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â€œA Court of Law, Not a Policy Forumâ€•: The Federal Court of Appeal weighs in on policy and the proper scope of intervenorsâ€™ submissions

In 2017, the Canada Food Inspection Agency (the "**CFIA**") determined that wines produced by Psagot Winery, a vineyard located within an Israeli settlement in the West Bank, could be sold in Canada with a "Product of Israel" label to meet "country of origin" labelling requirements required under the *Consumer Packaging and Labelling Act* and the *Food and Drugs Act*. This decision was challenged by Dr. David Kattenburg, a Canadian activist, on the basis that the wine was in fact produced on occupied Palestinian territory and not within Israel, making the labelling of "Product of Israel" false and misleading and therefore contrary to the applicable legislation.

Dr. Kattenburg succeeded before the Federal Court in his appeal of the CFIA decision, with the Court finding in its decision in *Kattenburg v Canada (Attorney General)* that there was "no dispute about the fact that the Israeli settlements in the West Bank are not part of the territory of the State of Israel". The Court concluded that the effect of the CFIA's decision was to permit labelling of the wine in a manner that was false, misleading and deceptive.

The Attorney General of Canada has since taken an appeal of the Federal Court's decision before the Federal Court of Appeal. After the appeal was commenced, the Federal Court of Appeal received motions seeking leave to intervene from twelve parties, including Jewish community groups, Israel and Palestine advocacy organizations, international human rights groups, legal advocacy organizations and law professors.

Justice Stratas dismissed all of these intervention motions on the basis that the proposed interveners sought to intervene on issues not raised by the appeal, including legal and humanitarian issues relating to the status of the West Bank and the territorial sovereignty of Israel under international law, or that they relied on evidence that was not before the Court, such as news articles, reports and opinions. In detailed reasons, Justice Stratas dissected the proposed interventions and

concluded that none of them would be useful to the Court's ultimate determination of the appeal.

However, Justice Stratas then went a step further, lamenting a "growing, regrettable tendency in public law cases in Canada" of organizations "seeking political and social reform to see courts as unfettered decision-making bodies of a political or ideological sort that can give them what they want". Relying on a number of prior decisions of the Federal Court of Appeal, he observed that the tendency of the Courts to grant numerous interveners the right to make submissions frequently gave court hearings the appearance of a parliamentary committee, and that the substance of such interventions too often included "loose policy talk" more properly befitting a policy forum.

The Court's reasons touch on an interesting issue regarding the proper role of intervenors. Prominent Canadian legal scholars, including the University of Ottawa's Professor Carissima Mathen, have argued for an expansive role for interveners, pointing out that those parties have a crucial "substantive, procedural and symbolic" role, including to elaborate points of law, point out jurisprudential patterns or to explore out the potential broader impact of the Court's decision on the case at bar in a way that the parties themselves cannot. This role is undoubtedly important, particularly in criminal or civil Charter cases, which often have broad (and sometimes otherwise unforeseen) impacts on non-parties' rights or on society at large.

However, Justice Stratas' criticism of the interveners in the *Kattenburg* case addresses a different situation, where the interveners seek to use the courtroom as a forum to share their policy perspectives, in a case where those preferences are neither determinative of nor relevant to the Court's ultimate decision. Stratas J.A. raises a valid concern that while the appeal will turn on the quotidian issue of how Canadian labelling requirements should be applied, the interveners appeared to him to be seeking to litigate a number of unrelated international legal and humanitarian issues arising out of the Israeli-Palestinian conflict at large.

Assuming each of the proposed interveners earnestly believed that their submissions would assist the Court, the scope of those submissions meant that their mere intervention could incidentally cause the Court to be seen as deciding a much broader and much more contentious issue than the product labelling dispute that is in fact before it. Each of these interveners would no doubt be thrilled to receive even *obiter* comments seen to prefer their position on the legality of Israeli settlements in the West Bank. However, that is decidedly not

the role of the Federal Court of Appeal in construing federal product labelling legislation.

It would be most unfortunate if these types of interventions inadvertently caused members of the public to see Canadian courts as active on fraught non-domestic political or legal issues such as the Israeli-Palestinian conflict. This seems to be the concern raised by Justice Stratas that some of the interveners may have been “lured to this appeal by torqued-up press reports distorting what the Federal Court decided.” The Court’s concern is understandable, given the language used in the Federal Court’s decision, and as some of the subsequent reporting makes clear.

If legally sophisticated and resourceful interveners with a special interest in the Israel-Palestine conflict could misunderstand the Court’s ruling, one can only wonder about the perception of the decision by ordinary members of the public. Justice Stratas’ comments stand as a reminder that the role of interveners, while important, has been carefully circumscribed by our Courts for a reason, and raise important questions about how policy interventions should be appropriately dealt with to avoid the perception that our courts have become politicized.

Canadian courts are not courts of public opinion or policy forums; they belong to an adversarial system which can only decide issues that are placed before it by parties. The role of interveners is to guide and influence those decisions, not to expand their scope or to seek broad policy declarations. Where their submissions instead seek to influence policy on foreign affairs matters, they should instead be directed to those in government whose role it is to determine Canada’s position on those issues: namely, the Prime Minister and the Minister of Foreign Affairs.