SUBMISSIONS OF DR. DAVID KATTENBURG
TO THE CANADIAN FOOD INSPECTION AGENCY (CFIA)
(AS MANDATED BY THE FEDERAL COURT OF APPEAL)

SUMMARY

1. In accordance with the May 5, 2021 judgment of the Federal Court of Appeal in *Attorney General of Canada v. Dr. David Kattenburg and Psagot Winery Ltd.*, Dr. David Kattenburg hereby makes the following submissions to the Canadian Food Inspection Agency ("CFIA") for its consideration in the redetermination of a decision which the CFIA rendered in July 2017.

2. The CFIA in fact rendered two contradictory decisions in this matter.

3. First, on July 7, 2017, the CFIA informed the Liquor Control Board of Ontario ("LCBO") that 'Product of Israel' labels on wines produced in two West Bank settlements did not comply with federal labelling statutes, and asked the LCBO to come up with an "action plan" for determining an alternative label (the "Initial Decision"). The Initial Decision was publicly revealed by the LCBO on July 11, 2017.

4. The Initial Decision arose from a complaint by Dr. Kattenburg, submitted to the LCBO in early January 2017 and to the CFIA in March 2017 (the CFIA had been aware of the complaint since early February 2017). Thus, the CFIA spent almost six months arriving at its Initial Decision. It did so, records reveal, in the most diligent manner, examining this labelling issue from all directions -- comprehensively, thoroughly and critically; leaving no stones unturned; taking its own enabling statutes and regulations into consideration, as well as foreign and international trade analyses provided to it by Global Affairs Canada ("GAC").

5. On July 13, 2017, within two days of the LCBO's announcement of the CFIA's Initial Decision, the CFIA rescinded its Initial Decision under pressure from the highest levels of the Canadian government (the "Reversal Decision"). The sole rationale given by the CFIA for the Reversal Decision was an obscure and irrelevant provision of the *Canada-Israel Free Trade Agreement* ("*CIFTA*"). CFIA and GAC officials knew, however, that *CIFTA*

did not apply to the wine labelling issue, but invoked *CIFTA* anyways as an expedient excuse to 'reverse-engineer' the desired outcome: placating Israel's government and pro-Israel lobbyists in Canada. Upholding the Canada-Israel "relationship" was indeed the ultimate reason for the CFIA's Reversal Decision. Indeed, it was the closing reason in an early draft of the Reversal announcement, which was ultimately redacted.[1]

6. In Dr. Kattenburg's submission, the Reversal Decision was unlawful and the product of political corruption of the regulatory process. Dr. Kattenburg asks that it be rescinded and that the Initial Decision be restored.

7. In its Reversal Decision, the CFIA effectively waived enforcement of federal statutes Parliament entrusted the CFIA to uphold, as well as canonical international statutes embedded in Canadian law obliging Canada to "respect and ensure respect for" humanitarian law in "all circumstances." The CFIA did so to placate a foreign government and its Canadian lobbyists, so that that foreign government could conceal the criminal origin of wines produced on stolen land and sold to Canadian consumers.

8. Many Canadians are troubled by Israel's 55-year belligerent occupation, colonization and *de facto* annexation of the Palestinian West Bank, and by the grave human rights abuses arising therefrom. These consumers would choose to avoid settlement products if given the information necessary to do so. Canada's formal position, in line with the rest of the international community, is that West Bank settlements are "flagrantly unlawful," and an impediment to a just and peaceful 'Two-State Solution' in the Middle East – a goal Canada has always claimed to pursue. Some (Dr. Kattenburg included) would consider purchasing products produced within Israel's internationally recognized borders, while avoiding those that aren't, if enabled to differentiate between the two. Canada's *Charter of Rights and Freedoms* guarantees their right to make "conscientious" consumer choices of this sort.

9. In Dr. Kattenburg's submission, the CFIA has another compelling reason to restore its Initial Decision. The purpose of country-of-origin labels is to inform consumers of the *geographical origin* of products, not to advance religious or ideological claims, as 'Product

[1] CTR, B18

of Israel' labels on settlement products manifestly do. The ideological motives for insisting on 'Product of Israel' labels are manifest in the public statements of the CEO of Psagot Winery Ltd. ("Psagot Winery"), which is also filing a submission with the CFIA.

10. For the above reasons and those that follow, the CFIA should rescind its Reversal Decision and restore its Initial Decision.

BACKGROUND

The Complainant

11. Dr. David Kattenburg is a resident of Hamilton, Ontario. At the time of his original complaint to the LCBO and CFIA regarding the labeling of West Bank settlement wine products, Dr. Kattenburg resided in Winnipeg, Manitoba. Dr. Kattenburg is a university science instructor, a freelance journalist and human rights advocate. He is also an oenophile, and has purchased wine regularly at wine vendor outlets across Canada, including the LCBO. He has visited Israel and the Occupied Palestinian Territories on five occasions since 2007, spending up to six weeks there. He has observed the human rights situation there at close hand, including Israel's brutal system of apartheid[2] -- a designated "crime against humanity" under the Rome Statute of the International Criminal Court.

Dr. Kattenburg's Original Complaint

12. By letter dated January 6, 2017, Dr. Kattenburg wrote to the LCBO about two wine products sold by the LCBO that are produced in the Israeli-occupied West Bank. The West Bank is part of the Israeli-occupied Palestinian Territories ("OPT"). The two wines to which Dr. Kattenburg's January 6, 2017 letter related were Shiloh Legend KP 2012 and Psagot Winery M Series, Chardonnay KP 2014. The above-mentioned wines are hereinafter referred to as the "Settlement Wines".

13. In his January 6, 2017 letter, Dr. Kattenburg advised the LCBO that the labels on these two wine products stated that they were produced in Israel, but that, in fact, they were

[2] See, for example: https://www.hrw.org/news/2021/07/19/israeli-apartheid-threshold-crossed and https://www.btselem.org/publications/fulltext/202101_this_is_apartheid.

produced in Israel's illegal West Bank settlements. Accordingly, Dr. Kattenburg requested that the LCBO require that correct origin labels be affixed to all bottles of the Settlement Wines being sold by the LCBO. The LCBO did not acknowledge Dr. Kattenburg's complaint until March 8, 2017. In its March 8, 2017 letter, the LCBO advised him that:

> We are currently working in collaboration with the Canadian Food Inspection agency (CFIA) to investigate the matter you have brought forward. As we are still in the process of consulting with CFIA, we do not have a response to provide at this time. We will contact you as soon as we have a final resolution to your inquiry.

14. By March 31, 2017, the LCBO had still not advised Dr. Kattenburg of the resolution of his complaint. Accordingly, on that date, Dr. Kattenburg wrote directly to the CFIA about the Settlement Wines. In his March 31, 2017 letter, he advised the CFIA that the Settlement Wines were falsely labelled as having been produced in Israel, and he requested that the CFIA take immediate action to rectify the misrepresentation. Between April 13 and May 16, 2017, Dr. Kattenburg exchanged emails with Richard Harlos, a CFIA inspector, regarding his complaint. Thereafter, Dr. Kattenburg received no further updates from the CFIA.

The Initial Decision

15. On July 12, 2017, Dr. Kattenburg learned from a post on the Facebook page of B'nai Brith Canada ("B'nai Brith") that, on July 11, 2017, the LCBO had sent a letter to its vendors advising that, on July 6, 2017, the LCBO had received "notification" from the CFIA advising the LCBO that "Product of Israel" would not be "an acceptable country of origin declaration" for the Settlement Wines.

16. The Facebook post in question ("B'nai Brith's First July 12 FB Post") appeared on B'nai Brith's Facebook page at 11:42 a.m. on July 12, 2017. According to B'nai Brith's First July 12 FB 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 First July 12 FB post included what appeared to be a copy of the LCBO's July 11, 2017 letter and stated that B'nai Brith was "shocked"

by the CFIA's Initial Decision. It further stated that B'nai Brith would provide updates on that decision.

17. B'nai Brith is an advocacy group that describes itself on its website as, among other things, a "staunch defender of the State of Israel." B'nai Brith has sought repeatedly to suppress criticism of Israel by falsely characterizing such criticism as discriminatory or anti-Semitic.

18. On the afternoon of July 12, 2017, promptly after learning of B'nai Brith's First July 12 FB Post, Dr. Kattenburg telephoned Mr. Harlos to acquire more information about the Initial Decision. Prior to seeing B'nai Brith's First July 12 FB Post, Dr. Kattenburg was unaware of the Initial Decision. In his July 12, 2017 conversation with Mr. Harlos, Mr. Harlos told Dr. Kattenburg that, within a week to ten days, he would provide to Dr. Kattenburg the Initial Decision in copy/paste format. Promptly following his telephone conversation with Mr. Harlos, Dr. Kattenburg sent an email to Mr. Harlos in which he asked Mr. Harlos to provide to him any guidance provided by the CFIA to the LCBO regarding adequate labelling of the Settlement Wines, and on the "action plan" referred to in the LCBO's July 11, 2017 letter to its wine vendors.

19. By letter dated August 27, 2021, Dr. Kattenburg's attorney asked the CFIA to release a CFIA document entitled "Briefing Material for Product of Israel on Wine" (RDIMS # 9730115), consisting of eleven tabs, that circulated within the CFIA shortly prior to the rescinding of the Initial Decision. The table of contents (TOC) for this briefing document was released by the CFIA to Dr. Kattenburg in a PDF file entitled "ATIP-2017-00144 Final Release 1," at Bates numbers 000402-000403, attached to an email dated 13-July, 2017 (11:39 a.m.) from Jodi White (Acting Director, Consumer Protection and Market Fairness Division) to other CFIA staff. The TOC had been approved by Daniel Miller (Executive Director, Food Import Export & Consumer Protection Directorate). As of this date (October 18, 2021) this briefing document, which is plainly relevant to the matters in issue, has not been provided to Dr. Kattenburg.[3]

[3] Compendium, 111-112. The Compendium that Dr. Kattenburg is filing with these submissions contains all emails and other documents on which he relies that were produced to him by the CFIA or GAC pursuant to his *Access to Information* requests. The Compendium does not include (1) emails that were produced to Dr. Kattenburg as part of the Certified Tribunal Record in his judicial review application or (2) emails that were produced to Dr. Kattenburg pursuant to his *Access to Information* requests and that were filed by him in his judicial review as part of a Second

20. The scope of the investigation and analysis the CFIA and GAC carried out in response to Dr. Kattenburg's January 2017 complaint, culminating in the CFIA's Initial Decision, is now known in detail (thanks to ATIP releases to Dr. Kattenburg).

21. In the course of their investigation culminating in that Initial Decision, CFIA and GAC staff assessed or received information and advice regarding the *Food and Drugs Act*, the *Consumer Packaging and Labelling Act*, the *Marking of Imported Goods Regulations* and the *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling* (Brussels, 23 March, 2013)[4]. International legal instruments and treaties (the Fourth Geneva Convention, the 1995 *Economic Protocol Between the State of Israel and the Palestinian Authority* and 1999 Canada-Palestinian *Framework for Trade & Economic Cooperation*) were brought to the CFIA's attention by GAC. GAC staff also confirmed to the CFIA Canada's official policy on the legal status of the OPT and Israel's Jewish-only settlements (illegal, as GAC confirmed to the CFIA).

22. Dr. Kattenburg has compiled a spreadsheet of names appearing on emails released to him under ATIP. Based on this, at least 250 people, from a half dozen federal agencies and departments deemed to be expert on the labelling matter, were either directly involved, consulted or cited as potential sources on the labelling matter. These included: the CFIA (103 staff members), GAC (116), Agriculture Canada, Health Canada (Minister Philpott), Innovation, Science & Economic Development Canada and the Canada Border Services Agency. CFIA units engaged in the labelling question included Bilateral Relations & Market Access, Consumer Protection & Market Fairness, Food Operations, Guidance and Expertise, International Regulatory Cooperation, Quality, Planning & Integration and Food Import & Export.

23. Between late April and mid-May 2017 (two months prior to the Initial Decision), Natalya Melnychenko (at the time, Bilateral Relations Officer for East Europe and Middle East - Bilateral Relations & Market Access) consulted directly with the GAC's Benjamin

Affidavit sworn by Dr. Kattenburg on April 23, 2019 (the "Second DK Affidavit").
[4] Compendium, Bates pp. 1-12.

Magnus (senior specialist, Trade Policy Branch, Technical Barriers & Regulations). Deputy Director Jean-Francois Marion was cc'd on these exchanges. Mr. Marion spoke directly to Ms. Melnychenko's colleague Ed Harrison (Consumer Protection & Market Fairness). A half dozen other GAC specialists contributed further expertise, from across GAC Trade Branch, including: Consultations & Impact Assessments, Trade Negotiations, Trade Agreements Secretariat, and International Affairs & Market Access. At a late stage in the formulation of a final response to the CFIA, a draft of this response was sent to Martin Thornell (Tariffs and Goods Market Access Division) who signed off on it. Another email suggests this draft was approved by the Director General of Market Access -- Marvin Hildebrand, at the time.[5]

24. GAC's assessment of the labeling question was clear and categorical. On April 28, 2017, the GAC's Marc Banzet wrote to Ben Magnus: "…tariff preferences provided by *CIFTA* and product labelling are two different things."[6] On May 10, 2017, Mr. Magnus wrote: "Ultimately it was determined that this issue should be left to the CFIA since it is primarily a matter of interpreting the Food and Drugs Act, the Consumer Packaging and Labelling Act, and their accompanying Regulations."

25. GAC staff also confirmed Canada's longstanding and current position – publicly enunciated at GAC's website -- that Israel is an occupying power in the West Bank (including in East Jerusalem), the Golan Heights and Gaza, that Israeli forces' presence in the West Bank is therefore subject to the Fourth Geneva Convention, and that its West Bank settlements are therefore illegal, not to mention an obstacle to a just and peaceful 'Two-State Solution' to the Israeli-Palestinian conflict.

26. Accordingly, GAC staff provided the CFIA with three options: (1) stick with current ('Product of Israel') labelling); (2) come up with an alternative regional label; or (3) send the matter back to the Israeli settlement producers (Psagot Winery and Shiloh Winery) to come up with something different (something they would not likely want to do, GAC staff commented). The GAC's preferred options were (2) and (3). Sticking with the

[5] Compendium, Bates pp. 127-130
[6] Second DK Affidavit, Exhibit "D".

current label was *not* a preferred option.[7]

27. Having received the GAC's assessment and advice, CFIA staff acknowledged the length to which GAC specialists had gone in confirming the irrelevance of *CIFTA* to the wine labelling question. "Thank you very much for your hard work and consultations," Ms. Melnychenko emailed Ben Magnus, with cc to Jean-Francois Marion, on May 10, 2017.[8] That same day, in a note to her colleague Ed Harrison, Melnychenko wrote: "We won't get more than this from GAC, as Jean-Francois and Ben really wanted to help, tried hard and did and reached out to everyone there who could be useful on this matter, and consolidated the options.[9]"

28. The above chronology substantiates Dr. Kattenburg's submission that the Initial Decision was neither hasty, ill-considered nor misinformed (as would subsequently be claimed). The Initial Decision was the product of extensive due diligence. CFIA and GAC staff had examined the settlement wine labelling issue from all directions -- exhaustively, comprehensively and critically, leaving no factual stone unturned; taking into consideration all relevant federal statutes and regulations, as well as international and trade policies beyond the CFIA's mandate and expertise, but potentially germane to the question at hand.

The Reversal Decision

29. The CFIA rescinded its Initial Decision, publicly, on the afternoon of July 13, 2017, forty-eight hours after that decision was communicated by the LCBO to Ontario wine vendors. In fact, the ultimate decision to reverse was made in the course of a business day, on July 12, under pressure from the most senior levels of the Canadian government. The sequence of events and communications leading to the Reversal Decision is now known in considerable detail (thanks to ATIP releases to Dr. Kattenburg).

30. Within hours of the LCBO announcement, on the morning of July 11, 2017, the CFIA and

[7] Second DK Affidavit, Exhibit "E".
[8] Compendium, Bates p. 145.
[9] Second DK Affidavit, Exhibit "E".

GAC were flooded by emails and phone calls from the Embassy of the Government of Israel. Mr. Ivor Tavay is cited as an embassy interlocutor.

31. An anonymous CFIA staff member scribbled on a piece of paper at 1:12 p.m. on July 11 that "[R]epresentative of various wineries" [sic]" had phoned.[10] The Embassy has been "reaching all over the department today," one GAC staffer wrote in an email at 4:42 p.m. on July 11. Under immense pressure, GAC and CFIA staff exchanged emails until at least midnight on July 11/12 (7 a.m. on the 12th, in Israel). Email traffic resumed first thing on the morning of July 12, 2017.

32. "We are ultimately going to rescind our decision," wrote Lara Boulanger-Stewart, assistant to CFIA President Paul Glover, at 6:25 p.m. on July 12, having just spoken with president Glover. Glover had just finished consulting with GAC Deputy Minister Ian Shugart, the government's most senior messenger regarding policy on Canada-Israel relations, including how Israeli settlement wines should be labelled. Although an "options" meeting had been called for the following morning, July 13, the decision to reverse had clearly been made, early on the afternoon of July 12.

33. Emails suggest CFIA staff were disgruntled by the news. "Is this a GAC problem?", CFIA staff member Wallace McLean asked Louise Carriere at 2:15 p.m. on July 12.[11] "Don't think we are doing statement now as otherwise whole govt owning issue," wrote Lara Boulanger-Stewart at 5:44 p.m. on July 12[12] . In an email to eleven CFIA staff, at 6:31 p.m., Acting VP, Operations James Crawford wrote: "I hope it is because the info on website was inaccurate and we were misinformed by partners."

34. Between at least 9:15 p.m. and midnight on July 12, at least a dozen members of the Privy Council and Prime Minister's Office exchanged emails and texts. Among these, Mr. John Hannaford, Policy and Defense Advisor to the Prime Minister, and Ken MacKillop, Assistant Secretary to the Cabinet. In a 9:28 p.m. note on July 12, MacKillop wrote: "I had a chat with Paul Glover at CFIA, who indicated that the decision taken on the wine from

[10] Compendium, Bates p. 91.
[11] Compendium, Bates p. 48.
[12] Compendium, Bates p. 57.

Israel was aligned with GAC's policy position on Israel and the Palestinian territory. He is very reluctant to issue any kind of retraction from CFIA until a policy discussion can occur tomorrow with GAC. I will advise [redacted] on this now."[13]

35. What President Glover wanted was a plausible rationale for rescinding a decision that had consumed the attention and expertise of over a hundred CFIA staff for six months. Messrs. Shugart and MacKillop provided that rationale: "additional information" about *CIFTA* revealed that, under the trade agreement, Israeli "territory" included the West Bank.

36. Both the Certified Tribunal Record in the litigation to follow, and emails subsequently released to Dr. Kattenburg under ATIP, reveal senior GAC officials knew the *CIFTA* rationale was flawed. They were aware of the advice Trade Branch had provided the CFIA, two months earlier, vetted at the highest bureaucratic level. Just before noon on July 12, 2017, GAC Trade Branch Director General of Market Access, Ana Renart, wrote to Robert Ready, Executive Director/Secretary, Trade Agreements & NAFTA Secretariat):

> Hi Rob, Just keeping you in the loop on an issue that has just come up with Israel. This was first brought to our attention a couple of months ago by CFIA, **at which time it was determined that this was not a trade issue.** [emphasis added] I understand that after consulting with various OGDs and within the dept, GAC did not provide CFIA with any advice on this issue[14].

37. At 6:46 p.m. on the 12th, with the CFIA's Reversal Decision circulating internally at the CFIA and a rationale urgently needed, Ana Renart wrote:

> Mark [Glauser; Director General Middle East Bureau] – happy to support and feed in to process as much as required, **but ultimately, advice being sought is not on a trade policy question[15]** [emphasis added].

38. Still, the Initial Decision was rescinded, and a public apology was issued. The apology went through various drafts. In one email, senior GAC official Alex Bugailiskis told CFIA Vice President Barbara Jordan that CFIA specialists "still weren't sure" about how to interpret

[13] Second Affidavit, Exhibit "H".
[14] Compendium, Bates p. 144.
[15] Compendium, Bates p. 142.

relevant trade policy regarding labeling.[16] In an email two hours before the reversal, Ms. Bugailiskis wrote:

> With regards to the substantive basis for defining the customs area, the following is being used. However, we should edit our original suggestion to **exclude reference to [redacted] as these are not mentioned explicitly.** [emphasis added] Instead, we could simply refer to the West Bank and Gaza[17].

39. Evidently, Ms. Bugailiskis told VP Jordan, hours before the announcement of the Reversal Decision, that reference to *Israel's West Bank settlements* should be excluded from their reason for rescinding the Initial Decision, since it wasn't clear if settlements were actually part of the Customs Union referred to in *CIFTA* Article 1.4.1(b).

40. Dr. Kattenburg learned about the Reversal Decision from a July 12, 2017 post on the Facebook page of B'nai Brith. In that post, B'nai Brith 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." Subsequent queries from Dr. Kattenburg to CFIA staff member Richard Harlos went unanswered.

41. On July 13, 2017, Dr. Kattenburg learned that the CFIA had posted a statement on its website announcing the Reversal Decision. That statement was as follows:

> The Canadian Food Inspection Agency (CFIA) regrets the outcome of the wine labellingassessment 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).
>
> 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 ascurrently labelled.
>
> The CFIA will be following up with the LCBO to correct our original response.

42. The ultimate reason for the Reversal Decision was deleted from the above public version:

[16] Certified Tribunal Record ("CTR"), B.
[17] Compendium, Bates p. 133.

"We respect all of our trade agreements and *we very much value the Canada-Israel relationship* [emphasis added]."[18]. In other words, in rescinding its Initial Decision, the CFIA had waived enforcement of its own enabling statutes and regulations, opting instead to prioritize the Canadian government's political goal of placating a foreign state and Canadian lobbyists – an aim totally alien from the regulator's reason for being.

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

44. On July 13, 2017, B'nai Brith also published an article on its website regarding the reversal ofthe CFIA's decision. That article was entitled "B'nai Brith Canada Commends Government for Pressuring Agency to Comply with Canadian Wine Regulations," and it stated in part that:

> "We thank the Government of Canada for responding so quickly to the legitimate concerns of the Jewish community and all concerned Canadians," said MichaelMostyn, Chief Executive Officer of B'nai Brith Canada. "We will continue to make inquiries about the origin of this travesty to ensure that nothing like [sic] ever happens again. B'nai Brith will always relentlessly advocate for our community."
>
> Mostyn said York Centre MP Michael Levitt should be specifically lauded for his quick work and leadership behind the scenes to help resolve this issue. In a statement, Levitt said: "I was shocked and deeply concerned (about). . .the discontinuation of the sale of products from two Israeli wineries as a result of a notice issued by the CFIA. This action was completely at odds with both the Government's long-standing close relationship withthe State of Israel and our focus on broadening the Canada-Israel trade relationship, suchas the upcoming ratification of an expanded Canada-Israel Free Trade Agreement."
>
> Levitt added that he will be travelling to Israel later this month and looks forward "toconnecting with both wineries to demonstrate my support."

45. On July 13, 2017, the Center for Israel and Jewish Affairs ("CIJA") issued two

[18] CTR, B18.

statements regarding the CFIA's Decisions. The first of these stated: "Over 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 of CIJA's July 13 statements was entitled "CIJA Commends Government for Prompt Revocation of CFIA Labelling Directive." That statement revealed that CIJA "learned about the directive on July 11th and immediately contacted key staff in the offices of the Ministerof 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."

46. 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."Although it claims to be non-partisan, CIJA has a long and unambiguous record of support for the State of Israel and frequently attacks those who criticize Israeli government policy. CIJA sponsors trips to Israel by elected officials, and then lobbies those officials to support CIJA's pro-Israel initiatives. One former MP who has travelled to Israel at CIJA's expense is former Member of Parliament Michael Levitt.

47. On July 13, 2017, an article regarding the Initial CFIA Decision also appeared in the *National Post*. According to that article, Itay Tavor, the head of public diplomacy at Israel's embassy in Ottawa, stated that "Israel supports free trade and objects to its politicization. We are currently in touch with the Canadian authorities and are discussing this matter." The *National Post* article also stated that Marty York, a spokesperson for B'nai Brith, advised the *National Post* 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."

48. On July 13, 2017, an article appeared in the *Times of Israel* in which Yaakov Berg,

the CEO of Psagot Winery, was quoted as stating that he was "amazed" at the CFIA's Initial Decision not to permit his wines to be labelled as "Product of Israel." Mr. Berg's rationale for opposing the CFIA's Initial Decision, and for defending 'Product of Israel' labels, was based on arguments of a political, Biblical and ideological nature, that are alien to the CFIA's mandate or scope of consideration as a Canadian federal regulator, and that the CFIA should ignore in its present reconsideration. According to the *Times of Israel* article, Mr. Berg stated:

> We are living in Judea and Samaria by historic right. Canada, of all places, which was established and developed on basis of occupying and sacrificing the homeland of another people and which has no roots or historical validity to its existence there, doesn't recognize the right of a Jew to live and cultivate vines on land inherited from his forefathers?

DR. KATTENBURG APPLICATION FOR JUDICIAL REVIEW

49. Dr. Kattenburg appealed the CFIA's Reversal Decision to the CFIA's Complaints & Appeals Office. On September 29, 2017, the CAO dismissed Dr. Kattenburg's appeal. Dr. Kattenburg promptly filed an Application for Judicial Review to the Federal Court of Canada. On July 29, 2017, Federal Court Justice Anne Mactavish (as she then was) upheld Dr. Kattenburg's Application, ruling that 'Product of Israel' labels were "false, misleading and deceptive." Justice Mactavish also held that 'Product of Israel' labels infringe on the Canadian Charter-protected right of Canadians "to express their political views through their purchasing choices."

50. The Attorney General appealed Justice Mactavish's ruling. On May 5, 2021, the Federal Court of Appeal (FCA) dismissed the appeal, but held that "courts should refrain from determining the proper outcome [of regulatory decisions] and providing the required justification themselves." The Court stated:

> [15] As the Supreme Court explains in *Vavilov* the process of justification, which binds administrative decision-makers, does not necessarily require exhaustive or lengthy reasons and any reasons are to be reviewed in light of the record and submissions made by the parties. But whatever form this takes, where, as here, legislative interpretation is in issue, the administrative decision-maker must demonstrate that its interpretation of the relevant provisions is consistent with their

text, context and purpose (*Vavilov* at para. 120 as applied in *Canada (Attorney General) v. Redman*, 2020 FCA 209 at paras. 20-21). Here this demonstration is totally lacking.

[16] While there may be cases where reviewing courts can discern how an administrative decision-maker construed the relevant legislation even though the matter was not explicitly addressed (*Vavilov* at para. 123), this is not such a case. ***We simply have no idea how the Agency construed its legislation in coming to the conclusion that the labels are compliant***, including how it addressed the pivotal issues: false and misleading as to what and from whose eyes and from which perspective is the question whether the labels are false or misleading to be assessed?

[Emphasis added.]

51. For the reasons that follow, Dr. Kattenburg submits that the CFIA should restore its Initial Decision and determine that "Product of Israel" labels on the Settlement Wines are false, misleading and deceptive.

LEGAL ARGUMENT

The CFIA's Reversal Decision Was Based Entirely on Political Pressure

52. Immediately after the Initial Decision became known to the Israeli government and its advocates in Canada, they launched a campaign to pressure the CFIA into reversing itself. B'nai Brith's article of July 13, 2017 explicitly acknowledges that CFIA staff were 'pressured' to change their Initial Decision. B'nai Brith, CIJA, the Israel embassy and the CEO of Psagot Winery (a party to the CFIA's present redetermination) engaged in inflammatory attacks against the regulator, using terms such as "shocked", "travesty", "amazed" and "discriminatory". CIJA and B'nai Brith apparently went so far as to demand that the CFIA staff member who rendered the Initial Decision (as if there were just one) be disciplined for doing his or her job in accordance with Canadian law.

53. The CIJA/B'nai Brith campaign of intimidation was aided by a sitting Member of Parliament, Michael Levitt, who was then Chair of the Canada-Israel Inter-Parliamentary Friendship Group. In a statement posted on his website on July 13, 2017, Mr. Levitt professed to be "shocked" and "deeply concerned" about the Initial Decision.

54. The CFIA's capitulation to political pressure violated its mandate to remain independent and transparent. Government agencies such as the CFIA are expected to make decisions in an open and public fashion that encourages citizen engagement. They should not act behind closed doors and under the pressure of well-funded lobby groups.

55. Ultimately, the record demonstrates (as detailed above) that CFIA staff took almost six months to render a decision based on painstaking consideration of the facts and the law, and then reversed itself, with breathtaking speed, under intense pressure from senior government officials and Canadian pro-Israel lobbyists. This has seriously undermined the public's trust in CFIA's competence and independence. In this regard, Section 3 of *Transparency in Regulatory Decision-Making; Policy Framework*[34] states:

> The Canadian Food Inspection Agency (CFIA) is committed to being as transparent aspossible and will proactively provide the public with useful and timely information on CFIA regulatory programs and services, regulatory requirements, and the outcomes ofits enforcement actions and decisions.

Canadian and International Law

56. Several federal laws and regulations require the labels on wines sold in Canada, including the Settlement Wines, to be correct, true and non-misleading. The labels on the Settlement Wines state that those wines are "Product of Israel" or "Made in Israel". This is false: indeed, there is no dispute that the Settlement Wines were produced in the West Bank, which does not form part of the sovereign territory of Israel.

57. It is beyond dispute that the West Bank does not fall within the internationally recognized boundaries of the State of Israel. GAC acknowledges that the West Bank does not form part of Israel's sovereign territory. Moreover, as opined by Israeli human rights lawyer Michael Sfard, whose affidavit and opinion are enclosed herewith, the West Bank does not form part of Israel's territory according to ***Israel's own domestic law***.

58. It is also beyond dispute that Israel's settlements in the West Bank violate Art. 49(6) of the

Fourth Geneva Convention and constitute a "grave breach" under the 1977 Protocol Additional to the *Convention*. They also constitute a presumptive war crime under the *Rome Statute of the International Criminal Court*. GAC acknowledges that Israel's settlements in the West Bank constitute a violation of the *Fourth Geneva Convention*.

59. The International Court of Justice ("ICJ") is the principal judicial organ of the United Nations. It was established in June 1945 by Article 7 of the *Charter of the United Nations ("UN Charter")*. Canada is a party to the *U.N. Charter* and a founding member of the United Nations. In 2004, the ICJ rendered an advisory opinion in which it held, unanimously, that Israel's settlements in the West Bank violate Article 49 of the *Fourth Geneva Convention*. As stated bythe ICJ in its summary of that advisory opinion:

> The information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, of the Fourth Geneva Convention which provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." The Security Council has taken the view that such policy and practices "have no legal validity" and constitute a "flagrant violation" of the Convention. The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

60. Accordingly, the Government of Canada has long recognized that the OPT (including the West Bank) is not part of Israel and that Israel's settlements in the OPT violate the *Fourth Geneva Convention*. The Canadian Government's Global Affairs website 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 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.

61. 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 it adopted

UNSC 2334, by a vote of 14-0 (with the United States abstaining).[19] The resolution states, in part:

> The Security Council,
>
> Reaffirming its relevant resolutions, including resolutions 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), and 1850 (2008),
>
> Guided by the purposes and principles of the Charter of the United Nations, and reaffirming, inter alia, the inadmissibility of the acquisition of territory by force, *Reaffirming the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to theProtection of Civilian Persons in Time of War, of 12 August 1949, and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice*,
>
> Condemning all measures aimed at altering the demographic composition, character andstatus of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions,
>
> Expressing grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines,
>
> Recalling the obligation under the Quartet Roadmap, endorsed by its resolution 1515 (2003), for a freeze by Israel of all settlement activity, including "natural growth", and the dismantlement of all settlement outposts erected since March 2001,
>
> […]
>
> 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 thetwo-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,

[19] https://www.un.org/webcast/pdfs/SRES2334-2016.pdf.

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, intheir relevant dealings, between the territory of the State of Israel and the territories occupied since 1967***;

[…]

[Emphasis added.]

62. Article 25 of the *U.N. 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." Thus, Canada is obliged under the *U.N. Charter* to give effect to the Security Council's call in Resolution 2334 for all U.N. members "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967."

63. Furthermore, Article 1 of the *Fourth Geneva Convention*[20] and Canada's *Geneva Conventions Act*[21] state that "The High Contracting Parties undertake to respect ***and to ensure respect for*** the present Convention ***in all circumstances***" [emphasis added]. Thus, as a High Contracting Party to the *Fourth Geneva Convention*, Canada is obliged to ensure Israel's respect for the Convention. By allowing the Settlement Wines to be falsely labelled as "Product of Israel", the Canadian government is not only failing to fulfill its duty to ensure Israel's respect for the *Convention*, but it is in fact facilitating Israel's violation of the *Convention* by enabling Israeli settlers to profit from business activities conducted in illegal West Bank settlements through concealment of the true origin of the wines. It is also effectively endorsing Israel's claim to sovereignty over lands Israel seized in the 1967 war, then colonized – among the gravest of crimes in international law.

[20] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf.
[21] https://laws.justice.gc.ca/eng/acts/g-3/index.html.

64. Section 2 of the *Geneva Conventions Act* approves of the *Geneva Conventions* and certain protocols thereto. Section 3 of that *Act* declares that every person who, whether within or outside Canada, commits a "grave breach" referred to in Article 85 of Schedule V to the Act is guilty of an indictable offence, and, if the grave breach causes the death of any person, is liable to imprisonment for life; and, in any other case, is liable to imprisonment for a term not exceeding fourteen years. Schedule V, Article 85 (4)(a) of the *Geneva Conventions Act* states "In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) ***the transfer by the occupying Power of parts of its own civilian population into the territory it occupies*** ...in violation of Article 49 of the Fourth Convention" [emphasis added]. As stated above, the ICJ held unanimously in 2004 that Israel's settlements in the West Bank constitute a violation of Art. 49 of the *Fourth Geneva Convention*.

65. Finally, Canada is a party to the *Rome Statute of the International Criminal Court* (the "*Rome Statute*"). On the GAC website, the Canadian government boasts of Canada's role in establishing the International Criminal Court.[22]

66. On June 29, 2000, Canada enacted the *Crimes Against Humanity and War Crimes Act* (the "*War Crimes Act*"),[23] becoming the first country in the world to adopt comprehensive legislation implementing the *Rome Statute*. Under section 4 of the *War Crimes Act*, every person is guilty of an indictable offence who commits genocide; a crime against humanity; or a war crime, and such persons are liable to life imprisonment.

67. By virtue of Sections 2(1) and 4(3) of the *War Crimes Act*, a "war crime" includes acts that are defined as "war crimes" under the *Rome Statute*. Under Article 8(2)(b)(viii) of

[22] https://www.international.gc.ca/world-monde/international_relations-relations_internationales/icc-cpi/index.aspx?lang=eng.
[23] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/.

the *Rome Statute*, a "war crime" includes:

> The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of thepopulation of the occupied territory within or outside this territory.

68. On July 9, 2021, Canadian law professor Michael Lynk, who is the United Nations Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, called on the international community to designate the creation of Israeli settlements as a war crime under the *Rome Statute*.[24]

69. In response to Psagot Winery's submission to the Federal Court of Appeal, Dr. Kattenburg filed a responding affidavit by a Palestinian resident of the West Bank, Munif Treish. Mr. Treish is a retired civil engineer and member of the City Council of Al-Bireh, a neighborhood of the Palestinian city of Ramallah which is immediately adjacent (right beneath) Psagot Winery.

70. Mr. Treish's affidavit, which is enclosed herewith, was accompanied by land deeds issued by the Israeli Coordination and Civil Liaison Land Registry, establishing that 82 Palestinians, including Mr. Treish's brother, are the owners of all lands Psagot Winery sits on (including the home of Psagot CEO Yakov Berg). Neither Mr. Treish's brother nor any other Palestinian land owner has been compensated for the unlawful appropriation of their land by Psagot Winery. In effect, the land Mr. Berg and his winery grow their grapes on has been stolen. Labeling wine products produced from those grapes as 'Product of Israel' adds insult to injury. The CFIA should decline to authorize such a label, by restoring its Initial Decision.

71. Ultimately, Israeli settlements in the West Bank constitute a war crime under Canadian domestic law and international law. They also constitute a flagrant and grave breach of the *Fourth Geneva Convention*. It is, moreover, beyond reasonable dispute that the West Bank does not lie within the internationally recognized boundaries of the State of Israel and that the Canadian government does not recognize Israeli sovereignty over the West

[24] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27291&LangID=E.

Bank.

72. In view of the foregoing considerations, the representation that the Settlement Wines are "Product of Israel" is indisputably false and misleading. Even worse, that misrepresentation constitutes concealment of the fact that the Settlement Wines are the product of a war crime and that its producer and importer are profiting from and complicit in a war crime.

The Recent Decision of the European Court of Justice

73. In November 2019, the European Court of Justice ("ECJ") rendered an advisory ruling in a proceeding commenced in France by Psagot Winery. Specifically, the ECJ was asked to rule on the legality of an interpretive notice issued by the European Commission stating 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."

74. The ECJ upheld the interpretive notice, stating:

> 34 Under the rules of international humanitarian law, these territories are subject to a limited jurisdiction of the State of Israel, as an occupying power, while each has its own international status distinct from that of that State.
>
> 35 The West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination, as noted by the International Court of Justice in its Advisory Opinion of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ Reports 2004, p.136, paragraphs 118 and 149). The Golan Heights form part of the territory of a State other than the State of Israel, namely the Syrian Arab Republic.
>
> 36 In the light of the foregoing, it must be held that displaying, on foodstuffs such as those at issue in the main proceedings, the indication that the State of Israel is their 'country of origin', when those foodstuffs actually originate in one of the territories referred to in paragraph 33 above, would be liable to deceive consumers.
>
> 37 In addition, in order to prevent consumers being misled as to the fact that the State of Israel is present in those territories as an occupying power and not as a sovereign entity within the meaning of paragraph 29 above, it appears necessary to inform them that those foodstuffs do not originate in that State.

75. A copy of the ECJ's decision is enclosed herewith.

76. In effect, the Reversal Decision's interpretation of the *FDA* and *CPLA* endorses and facilitates Israel's "flagrant violation" of international law. Allowing settlement producers to label their wines as "Product of Israel" conceals that these wines are produced in illegal settlements situated in occupied territory. Conscientious consumers are thereby deprived of information that might persuade them not to buy those products. "Product of Israel" labels make the commercial activities of illegal settlers more profitable, and effectively endorse what the Canadian government knows to be a high crime: the acquisition, colonization and *de facto* annexation of lands seized in the course of armed conflict..

The Canada Israel Free Trade Agreement does not authorize "Product of Israel" Labels on Products made in Israel's illegal West Bank settlements

77. There is no basis upon which to invoke *CIFTA* as a justification for permitting "Product of Israel" labels on the Settlement Wines.

78. Article 1.4.1b of *CIFTA* states:

> ***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.]

79. The interpretation of Art. 1.4.1b of *CIFTA* adopted by the CFIA in making the Reversal Decision gives no effect to the words "For the purposes of this Agreement." On the contrary, that interpretation of *CIFTA* wrongly assumes that Art. 1.4.1b's definition of "territory" of Israel applies ***for all purposes***, including consumer protection.

80. According to *CIFTA* Art. 1.2, *CIFTA*'s objective "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."

81. Generally, a barrier to trade is a government-imposed restraint on the international flow of goods, such as a tariff. Exceptionally, a consumer protection requirement can constitute a "technical" barrier to trade, but the vast majority of such requirements constitute legitimate government action to protect the public and do not offend trade agreements. Canada's Ministry of International Trade recognizes this.[25]

82. Further, Article 4.2 of *CIFTA* excludes all standards-related matters, stating: "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")]."[78] *CIFTA* itself does not alter Canada's labelling laws.

83. 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

[25] In 2018, in testimony before Parliament's International Trade Committee, the Minister of International Trade Diversification stated "CIFTA doesn't contain any commitments that are specific to labelling, which falls under the purview of the Canadian Food InspectionAgency…":**,** International Trade Committee hearing, Nov. 29th, 2018.

of human health or safety, animal or plant life or health, or the environment…

[Emphasis added.]

84. 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.

85. By their plain terms, s. 5 of the *Food and Drugs Act* ("*FDA*") and s. 7(1) of the *Consumer Packaging and Labelling Act* ("*CPLA*") apply to ***all*** wine products, whether domestic or foreign. The country-of-origin labels on Canadian wines must be as truthful as those on Settlement Wines. There is no evidence that requiring producers of Settlement Wines to label their wines as "Product of West Bank Israeli Settlement" (or words of similar effect) would impose on them an unfair or impracticable burden. The consumer protection provisions at issue in this case are non-discriminatory: they preserve a level playing field for domestic and foreign producers.

86. As argued above, the regulation of domestic product labeling is not a *CIFTA* 'purpose'. As GAC trade specialist Marc Banzet wrote to nine Trade Branch colleagues in April 2017, "[Tariff] preferences provided by CIFTA and product labelling are two different things."[26]

87. Even if domestic product labeling were regulated under *CIFTA* (which it is not), illegal, Jewish-only settlements in the Palestinian West Bank are not beneficiaries under *CIFTA*. As confirmed by Justice Mactavish in her July 29, 2019 Federal Court ruling [para. 78], "Regulations that Canada has promulgated as part of its implementation of CIFTA define 'Israel or another beneficiary' as meaning 'the territory where the customs laws of Israel are applied.'" At para. 79 in her ruling, Justice Mactavish writes:

> The Customs Tariff definition further states that this includes "the territory where those laws are applied ***in accordance with Article III of the Protocol on Economic Relations*** set out in Annex V of the Israeli Palestinian Agreement on the West Bank and the Gaza Strip." **[**Paris Protocol]) [emphasis added].

[26] Second DK Affidavit, Exhibit "D".

88. Justice Mactavish provided a link to the Paris Protocol at para. 80 of her reasons. The word "settlement" appears just once in the 23-page document, under 'Direct Taxation':

> Israel will transfer to the [PA] a sum equal to: 1. 75% of the income taxes collected from Palestinians from the Gaza Strip and the Jericho Area employed in Israel. 2. The full amount of income taxes collected from Palestinians from the Gaza Strip and Jericho Area employed in settlements." [notice the distinction between "Israel" in item 1 and "settlements" in item 2]

89. The provisions of the Paris Protocol dealing with customs arrangements are entitled ***"Import taxes and import policy."*** [emphasis added] The term "export" appears twice, in one small paragraph dealing with Palestinian export access and equal treatment at points ***"in Israel."*** The remainder of this section deals exclusively with the importation of goods from Jordan, Egypt and other Arab countries, and from elsewhere, into "Palestinian areas."

90. The Paris Protocol does not specify that settlements are part of Israel's customs area under the Protocol, and deals exclusively with ***Palestinian exports.*** The Protocol's declared aim, in fact, was to boost the ***Palestinian economy*** in lead-up to final status negotiations in the post-Interim Period, whereas the settlements, and the theft of Palestinian land which is carried on in order to build and expand the settlements, ***undermine*** the Palestinian economy. The Protocol's Preamble states:

> Both parties shall cooperate in this field in order to establish a sound economic basis for these relations, which will be governed in various economic spheres by the principles of mutual respect of each other's economic interest, reciprocity, equity and fairness, and
>
> This protocol lays the groundwork for strengthening the economic base of the Palestinian side and for exercising its right of economic decision making in accordance with its own development plan and priorities.

91. In the course of their consultations on the wine labelling issue, CFIA and Global Affairs Trade Branch staff understood that: (a) *CIFTA* and product labeling are distinct and unrelated issues; (b) labelling is not a '*CIFTA* purpose'; and (c) Israel's customs area ***for CIFTA purposes*** is set forth in Oslo-era Israel-Palestinian agreements, which said nothing about settlements (having been declared off bounds for discussion until final status negotiations). An internal GAC email shortly prior to the July 13, 2017 public

announcement and apology regarding the CFIA's Reversal Decision, containing an early version of that apology [CTR B1], stated:

> The CAO confirmed that the initial response respecting these wines did not fully consider [CIFTA]. After the initial response was communicated to the regulated party, it was brought to the CFIA's attention by [GAC] that Article 1.4.1(b) of CIFTA defines "territory" with respect to Israel ***for the purposes of the Agreement***, as the territory where Israel's customs laws are applied. Israel's customs laws are applied in the West Bank [emphasis added].

92. Going into further detail, a GAC backgrounder [CTR B6-7] stated:

> CIFTA Article 1.4.1b specifies that "territory means … with respect to Israel the territory where its customs laws are applied." This was considered ***in relation to the application of Israel's customs laws to the West Bank in light of arrangements between Israel and the [PLO] such as the 1995 Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*** and the acknowledgement of the application of Canadian regulations regarding CIFTA to the West Bank by the Palestinian Authority in the 1999 Joint Canada-Palestinian Framework for Economic Cooperation and Trade between Canada and the [PLO] on behalf of the [PA] [emphasis added].

93. Further, in a draft response to Dr. Kattenburg's letter to CFIA President Paul Glover, two weeks after the Reversal Decision, senior GAC Middle East trade official Alex Bugailiskis told CFIA VP Barbara Jordan that the following "second paragraph" made a "stronger linkage" between the Reversal Decision and the Israel/[redacted] Customs union" [CTR B11]:

> The CFIA ultimately determined … that the products … meet Canada's regulatory requirements for wine labelling … This was considered ***in relation to our understanding of the application of Israel's customs laws under the 1994 Protocol on Economic Relations between the Government of the State of Israel and the P.L.O.*** representing the Palestinian people that includes the West Bank and the Gaza Strip. This supports our conclusion that "Product of Israel" is an acceptable country of origin declaration of origin for these wines [[emphasis added].

94. The next day, however, Ms. Bugailiskis wrote the following to VP Jordan [CTR B13]:

> Thanks for your patience. Despite best efforts the trade policy team says they cannot sanction the language that I suggested in the second paragraph. ***They need to***

> ***undertake further consultations with Finance to understand how we have actually interpreted and applied the Customs Union*** [emphasis added].

95. Throughout the drafting of Mr. Glover's proposed response to Dr. Kattenburg's late July 2017 complaint, confusion reigned over what Israel's extended customs area (*i.e.,* the Israeli-Palestinian Customs Union created under the Paris Protocol) actually comprised [CTR B15]:

> The CFIA ultimately determined [that CIFTA Article 1.4.1b] … specifies that "territory means, with respect to Israel the territory where its customs laws are applied", and was considered in relation to our understanding of the application of Israel's customs laws with respect to East Jerusalem, the West Bank, the Gaza strip and the Golan Heights.

96. Elsewhere in the ATIP record, GAC specialists acknowledge that the Israeli-Palestinian customs union is actually limited to ***Palestinian Areas*** of the West Bank, with no mention of settlements. Back in 2012, one GAC official wrote to others[27]:

> I am writing to you regarding the issue of customs administration between Israel and the Palestinian Authority, given that the tariff preferences of the Canada-Israel FTA extend to areas of the West Bank ***under Palestinian Authority*** [emphasis added].

97. The idea that Israeli customs authority extended to "Palestinian Areas" of the West Bank was first presented to the CFIA in early May 2017, two months prior to the Initial Decision. An April 28 note from technical barriers/regs specialist Ben Magnus to the CFIA's Natalya Melnychenko stated:

> Through the 1999 Joint Canadian-Palestinian Framework for Economic Cooperation and Trade, Canada and the [PA] recognized that preferential market access treatment under the CIFTA would apply to goods originating from, or destined to, ***areas under the authority of the Palestinian Authority*** [emphasis added][28].

98. In draft "Product of Israel Labelling" notes dated May 5, 2017, however, the above paragraph was struck out, with the following comment (from Martin Thornell, GAC's Tariff and Goods Market Access Division):

[27] Compendium, Bates pp. 134-135.
[28] Second DK Affidavit, Exhibit "C".

> Comment from TPG: We deleted this part because the matter at hand [product labelling] does not pertain to the preferential tariff treatment of imported goods under CIFTA[29].

99. Of central importance to the *CIFTA* issue is an email from GAC's Alex Bugailiskis to CFIA VP Barbara Jordan sent shortly before noon on July 13, 2017. CFIA chief Paul Glover had already decided to rescind the Initial Decision. An "options" meeting was planned for CFIA executives first thing on the morning of the 13th. That meeting complete, Ms. Bugailiskis wrote to Ms. Jordan, stating:

> With regards to the substantive basis for defining the customs area, the following is being used. However, we should edit our original suggestion to ***exclude reference to [5 cms. redacted] as these [notice plural] are not mentioned explicitly.*** Instead, we could simply refer to the West Bank and Gaza [emphasis added][30].

100. Backing up her advice to Ms. Jordan, Ms. Bugailiskis presented in bulleted form: a) the 1994 Paris Protocol ("Israel and Palestinian [sic] establish a customs union"), b) *CIFTA* in 1996, c) the WTO definition of "a customs zone established by a customs union," and d) Canada's own 1999 "Framework for Economic Cooperation and Trade" that "took note of the Paris Protocol." Then, in a final bullet, Ms. Bugailiskis wrote:

> GAC's understanding of this situation has been that, due to the above, the PA has recognized that CIFTA applies to goods originating from and destined for the West Bank and Gaza Strip. [9 cm of text redacted] we are on sound on trade policy [sic].

101. What was redacted from the above email? In all likelihood, Ms. Bugailiskis advised Ms. Jordan that it would not be sound trade policy to state, outright, that Israel's flagrantly unlawful settlements are *CIFTA* beneficiaries. Instead, the CFIA ***should limit itself to talking about the West Bank***. All of this constituted a deeply flawed but expedient interpretation of *CIFTA* conjured up in order to reverse-engineer a politically desirable outcome.

102. Finally, just before noon on July 12, 2017 -- the CFIA under political pressure from

[29] Second DK Affidavit, Exhibit "C".
[30] Compendium, Bates p. 133.

the highest levels of government, and about to rescind its exhaustively researched Initial Decision -- GAC Trade Branch Director General of Market Access, Ana Renart, wrote to Robert Ready, Executive Director/Secretary, Trade Agreements & NAFTA Secretariat), stating:

> Hi Rob, Just keeping you in the loop on an issue that has just come up with Israel. This was first brought to our attention a couple of months ago by CFIA, ***at which time it was determined that this was not a trade issue.*** I understand that after consulting with various OGDs and within the dept, GAC did not provide CFIA with any advice on this issue [emphasis added][31].

103. At 6:46 p.m. on the July 12, 2017, as the CFIA's Reversal Decision circulated internally at the CFIA and a rationale for that decision was urgently needed, Ms. Renart wrote:

> Mark [Glauser; Director General Middle East Bureau] – happy to support and feed in to process as much as required, ***but ultimately, advice being sought is not on a trade policy question*** **[emphasis added][32].**

104. Enclosed herewith is a letter, dated September 27, 2021, from the Palestinian General Delegation in Ottawa, Canada. Appended to that letter is a position paper from the Ministry of Foreign Affairs and Expatriates of the State of Palestine. Among other things, that position paper affirms the Ministry's position that: (1) the Occupied Palestinian Territories (including the West Bank) do not form part of the State of Israel, including for matters of customs and trade; (2) Israel's West Bank Settlements violate international law and do not form part of any customs unions between Israel and Palestine; and (3) Canada's decision to allow "Product of Israel" labels on the Settlement Wines does not comport with Canada's obligations under international law.

105. In light of all of the above, Dr. Kattenburg urges the CFIA to reject the position that *CIFTA* authorizes the use of "Product of Israel" labels in products made in Israel's illegal settlements situated on Occupied Palestinian Territory. As held by Justice Mactavish:

> Reliance on the *CIFTA* definition of "territory" for the purposes of Canadian

[31] "Compendium," Bates 144
[32] "Compendium," Bates 142

product labelling requirements also leads to a false and misleading result. It is thus unreasonable.[33]

106. In its redetermination, the CFIA should rely exclusively on: a) its own enabling statutes; b) the Canadian government's long-standing position that the West Bank does not form part of the State of Israel and Israeli settlements therein are illegal; c) Canada's obligation under Article 25 of the UN Charter to abide by UN Security Council resolutions (including UNSC 2334, which obliges member states to distinguish in their relations with Israel between Israel 'proper' and the Israeli-occupied Palestinian territories); d) Article 1 of the *Geneva Conventions Act* (1985), stating that Canada shall "respect and ensure respect for the Convention in all circumstances;" and (e) provisions of the Canadian *Charter of Rights and Freedoms* guaranteeing Canadians the right to act in accordance with the conscience and freely express themselves through conscientious consumer choices, based on truthful information.

107. Finally, Section 3 of the *CPLA* states:

> (1) Subject to subsection (2) and any regulations made under section 18, the provisions ofthis Act that are applicable to any product apply *notwithstanding any other Act of Parliament*.
>
> **Exemption**
>
> (2) This Act does not apply to any product that is a device or drug within the meaning ofthe Food and Drugs Act.
>
> [Emphasis added.]

108. Thus, and in any event, neither *CIFTA* nor the *Canada-Israel Free Trade Agreement Implementation Act*[48], which implements *CIFTA*, could override the prohibition on false and misleading labels contained in Section 7 of the *CPLA*.

The Settlement Wines Violate the Food and Drugs Act

109. Section 5(1) of the *FDA* states:

[33] *Kattenburg v Attorney General of Canada*, 2019 FC 1003 (CanLII), para. 112 (https://www.canlii.org/en/ca/fct/doc/2019/2019fc1003/2019fc1003.html?resultIndex=1).

> No person shall label, package, treat, process, sell or advertise any food in a manner thatis false, misleading or deceptive or is likely to create an erroneous impression regardingits character, value, quantity, composition, merit or safety.

110. Section 2 of the *FDA* defines "food" to include "any article manufactured, sold or represented for use as food or drink for human beings…" Thus, the Settlement Wines clearly constitute a "food" for purposes of the *FDA*, and the Section 5 prohibition on false, misleading or deceptive labels applies to the Settlement Wines.

111. The statement appearing on the labels of the Settlement Wines that those wines are "Product of Israel" constitutes a false, misleading or deceptive statement as to the character and merit of the Settlement Wines. That statement therefore constitutes a violation of Section 5 of the *FDA*.

112. In addition, and as stated on the CFIA website:Country of Origin for Wine

> 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"]. This declaration must be shown in English and French [B.01.012.(2), FDR] andmust appear on the principal display panel [B.02.108, FDR].

113. There is no dispute that the Settlement Wines and the grapes from which they are made are produced entirely in the West Bank. Further, for the reasons explained above, it is indisputable that the West Bank is not part of the State of Israel. Thus, the claim appearing on the labels of the Settlement Wines that those wines are "Product of Israel" plainly violates the *Food and Drug Regulations*.

The Settlement Wines Violate the Consumer Packaging and Labelling Act

114. Section 7(1) of the *CPLA* states that "No dealer shall apply to any prepackaged product or sell, import into Canada or advertise any prepackaged product that has applied to it a label containing any false or misleading representation that relates to or may reasonably be regarded as relating to that product." 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 thebusiness of importing, packing or selling any product."

Thus, the producers, importers and sellers of the Settlement Wines constitute "dealers" within the meaning of the *CPLA*.

115. In addition, Section 2(1) of the *CPLA* defines a "product" as "any article that is or may be the subject of trade or commerce…" 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." The 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. Thus, the Settlement Wines constitute "products" and "prepackaged products" within the meaning of Section 2(1) of the *CPLA* and are therefore subject to the prohibition contained in Section 7(1) thereof against false or misleading statements on labels.

116. 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 product that ***may reasonably be regarded as likely to deceive a consumer with respect to the matterso described or illustrated.***
>
> [Emphasis added.]

117. As explained above, the Settlement Wines were produced in the West Bank and it is indisputable that the West Bank does not form part of the State of Israel. Thus, Settlement Wine labels which bear the designation "Product of Israel" are likely to deceive a consumer with respect to the country of origin of those wines. Therefore, the producers, importers and sellers of the Settlement Wines are clearly violating Section 7 of the *CPLA*.

118. Psagot Winery might argue that consumers could determine that the wineries in question are not in fact situated in Israel by conducting research on the location of the wineries from which the wines emanate.

119. The CFIA's acceptance of such an argument would effectively render meaningless

the country-of-origin labelling requirements of the *FDA* and the *CPLA*: if consumers are required to conduct research to verify the accuracy of the country-of-origin labels on wines, then there is no point in requiring that wines bottles have accurate country-of-origin labels. In essence, acceptance of that argument would resurrect the anachronistic and unjust principle of *caveat emptor* (the buyer beware).

120. Moreover, the CFIA's acceptance of such an argument would also create enormous inefficiency in consumer markets by forcing all consumers to expend the time and energy necessary to verify the accuracy of the country-of-origin label. A far more efficient approach to consumer regulation would be to entitle consumers to take country-of-origin labels at face value and not to impose upon them all the burden of conducting their own, duplicative research to verify the accuracy of the label.

121. The simple, unavoidable and undeniable fact is that these wineries are *not situated in Israel*. Their current country-of-origin labels therefore violate the *FDA* and the *CPLA*.

122. Finally, Psagot Winery might also argue that the average consumer would know that the wineries in question are situated in West Bank and not in Israel.[34] There is, however, no basis for such a finding. On the contrary, and as stated above, it has long been the official position of Canada's own government – a position that can be readily ascertained by consulting the GAC website -- that the West Bank is occupied territory and does not form part of the State of Israel. This has also been for many years the position of the International Court of Justice, the U.N. Security Council and the U.N. General Assembly. Thus, the average Canadian consumer would assume that a wine labelled as "Product of Israel" and approved for sale in Canada bearing such a label was ***not*** produced in the West Bank.

[34] In *R. v. Salerno Dairy Products Ltd.*, 1995 CanLII 17958 (AB PC), an Alberta provincial court judge applied the 'average person' test in determining whether the use of the term "grated parmesan cheese" violated s. 33(1) of the *Canada Agricultural Products Act*. See: https://www.canlii.org/en/ab/abpc/doc/1995/1995canlii17958/1995canlii17958.html?autocompleteStr=R.%20%20Dairy%20Products&autocompletePos=2, para. 29.

The FDA and CPLA were intended to protect conscientious consumers

123. Before the Federal Court of Appeal, the Attorney General erroneously asserted that there "is no support in the legislative record" for the proposition that the *FDA* and *CPLA* were intended to protect conscientious consumers and that "[t]he expression 'buy conscientiously' does not even appear in the legislative record."[35]

124. In fact, in a Parliamentary debate concerning the *CPLA*, the Minister of Consumer and Corporate Affairs stated:

> The second principle of the bill is the provision of full and factual information on labels. This is a fundamental requirement of the consumer movement. It is a fundamental axiom of consumerism that consumers ought to be able to exercisea rational choice. In order for consumers to buy conscientiously in the market place, it is necessary that they be provided with full and factual information.

125. Similarly, the Minister of Consumer and Corporate Affairs stated:

> It seems that quite apart from this economic rationale for full, accurate and relevant information, ***the consumer is entitled to the truth about a product for truth's sake. Truth surely is a virtue in itself, and should therefore be sufficientreason for the requirements concerning packaging and labelling which are contained in this bill***.
>
> [Emphasis added.]

126. The Minister also rejected the suggestion that s. 7 of the *CPLA* needed to be amended to deal with the practice of labelling food products as "Canada No. 1" (a grading standard) when those products came from outside of Canada. He stated:

> There is ***no reason*** why we should not have South Dakota potatoes for sale in Canada but the consumer should not be confused into thinking that they are Manitoba potatoes.
>
> [Emphasis added]

127. The plain implication of the Minister's statement is that consumers sometimes buy products made locally for reasons unrelated to the quality of the products. The Minister believed that s. 7 of the *CPLA* should and does protect such consumers. The

[35] The extracts of the legislative record that are cited herein were filed by the lawyers for the Attorney General of Canada with the Federal Court of Appeal.

Appellant argues, however, that such consumers should effectively be subject to *caveat emptor*.

128. Further, in a debate over the *FDA*, the Minister of National Health and Welfare stated the value of s. 5 of the statute lay in part in the fact that bread advertised as 'whole-wheat bread' "was a deception" even though the bread "was not necessarily injurious to health." He then added "I think the public should get the ***fullest protection that it is possible to give to them*** [emphasis added]."

129. Accordingly, it is clear from the legislative record that the *FDA* and the *CPLA* were intended by Parliament to protect conscientious buying by consumers.

Permitting the use of false and deceptive "Product of Israel" labels on Settlement Wines would violate Dr. Kattenburg's Charter right to free expression

130. Section 2 of the *Canadian Charter of Rights and Freedoms* declares that the fundamental freedoms of Canadians include freedom of conscience and freedom of expression.

131. As stated by the Supreme Court of Canada in *Irwin Toy Ltd. v Quebec (Attorney General)*:

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning isits content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, howeverunpopular, distasteful or contrary to the mainstream…
>
> […]
>
> The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts…[36]

132. The act of refusing to purchase wines made in Israel's illegal settlements is both an act of conscience and an expressive act: it conveys the consumer's conscientious objection to violations of international law and human rights. Moreover, labels that

[36] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, p. 968.

convey the false impression that the Settlement Wines were made within Israel's sovereign boundaries impede consumers' rights to act in accordance with their conscience and to express their objection to Israel's violations of human rights and international law that Canada is obliged to respect and ensure respect for.

133. Accordingly, the CFIA's acceptance of "Product of Israel" labels on Settlement Wines sold in Canada would infringe the right of Canadian consumers to freedom of conscience and freedom of expression.

The Submissions of Psagot Winery have no merit

134. Psagot Winery was granted party status in these proceedings by the FCA. In its submissions to the FCA, Psagot Winery asserted that its wines are produced by Israeli nationals who a) are subject to Israeli domestic, taxation and customs laws, b) are in possession of an Israeli business license, c) carry out their business on land "controlled, administered, governed, and secured by Israel," and d) are protected by the Israeli military against the "constant threat of deadly violence." Psagot Winery also asserted that its winery is located a "mere fifteen-minute drive north of Jerusalem."

135. These arguments are absurd and irrelevant, however, to the wine labelling question at hand. Even if every one of the assertions made by Psagot Winery before the FCA were proven to be factually and legally accurate, those facts would not alter the reality that Psagot Winery is not situated within the sovereign boundaries of Israel but is instead situated on Occupied Palestinian Territory stolen from Palestinians in violation of international law.

136. The fact that the State of Israel, by means of brute military force, is able to dispossess Palestinians of their land does not alter that reality that that land is beyond the internationally recognized boundaries of the State of Israel. Indeed, and as mentioned above, Canada's government acknowledges that the West Bank lies outside the sovereign boundaries of Israel and that, even under Israel's own domestic laws, the West Bank does not form part of the sovereign territory of Israel.

137. CFIA regulations stipulate that an origin label should reveal the *geographical* origin of the contents of the product (e.g., the place where the grapes were grown, in the case of wine) – not the nationality of the vintner, or the jurisdiction that licenses or taxes the vintner, or the security force that provides armed protection to the vintner. The strictly geographical sense of the origin label is consistent with the *Protocol to the 2007 World Wine Trade Group Agreement on Requirements for Wine Labelling* (Brussels, 23 March, 2013), a protocol apparently adhered to by the CFIA.[37]

138. The purpose of country-of-origin labels is to inform consumers of the *geographical origin* of products – not to promote the vintner's religious or ideological beliefs.

139. The last of the above points –that Psagot Winery is a fifteen-minute drive north of Jerusalem – is true only if the driver is Jewish or an international visitor in a vehicle with an Israeli license plate. If the driver is Palestinian (Muslim or Christian), from the southern edge of Jerusalem, the drive could take up to three hours. Dr. Kattenburg knows this through first-hand experience.

CONCLUSION

140. For all of the reasons stated above, Dr. Kattenburg submits that "Product of Israel" labels on the Settlement wines are false, misleading and deceptive and violate both the *FDA* and the *CPLA*. He respectfully requests that the CFIA immediately advise wine and food importers, dealers and vendors throughout Canada that "Product of Israel" labels may not be affixed to wines and other food products produced in Israel's West Bank settlements because such labels are false, misleading and deceptive and violate the *FDA* and *CPLA*.

141. Finally, a poll conducted in Canada in early 2017 by EKOS Research Associates found broad sympathy among Canadians for Canadian government sanctions on Israel for the purpose of pressuring Israel to comply with international law.[38] Notably, Dr.

[37] Compendium, Bates pp. 1-17.
[38] https://www.cjpme.org/pr_2017_03_03.

Kattenburg is not requesting that the CFIA bar the importation of products made in Israel's illegal settlements, although that would be an entirely reasonable position for him to take. Rather, he is simply asking that these products not be falsely and deceptively labelled as "Product of Israel". In Dr. Kattenburg's submission, the CFIA should respect Canadian public opinion, by allowing Canadian wine consumers to differentiate readily between wines truly produced in Israel, and those produced in occupied territory and in flagrant violation of both international and Canadian law.

A Dimitri Lascaris
360, rue St. Jacques, Suite G101
Montreal, Quebec H2Y1P5
Tel.: (514) 941-5991
Email: alexander.lascaris@gmail.com
Solicitor for Dr. David Kattenburg