Federal Court of Appeal | Cour d'appel fédérale

Date: 202001006

Docket: A-312-19

Citation: 2020 FCA 164

Present: **STRATAS J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DR. DAVID KATTENBURG and PSAGOT WINERY LTD.

Respondents

Dealt with in writing without appearance of parties.

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

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

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

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

A. The intervention motions

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

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

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

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

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

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

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

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

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

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

(3) *Are the moving party's submissions doomed to fail*? When considering an intervention motion, the Court should not venture too deeply into the merits of issues that are for the panel. That being said, the panel should not have to deal

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

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

[10] I will now consider these questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[25] International law is irrelevant to the discernment of legislative purpose in a case like this: *Gitxaala Nation* v. *Canada*, 2015 FCA 73 at paras. 11-18; *Ishaq* at para. 27. Legislative purpose is discovered from the words of the provision, related provisions, and, with some caution, legislative history and regulatory impact or official explanatory statements: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 at paras. 25-27 and 35; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at paras. 50-51. Sometimes it is clear from these things that the purpose of a legislative provision is to implement some or all of an international instrument: *Entertainment Software Association* at

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

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

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

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

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

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

[29] This too is doomed to fail.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) Concluding observations concerning the intervention motions

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

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

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

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

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

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

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

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

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

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

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

C. Another procedural issue

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

D. Disposition

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

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

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

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

WRITTEN REPRESENTATIONS BY:

Gail Sinclair Negar Hashemi	FOR THE APPELLANT
A. Dimitri Lascaris	FOR THE RESPONDENT, DR. DAVID KATTENBURG
David Matas	FOR THE PROPOSED INTERVENER, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA
Barbara Jackman	FOR THE PROPOSED INTERVENER, INDEPENDENT JEWISH VOICES
Mark J. Freiman	FOR THE PROPOSED INTERVENER, CENTRE FOR ISRAEL AND JEWISH AFFAIRS
David Elmaleh Aaron Rosenberg	FOR THE PROPOSED INTERVENER/RESPONDENT, PSAGOT WINERY LTD.

Faisal Bhabha Madison Pearlman	FOR THE PROPOSED INTERVENER, CENTRE FOR FREE EXPRESSION
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