Federal Court of Appeal File No: A-312-19

FEDERAL COURT OF APPEAL

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Responding Party
(Appellant in Federal Court of Appeal)

- and -

DR. DAVID KATTENBURG

Responding Party
(Respondent in Federal Court of Appeal)

WRITTEN REPRESENTATIONS OF THE NON-PARTY, PSAGOT WINERY LTD.

September 25, 2019

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. Psagot Winery Ltd. ("**Psagot Winery**") moves for an Order adding it as a party to this proceeding pursuant to Rule 104(1)(b) of the *Federal Courts Rules* (the "***Rules***"),[1] including as a respondent to the Attorney General of Canada's (the "**AG**") appeal to the Federal Court of Appeal (the "**Appeal**") of the Judgment of the Federal Court dated July 29, 2019 (the "**Judgment**"), reported collectively with reasons for judgment (the "**Reasons**").[2] In the alternative, Psagot Winery moves for an Order granting it leave to intervene in the Appeal pursuant to Rule 109.

2. Psagot Winery should be added as a party to this proceeding. It was not named as a respondent in the underlying judicial review application, nor was it provided notice. No court documents were served upon it, and its position and interests were not advanced. Borrowing language from Rule 303(1) of the *Rules*, it is a party "directly affected by the order that was sought in the (underlying judicial review) application…" Its wines and labelling practices were explicitly referenced in, and formed the core of, the Reasons and Judgment. Its rights were affected, obligations were imposed upon it, and it was prejudicially affected by the Judgment.

3. In the alternative, Psagot Winery should be granted leave to intervene in the Appeal pursuant to Rule 109. It has a genuine interest in the matters on Appeal, and there is a strong possibility that Psagot Winery will be directly affected by the outcome of the Appeal. Psagot Winery brings necessary knowledge, skills, and experience to the questions at issue in this Appeal, and its participation will bring valuable insights and perspectives that will further this Court's

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[1] SOR/98-106 [***Rules***].
[2] *Kattenburg v. Canada (Attorney General)*, 2019 FC 1003 (CanLII), Motion Record of the Non-Party, Psagot Winery ("**MR**"), Tab 2D, p. 36 [***Kattenburg***].

determination of the matter.

4. For the reasons set out above, and expanded upon below, Psagot Winery should be added as a party to this proceeding, including on Appeal. Alternatively, it should be granted leave to intervene in the Appeal.

THE FACTS

The Application and the Federal Court's Decision

5. The Applicant, Dr. David Kattenburg ("**Kattenburg**"), commenced this judicial review application challenging the Complaints and Appeals Office (the "**CAO**") of the Canadian Food Inspection Agency (the "**CFIA**") decision affirming the CFIA's determination that two specific wines produced in the West Bank — that of Psagot Winery and Shiloh Winery — could be imported and sold in Canada labelled as "Products of Israel" in accordance with Canada's "country of origin" labelling requirements (the "**Application**").

6. In her Reasons, the Honourable Madam Justice Mactavish (the "**Application Judge**") held that labelling "Settlement Wines" as "Products of Israel" was both inaccurate and misleading, given that "*all* of the parties and interveners agreed that the settlements in issue in this proceeding were not part of the State of Israel", with the result that the CAO's decision affirming that "Settlement Wines" may be so labelled was unreasonable.[3]

Psagot Winery: Wine Produced by Israelis in the Land of Israel

7. Psagot Winery is an award-winning winery located on a hilltop community overlooking

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[3] *Ibid* at para. 5, MR, Tab 2D, p. 36.

the Judaean Mountains and located a mere fifteen-minute drive north of Jerusalem, Israel.[4]

8. Psagot Winery's founder and CEO, Yaakov Berg ("**Berg**"), and his wife, planted their first vineyards twenty years ago on the same site where Jews produced wine destined for the priests of the Jewish Temple in Jerusalem. They are proud to continue the long and unbroken tradition of Jewish presence in their homeland, exercising their basic human right to live as Jews in the Land of Israel — a right which has been exercised by Jews in the region continuously for over 3,000 years.[5]

9. During the vineyard's construction, an ancient cave from the Hasmonean Dynasty (the last ancient vestige of sustained Jewish self-governance in the region) was discovered, and in it, a coin dating back to the Jewish Great Revolt against Roman rule in 66 BCE. The coin is stamped with the words "For Freedom of Zion", adorned with a vine leaf and an image of an amphora – an ancient container used for storing wine. This coin embodies the essence of Psagot Winery's story, and its image is born upon a selection of wines produced at the winery. For Psagot Winery, the coin is a reminder of its deep connection to the region. Archeologists have also proven that the vineyard is located precisely on the site where Jewish forefathers produced wine destined for the priests of the Jewish Temple in Jerusalem.[6]

10. Despite virtually uncultivatable land, sweltering heat, minimal rainfall, and a shortage of indigenous wine grapes, their years of hard work bore fruit. In 2003, Berg and his wife went on to formally found their winery, naming it Psagot Winery after the local community — Psagot

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[4] Affidavit of Yaakov Berg ("**Berg Affidavit**") at para. 2, MR, Tab 2, p.10.
[5] Berg Affidavit at paras. 2 – 3, MR, Tab 2, p. 10-11
[6] Berg Affidavit at para. 4, MR, Tab 2, p. 11

(Hebrew for "peaks"). It has been growing ever since.[7]

11. Each year, the winery produces more than 350,000 bottles from a range of 11 different wines. The majority of the wines — approximately 70% — are exported to dozens of countries worldwide, including Canada, United States, France, United Kingdom, Belgium, Germany, Switzerland, Panama, Brazil, and Australia.[8]

12. Psagot Winery has attained international acclaim, including being named ***Israel's*** best wine producer, and winning gold medals for ***Israeli*** wine in competitions.[9]

13. Psagot Winery is located in territory controlled, administered, governed, and secured by the State of Israel, in the Land of Israel. Psagot Winery's business license was issued by the State of Israel and all of its wines are produced by Israeli nationals.[10] Psagot Winery is subject to Israeli domestic law, Israeli taxation laws and Israeli customs laws (when exporting).[11] Under constant threat of deadly violence, the Psagot community is protected by Israel's military, the Israel Defense Forces.[12]

14. They are not experts in Israeli or international law, nor are they politicians — they are winemakers. They understand that there are competing Israeli and Palestinian Arab claims of sovereignty to the West Bank (what they refer to as Judaea and Samaria), or more accurately, respective portions of this territory. This is disputed territory, some areas of which are more

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[7] Berg Affidavit at para. 6, MR, Tab 2, p. 11
[8] Berg Affidavit at para. 7, MR, Tab 2, p. 11-12
[9] Berg Affidavit at para. 8, MR, Tab 2, p. 12
[10] Exhibit "A" to the Berg Affidavit, MR, Tab 2A, p. 18
[11] Exhibits "B" and "C" to the Berg Affidavit, MR, Tabs 2B and 2C, pp. 23 and 23, respectively.
[12] Berg Affidavit at para. 9, MR, Tab 2, p. 12

vigorously disputed than others — not unusual in a region marked by conflict.[13]

15. Nevertheless, Psagot Winery's wines are produced by Israelis under the auspices of an Israeli company in an Israeli community subject to Israeli law in Israeli territory. Put simply, Psagot Winery proudly produces wines that are products of Israel.[14]

The Application and Psagot Winery: Directly Affected/Interested but Not a Party

16. Psagot Winery was not named as a respondent to the Application, despite Psagot Winery being directly affected by it, having a direct interest in its outcome, and its labelling practices having been the basis and at the core of the Application.[15]

17. Psagot Winery only learned of the Application a few months ago — around the date of the actual hearing of the Application. In fact, the first court document it viewed in relation to this proceeding was the Judgment and the Reasons.[16]

18. It was not provided notice of the Application and was not served (either formally or informally) with any court documents. Accordingly, Psagot Winery did not have an opportunity to make submissions, to put forward information and documentation before the Court, to provide its insight and position, or ultimately, to be heard.[17]

The Absence of Psagot Winery Leads to the Judgment and the Reasons

19. The Application was decided, in large part, on the basis of the Court's finding that there was consensus among the parties regarding the status of Jewish communities in Judea and

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[13] Berg Affidavit at para. 10, MR, Tab 2, p. 12-13
[14] Berg Affidavit at para. 11, MR, Tab 2, p. 13
[15] Berg Affidavit at para. 13, MR, Tab 2, p. 13
[16] Berg Affidavit at para. 14, MR, Tab 2, p. 13
[17] Berg Affidavit at para. 16, MR, Tab 2, p. 14

Samaria.[18]

20. Psagot Winery does not agree. Had Psagot Winery been named as a respondent to the Application, and properly served with the corresponding court documents, it would have advanced submissions that its wines are indeed products of Israel. Accordingly, Psagot Winery would have submitted that the CAO's determination permitting the labelling of these products as "Products of Israel" fell within a range of possible, acceptable, and defensible outcomes such that the Application ought to have been dismissed.[19]

21. The Judgment and Reasons has had immediate, negative impacts on Psagot Winery's Canadian operations. It has incurred financial loss — it has not exported a single bottle of wine to Canada since the release of the Judgment and Reasons, and it is in "limbo" until the CFIA completes its review and releases its determination on what to include on its labels for wines destined for Canada.[20]

22. Its international reputation and brand have also been damaged as a result of the Judgment and Reasons, as it has been widely-reported in international media that a Canadian court has determined that Psagot Winery engaged in labelling practices that are false, misleading and deceptive.[21]

PART II – STATEMENT OF ISSUES

23. The issue on this motion is whether Psagot Winery should be added as a party to this

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[18] *Kattenburg* at paras. 5, 70, 94, 101, MR, Tab 2D, p.36
[19] Berg Affidavit at paras. 18 – 19, MR, Tab 2, p. 14
[20] Berg Affidavit at para. 20, MR, Tab 2, p. 14
[21] Berg Affidavit at para. 21, MR, Tab 2 and 2E, p. 15

proceeding pursuant to Rule 104(1)(b), or alternatively, as an intervener in the Appeal.

24. Psagot Winery submits that the following questions should be considered in the making of this determination:

(a) whether Psagot Winery meets the legal test for adding a party to a proceeding; and

(b) whether Psagot Winery meets the legal test for intervener status.

PART III – STATEMENT OF SUBMISSIONS

A. THE TEST FOR ADDING A PARTY

25. Rule 104(1)(b) provides the Court discretion to add a party to a proceeding "at any time" where it should have been joined at first instance or it is a necessary party, as follows:

> **Order for joinder or relief against joinder**
>
> 104 (1) At any time, the Court may
>
> […]
>
> (b) order that a person *who ought to have been joined as a party* **or** *whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined* be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.
>
> [Emphasis added]

26. Satisfaction of either of these requirements is sufficient.[22]

27. Notwithstanding that Psagot Winery was not a respondent in the Application (through no fault of its own), it may be added as a party to the Appeal. The preamble to the *Rules* and Rule

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[22] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236 (CanLII) at para. 11 [***Forest Ethics***].

1.1(1) confirm that the *Rules* apply to both the Federal Court and the Federal Court of Appeal:

> Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court
>
> **…**
>
> **Application**
>
> 1.1 (1) These Rules apply to all proceedings in the Federal Court of Appeal and the Federal Court unless otherwise provided by or under an Act of Parliament.

28. Rule 303 of the *Rules* governs which parties must be named as respondents to a judicial review application to the Federal Court:

> **Respondents**
>
> 303 (1) Subject to subsection (2), *an applicant* ***shall*** *name as a respondent every person*
>
> > (a) *directly affected by the order sought in the application*, other than a tribunal in respect of which the application is brought; or
> >
> > (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.
>
> **Application for judicial review**
>
> > (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.
>
> [Emphasis added]

29. In *Forest Ethics Advocacy Association v. Canada (National Energy Board),* Justice Stratas set out the test for who must be named as a respondent to a judicial review application and accordingly, who should be added as a party pursuant to Rule 104(1)(b), as follows:[23]

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[23] *Ibid* at para. 12

> [18] The words "directly affected" in Rule 303(1)(a) mirror those in subsection 18.1(1) of the *Federal Courts Act*. Under that subsection, only the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. Rule 303(1)(*a*) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision were different, could have brought an application for judicial review themselves.
>
> [19] Accordingly, guidance on the meaning of "direct interest" in Rule 303(1)(a) can be found in the case law concerning the meaning of "direct interest" in subsection 18.1(1) of the *Federal Courts Act*. […]
>
> [20] A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *League for Human Rights of B'Nai Brith Canada v. R.*, 2010 FCA 307 (F.C.A.) at paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue*, [1976] 2 F.C. 500 (Fed. C.A.); *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 (F.C.A.).
>
> [21] **Translating this to Rule 303(1)(a), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(b), it should be added as a respondent**.
>
> [Emphasis added]

30. Accordingly, a party should be added as a respondent where the relief sought in the application for judicial review will: (a) affect a party's legal rights; (b) impose legal obligations upon it; or (c) prejudicially affect it in some direct way."[24]

31. The language used in both Rule 303 itself ("**shall**" name as a respondent) and the appellate law noted above ("**should**" be added as a respondent) contain affirmative, arguably mandatory language — suggesting that if Psagot Winery indeed has a direct interest in the proceeding, it should be added.

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[24] *Innovator Company v. Canada (Attorney General)*, 2017 FC 864 (CanLII) at para. 23, citing *Forest Ethics* at paras. 20 - 22

32. In *Forest Ethics*, an environmental organization and an individual activist brought an application for judicial review (the "**Forest Ethics JR Application**") relating to Enbridge Pipelines Inc.'s ("**Enbridge**") pipeline expansion proposal (the "**Pipeline Proposal**") to the National Energy Board (the "**NEB**"), but did not name Enbridge as a party to the proceeding.

33. In granting Enbridge's motion to be added as a respondent to the Forest Ethics JR Application, Justice Stratas for the Federal Court of Appeal found that Enbridge would be directly, prejudicially affected by the relief sought therein because:[25]

(a) Enbridge's Pipeline Proposal was the subject of the NEB's review proceedings;

(b) Enbridge's pipeline project would be delayed if the relief sought in the Forest Ethics JR Application were granted; and

(c) Enbridge's Pipeline Proposal could be rejected if the relief sought in the Forest Ethics JR Application were granted.

34. In *Coulson Aircrane Ltd. v. Canada (Minister of Transport)*, the Federal Court added non-party, VIH Logging Ltd. ("**VIH**"), as a respondent to a judicial review application by Coulson Aircrane Ltd. ("**Coulson**"), a helicopter operator seeking to prohibit the Minister of Transport from issuing temporary exemptions to allow two Russian-made helicopters from being operated in Canada (the "**Coulson JR Application**").[26]

35. VIH — a competitor of Coulson — had an agreement with the Russian manufacturers to operate the Russian-made helicopters in Canada. VIH argued, *inter alia*, that:[27]

(a) it would be directly affected as a result of the time and money it has invested in the

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[25] *Forest Ethics* at para. 24
[26] *Coulson Aircrane Ltd. v. Canada (Minister of Transport)*, 1997 CarswellNat 648, 130 F.T.R. 161, 71 A.C.W.S. (3d) 418 ["***Coulson"***].
[27] *Ibid* at paras. 7, 12

Russian helicopter project and the business commitments it had made for the use of the helicopters if the relief sought in the Coulson JR Application were granted;

(b) it should be a party to the Coulson JR Application in order to protect its interests and to answer allegations by Coulson that VIH would be using uncertified and unsafe Russian helicopters;

36. The Court noted that VIH "ought to have an opportunity to defend itself and its position" but had "fallen between cracks if not gaps". [28] In adding VIH as a party to the proceeding, the Court noted the following factors:[29]

(a) VIH ought to have a remedy;

(b) VIH was interested in the outcome from a business and financial perspective;

(c) VIH ought to have a forum to refute various charges against it by the applicant;

(d) VIH would bring a "different alignment and perspective to the matter";

(e) it would be in the interests of justice for the Court to hear VIH so as to effectively and completely adjudicate upon the matter;

(f) to allow an adversely interested entity to be shut out of the proceeding with no other forum to effectively make its case would be to allow an abuse of process; and

(g) VIH would be directly affected by any injunction.

Psagot Winery Should be Added as a Party

37. Psagot Winery has satisfied the applicable legal test to be added as a party to this proceeding.

38. It "ought to have been joined as a party" within the meaning of Rule 104. Rule 303(1)

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[28] *Ibid* at para. 22
[29] *Ibid* at paras. 22 -27

specifically contemplates — with mandatory language — that "an applicant **shall** name as a respondent every person (a) directly affected by the order sought in the application…"

39. Psagot Winery was undoubtedly directly affected by the order that was sought in the Application, and will similarly be directly affected by any order arising from the Appeal.

40. Its legal rights are impacted by the Judgment and will be similarly impacted by the Appeal, and the Federal Court imposed legal obligations on Psagot Winery too. The Federal Court declared that Psagot Winery's labels were false, misleading and deceptive – and contrary to various statutes.

41. The Application Judge effectively ruled that Canadian institutions cannot sell Psagot Winery's wines with the labels as-is, subject to the CFIA directing a practice in accordance with the Reasons.

42. Psagot Winery was also prejudiced in a direct, unique way, and in a different manner than other exporters of goods in the region. Psagot Winery's labels were at the core of the Application and formed the subject matter of the Judgment and Reasons:

> [15] Dr. Kattenburg states in his affidavit that he **visited the Psâgot winery** in June of 2017. **The winery is one of the two wineries that produce the wines in issue in this case. It is located in the Psâgot settlement**, just east of Ramallah in what Dr. Kattenburg refers to as the "Occupied Palestinian Territories". While he was there, Dr. Kattenburg confirmed that the wines that were sold at the Psâgot winery had in fact been produced in the West Bank. Also at issue in this proceeding are wines produced in the Shiloh settlement, which Dr. Kattenburg notes is also in the West Bank.
>
> [16] Prior to visiting the West Bank, however, **Dr. Kattenburg had sent a letter** to the Liquor Control Board of Ontario (LCBO) on January 6, 2017, **stating that two wines sold in Ontario were falsely labelled** as being products of Israel, when they had in fact been produced in Israeli settlements in the West Bank. **The wines in question are** Shiloh Legend KP 2012 and **Psâgot Winery M Series, Chardonnay KP 2015 (the Settlement Wines)**. A copy of Dr. Kattenburg's letter was also sent to the CFIA.

[Emphasis added]

43. Nevertheless, it was not given the opportunity to make submissions or participate in the proceeding. There have been international and local media reports worldwide about Psagot Winery bearing misleading and false labels on its wines. It has sustained reputational damage.

44. It was not provided notice of the proceedings, a clear violation of procedural fairness.

45. Psagot Winery was also prejudiced by this lack of notice because the Application Judge in large part relied on the finding that the parties agreed that Psagot does not form part of Israel[30] — a concession that Psagot Winery does not agree with. In the absence of this finding, the Application Judge likely would have undertaken a more extensive analysis of the issue.

46. As in *Forest Ethics*, Psagot Winery is the subject of the Application and is directly, prejudicially affected by it. As in *Coulson Aircrane*, Psagot Winery has "fallen between the cracks" and "ought to have an opportunity to defend itself and its position."

47. In sum, Psagot Winery should be added as a party respondent to the Appeal, as it satisfies the express language in the applicable *Rules,* the test set out in the applicable cases, and the general public policy principle of procedural fairness.

B. THE TEST FOR LEAVE TO INTERVENE

48. Rule 109 of the *Rules* allows the Court to grant leave to a non-party to intervene in a proceeding. The central issue to be decided on a motion to intervene is whether the proposed intervention will assist the Court in determining a factual or legal issue raised by the proceeding.

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[30] *Kattenburg* at paras. 5, 70, 94, 101, MR, Tab 2D, pp. 36

49. In *Ferroequus Railway Co. v. Canadian National Railway Co*.,[31] this Court expounded upon Rule 109(2), as follows:

> "The assistance must not merely be a re-iteration of the position taken by a party, but rather must provide a different perspective. What is required is a "relevant and useful point of view which the initial parties cannot or will not present…"

50. The appropriate criteria to be added as an intervener in a proceeding has been set out many times (albeit, with slightly different iterations). Recently, the Federal Court of Appeal cited with approval the following factors in *York University v. Canadian Copyright Licensing Agency (Access Copyright)*:[32]

> (1) is the proposed intervenor directly affected by the outcome?
>
> (2) does there exist a justiciable issue and a veritable public interest?
>
> (3) is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) are the interests of justice better served by the intervention of the proposed third party?
>
> (6) can the Court hear and decide the cause on its merits without the proposed intervenor?

51. This Court in *Sports Maska Inc. v. Bauer Hockey Corp.*, recently reaffirmed these factors, as follows:[33]

> [42] The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word

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[31] *Ferroequus Railway Co. v. Canadian National Railway Co*., 2003 FCA 408 (CanLII), at para. 13
[32] *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2018 FCA 81 (CanLII), citing Justice Rouleau in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74, at 79 and 80 (and affirmed on appeal ([1990] 1 F.C. 90, at 92)) at para. 3
[33] *Sports Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 44 (CanLII) at para. 42

> in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing [Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 (CanLII), [2015] 2 F.C.R. 253] factors are simply an example of the flexibility which the Rothmans, Benson & Hedges factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

Psagot Winery Should (Alternatively) be Granted Leave to Intervene

52. As set out in more detail below, Psagot Winery has an interest in this Appeal and its submissions will assist the determination of the issues related to the proceeding. As well, taking into account the considerations set out by this Court in *Rothmans*, as confirmed by *York University*, Psagot Winery should be granted leave to intervene in the circumstances.

Factor 1: Psagot Winery is Directly Affected by the Outcome of the Appeal

53. As noted above, Psagot Winery is directly affected by the outcome of the Appeal, as it was by the Judgment. Its labelling practices are “front and centre” in the Appeal. Psagot Winery’s labelling practices were the basis for the Judgment and at the core of the Application. The Application Judge recognized this at the outset of her Reasons.

54. The Application Judge went on to explicitly find that the labels on the “Settlement Wines” (which was defined above at paragraph 16 in the Reasons as including the *Psagot Winery M Series, Chardonnay KP 2015*) were false, misleading, deceptive.

55. Its business practices and how it exports its product to Canada are affected. The outcome of the Appeal will either affirm the CFIA and CAO’s determination that Psagot Winery’s products

are reasonably labelled as "Products of Israel", or affirm the finding that labelling its wines "Product of Israel" is false and misleading.

Factor 2: There is a Justiciable Issue and a Veritable Public Interest

56. The issues on Appeal are justiciable, and there is a genuine public interest component of the Appeal. The Appeal may arguably impact all producers of food and beverages that operate in conflict zones and areas where territory is the subject matter of dispute. The issues on Appeal transcend the two parties to the dispute.

57. It is imperative that the entity that was the subject of the Application – and that will necessarily be the subject of the Appeal – be granted a voice.

58. Psagot Winery also has a reasonably arguable case.

59. First, the standard of review favours Psagot Winery. The CFIA permitted Psagot Winery's wine to be labelled as a "Product of Israel. The CAO affirmed the decision. Since the standard of review for the judicial review application was reasonableness, the Court had to consider whether the decision fell "within a range of possible, acceptable outcomes", as opposed to the elevated standard of "correctness".

60. Second, Psagot Winery is located in territory controlled, administered, governed, and secured by the State of Israel, in the Land of Israel. Psagot Winery's business license was issued by the State of Israel and all of its wines are produced by Israeli nationals. Psagot Winery is subject to Israeli domestic law, Israeli taxation laws and Israeli customs laws (when exporting). Under

constant threat of deadly violence, it is protected by the Israel Defense Forces.[34]

61. Psagot Wines are produced by *Israelis* under the auspices of an *Israeli* company in an *Israeli* community subject to *Israeli* law in *Israeli* territory. Put simply, it was within the range of "possible, acceptable outcomes" that the wines are products of Israel.[35]

62. The fact is that the anchor of the Judgment was Court's finding that Psagot is not part of Israel, which informed the Application Judge's analysis throughout.[36]

63. This finding goes to the root of the Judgment. The Application Judge's analysis was clouded by this finding – one that Psagot Winery does not agree with, would not have conceded, and would have vigorously opposed. Had Psagot Winery been named as a respondent, there would not have been consensus on this issue, which could have and should have led to a very different result.

Factor 3: There is a Lack of any other Reasonable or Efficient Means to Submit the Question to the Court

64. Permitting Psagot Winery to be added as a party or to intervene is a reasonable and efficient way for it to participate in this judicial process and submit questions of fact and law to the Court.

65. Rather than initiate a completely fresh process, adding Psagot Winery to the proceeding is fair, reasonable and efficient. It would avoid a multiplicity of proceedings, avoid inconsistent findings, and protect scarce judicial resources.

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[34] Berg Affidavit at para. 9, MR, Tab 2, p. 12
[35] Berg Affidavit at para. 11, MR, Tab 2, p. 13
[36] See *Kattenburg* at paras. 5, 70, 94 and 101, MR, Tab 2D, pp. 36

Factor 4: The Position of Psagot Winery is Not Adequately Defended by one of the other Parties

66. The only parties to the Appeal are Kattenburg and the AG. Those parties both took a decidedly different position than Psagot Winery. More specifically, the parties on the Application took the position that Psagot does not form part of Israel's territory. Paragraphs 5, 70, 94 and 101 confirm not only the parties' concession, but that it played a very important role in the Judgment:

> [5] While there is profound disagreement between those involved in this matter as to the legal status of Israeli settlements in the West Bank, I do not need to resolve that question in this case. Whatever the status of Israeli settlements in the West Bank may be, **all of the parties** and interveners agree that the settlements in issue in this case are not part of the State of Israel. **Consequently**, labelling the settlement wines as "Products of Israel" is both inaccurate and misleading, with the result that the CAO's decision affirming that settlement wines may be so labelled was unreasonable.
>
> ….
>
> [70] With respect to the second issue, the parties and the interveners provided the Court with extensive international law arguments with respect to the legal status of Israeli settlements in the West Bank. Dr. Kattenburg also provided expert evidence addressing this question. While I have carefully considered this evidence and these arguments, I have determined that it is not necessary to decide this issue. **Both parties** and both interveners **agree** that, whatever the legal status of the settlements may be, **the fact is that they are not within the territorial boundaries of the State of Israel.**
>
> ….
>
> [94] There is no comparable statement on the labels on the Settlement Wines. They do not identify the source of the Settlement Wines as being "Israeli settlements in the West Bank", "the West Bank" or "Occupied Palestinian Territories". Rather they are identified only as coming from the State of Israel – something that **the parties agree** is simply not the case.
>
> …
>
> [101] **Given that there is no dispute about the fact** that the Israeli settlements in the West Bank are not part of the territory of the State of Israel, identifying Settlement Wines as being "Products of Israel" is false, misleading and deceptive. Moreover, as will be discussed further on in these reasons, labelling Settlement Wines as "Products of Israel" interferes with the ability of Canadian consumers to make "well informed decisions and well informed and rational

choices" in order to be able to "buy conscientiously".

[Emphasis added]

67. Psagot Winery fundamentally disagrees with this concession. Its interests were not represented by one of the parties.

Factor 5: The Interests of Justice are Better Served by the Intervention of Psagot Winery

68. This factor overlaps with other points already set out above. Psagot Winery should be "at the table" when an esteemed appellate court is considering Psagot Winery's labelling practice of placing "Product of Israel" labels on its bottles. All of the relevant facts should be placed before the Court to avoid a scenario similar to the Application where a significant decision with far-reaching effects was made based on a concession / agreement of the two parties to the dispute. Psagot Winery's position ought to be placed before the Court so that all matters in dispute can be effectually and finally determined.

69. Given the likely terms of Psagot Winery's intervention, including the limit on the amount of time allocated for oral submissions at any hearing of this Appeal, Psagot Winery's intervention will not jeopardize "the just, most expeditious and least expensive" determination of this proceeding on its merits. In fact, its intervention would likely facilitate such determination.

Factor 6: The Court Should Not Hear and Decide the Case on the Merits without Psagot Winery

70. For all of the reasons set out above (including but not limited to its unique perspective, its position that differs from the parties and interveners, its proposed factual evidence regarding its business practices and history of the winery), Psagot Winery should be involved in the Appeal, given that its practices formed the basis of the Judgment, notwithstanding that it was not present.

C. SUMMARY AND CONCLUSION

71. Psagot Winery is a proper party to the Appeal. It was a proper party to the Application, but unfortunately the clock cannot be turned back. In accordance with the *Rules* and the applicable jurisprudence, it should be added as a party with the corresponding orders to amend the title of proceedings, to direct the parties and proposed interveners to serve Psagot Winery with all court documents, and to provide directions to Psagot Winery with respect to its right to file materials and participate in the oral hearing of the Appeal.

72. In the alternative, and in the event that Psagot Winery is not granted an order adding it as a party, it should be granted Leave to intervene in the Appeal. It is in a unique position as the subject winery on the Appeal to provide relevant and material factual information as well as provide its legal submissions that will assist this Court in considering the issues before it.

PART IV - ORDER REQUESTED

73. Based on the foregoing, Psagot Winery requests an Order adding it as a party, with full rights to participate in the same manner as the other parties to the Appeal and the corollary orders set out in the Notice of Motion. In the alternative, Psagot Winery seeks Leave to intervene in the Appeal, with proposed limits to participate as ordered and directed by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Elmaleh / Aaron Rosenberg
RE-LAW LLP
Lawyers for Psagot Winery Ltd.

SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236
2. *Innovator Company v. Canada (Attorney General)*, 2017 FC 864
3. *Coulson Aircrane Ltd. v. Canada (Minister of Transport)* 1997 CarswellNat 648, 130 F.T.R. 161, 71 A.C.W.S. (3d) 418
4. *Ferroequus Railway Co. v. Canadian National Railway Co*., 2003 FCA 408
5. *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2018 FCA 81
6. *Sports Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 44

SCHEDULE ‘B’ — RULES

Federal Courts Rules (SOR/98-106)

Rules for Regulating the Practice and Procedure in the Federal Court of Appeal and the Federal Court

…

Application

1.1 (1) These Rules apply to all proceedings in the Federal Court of Appeal and the Federal Court unless otherwise provided by or under an Act of Parliament.

…

Order for joinder or relief against joinder

104 (1) At any time, the Court may

(a) order that a person who is not a proper or necessary party shall cease to be a party; or

(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

…

Leave to intervene

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

…

Respondents

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

Application for judicial review

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.