Federal Court  Cour fédérale

Date: 20181107

Dockets: T-1577-17
T-1763-17

Citation: 2018 FC 1118

Ottawa, Ontario, November 7, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

HONEY FASHIONS LTD

Applicant

and

PRESIDENT CANADA BORDER SERVICES AGENCY AND THE ATTORNEY GENERAL OF CANADA

Respondents

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JUDGMENT AND REASONS

[1] These are applications by Honey Fashions Ltd. [Honey Fashions] for judicial review of two decisions of the Canadian Border Services Agency [the CBSA] Trade Operations Division Manager, Gilles Cormier, rejecting claims for remission of duties under the *Textiles and Apparel Remission Order, 2014,* SOR/2014-278 [TARO 2014].

[2] I find that the decisions under review are unfair and unreasonable and they must be set aside. They are unfair as the administrative process followed was contrary to the legitimate expectations of Honey Fashions based on the past clear and consistent approach of the CBSA. They are unreasonable as they are arbitrary, being contrary to the long-standing past practice of the CBSA, being made without any explanation for the change in position, and being made without reference to its prior practice, or offering an explanation why that prior practice and interpretation of the relevant orders was being changed.

[3] The following sections dealing with the background to Canada's Textile and Apparel Remission Program [TARO Program], and the background facts directly relevant to the two decisions under review are taken from the affidavits sworn by Bernie Tevel and Stephen Yanow filed by Honey Fashions, and the affidavit of Bradley Jablonski filed by the respondents.

[4] Mr. Tevel is the President of Honey Fashions and has held that position since 1999. He provided evidence of the participation of Honey Fashions in the TARO Program, and the results of its various claims for remission prior to the decisions under review. Mr. Yanow is the

President of Piccolo Mondo Ltd. which was a blouse manufacturer in Montréal, Québec. It was one of the first Canadian manufacturers to use the TARO Program. Mr. Yanow attests that he "quickly became an expert in the rules and requirements of the program" and as his company's manufacturing business declined, he began "to focus on assisting other Canadian manufacturers to earn the benefits of the program." He states that between 1998 and 2012, the main business of his company (using the business name Global Remissions), "was matching Canadian manufacturers who were eligible to participate in various textile and apparel remission orders with Canadian importers who imported qualifying goods." Mr. Jablonski has been the manager of the Trade Incentives Unit, within the Trade and Anti-dumping Programs Directorate of the CBSA, since 2015. He states that he is responsible for "overall program management, national policy functional guidance and coordination relating to remission orders that the CBSA administers".

The TARO Program

[5] Goods imported into Canada are subject to customs duties and taxes; however, the Governor in Council may, by remission order, remit all or a portion of the customs duties. When a remission order is in effect goods will be imported subject to lower or no duties. When importers have paid duties on imported goods that are subject to a remission order they may subsequently claim a drawback or refund of duties paid. The claims under consideration relate to claims for drawback of duties paid.

[6] In 1988, in an effort to assist Canada's textile and apparel manufacturing businesses that were being negatively affected by low-priced imports, Canada established the TARO Program

putting in place a series of remission orders. The various remission orders were recommended to the Governor in Council by the Minister of Finance whose department drafted the remission orders and is responsible for the policy underlying them. The administration of the remission orders put in place under the TARO Program is the responsibility of the CBSA.

[7] Each of the remission orders contains a Schedule 1 listing the companies that are eligible manufacturers entitled to the benefit of the remission [Schedule 1 Manufacturer]. Initially, the remission orders provided that each of the Schedule 1 Manufacturer's eligibility for remission was conditional on it producing a certain volume of goods in Canada. The *North American Free Trade Agreement* obligated Canada to eliminate performance-based measures and so Canada changed the remission orders by removing that performance-based condition. The remission orders were accordingly amended to establish a maximum remission amount based on the total amount of remission that had been received in 1995 by each company. Under these orders each qualified company had five years to claim remission after the goods were imported.

[8] In 2010 the CBSA decided to review its administration of the TARO Program, and suspended the processing of all remission claims pending its Quality Assurance Review [QAR]. As a consequence, the claims of Honey Fashions for remission of duty on goods imported in 2006, 2007, 2008 and 2009 were held in abeyance.

[9] Mr. Yanow described the impact of the TARO Program on Canadian textile and apparel manufacturers in the years prior to the QAR. He attests that an "unintended consequence of the design of the program was that it encouraged manufacturers to become importers" in order to

take the benefit of the remission orders. Those that had no interest in becoming importers "began looking for ways to earn the benefits of the program as Canadian manufacturers without being obliged to start or expand an importing business." In short, they looked for ways to obtain the remission of duties on goods that they had not imported or were not going to import.

[10] Mr. Yanow, other manufacturers, and their association representatives met with officials of the Department of Finance to discuss how Schedule 1 Manufacturers in Canada with no desire to become importers could take advantage of the TARO Program. He attests that together they agreed to a work-around. "Officials of the Department of Finance ruled that, under the various remission orders, eligible Canadian manufacturers could contract with Canadian importers to ensure that the benefits of the remission program would flow to the Canadian manufacturers." Under this arrangement, what was required for a Canadian manufacturer listed on Schedule 1 to claim the benefit of the duty remission was that its name appear as the importer of record on the customs forms – it was not required that it be the actual purchaser of the goods. This, he says, is confirmed in an internal memo of April 26, 1993, authored by Dr. Patricia Close, Director of International Trade and Tariffs at the Department of Finance. This memo is significant to the issues in dispute and so is reproduced here in its entirety:

> Issue
>
> To review the extent of the practice known as "selling of entitlement" within the textile and apparel duty remission programs.
>
> Background
>
> The six textile and apparel remission Orders allow qualified manufacturers to import either fabric or apparel under remission based on the production and/or sourcing of either fabrics or apparel in Canada. The Orders were negotiated with industry after the FTA was announced and they address the consensus of the apparel

industry at that time. The intent of the Orders was to allow Canadian textile and apparel manufacturers to rationalize their production by specializing in only a few lines while earning remission credits to import complimentary goods. This would allow Canadian apparel manufacturers to market a complete fashion line.

The Orders allow manufacturers to import qualifying goods up to the amount of the remission entitlement earned; however, the Orders do not specify that the manufacturer has to own the goods imported [emphasis on the word "own" in original]. Nor does Customs legislation specify that the importer of record must be the owner of the imported goods.

When the programs were implemented, Customs officials met with industry representatives to explain the benefits of the programs. One of the concerns that industry mentioned was that many of the manufacturers have never been importers of finished products and in order to receive the intended benefits they were being forced to import. Some industry representatives suggested that they could make deals with importers (in many cases, their customers) to import goods under the manufacturer's entitlement. This suggestion was discussed with Finance and it was decided that manufacturers could do business in any manner they chose as long as the manufacturers had accumulated the eligible entitlement and that the manufacturer was the importer of record – any requirement beyond this would be administratively difficult to enforce. However, it was stressed to the manufacturers that they would still be responsible for any implications of goods they did not own (i.e. must repay duties on imports over entitlement).

Status

At a recent apparel and footwear SAGIT [Sectoral Advisory Group on International Trade], the Chairman, Jack Kivenko, brought up the issue. He was surprised when he was approached by a consultant who was offering services to broker his entitlements. Other members of the SAGIT noted to him that the selling of their remission entitlements was common practice and one which allowed them to benefit from the program when they didn't need the import benefits. They asked that Kivenko's derogatory comments be struck from the record.

As a result of the SAGIT meeting, Customs has contacted their regional offices concerning the pervasiveness of the selling of remission entitlements. While the information they received was not complete or detailed, it appears that the practice is widespread

throughout the industry sector. In Winnipeg, it seems that almost all participants (90%) in the program are either buying or selling entitlements. Originally the companies were only buying and selling entitlement locally but recently the companies involved are selling nationally. In Montréal, it is estimated that about 60% of the companies are engaging in this practice.

The "remission broker" is a recent phenomenon. These are customs brokers or consultants who identify manufacturers who have not used all of their import entitlement. For a fee, they locate importers who are interested in buying the entitlement. Depending on how you look at it, they essentially provide a service to manufacturers to locate importers willing to purchase excess entitlement. In this way, the manufacturers will receive some of the remission benefit (in the form of cash) that they have earned but otherwise would not have used.

Assessment

Finance was apprised at the inception of the program about the possibility of selling of entitlement and, as it is currently taking place, the practice is in compliance with the conditions set out in the remission Orders and the Customs Act. (There is no requirement in the Orders that the importer of record be the owner of the goods imported. Manufacturers are simply acting as agents for third-party owners and paying a remitted duty - the benefit of which is passed on to the owner.) In fact, it could be argued that it is the marketplace at work.

In the course of the NAFTA, we tried to negotiate some flexibility to make changes affecting the administration of the Orders, but ran up against a brick wall. The U.S. could react negatively to the Canadian producers selling the entitlements and the development of the "remission broker" makes it more likely that the U.S. could find out about the practices – given the fact that consultants are now involved in brokering the entitlements. On the other hand, the U.S. may already be aware of the practice and, because of benefits to their industry when Canadian companies import U.S. goods under the programs, may already be willing to turn a blind eye.

It is important to note that the sale of remission entitlement directly benefits Canadian apparel producers who are currently unable to benefit from the Orders to the extent intended. (Program take-up is currently only about 50% due to, inter alia, technical difficulties with the Orders created, in large part, by unforeseen changes in the industry.) To prohibit this practice could, to a large extent, counteract our efforts to provide additional assistance to the

> apparel sector via the temporary waiver of the penalties in the Orders. It would also be vociferously opposed by almost all apparel producers. (In any event, the programs end by 1998.) Moreover, market practices would likely make it possible for manufacturers and prospective buyers of entitlement to work around any changes to the programs that would be designed to prevent the practice.
>
> In the circumstances, and since the U.S. has tied our hands at making even the most modest technical changes to the Orders (in case the proposed changes would increase the benefits to the producers), I would recommend that we instruct Customs to continue to monitor the situation, but otherwise lie low.
>
> If you'd like to discuss a more proactive role, please let me know.
>
> [additional emphasis added]

[11] As was noted by counsel, these arrangements were so notorious that the CBSA gave them a name: "Partnering Agreements."

[12] Memorandum D8-11-7 *CBSA Policy on the Transfer of Entitlement Pursuant to the Textile and Apparel Remission Orders* outlines and explains how Schedule 1 Manufacturers may use Partnering Agreements to take full advantage of the remission entitlement. The relevant provisions of Memorandum D8-11-7 are as follows:

> **Partnering Agreements**
>
> 5. Subject to conditions, an eligible apparel manufacturer or eligible fabric producer (one who is named in the Schedule to the Order), may enter into a partnering agreement with another company in order to realize its full remission allocation in a given year. In this way the eligible company is the importer of record for the goods and the other company is the owner or consignee of the goods.

Accounting and Adjustment Requirements

> 6. If goods that are subject to a partnering agreement and for which remission is or will be claimed have already been imported and accounted for in the name of the other company (i.e., the owner or purchaser), it will be necessary to amend the importer name before remission will be approved. In such cases, a name change request must be submitted in accordance with instructions set out in CBSA Memorandum D-17-2-3, *Importer Name/Account Number or Business Number Changes*.

[13] Paragraph 5 makes it clear that a Schedule 1 Manufacturer need not be the owner of the goods and paragraph 6 makes it clear that it need not have been the importer. Under that paragraph, a party that has imported goods and paid the duty on the goods may subsequently be replaced as the importer of record by a Schedule 1 Manufacturer, by way of name change request, which will then be entitled to claim the remission under the TARO Program.

[14] CBSA also accepted that a Schedule 1 Manufacturer's remission entitlement under the remission orders could be transferred on cessation of its business to another Schedule 1 Manufacturer. In this manner Honey Fashions, among others, increased its remission entitlement from that which was specifically given to it in the remission orders. In the QAR, CBSA determined that it ought not to have permitted manufacturers to increase their original entitlements in this manner and it proposed to restrict manufacturers to their original entitlement.

[15] After consultation, and having determined that manufacturers had been acting in good faith in transferring remission entitlements, CBSA decided that it would not restrict Schedule 1 Manufacturers to their original entitlement. To address the situation the Department of Finance recommended to the Governor in Council that it enact TARO 2014. The Regulatory Impact

Analysis Statement that accompanied TARO 2014 explained the error in accepting transfers was that of CBSA alone, and described the effect of TARO 2014 as follows: "Remission is available for goods for which an authorization for remission was issued before December 31, 2012, and which were imported into Canada during the period beginning January 1, 2008, and ending December 31, 2012."

[16] The QAR also disclosed two other errors in the administration of the TARO Program by the CBSA. It is important when judging these applications to note that the practice of manufacturers and importers entering into contractual agreements whereby the manufacturer became the importer of record but not the owner of the goods, as described by Mr. Yanow and Dr. Close, was not identified as an error or something that the CBSA was required to address.

[17] Mr. Tevel attests that Honey Fashions has always participated in the TARO Program and "ensured it received the full remission benefit it was entitled to" by becoming "the importer of record of goods that were previously imported by others." He attests that this was done in the following manner:

> Honey Fashions became the importer of record by filing a name change notification with the Canada Border Agency ("CBSA") confirming that, with the agreement of the original importer, it was becoming the importer of record of apparel that qualified for remission. Until our 2011 and 2012 applications, CBSA officials consistently accepted such name change notification to change the importer of record, and processed Honey Fashions' remission applications on the basis that Honey Fashions was the importer of record. [emphasis added]

[18] As noted above, as a consequence of the QAR, the unprocessed claims of Honey Fashions were held in abeyance. Following that review and the passing of TARO 2014, these claims were processed.

[19] One of the claims held in abeyance was the claim of Honey Fashions filed November 11, 2010, for $216,305.30 [the 2009 Claim]. That claim was accompanied with the request of Honey Fashions that it become the importer of record for the goods that had previously been imported by another. A number of letters accompanied the claim relating to the transactions listed in it. Each letter contained similar language, as follows:

> In compliance with Memorandum D 17-2-3, paragraph 10, kindly forward our letter to regional records room, for filing with accounting documents.
>
> | | |
> |---|---|
> | Importer name entered as: | 863453767 RM 0001
Reitmans Distribution Inc.
250 Sauve Street West
Montreal, Quebec
H3L 1Z2 |
> | Should be: | 102391109RM0001
Honey Fashions Ltd
1615 Louvain St. Quest
Montreal, Quebec
H4N 1G6 |
>
> Incorrect party has been named as importer of record and true importer is not [*sic*] entitled to conditions, exemptions, privileges, remission orders or licences, and both parties in this transaction consent to the change as per aforementioned Memorandum and formal notification by copy of this letter.

It appears to the Court that the inclusion of the word “not” is in error as it is not included in later submissions which track the language in section 13 of Memorandum D 17-2-3.

[20] Paragraph 10 of Memorandum D17-2-3 referenced in the request letter provides as follows:

> Should an importer/broker/agent wish to notify the CBSA of an error in the importer name/account number or business number, a letter should be sent to the CBSA Trade Operations office in the region where the goods were released, explaining the reason for the change. When this letter is presented by a broker or an agent, it must indicate that a copy has been sent to the original importer of record. CBSA Trade Operations will forward the letter to the regional records room for filing with the accounting document. Note that the CBSA's automated system will not be updated to reflect the information contained in the letter.

[21] After the QAR had been completed, by letter dated April 30, 2015, Gilles Cormier "approved and finalized" the 2009 Claim (as well as the others held in abeyance), and a payment in the amount claimed was sent to Honey Fashions.

[22] The CBSA on July 16, 2015 advised Honey Fashions that in accordance with the *Outerwear Apparel Remission Order*, Honey Fashions was entitled to a refund of duties under the TARO Program for goods imported in 2011 and 2012, not exceeding a total of $137,025.00. Honey Fashions filed a claim for a drawback of duties for goods imported in 2011 in the amount of $66,427.17 [Claim 269503]. Gilles Cormier refused that claim, writing:

> This letter is to inform you that drawback claim no. 269503, in the requested amount of $66,427.17 and received in this office on May 13, 2016 has been refused.
>
> A request for a name change must be the result of an error of the importer or the Canadian Border Services Agency (CBSA) as described in Memorandum D17-2-3, Importer Name/Account Number or Business Number Change.
>
> The documents you have provided do not clearly establish that the name change is the result of an error of the importer or the Canada

> Border Services Agency or that the terms of Memorandum D17-2-3 have been met.

[23] Honey Fashions submitted a revised claim for outerwear remission for 2011, asking that the claim be considered in light of additional submissions it was advancing. The revised claim was in the amount of $68,512.48 [Claim 270228]. The refusal decision dated September 6, 2017 was in language identical to that refusing Claim 269503. The decision refusing Claim 270228 is that under review in Docket T-1763-17.

[24] The CBSA on July 18, 2015, advised Honey Fashions that in accordance with the *Blouses, Shirts and co-ordinates Remission Order*, Honey Fashions was entitled to a refund of duties under the TARO Program for goods imported in 2011 and 2012, not exceeding a total of $3,143,139.32. Honey Fashions filed six separate drawback claims with respect to goods imported in 2011 and 2012. These claims were consolidated into one [Claim 268618] totalling $3,002,642.79.

[25] Included with Claim 268618 were letters identical to that reproduced at paragraph 18 above, save that the first line of the last paragraph omitted the word “not” and thus reads as follows:

> Incorrect party has been named as importer of record and true importer is entitled to conditions, exemptions, privileges, remission orders or licences, and both parties in this transaction consent to the change as per aforementioned Memorandum and formal notification by copy of this letter.

[26] By letter dated August 12, 2015, from Mr. Gilles Cormier, Honey Fashions was informed that its claim was under review:

> This letter is to inform you that drawback claim no. 268618, in the requested amount of $3,002,642.79 and received in this office on July 14, 2015, is currently under review.
>
> Some of the goods claimed are not imported or duty paid by your company.
>
> Furthermore, a request for a name change must be the result of an error of the importer or the Canadian Border Services Agency (CBSA) as described in Memorandum D17-2-3, *Importer Name/Account Number or Business Number Change*.
>
> In order for the CBSA to conduct a further review for consideration of the name change, the following documentation is required:
>
> a. Documents (e.g. purchase orders, commercial invoices, cancelled cheques, fax transmissions, written correspondence, etc.) which clearly indicate the claimant's interest and the part played by the claimant in the import transaction;
>
> b. A letter from the importer of record, declaring involvement in the importation;
>
> c. A clear and complete explanation of why the party named as the importer on the original accounting document was so named, and why the importer/agent now believes that a second party is the true importer.

[27] By letter dated February 4, 2016, Mr. Gilles Cormier advised Honey Fashions that Claim 268618 was refused for reasons identical to those provided when he refused Claim 269503, namely:

> The documents you have provided do not clearly establish that the name change is the result of an error of the importer or the Canada Border Services Agency or that the terms of Memorandum D17-2-3 have been met.

[28] On December 23, 2016, Honey Fashions resubmitted the entire claim for $3,071,133.83 [Claim 270217] accompanied by submissions identical to those which it had provided previously in regard to Claim 269503. CBSA responded in a manner similar to that involving the other claim. By decision dated September 6, 2017, and in language identical to that relating to the rejection of claim 270228, Mr. Gilles Cormier refused Claim 270217. The decision rejecting Claim 270217 is the decision under review in Docket T-1577-17.

[29] Mr. Tevel attests that the claims made for 2011 and 2012 (by way of change of importer of record name after importation) were done in the same manner as all previous claims that had been approved by CBSA:

> The name change procedure that Honey Fashions followed for 2011 and 2012 was precisely the same name change procedure we had followed, and CBSA had accepted, in previous remission claims, including those of 2007, 2008, and 2009. The claims for 2007 were processed under the previous orders, but the claims for 2008 and 2009 were processed under Taro 2014. Mr. Cormier's letter was the first indication that CBSA was about to reverse its previous position on name changes. [emphasis added]

Issues in Dispute

[30] There are two issues that must be addressed:

1. What is the standard of review of the decision under review; and
2. On the basis of that standard, do the decisions withstand review?

Standard of Review

[31] Honey Fashions submits the standard of review is correctness.

[32] It points to *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], wherein the Supreme Court of Canada at para 55 stated that questions of law of central importance to the legal system and outside the specialized area of expertise of the administrative decision-maker attract a correctness standard. The Supreme Court at para 59 of *Dunsmuir* also noted that "administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*."

[33] Honey Fashions notes that while the *Customs Act* is within the CBSA's jurisdiction, it has no jurisdiction to determine who may or may not be the importer of goods. It says that Parliament has not given any jurisdiction to the CBSA in this regard and that the only limited jurisdiction it has assigned is to the Governor in Council through paragraph 164(1)(e) of the *Customs Act*, and this is only in regards to non-resident importers. Honey Fashions submits that in purporting to exercise an authority that has not been delegated to it, CBSA has made an error of law that is reviewable for correctness.

[34] I agree with Honey Fashions that if the CBSA has no authority to decide whether or not one is an importer under the *Customs Act* and the remission orders, then the decisions under review cannot stand. However, for the reasons that follow, I find that it does have such authority and jurisdiction and its decision is subject to review on the standard of reasonableness.

[35] Paragraph 5(1)(a) of the *Canada Border Services Agency Act*, SC 2005, c 38 stipulates that CBSA "is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by supporting the

administration or enforcement, or both, as the case may be, of the program legislation." "Program legislation" pursuant to section 2, includes and any Act or instrument made under any Act or part thereof "under which duties or taxes collected and paid pursuant to the *Customs Act* are imposed."

[36] On a plain reading, CBSA is responsible for the administration and enforcement of duties and tariffs arising under the *Customs Act* and remission orders. I agree with the respondents that in order for CBSA to carry out its "mandate to conduct a compliance verification, it inevitably needs to identify the importer who is subject to the *Customs Act*." As the Supreme Court of Canada observed in *ATCO Gas & Pipeline Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4; at para 51: "[T]he powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislation."

[37] Therefore, I find that the CBSA does have jurisdiction to make decisions as to the identity of the importer of goods into Canada, and it is required to do so as a part of its implied powers. As it is interpreting its home statute, it does so subject to a reasonableness review.

The CBSA Interpretation

[38] Determination of the importer is relevant to the decisions under review which were made pursuant to TARO 2014, which provides as follows:

> 1. (1) Remission is granted to the companies set out in Schedule 1 of customs duties paid or payable under the *Customs Tariff* in

> respect of goods for which the Canada Border Services Agency, in error, issued authorizations for remission of customs duties in the course of its administration of the initial remission orders set out in column 1 of Schedule 2.
>
> (2) The amount of the remission granted to each company is calculated in accordance with the initial remission order under which the authorization for remission was issued.
>
> 2. The remission is granted to each company on the following conditions:
>
> > (*a*) the goods were imported into Canada during the period beginning on January 1, 2008 and ending on December 31, 2012;
> >
> > (*b*) the authorization for remission was issued to the company on or before December 31, 2012; and
> >
> > (*c*) an application for the remission is received by the Canada Border Services Agency on or before the deadline set out in column 2 of Schedule 2 in respect of the initial remission order under which the authorization for remission was issued.

[39] The initial remission orders relevant to the decisions under review are the *Outerwear Apparel Remission Order, 1998*, SOR/98-88 (regarding Claim 270228) and *Blouses, Shirts and Co-Ordinates Remission Order, 1998*, SOR/98-89 (regarding Claim 270217). Each order contains identical language relating to remission, as follows:

- Re Claim 270228: "remission is hereby granted of the customs duties paid or payable under the *Customs Tariff*, to a manufacturer of outerwear apparel set out in the schedule in respect of outerwear apparel <u>imported into Canada by the manufacturer</u> … [emphasis added]."

- Re Claim 270217: "remission is hereby granted of the customs duties paid or payable under the *Customs Tariff* to a women's blouse, shirt or co-ordinated apparel

> manufacturer, set out in the schedule in respect of blouses, shirts or co-ordinated apparel imported into Canada by the manufacturer … [emphasis added]."

[40] It appears to the Court, and there is no suggestion to the contrary, that the claims for remission leading to the decisions under review meet all of the conditions for acceptance so long as the goods were "imported into Canada by the manufacturer." It is evident that had the name change request been positively acted upon by the CBSA, Honey Fashions would have become the importer of record, and thus would have "imported into Canada" the goods in question.

[41] Therefore, the decision to deny Honey Fashions the remissions under the TARO Program stands or falls with the decision not to accept the name change to list Honey Fashions as the importer of record.

[42] I find that the decision not to accept the name change cannot stand for two reasons: first, it was made in breach of CBSA's duty of fairness, and second, it was arbitrary and thus unreasonable.

Legitimate Expectations

[43] In its memoranda Honey Fashions submits that the decision of the CBSA not to accept it as the importer of record was contrary to many years of practice and was unfair:

> Mr. Cormier's decision to reject Honey Fashions' application for duty remission was founded on his refusal to permit a name change from the original importer to Honey Fashions.
>
> In refusing to act on the proposed name change, Mr. Cormier decided (contrary to twenty years of CBSA's consistent practice)

> that Honey Fashions cold not be listed as the importer of record of imported goods. No CBSA official has such authority.
>
> …
>
> CBSA's radical departure from its consistent practice, under the TARO Program, including its prior decision under Honey Fashions'' application under TARO 2014, was arbitrary, unfair, and not based on any express or implied condition of any remission order.

[44] The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, observed that if one has a legitimate expectation that a certain procedure will be followed, then that procedure will be required by the duty of fairness:

> Our Court has held that, in Canada, this doctrine [of legitimate expectations] is part of the doctrine of fairness or natural justice, and that it does not create substantive rights. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. <u>This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights</u>. [emphasis added and authorities omitted]

[45] In *Canada (Attorney General) v Mavi*, [2011] 2 SCR 504 at para 68, Justice Binnie observed that "representations" that create legitimate expectations must be "clear, unambiguous

and unqualified." The same may be said of regular practices of administrative decision-makers that ground a legitimate expectation.

[46] I find that in the circumstances at hand that there is a clear, unambiguous and unqualified regular administrative practice of the CBSA that the name change submitted to name a Schedule 1 Manufacturer post importation would be accepted and subsequent remission of duties to it would follow.

[47] The uncontradicted evidence before the Court is that Honey Fashions has participated in the TARO Program since its inception, that it was not a major importer of apparel but took full advantage of its entitlements under the program by becoming the importer of record of goods previously imported by others. It did so by filing a name change with the CBSA to record it as the importer of record, with the agreement of the initial importer. This procedure was accepted and arguably endorsed by the CBSA. Until the decisions under review were made, "CBSA officials consistently accepted the name change notification to change the importer of record, and processed Honey Fashions' remission applications on the basis that Honey Fashion was the importer of record." The change in the procedure for changing the importer of record had dramatic consequences to Honey Fashions.

[48] Not only was this administrative process consistently accepted by the CBSA, it was not flagged during the QAR as an unacceptable, suspect or illegitimate practice. Nor did it raise any concern during any of the three audits of Honey Fashions done by the CBSA. I am satisfied that the evidence discloses a clear, unambiguous and unqualified regular practice of administrative

decision-makers that ground a legitimate expectation. Moreover, as submitted by Honey Fashions, "[t]he arbitrary and unfair nature of CBSA's change of policy was exacerbated by the fact that it occurred long after Honey Fashions could even consider complying with it."

Unreasonable Decision

[49] I also find that the decisions under review made by Mr. Gilles Cormier are unreasonable.

[50] The respondent accepts that these decisions were contrary to, and in fact the exact opposite of, the decision he made regarding the 2009 Claim. The respondents submit that previous CBSA decisions and the 2009 Claim decision in particular are irrelevant. They say that administrative decision-makers are not bound by their previous decisions (citing *Domtar Inc v Québec (Commission d'appel en matière de lésions professionnelles*), [1993] 2 SCR 756 [*Domtar*]) and because the doctrine of *stare decisis* does not apply in the context of administrative tribunals (Citing *Canada Post Corporation v Canadian Union of Postal Workers*, 2015 FC 682 [*Canada Post*]).

[51] In *Domtar* the Supreme Court of Canada overturned a decision of the Québec Court of Appeal that had overturned an interpretation of a section of the Act respecting Industrial Accidents and Occupational Diseases given by the Commission d'appel en matière de lésions professionnelles. The Court of Appeal did so, not because the interpretation was patently unreasonable, but because it conflicted with an earlier interpretation given by the Labour Court: an interpretation it preferred. The inconsistency in interpretation was therefore between two

different administrative tribunals, and not within the same tribunal. In fact the evidence was that each tribunal had consistently adhered to its own interpretation.

[52] The decisions here under review were made by the same person who made two decisions only a few months apart on identical material facts, but reached a different result. While the doctrine of *stare decisis* does not apply to administrative decision-makers, they remain subject to the requirement described by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 that their decisions be justified, transparent and intelligible.

[53] Here Mr. Gilles Cormier, the decision-maker, makes no reference to his earlier decision or the long-standing departmental practice. He offers no explanation why the practice followed by Honey Fashions in the applications for remission results in the opposite result from that reached many times over 20 years. In my view, if an administrative judge rules "X" on one occasion and then rules "Not X" shortly thereafter on identical material facts, with no explanation for the difference, one cannot but conclude that the decision is arbitrary – it lacks "justification, transparency and intelligibility within the decision-making process."

Conclusion

[54] For these reasons the decisions under review must be set aside and the remission claims of Honey Fashions be remitted back to the CBSA to be determined afresh by a different decision-maker, if possible, but in any event in keeping with the legitimate expectations of Honey Fashions based on the consistent and long-standing practice of the CBSA.

[55] Honey Fashions is entitled to its costs which the parties agreed should be set for both applications at $6,719.40.

JUDGMENT IN T-1577-17 AND T-1763-17

THIS COURT'S JUDGMENT is that these applications are allowed, the decisions under review are set aside and the remission claims of Honey Fashions are to be determined afresh by a different decision-maker, if possible, but in any event in keeping with the legitimate expectations of Honey Fashions based on the consistent and long-standing practice of the CBSA; and Honey Fashions is entitled to its costs fixed at $6,719.40 for both applications.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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