Reversed Soon."¹⁸

18. On July 12, 2017, CFIA President Paul Glover called a meeting within the CFIA.

According to Eric Jeurond, a Senior Complaints and Appeals Advisor of the CFIA's Complaints and Appeals Office ("CAO") who has sworn an affidavit in response to this Application, Mr. Glover called the July 12 meeting "to understand the issue, background and discussions with GAC." Mr. Glover called another meeting within the CFIA on the morning of July 13. According to Mr. Jeurond, the purpose of the July 13 meeting was "the development of options for the matter in light of the information provided by GAC". The three options identified by the CFIA were:

Option 1: Provide clarification on alternative acceptable origin statements that reflect the region.

CFIA would maintain its position and work with LCBO and affected parties to develop an alternative declaration to satisfy origin labelling that reflects the region.

Option 2: Indicate that CFIA is reviewing the matter through its food labelling modernization initiative CFIA recently engaged on country of origin labelling and blended wine labelling through online consultations and could indicate this matter is under review in the context of these initiatives.

Option 3: Indicate that CFIA will reverse the decision based on further information related to Canada-Israel Free Trade Agreement.

¹⁸ *Ibid.*

Further information was received respecting the Canada-Israel Free Trade Agreement that may be used to support maintaining status quo (Product of Israel) on these products.¹⁹

19. On the evening of July 12, however, at 6:25 pm, the CFIA's Lara Boulanger-Stewart sent an email to thirteen CFIA officials, including Mr. Glover, in which she wrote:

Just spoke to Paul, we need the statement asap. We are ultimately going to rescind our decision. Statement should note, we regret any confusion this may have caused, these things are subject to interpretation and that we will continue with the status quo will and are following up with the LCBO."²⁰

20. It thus appears that CFIA senior management decided to rescind staff's initial decision before the July 13 meeting which Mr. Glover ostensibly called to 'consider' three options, including an option to maintain the original CFIA decision.

21. On July 13, 2017, after the meeting held on the morning of that day, the CFIA posted an announcement on its website that it had reversed staff's determination that "Product of Israel" labels on the Settlements Wines did not comply with Canadian law. The CFIA's announcement stated:

"Product of Israel" Wine Labelling

The Canadian Food Inspection Agency (CFIA) regrets the outcome of the wine labelling assessment which led to the Liquor Control Board of Ontario's (LCBO) response regarding products from two wineries labelled as "Product of Israel."

In our assessment, we did not fully consider the *Canada-Israel Free Trade Agreement* (CIFTA).

¹⁹ Jeaurond Affidavit, para. 45, Exhibit "P".

²⁰ CTR, p. A264 [AAR, vol. 3, Tab E, p. 650].

Further clarification of the CIFTA (Article 1.4.1b) indicates that these wines adhere to the Agreement and therefore we can confirm that the products in question can be sold as currently labelled.

The CFIA will be following up with the LCBO to correct our original response.²¹

22. On July 13, 2017 at 5:40 pm, B'nai Brith posted on its Facebook page a statement in which its CEO, Michael Mostyn, thanked Canada's Government for "responding so quickly to the legitimate concerns of the Jewish community and all concerned Canadians." In that post, Mr. Mostyn also stated that "B'nai Brith will always relentlessly advocate for our community" and "will continue to make inquiries about the origin of this travesty, to ensure that nothing like [sic] ever happens again."²²

23. On July 13, 2017, B'nai Brith also posted an article on its website entitled "B'nai Brith Canada Commends Government for Pressuring Agency to Comply with Canadian Wine Regulations." That statement "specifically lauded" Liberal MP Michael Levitt, Chair of the Canada-Israel Interparliamentary Friendship Group, for his "quick work and leadership behind the scenes to help resolve this issue." B'nai Brith quoted Mr. Levitt as stating in part that:

I was shocked and deeply concerned (about)... the discontinuation of the sale of products from two Israeli wineries as a result of the issuance of a notice by the CFIA. This action was completely at odds with... the Government's long-standing close relationship with the State of Israel...²³

²¹ Kattenburg Affidavit, para. 33, Exhibit "14" [AAR, vol. 1, Tab B, pp. ____].

²² Kattenburg Affidavit, Exhibit "15" [AAR, vol. 1, Tab B, pp. 29 and 85].

²³ Kattenburg Affidavit, paras. 35-36, Exhibits "16" and "17" [AAR, vol. 1, Tab B, pp. 30, 87-89 and 91].

24. On July 13, 2017, the Center for Israel and Jewish Affairs ("CIJA") issued two statements regarding the CFIA's Settlement Wines labelling decisions.
25. The first statement stated that "For the past few days, CIJA's team in Ottawa has constructively engaged senior officials in the Government of Canada to resolve this issue. We applaud them for responding so quickly to make this right." The second statement was entitled "CIJA Commends Government for Prompt Revocation of CFIA Labeling Directive" and stated in part that CIJA "learned about the directive on July 11th and immediately contacted key staff in the offices of the Minister of International Trade and Global Affairs Canada. We learned that the directive, which is at odds with government policy, was mistakenly issued at the bureaucratic level with no direction from political staff or the Minister." On its website, CIJA describes itself as a "national, non-partisan, non-profit organization, representing the perspectives of 150,000 Canadian Jews affiliated through local Federations."²⁴

E. The Applicant's Appeal to CAO

26. On August 6, 2017, through his counsel, the Applicant filed with the CAO an appeal from the CFIA's decision to reverse its initial decision that the country-of-origin declarations on the Settlement Wines did not comply with Canadian law.²⁵

²⁴ Kattenburg Affidavit, paras. 37-40, Exhibits "19", "20" and "21" [AAR, vol. 1, Tab B, pp. 30-31, 96, 98 and 100-102].

²⁵ Kattenburg Affidavit, para. 48, Exhibit "27" [AAR, vol. 1, Tab B, pp. 33 and 114-144].

27. The CAO was created as part of the CFIA's efforts to conduct its operations on the basis of transparency and accountability. It was introduced to provide stakeholders with a redress mechanism.²⁶
28. According to Mr. Jeaurond, once a proper complaint has been filed with the CAO, the CAO takes various steps, one of which is that "the CAO gathers all relevant information about the complaint from the complainant and the CFIA."²⁷
29. The Applicant's appeal to the CAO raised two different categories of concerns within the CAO's mandate: (1) the quality of the service that the CFIA had provided; and (2) the CFIA's response of July 13, 2017 with respect to the regulatory application of country of origin labelling of the two imported wines in question.²⁸
30. On September 28, 2017, after gathering various documents from CFIA personnel and seeking clarification of certain of those documents, the CAO communicated its conclusions to the Applicant and his counsel. With respect to the service-related component of the Applicant's appeal, the CAO affirmed that the appeal was warranted because the CFIA had failed to provide a response to the Applicant as a member of the public who had initiated the matter with the CFIA. Regarding this oversight, CFIA staff acknowledged the importance of timely and direct communications with persons who raise concerns with the CFIA and expect a response. With respect to the regulatory component of the complaint, the CAO

²⁶ Jeaurond Affidavit, para. 9.

²⁷ Jeaurond Affidavit, para. 14.

²⁸ Jeaurond Affidavit, para. 15.

agreed with the CFIA's July 13, 2017 response. The CAO confirmed that its decision was final and that there was no further redress mechanism within the CFIA.²⁹

31. On cross-examination, Mr. Jeaurond confirmed the following:

- (1) in evaluating the Applicant's appeal, the CAO did not communicate with any of the CFIA staff who participated in the initial determination that the country-of-origin declarations on the Settlement Wines failed to comply with Canadian law;
- (2) none of those employees participated in the meeting held by CFIA senior management on the morning of July 13;
- (3) at the time that the CAO completed its assessment of the Applicant's appeal, Mr. Jeaurond did not know that CFIA senior management had decided to reverse staff's decision before the meeting held by CFIA senior management on July 13;
- (4) the CFIA does not dispute that the Settlement Wines were produced entirely in the West Bank;
- (5) the sole basis on which CFIA management reversed the initial decision of CFIA staff was further consideration of Art. 1.4.1b of *CIFTA*; and
- (6) The CAO did not engage in its own independent analysis of Article 1.4.1b of *CIFTA* and relied on input from the CFIA relating to GAC's expertise on international trade law and policy.³⁰

F. The Applicant's Application for Judicial Review

32. The Applicant filed the within Application on October 24, 2017. In his supporting affidavit, the Applicant explained that he has initiated this Application and the complaint out of which it has arisen to help ensure respect for Canada's consumer

²⁹ Jeaurond Affidavit, paras. 18-35.

³⁰ Jeaurond Transcript, question 170, p. 47; question 179, p. 49; question 144, p. 40; and questions 67-70, pp. 17-19 [AAR, vol. 4, Tab F, pp. 738, 740, 731 and 708-710].

protection and product labelling laws, to help ensure that he 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. The Applicant further states that he believes 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 and that the labeling of Settlement Wines on Canadian store shelves as 'Product of Israel' facilitates and effectively endorses Israel's *de facto* annexation of large portions of the West Bank, in violation of international law. The Applicant states that this "is an affront to my conscience as a Jewish person and to my commitment to the rule of law as a citizen of Canada."³¹

33. The Respondent elected not to cross-examine the Applicant.

G. The Expert Evidence

34. In support of this Application, the Applicant has also filed an expert affidavit from Michael Sfard. Mr. Sfard is a lawyer called to practice in the Courts of Israel. He specializes in international human rights law, international humanitarian law and Israeli administrative law. He has an LL.B. from the law faculty of the Hebrew University of Jerusalem and an LL.M. in international human rights law from the University College of London.³²

³¹ Kattenburg Affidavit, para. 10 [AAR, vol. 1, Tab B, p. 23].

³² Affidavit of Michael Sfard, sworn February 18, 2018 ("Sfard Affidavit"), para. 1-8 [AAR, vol. 2, Tab D, pp. 368-370].

35. In response to the questions put to him, Mr. Sfard rendered the following opinions:

- (1) according to international law, the West Bank does not lie within the recognized boundaries of the State of Israel;
- (2) the West Bank is considered "occupied territory" within the meaning of the term under international humanitarian law;
- (3) the West Bank (except east Jerusalem) is not considered sovereign territory of the State of Israel even under Israeli law; rather, it is considered a 'disputed territory' to which the State of Israel has claims and/or an occupied territory that is held according to the laws of belligerent occupation; and
- (4) the Israeli settlement enterprise in the West Bank constitutes a violation of both customary international humanitarian law and a specific prohibition contained in the *Fourth Geneva Convention*.³³

36. The Respondent did not cross-examine Mr. Sfard and filed no expert evidence.

PART II: POINTS IN ISSUE

37. The Applicant submits that the issues raised by this Application are:

- (a) what is the correct standard of review?
- (b) did the decision-maker err in law by determining that "Product of Israel" labels on the Settlement Wines comply with Canadian law?

PART III: SUBMISSIONS

A. Standard of Review

38. There appears to be no dispute that the Settlement Wines are sold in Canada bearing "Product of Israel" labels and that the Settlement Wines are produced

³³ Sfard Affidavit, para. 10 [AAR, vol. 2, Tab D, p. 371].

entirely in the West Bank.³⁴ There also appears to be no dispute that the West Bank is not part of the state of Israel and that it constitutes occupied Palestinian territory. Thus, there are no material facts in dispute.

39. This application turns entirely on the decision-maker's interpretation of Article 1.4.1b of *CIFTA*. The core question in this application is: does Art. 1.4.1b of *CIFTA* authorize the producers of goods in Israel's illegal settlements to label products which they sell in Canada as "Product of Israel" even though the products are not in fact produced in the State of Israel?

40. The Supreme Court of Canada has held that most questions of law should be reviewed on a correctness standard.³⁵ The Applicant submits that the question of whether Settlement Wines may be labelled in Canada as "Product of Israel" by virtue of Art. 1.4.1b of *CIFTA* requires no particular administrative expertise and that, accordingly, the appropriate standard of review is correctness.

B. The Decision-Maker Erred in Law

(1) Settlement Wines Labelled as "Product of Israel" Violate the *FDA*

41. Section 5(1) of the *Food and Drugs Act* ("*FDA*") states:

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.³⁶

³⁴ Kattenburg Affidavit, paras. 62-64 and 67, Exhibits "39" - "41" [AAR, vol. 1-2, Tabs B-C, pp. 36-37, 203-204, 206-207 and 209-215].

³⁵ *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, para. 51 [Applicant's Book of Authorities ("Applicant's BoA"), Tab 1].

³⁶ R.S.C., 1985, c. F-27, s. 5(1).

42. Section 2 of the *FDA* defines "food" to include "any article manufactured, sold or represented for use as food or drink for human beings..."³⁷ Thus, Settlement Wines constitute a "food" for purposes of the *FDA*, and the Section 5 prohibition on false, misleading or deceptive labels applies to Settlement Wines sold in Canada.
43. A clear indication of the country of origin is required on all standardized wine products described in B.02.100 and B.02.102 to B.02.107 of the *Food and Drug Regulations* ("FDR").³⁸ Under the *FDR*, a wine may claim to be wine of a country if (a) the wine is made from at least 75% of the juice of grapes grown in that country and is fermented, processed, blended and finished in that country; or (b) in the case of wines blended in that country, at least 75% of the finished wine is fermented and processed in that country from the juice of grapes grown in that country.³⁹
44. There appears to be no dispute that the Settlement Wines are made entirely of juice from grapes grown in the OPT and that the juice from which those Settlement Wines are made is fermented, processed, blended and finished in the OPT.
45. Accordingly, the "Product of Israel" declaration appearing on the Settlement Wines violates, *prima facie*, the *FDA* and the regulations promulgated thereunder.

**(2) Settlement Wines Labelled as "Product of Israel"
Violate the *CPLA***

46. Section 7(1) of the *CPLA* states:

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

³⁷ *Ibid*, s. 2.

³⁸ C.R.C., c. 870, sections B.02.100 and B.02.102 to B.02.108.

³⁹ *Ibid*; Jeaurond Affidavit, para. 22, Exhibit "N".

containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product.⁴⁰

47. Section 2(1) of the *CPLA* defines a "dealer" as "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."⁴¹ Thus, producers, importers and sellers of Settlement Wines are "dealers" under the *CPLA*.
48. Section 2(1) of the *CPLA* defines a "product" as "any article that is or may be the subject of trade or commerce..."⁴² That Section also defines a "prepackaged product" as "any product that is packaged in a container in such a manner that it is ordinarily sold to or used or purchased by a consumer without being re-packaged." Settlement Wines being sold in Canada are packaged in containers that are ordinarily sold to or used or purchased by a consumer without being re-packaged.
49. Settlement Wines therefore constitute "products" and "prepackaged products" within the meaning of s. 2(1) of the *CPLA* and are therefore subject to the prohibition contained in s. 7(1) of the *CPLA* against false or misleading statements on labels.
50. Section 7(2) of the *CPLA* states:

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

⁴⁰ R.S.C., 1985, c. C-38, s. 7(1).

⁴¹ R.S.C., 1985, c. C-38, s. 2(1).

⁴² *Ibid.*

product that may reasonably be regarded as likely to deceive a consumer with respect to the matter so described or illustrated.⁴³

[Emphasis added].

51. As stated above, the Settlement Wines were produced entirely in the West Bank, which does not form part of the state of Israel. Thus, the "Product of Israel" country-of-origin declarations on the Settlement Wines are false and misleading and therefore violate, *prima facie*, Section 7 of the *CPLA*.

(3) Neither *CIFTA* Nor the *CIFTA Act* Authorizes Products Made in Israel's Illegal Settlements to be Labelled as "Product of Israel"

52. In 1996, *CIFTA* was implemented into Canadian law by the *Canada-Israel Free Trade Implementation Act* (the "*CIFTA Act*").⁴⁴

53. Section 4 of the *CIFTA Act* states:

The purpose of this Act is to implement the Agreement, the objective of which, as elaborated more specifically through its provisions, is to eliminate barriers to trade in, and facilitate the movement of, goods within the free-trade area established by the Agreement, and thereby to promote conditions of fair competition and substantially increase investment opportunities in that free-trade area.⁴⁵

⁴³ R.S.C., 1985, c. C-38, s. 7(2).

⁴⁴ S.C. 1996, c. 33. *CIFTA* is a goods-only trade agreement that has been in force since January 1, 1997. In 2014, Canada and Israel agreed to 'modernize' *CIFTA*. On May 28, 2018, the governments of Canada and Israel signed the *Canada-Israel Free Trade Amending Protocol* (the "*Amending Protocol*"). Article 3 of the *Amending Protocol* stipulates that it shall "enter into force on the first day of the second month following the date of the latter diplomatic note by which the Parties notify each other that their respective internal legal procedures for the entry into force of this Protocol have been completed." As of this date, the *Amending Protocol* has not come into force. See: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/protocol-protocole.aspx?lang=eng> and <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng>.

⁴⁵ *Ibid*, s. 4.

54. Article 1.4.1b of *CIFTA* states, in pertinent part:

For the purposes of this Agreement, unless otherwise specified:

[...]

territory means:

[...]

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

[...]

[Emphasis added.]

55. The decision-maker's interpretation of Art. 1.4.1b of *CIFTA* gives no effect to the words "For the purposes of this Agreement." On the contrary, its interpretation of *CIFTA* wrongly assumes that Article 1.4.1b's definition of "territory" of Israel applies for all purposes, including consumer protection purposes.

56. The purposes of *CIFTA* are set forth in Article 1.2 thereof, which states:

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.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objective set out in paragraph 1 and in accordance with applicable rules of international law.

3. Each Party shall administer in a consistent, impartial and reasonable manner all laws, regulations, decisions and rulings affecting matters covered by this Agreement.⁴⁶

⁴⁶ *CIFTA*, art. 1.2.

57. Thus, the purpose of *CIFTA* is to eliminate barriers to trade and facilitate the movement of goods between Canada and Israel. Generally, a barrier to trade is a government-imposed restraint on the international flow of goods or services. The most common trade barrier is a tariff. Other barriers include quotas and subsidies.
58. Although a consumer protection requirement can constitute a “technical” barrier to trade, the vast majority of such requirements constitute legitimate action by governments to inform and protect the public and do not run afoul of trade agreements. Canada’s Ministry of International Trade recognizes this, stating:

Successive rounds of multilateral trade negotiations at the World Trade Organization (WTO), and the negotiation of numerous bilateral and regional trade arrangements have led to a substantial reduction in global tariffs. As tariffs have decreased, there has been increased focus on ensuring non-tariff measures or policies, including technical regulations and standards, do not restrict or distort international trade.

Governments use technical regulations and standards to achieve a range of policy goals, such as ensuring the health and safety of their citizens, protection of the environment, and consumer protection. While the vast majority of technical regulations and standards are designed to achieve non-trade related objectives, they can also have the unintended effect of restricting or distorting trade. Furthermore, as the use of tariffs as a trade-policy tool has diminished, there can, at times, be an increased incentive for governments to use regulations and standards as an alternative, and less transparent means of restricting the entry of foreign products.

[...]

Canada’s international trade agreements preserve the right of Canada and its trading partners to regulate in order to meet legitimate objectives, such as human health and safety, or environmental protection. At the same time, they impose rules that [sic] aimed at ensuring that technical regulations and standards do not unnecessarily restrict international trade. Having strong international rules relating to technical regulations and standards provides Canadian exporters with more secure, predictable access to foreign markets for their products. It also helps business and consumers, by ensuring that technical

regulations and standards do not add unnecessary costs to internationally traded products.⁴⁷

[Emphasis added.]

59. Further, Article 4.2 of *CIFTA* excludes all standards-related matters, noting that "The 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 ("WTO")]."⁴⁸ Thus, *CIFTA* itself does not affect the operation of Canada's labelling laws.

60. Article 2 of the WTO's *Agreement on Technical Barriers to Trade* states:

Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.⁴⁹

⁴⁷ Kattenburg Affidavit, para. 69, Exhibit "46" [AAR, vol. 1-2, Tabs B-C, pp. 38 and 231-232].

⁴⁸ *CIFTA*, art. 4.2.

⁴⁹ *Agreement on Technical Barriers to Trade* of the WTO, art. 2.

61. A requirement that labels on all wine products, whether domestic or foreign, accurately identify the product's country of origin is not a technical barrier to trade. Such a requirement is a legitimate measure to inform and protect Canadian consumers. By their plain terms, Section 5 of the *FDA* and Section 7(1) of the *CPLA* apply to all wine products, whether domestic or foreign. Thus, the country-of-origin labels on Canadian wines are no less required to be truthful than country-of-origin labels on the Settlement Wines. For example, the producer of a wine in Ontario may not label that wine as "Product of France." Thus, these statutory provisions are non-discriminatory: they preserve a level playing field for domestic and foreign wines.
62. In addition, there is no evidence before this Court that requiring the producers of Settlement Wines to label their wines as "Product of the West Bank", "West Bank Israeli Settlement" or words to that effect would impose a significant or undue economic burden on those producers and thereby place them at an unfair disadvantage relative to domestic or other foreign wine producers.
63. Consequently, s. 5 of the *FDA* and s. 7(1) of the *CPLA* are not technical barriers to trade and do not run afoul of *CIFTA* or the *Agreement on Technical Barriers to Trade*, nor does *CIFTA*'s definition of the "territory" of Israel bring the country-of-origin declarations on the Settlements Wines into compliance with Canadian prohibitions on false and misleading labelling.
64. At most, *CIFTA*'s definition of "territory" of Israel entitles products made in Israel's illegal West Bank settlements to preferential tariff treatment, but it does not permit those products to be falsely labeled as "Product of Israel."

65. Finally, even if *CIFTA* contained a provision which purported to entitle producers in Israel's illegal settlements to label their products as "Product of Israel" – and *CIFTA* contains no such provision – such a provision could not override Section 7 of the *CPLA* because Section 3 of the *CPLA* stipulates that the provisions of the *CPLA* apply notwithstanding any other Act of Parliament.⁵⁰

(4) CIFTA Must be Interpreted in Accordance with International Law

66. Article 1.2.2 of *CIFTA* requires that *CIFTA* be interpreted and applied in accordance with applicable rules of international law.⁵¹

67. In addition, in *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada held that:

[T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]⁵²

68. In *Baker*, the Supreme Court stated that this was the proper approach to statutory interpretation even where the relevant international human rights instrument had not been implemented into Canadian law.

⁵⁰ *CPLA*, s. 7.

⁵¹ *CIFTA*, art. 1.2.2.

⁵² [1999] 2 SCR 817, 1999 CanLII 699 (SCC), para. 70 [Applicant's BoA, Tab 2]; See also *Canada (Justice) v. Khadr*, [2008] 2 SCR 125, 2008 SCC 28 (CanLII), para. 25 [Applicant's BoA, Tab 3].

69. In this case, the relevant international instrument, namely, the *Fourth Geneva Convention*, has been implemented into Canadian law by the *Geneva Conventions Act*.⁵³ Section 2 of that Act declares that "The Geneva Conventions for the Protection of War Victims, signed at Geneva on August 12, 1949 and set out in Schedules I to IV, are approved."⁵⁴
70. The interpretation of *CIFTA* adopted by the decision-maker violates not only the *Fourth Geneva Convention*, but also the *United Nations Charter*, a key ruling of the International Court of Justice ("ICJ") as to the illegality of Israel's settlements, and numerous resolutions of the U.N. Security Council and General Assembly.
71. The ICJ is the principal judicial organ of the United Nations. It was established by Article 7 of the *Charter of the United Nations* ("*United Nations Charter*").⁵⁵ Canada is a party to the *United Nations Charter* and a founding member of the United Nations.
72. In 2004, the ICJ held in an advisory opinion that Israel's settlements in the West Bank violate Article 49 of the *Fourth Geneva Convention*. As stated by the ICJ:

120. As regards these settlements, The Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupied." That provision prohibits not only deportations or forced transfers of the population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the

⁵³ R.S.C., 1985, c. G-3.

⁵⁴ *Ibid*, s. 2.

⁵⁵ *United Nations Charter*, art. 7.

establishment of settlements in Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

[...]

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

[...]

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.... The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

[...]

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'....", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law"... In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States... are under an obligation not to render aid or assistance in maintaining the situation created by

such construction.... In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.⁵⁶

[Emphasis added.]

73. As noted by the ICJ, Article 1 of the *Fourth Geneva Convention* states that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."⁵⁷ As a High Contracting Party to the *Fourth Geneva Convention*, Canada is obliged to ensure Israel's respect for the *Convention*. By allowing Settlement Wines to be imported and sold in Canada with false "Product of Israel" labels, Canada is violating its duty to ensure the State of Israel's respect for the *Convention*.⁵⁸

74. Moreover, the United Nations Security Council and General Assembly have repeatedly condemned Israel's settlements as a violation of the *Fourth Geneva Convention*. The Security Council's most recent condemnation was issued in December 2016 when the Security Council adopted Resolution 2334, by a vote of 14-0 (with the United States abstaining). Resolution 2334 states, in part, as follows:

The Security Council,

⁵⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports of Judgments, Advisory Opinions and Orders, July 9, 2004 [Applicant's BoA, Tab 4].

⁵⁷ Geneva Convention IV, art. 1.

⁵⁸ *Everyone's Business: Third Party Responsibility and the Enforcement of International Law in the oPt*, Diakonia International Humanitarian Law Resource Centre, October 2016, pp. 4-7 [Applicant's BoA, Tab 5]; Kattenburg Affidavit, paras. 74-75, Exhibits "51" - "52" [AAR, vol. 1-2, Tab B-C, pp. 40 and 267-333].

[...]

1. Reaffirms that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;
2. Reiterates its demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem, and that it fully respect all of its legal obligations in this regard;
3. Underlines that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;
4. Stresses that the cessation of all Israeli settlement activities is essential for salvaging the two-State solution, and calls for affirmative steps to be taken immediately to reverse the negative trends on the ground that are imperilling the two-State solution;
5. Calls upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967;

[...] ⁵⁹

[Emphasis added.]

75. Article 25 of the *United Nations Charter* states that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."⁶⁰ Thus, Canada is obliged under the *United Nations Charter* to give effect to the Security Council's call in Resolution 2334 for all

⁵⁹ United Nations Security Council Resolution 2334, December 23, 2016 [Applicant's BoA, Tab 6].

⁶⁰ *United Nations Charter*, art. 25.

United Nations members "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967."

76. Consistently with the international legal obligations of European Union member states, the European Commission has adopted an interpretive notice relating to the labelling of products from Israeli settlements in the OPT. That notice states, among other things, that "Since the Golan Heights and the West Bank (including East Jerusalem) are not part of the Israeli territory according to international law, the indication 'product from Israel' is considered to be incorrect and misleading in the sense of the referenced legislation."⁶¹

77. Similarly, the United States Customs and Border Protection Agency has issued guidance relating to products made in the West Bank, stating:

goods produced in the West Bank or Gaza Strip shall be marked as originating from "West Bank," "Gaza," "Gaza Strip," "West Bank/Gaza," "West Bank/Gaza Strip," "West Bank and Gaza," or "West Bank and Gaza Strip." It is not acceptable to mark the aforementioned goods with the words "Israel," "Made in Israel," "Occupied Territories-Israel," or any variation thereof. Goods that are erroneously marked as products of Israel will be subject to an enforcement action carried out by U.S. Customs and Border Protection. Goods entering the United States must conform to the U.S. marking statute and regulations promulgated thereunder.⁶²

78. As stated above, both Art. 1.2.2 of *CIFTA* and the Supreme Court of Canada's decision in *Baker* call for an interpretation of CIFTA that accords with Canada's

⁶¹ Kattenburg Affidavit, para. 72, Exhibit "49" [AAR, vol. 1-2, Tabs B-C, pp. 39 and 260-263].

⁶² Kattenburg Affidavit, para. 73, Exhibit "50" [AAR, vol. 1-2, Tab B-C, pp. 39-40 and 265].

obligations under international law. The decision-maker's interpretation of *CIFTA* is profoundly contrary to those fundamental obligations.

(5) The Evidence Does Not Establish That Israel's Customs Laws Are Applied in the West Bank

79. Whatever the purposes of *CIFTA* may be, the evidence does not establish that

Israel's customs laws are applied in the West Bank, and therefore, the definition of the "territory" of Israel set forth in Art. 1.4.1b does not encompass the West Bank.

80. The Respondent has furnished to the Court a Foreign Relations Certificate signed by

Canada's Minister of Foreign Affairs. Attached to that certificate is a non-legally

binding *Joint Canadian-Palestinian Framework for Economic Cooperation and Trade*

Between Canada and the Palestinian Liberation Organization on Behalf of the

Palestinian Authority (the "*Framework*"). The *Framework*, however, does not contain

an acknowledgement by the Palestinian Authority that Israel's customs laws are

applied in the West Bank, nor does the *Framework* identify settlements as falling

within Israel's putative extended customs area.

81. In its preamble, the *Framework* does 'take note of' other international instruments,

including the 1994 *Protocol on Economic Relations Between Israel and the Palestine*

Liberation Organization (the "*Protocol*"). The *Protocol* contains various provisions

relating to customs practices and laws in the West Bank. Section 1.2 of Article III of

the *Protocol* declares that the "Palestinian Authority will have all powers and

responsibilities in the sphere of import and customs policy and procedures" with

regard to the categories of goods specified in that section.⁶³ Section 1.5 under Article III of the *Protocol* provides that, with respect to goods not specified in Section 1.2, “the Israeli rates of customs, purchase tax, levies, excises and other charges, prevailing at the date of signing of the Agreement, as changed from time to time, shall serve as the minimum basis for the Palestinian Authority. The Palestinian Authority may decide on any upward changes in the rates on these goods and exceeding quantities when imported by the Palestinians” to the areas under the jurisdiction of the Palestinian Authority.⁶⁴

82. Thus, at most, the customs laws applied in the West Bank are a hybrid of Israeli and Palestinian customs laws. It is inaccurate and an oversimplification to assert that ‘Israel’s customs laws are applied in the West Bank.’ Accordingly, the West Bank is not encompassed within the definition of Israel’s “territory” in Art. 1.4.1b of *CIFTA*.

C. Conclusion

83. For the reasons stated above, the evidence does not establish that Israel’s customs laws are applied in the West Bank, but even if they are applied in Palestinian territory occupied by Israel, *CIFTA* art. 1.4.1b does not entitle producers of products in Israel’s illegal settlements to falsely label those products in Canada as “product of Israel”.

PART IV: ORDER SOUGHT

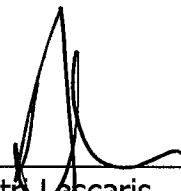
84. The Applicant respectfully requests an Order:

⁶³ *Protocol*, s. 1.2.

⁶⁴ *Protocol*, s. 1.5.

- (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* authorizes products made in the OPT to be labelled as "Product of Israel";
- (c) declaring that, insofar as Settlement Wines are labelled as "Product of Israel," Settlement Wines violate section 5(1) of the *FDA*;
- (d) declaring that, insofar as Settlement Wines are labelled as "Product of Israel," 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*, as well as Canada's obligations as a party to the *Fourth Geneva Convention* and the *United Nations Charter*; and
- (f) granting to the Applicant his costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of November, 2018.



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PART V: LIST OF AUTHORITIES

STATUTES AND INTERNATIONAL INSTRUMENTS

Agreement on Technical Barriers to Trade of the World Trade Organization, article 2

Canada-Israel Free Trade Implementation Act, S.C. 1996, c. 33, section 4

Canada-Israel Free Trade Agreement, articles 1.2, 1.4.1b and 4.2

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

Food and Drugs Act, R.S.C., 1985, c. F-27, sections 2 and 5

Food and Drugs Regulations, C.R.C., c. 870, sections B.02.100 and B.02.102 to B.02.108

Geneva Convention IV, articles 1 and 49

Geneva Conventions Act, R.S.C., 1985, c. G-3, section 2

Joint Canadian-Palestinian Framework for Economic Cooperation and Trade Between Canada and the Palestinian Liberation Organization on Behalf of the Palestinian Authority

Protocol on Economic Relations Between Israel and the Palestine Liberation Organization, Article III, Sections 1.2 and 1.5

United Nations Charter, articles 7 and 25

United Nations Security Council Resolution 2334, December 23, 2016

JURISPRUDENCE

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 (SCC)

Canada (Justice) v. Khadr, [2008] 2 SCR 125, 2008 SCC 28 (CanLII)

Dunsmuir v. New Brunswick, [2008] 1 SCR 190

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,
ICJ Reports of Judgments, Advisory Opinions and Orders, July 9, 2004

OTHER AUTHORITIES

Everyone's Business: Third Party Responsibility and the Enforcement of International Law in the oPt, Diakonia International Humanitarian Law Resource Centre, October 2016, pp. 4-7

PART VI: CHRONOLOGY OF APPLICANT'S COMPLAINTS

Kattenburg v AG of Canada (T-1620-17)
Case Chronology

DATE	EVENT	SOURCE
06-Jan-17	Applicant (David Kattenburg; DK) writes letter to Liquor Control Board of Ontario (LCBO) to complain about two settlement wines labeled "Product of Israel"	Applicant affidavit, Exhibit 1
13-Jan-17	CFIA Toronto office and LCBO receive Applicant's letter of complaint	Certified Tribunal Record (CTR): A128
13-Jan-17 to 20-Feb-17	"CFIA Toronto Region requested additional information from LCBO (e.g. product specifications, labels) and verifies applicable regulatory requirements." CFIA Food Operational Guidance & Expertise works on file; consults with Consumer Protection & Market Fairness Division, Policy & Programs Branch (CPFMD); Email from Trish MacMillan to CFIA Complaints & Appeals Office: "CFIA consulted Global Affairs Canada, as well as the information on the GAC website, in order to provide guidance on to respond [sic] to the complaint received. Internal discussions with PPB also occurred between the food and international programs."	CTR: A128, 142, 147, 152
21-Feb-17	"CFIA Toronto Office engaged the Food Operational Guidance and Expertise section for advice on the issue"; "Food OGE ... consulted with Consumer Protection and Market Fairness Division in Policy and Program Branch"; "Is 'Product of Israel' an acceptable country of origin declaration for wines with grapes grown, fermented, processed, blended and finished outside Israel's sovereign borders but on Israeli occupied territories and settlements in the West Bank?"; Guidance requester name: Stephanie Soo: "Is the enquiry the result of missing, inaccurate or incomplete information?" Answer: "Yes"; "Israeli settlements in the occupied territories are a violation of the Fourth Geneva Convention"	CTR: A128, 147, 150, 153, 275
21-Feb-17 to 05-July-17	"Food OGE worked on the file and consulted with Consumer Protection and Market Fairness Division in Policy and Programs Branch. CPFMD consulted Global Affairs Canada and CFIA International."	CTR: A147

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28-Feb-17	OGE Specialist Giselle Munroe receives request for guidance from Stephanie Soo; Munroe responds: ""Product of Israel" would not be an acceptable country of origin declaration for wine products that have been made from grapes that are grown, fermented, processed, blended and finished in the West Bank occupied territory." [They] "may be labelled as "Made in the West Bank," "Made in the West Bank Territories," or "Product of the West Bank," or similar terms." "... wine products from these regions that are labelled as "Product of Israel" would not be acceptable and would be considered misleading as per subsection 5(1) of the <i>Food and Drugs Act</i> ." [having consulted with Edward Harrison, Policy and Programs Specialist, Consumer Protection and Market Fairness Division, and Beatrice Leung, Alexa Morden, Sonia Worobec, Roxanne Baskett, National Operations Specialists, Food Labelling and Composition]	CTR: A156
08-Mar-17	Applicant receives letter from LCBO, indicating that LCBO is working in collaboration with CFIA to investigate his complaint	Applicant affidavit, Exhibit 2
31-Mar-17	Applicant writes directly to CFIA, complaining about the two settlement wines (received April 12)	Applicant affidavit, Exhibit 3
April-May 17	CPMFD consults with CFIA International and Global Affairs Canada	CTR: A128
13-Apr-17	Applicant receives letter from CFIA, acknowledging receipt of his 31-March letter	Applicant affidavit, Item 13
18-Apr-17	CFIA Inspector Richard Harlos notifies Applicant by email that "the issue has already been forwarded to our Center of Excellence specialists," indicating that the Applicant's complaint "would appear to be a complicated issue, one that relies on accurate information being gathered before a decision can be rendered."	Applicant affidavit, Exhibit 5
17-May-17	CFIA Inspector Richard Harlos notifies Applicant by email that his complaint continued to be reviewed	Applicant affidavit, Exhibit 6

21-Jun-17	CPMFD issues guidance to OGE stating: "The Government of Canada does not recognize Israel's sovereignty over the territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip). As such, wine products from these regions labelled "Product of Israel" would not be acceptable and would be considered misleading as per subsection 5(1) of the Food and Drugs Regulations. For wine products that have been made from grapes that are grown, fermented, processed, blended and finished in the West Bank occupied territory to meet Canadian country of origin labelling requirements, they may be labelled as "Made in West Bank", "Made in the West Bank Territories", or "Product of the West Bank", or some similar terms"; " Trish MacMillan: "Policy and Programs Branch provided guidance to Operations based on the consultations with GAC on June 21, 2017 ... Portions of this guidance were later communicated to the [LCBO] on July 6th."	CTR A128, 142
05-Jul-17	"Advice on the compliance of the labels was communicated from the OGE to the CFIA Toronto Region. The advice validated the complaint with supporting rationale that the Government of Canada does not recognize Israel's sovereignty over the territories occupied in 1967 ... This statement is posted on Global Affairs Canada's external website."	CTR: A128
06-Jul-17	CFIA Toronto region "advised LCBO that ['Product of Israel' settlement wine labels] were "non-compliant and requested an action plan"	CTR: A128
06-Jul-17; 1:30 PM	Email from Stephanie Soo to Dorina Brasoveanu [LCBO]: "Regarding the two [wine] products ... "Product of Israel" would not be an acceptable country of origin declaration for wine products that have been made from grapes that are grown fermented, processed, blended and finished in the West Bank occupied territory. The Government of Canada does not recognize Israel's sovereignty over the territories occupied in 1967 ... As such, wine products from these regions that are labelled as "Product of Israel" would not be acceptable and would be considered misleading as per subsection 5(1) of the Food and Drugs Act. Please provide your corrective action plan for these two products by Thursday, July 20, 2017."	CTR: A268
07-Jul-17; 6:23	Email from Dorina Brasoveanu to Stephanie Soo: "As we are working on defining the requested action plan, we request guidance on the appropriate labelling of the country of origin declaration for wines that originate in the below mentioned territories. Can you please assist us with a recommendation?"	CTR: A267

Kattenburg v AG of Canada (T-1620-17)
Case Chronology

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11-Jul-17; morning	LCBO releases statement to all sacramental wine vendors, indicating CFIA ruling that "Product of Israel" would not be an acceptable country of origin declaration for settlement wines; LCBO issues letter to 2 Israeli wineries "based on a CFIA interpretation with respect to country of origin labelling for wines originating in the West Bank from grapes that are grown, fermented, processed, blended and finished in the West Bank occupied territory."	CTR: A128, 130, 148
11-Jul-17; 3:35 PM	Email from Vincent Caron (President, LCBO) to Stephanie Soo (CFIA): "This morning I sent a notification to sacramental wine vendors appointed by the LCBO regarding your notification from last Thursday ... as some of them may have imported products from the region you mentioned. Later this afternoon, I received a phone call from Mr. Itay Tavor [blacked out] from the Israeli Embassy in Ottawa. Mr. Tavor had some questions on the opinion you provided, and therefore was looking to discuss with someone at the CFIA ... He did indicate that the request was time sensitive."	CTR: A267
11-Jul-17; 4:08 PM	Email from Stephanie Soo to Vincent Caron: "Would you be able to forward the specific questions Mr. Tavor has? I can refer him to the best person to speak with at CFIA."	CTR: A266
11-Jul-17; 4:14 PM	Email from Vincent Caron (President, LCBO) to Stephanie Soo (CFIA): "I just spoke to him again. He was looking to speak to someone and wanted to know what was the purpose of this order. He did not elaborate. He also asked about the origin of the complaint and I told him I could not elaborate on that for obvious privacy reasons."	CTR: A266
11-Jul-17; 6:02 PM	Email from Matthew Smith [GAC] to Kathy Twarddek [CFIA]: "The Embassy of Israel reached out to Global Affairs at senior levels today in response to the attached letter from the LCBO ... The Embassy has expressed [deleted] and noted that the Government of Israel [deleted] to this matter ..."	CTR: B22
12-Jul-17	"The CFIA was made aware through media requests and phone calls of concerns that its interpretation may not have fully considered all factors."	CTR: A129
12-Jul-17; 11:42 AM	B'Nai Brith Canada posts statement on Facebook, stating it is "shocked" by initial CFIA decision, and that further updates will be forthcoming.	Applicant Affidavit; Exhibit 7

Kattenburg v AG of Canada (T-1620-17)
Case Chronology

12-Jul-17; 3:36 PM	Email from Raymond Yip to Janis Lauder: "As discussed BC Liquor Distribution Branch contacted me just now regarding a ruling by CFIA regarding 'Product of Israel' wines not recognized by Canada and as such BC Liquor is wondering if they are required to stop selling certain Israeli wines ... Can someone look into this ..." July 13 email from Carolyn Bateman to Craig Price: "I forwarded this to Billy Williams so he knows it's not an isolated complaint in Ontario any longer."	CTR: A191
12-Jul-17; 4:45 PM	CFIA President calls meeting with CFIA executives from several branches to understand the issue, background, discussions with other government departments; requests summary of available information; "discussions with Global Affairs Canada"	CTR: A129, 130
12-July-17; 6:08 PM	Email from Barbara Jordan to Lara Boulanger-Stewart: "Lara - below is the short "chron" along with a couple of attachments ... [brief chronology follows] ... CFIA aligns its assessment of country of origin claims with Global Affairs Canada's position in assessing country of origin declaration. CFIA consulted Global Affairs Canada, as well as the information on the following website regarding occupied territories, in order to respond to the complaint received."	CTR: A248
12-Jul-17; 6:25 PM	Email from Lara Boulanger-Stewart to 13 CFIA recipients: "Hi folks. Just spoke to Paul, we need the statement asap. We are ultimately going to rescind [emphasis added] our decision. Statement should note, we regret any confusion this may have caused, these things are subject to interpretation and that we will continue with the status quo will and are following up with LCBO [all sic]"	CTR: A264
12-July-17; 6:31 PM	Email from William Williams to James Crawford and eleven CFIA recipients: "Hey folks we are rescinding [emphasis added] our decision. More messaging to follow."	CTR A264
12-Jul-17; 6:42 PM	Email from James Crawford (CFIA, Acting VP, Operations) to eleven CFIA staff: "I hope it is because the info on website was inaccurate and we were misinformed by partners. Jim."	CTR: A264

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12-Jul-17; 7:53 PM	<p>B'Nai Brith Canada media release entitled "B'Nai Brith Expects Disturbing Canadian Food Inspection Agency Decision Against Israeli Wines to Be Reversed Soon." Text reads: "B'Nai Brith Canada is expecting that the CFIA will soon rescind [emphasis added] its recent decision to order the removal of certain Israeli wines from stores shelves. "B'Nai Brith has received a lot of information on this matter from multiple sources and officials during the past 24 hours as we were advocating on behalf of the community," says Michael Mostyn, Chief Executive Officer of B'nai Brith Canada. "We can say now that we are expecting this disturbing decision to be corrected in short order." B'Nai Brith Canada posts statement on Facebook states: "While advocating on behalf of the grassroots Jewish community, B'Nai Brith discovered that the decision targeting Israeli wines in LCBO will soon be reversed."</p>	Applicant Affidavit; Exhibits 10, 11; CTR 186-189
12-Jul-17; 10:43 PM	<p>Email from CFIA President Paul Glover to Lara Boulanger-Stewart and 13 other CFIA staff: "I have spoke with PCO [Privy Council Office] and GAC (DM). I don't want CFIA issuing a statement that isn't aligned with gov't policy. We will need to work with GAC tomorrow on options. A quick huddle first thing in [sic] probably best as is suspect I am not done tonight with calls. For tomorrow asap can I please get all we know about the wine companies in question...do they make other wines, do they operate elsewhere, etc. Do we even know this info? Can we get this info if we don't have it. Also will need a quick summary or requirements for wine labelling. Thanks for all the support tonight."</p>	CTR: A263
12-Jul-17; 11:04 PM	<p>Email from Jodi White to Daniel Miller: "Daniel, in response to the request below, please see the summary of labelling requirements for wine ... 'Prepackaged wine sold in Canada is required to indicate the country of origin on the label. This statement, like all other labelling, must be truthful and not be misleading.'"</p>	CTR: A261
13-Jul-17	<p>"GAC (ADM) corresponded with CFIA President, suggesting that the Canada-Israel Free Trade Agreement (CIFTA), Article 1.4.1b be the reference applied in this case ... It is GAC's view that Israel applies its customs laws not only to the State of Israel but also with respect to East Jerusalem, the West Bank, the Gaza strip and the Golan Heights."</p>	CTR: A129

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13-Jul-17; 9AM	CFIA President meets with CFIA executives from several branches to "provide a debrief of his preliminary discussions with GAC in response to the issue; request a compilation of CFIA documentation on the file; request the development of options to address identified concerns with respect to the original CFIA interpretation; options to address concerns were developed; discussions between the CFIA and Global Affairs Canada were held at the VP and ED levels of PPB, during which time clarifications were provided regarding [CIFTA] and Israel-Palestinian arrangements regarding the application of customs laws to the West Bank. Based on discussions with GAC, a recommended option was identified."	CTR: A129
13-Jul-17; 9AM	Email from Alex Bugailiskis [GAC] to Paul Glover: "Further to your conversation with Deputy Minister Ian Shugart last evening, he has asked us to convey the following guidance on the issue of products from Israel. You were correct in referring to Canada's longstanding policy which clearly states that "Canada does not recognize permanent Israeli control over territories occupied in 1967 ... However, without prejudice to that longstanding policy position, I would suggest that your reference point be the Canada-Israel Free Trade Agreement (CIFTA) Article 1.4.1b of that agreement, specifies that "territory means ... [sic] with respect to Israel the territory where its customs laws are applied". It is our understanding that Israel applies its customs laws not only to the State of Israel, but also with respect to East Jerusalem, the West Bank, the Gaza Strip and the Golan Heights."	CTR: B21
13-Jul-17; 12-12:30 PM	Vice President, Policy & Programs Branch (Barbara Jordan) "presented a summary of her morning discussions with GAC with new information on [CIFTA] as well as to Israeli-Palestinian arrangements regarding the application of customs laws to the West Bank ... The information and clarifications from GAC support that the wines in question may continue to be labeled "Product of Israel". Participants agreed on this approach." Presented the recommended option to the President. Recommendations were supported and next steps identified."	CTR: A129, 130, 131

13-July-17; 12:15 PM	Email from Alex Bugailiskis [GAC] to Barbara Jordan, re: CFIA public reversal notice: "This is the language in play. Waiting for confirmation on those parts in red and green. Soon!!" Reversal notice includes line that reads: "Article 1.4.1(b) sets out the geographic application of [CIFTA]. For the purposes of that agreement this includes both Israel and the territories covered by Israeli customs law. This is consistent with the WTO approach to free trade agreements. Furthermore, Israel has a Customs Union with the Palestinian authority (1994)"	CRT: A246, 247
13-Jul-17; 12:34 PM	Email from Barbara Jordan to Genevieve Desjardins re: CFIA public reversal notice: "I've confirmed with GAC we're on solid ground so good to Go [sic] from policy perspective."	CTR: A246
13-Jul-17; 1:03 PM	Email from Barbara Jordan to Alex Bugailiskis [GAC]: "Alex - as the regulator, we feel it is important to have a rationale in the statement for change in the decision. Here is what we propose: 'We regret the confusion caused by our response to the LCBO's request for clarification of wine labelling regulations. In our assessment we did not fully consider [CIFTA]. We can confirm that the products in question can be sold as currently labelled and we will be following up with the LCBO to correct our response.' Are you ok with this?"	CTR: B19
13-Jul-17; 1:23 PM	Email from Alex Bugailiskis to Barbara Jordan: "I am okay but will need to run it through our comms. I am ta [sic] farewell lunch just now so will ask Mark my DG to run with this."	CTR: B19
13-Jul-17; 1:38 PM	Email from Mark Glauser [GAC] to Barbara Jordan: "We have green light from Minister's office on following language (a bit different than what you had proposed). I understand this will be coming to you via comms channels. 'The Canadian Food Inspection Agency (CFIA) regrets the outcome of the wine labelling assessment which led to the Liquor Control Board of Ontario (LCBO) response regarding products from two wineries labelled as "Product of Israel". In our assessment, we did not fully consider [CIFTA]. Further clarification of the CIFTA (Article 1.4.1b) indicates that these wines adhere to the Agreements and therefore we can confirm the the products in question can be sold as currently labelled. We respect all of our trade agreements and we very much value the Canada-Israel relationship. " [emphasis added; this last line deleted from final CFIA public announcement]	CTR: B18

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13-Jul-17; 1:39 PM	Email from Carolyn Bateman to ROCs: "Please advise your Inspectors that national is working on a public statement with respect to wine labelling specific to the regions of interest ... I've also asked that national advise re once the public statement is issued, whether complaints and appeals from clients are to go direct to CAO or be addressed through progressive Mgt chain in the Area (I'm pushing for direct to COA [sic])."	CTR: A190
13-Jul-17; approx. 4:30 PM	Statement of Reversal Decision approved by CFIA President, posted at CFIA website.	CTR: A130, 242, 243
13-Jul-17; 5:12 PM	Email from Joe DiLecce (CFIA) to Dorina Brasoveanu and Vincent Caron: "The Canadian Food Inspection Agency regrets the outcome of the wine labelling assessment which led to the [LCBO] response regarding products from two wineries labelled as "Product of Israel" ... [We] can confirm that the products in question can be sold as currently labelled."	CTR: B17
13-Jul-17; 5:40 PM	B'Nai Brith Canada Facebook post with statement by CEO Michael Mostyn, thanking Government of Canada for "responding so quickly to the legitimate concerns of the Jewish community and all concerned Canadians." Also that "B'Nai Brith will always relentlessly advocate for our community" and "will continue to make inquiries about the origin of this travesty, to ensure tht nothing like [sic] ever happens again." B'Nai Brith also posts at its website page (no time indicated): "B'Nai Brith Canada Commends Government for Pressuring Agency to Comply with Canadian Wine Regulations."	Applicant affidavit, Exhibit 15, 16
13-Jul-17; early evening	Member of Parliament Michael Levitt posts statement at his website entitled "STATEMENT ON CFIA'S ERROR AND REVERSAL ON LABELLING OF ISRAELI WINES." Included in that statement: "I would like to thank the Government of Canada for their quick efforts in resolving this matter, as soon as the error at CFIA was discovered. I would also like to acknowledge the work of CIIA, B'nai Brith Canada, and the Canadian Friends of Simon Wiesenthal Centre for their continued advocacy on behalf of the Jewish Community."	Applicant affidavit, Exhibit 17

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13-Jul-17; early evening	Center for Israel and Jewish Affairs (CIJA) issues two statements regarding CFIA reversal decision. The first states: "For the past few days, CIJA's team in Ottawa has constructively engaged senior officials in the Government of Canada to resolve this issue. We applaud them for responding so quickly to make this right." The second CIJA statement states that CIJA "learned about the directive on July 11th and immediately contacted key staff in the offices of the Minister of International Trade and Global Affairs Canada. We learned that the directive, which is at odds with government policy, was mistakenly issued at the bureaucratic level with no direction from political staff or the Minister."	Applicant affidavit, Exhibit 19, 20
13-Jul-17; early evening	<i>National Post</i> publishes article entitled "Canadian Food Inspection Agency backtracks after saying wine from the West Bank isn't from Israel." Itay Tavor, identified as head of public diplomacy at Israel's embassy in Ottawa, quoted as saying: "Israel supports free trade and objects to its politicization. We are currently in touch with the Canadian authorities and are discussing this matter." <i>National Post</i> article also states that Marty York, a spokesperson for B'nai Brith, advised the <i>National Post</i> that a "high-ranking official" had informed B'nai Brith that a "low-level person" at the CFIA had made a decision without seeking authority from the federal government, and that "this is going to be rescinded shortly and we also expect that this person who made this decision will be disciplined."	Applicant affidavit, Exhibit 23
Late July, 2017	Letter from CFIA President Paul Glover to Applicant (never sent): "...The Government of Canada takes the issue of Country of Origin labelling very seriously, and recognizes the importance of providing Canadians with truthful and accurate information to assist in their purchasing decisions."	CTR: A232