Federal Court  Cour fédérale

Date: 20200331

Docket: T-15-19

Citation: 2020 FC 462

Ottawa, Ontario, March 31, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

KIK CUSTOM PRODUCTS INC.

Applicant

and

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY (CBSA)

Respondent

JUDGMENT AND REASONS

> Let us take, for example, this piece of wax. It has just been taken from the honeycomb; it has not yet quite lost the taste of the honey; it retains some of the scent of the flowers from which it was gathered; its colour, shape and size are plain to see; it is hard, cold and can be handled without difficulty; if you rap it with your knuckle it makes a sound. In short, it has everything which appears necessary to enable a body to be known as distinctly as possible. But even as I speak, I put the wax by the fire, and look: the residual taste is eliminated, the smell goes away, the colour changes, the shape is lost, the size increases; it becomes liquid and hot; you can hardly touch it, and if you strike it, it no longer makes a sound. But does the same wax remain?
>
> René Descartes, Meditations on First Philosophy (1641)

I. OVERVIEW

[1] Is a container that has been filled with something in the same condition as it was in before it was filled? This is not just an interesting philosophical question. The answer can have significant consequences under international trade agreements.

[2] KIK Custom Products Inc., the applicant, is an Ontario-based company that manufactures a variety of packaged consumer goods including household and personal care products. One of its operations involves importing empty, pre-labeled plastic container products (bottles, tubes, caps, and lids) from outside North America. The containers are filled at the applicant's plant with sunscreen and other body care products such as moisturizers and acne treatments which the applicant manufactures in Canada. The filled containers (pre-labelled with various brand names and markings) are then sealed and packaged for shipment to retailers in the United States. A small percentage of the applicant's products are also exported to Australia.

[3] The applicant pays customs duties on the container products when they are imported into Canada. However, as explained below, the applicant may be entitled to a "drawback" or refund of these payments if the container products are exported in the same condition as they were in when they were imported into Canada.

[4] Between January 1, 2016, and April 12, 2017, the applicant paid some $447,818.57 in customs duties on plastic container products that it imported into Canada. In May 2018, the applicant filed a claim under the Canada Border Services Agency's Duty Drawback Program for

$411,247.74 pertaining to container products that had been filled and then exported. In response, CBSA directed the applicant to submit a request for a "same condition" process ruling in relation to the goods in question. The applicant submitted this request on or about August 30, 2018.

[5] While the ruling was pending, CBSA approved the applicant's drawback claim provisionally and authorized an interim payment of $287,873.00. However, in a letter dated November 8, 2018, a Senior Program Officer with CBSA informed the applicant that "the processes applied to the goods are not allowable" and, as a result, the applicant was not entitled to the drawback it had claimed. Because of a delay in sending this letter to the applicant, the decision was re-issued on November 30, 2018. The two letters are otherwise identical.

[6] The applicant has applied for judicial review of this decision under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The applicant contends that the officer's determination that the exported goods are not in the same condition as when they were imported is unreasonable.

[7] For the reasons that follow, I am not persuaded that the decision is unreasonable. Standing on its own, the November 30, 2018, letter is problematic in ways I will elaborate upon below. However, it does not stand alone. I am satisfied that, reading the letter together with communications between the officer and representatives of the applicant after the decision was released and against the legal backdrop to "same condition" rulings, the officer's decision meets the requirements of justification, transparency and intelligibility. As a result, the application for judicial review will be dismissed.

II. STANDARD OF REVIEW

[8] The parties agree, as do I, that the officer's decision should be reviewed on a reasonableness standard. This is the standard articulated by this Court previously in relation to "same condition" rulings: see *Dorel Industries Inc v CBSA*, 2014 FC 175 at para 14 [*Dorel*].

[9] Shortly after the hearing of the present application, the Supreme Court of Canada set out a revised approach for determining the standard of review with respect to the merits of an administrative decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is now the presumptive standard, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Vavilov* at para 10). In my view, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review here.

[10] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasized were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. Although, as already noted, the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the officer's decision is consistent with the *Vavilov* framework. I have applied that framework in coming to the conclusion that the officer's decision is reasonable; however, the result would have been the same under the *Dunsmuir* framework.

[11] Reasonableness review "aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (*Vavilov* at para 82). The focus of reasonableness review "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83).

[12] The exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96).

[13] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Where the decision maker has provided reasons, the reviewing court must begin its inquiry into the reasonableness of the decision "by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion" (*Vavilov* at para 84, internal quotation marks deleted). The reasons must be read in light of the record as a whole and with due sensitivity to the administrative setting in which they were given (*Vavilov* at paras 91-94). The goal is to "develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable" (*Vavilov* at para 99). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13).

[14] As noted, the officer's decision was originally set out in a letter dated November 8, 2018, which was then re-issued on November 30, 2018. After receiving the decision, the applicant's representatives exchanged several emails with the officer seeking clarification and reconsideration of his determination that the processes in question were not allowable. The applicant's initial position on this application for judicial review was that the November 30, 2018, letter must stand or fall on its own and that the subsequent emails should not be considered when assessing the reasonableness of the officer's decision. However, the applicant moderated this position somewhat during the hearing of this matter. I will address this issue further below.

[15] The burden is on the applicant to demonstrate that the officer's decision is unreasonable. The applicant must establish that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

III. LEGAL CONTEXT

[16] Canadian tariff law provides for a number of circumstances under which a Canadian importer of goods may be granted relief from the payment of duties that would otherwise be payable on those goods when they are imported. Canada's ability to grant relief in relation to imported goods that are subsequently exported to the United States or Mexico is, however, constrained by the terms of the *North American Free Trade Agreement* [*NAFTA*]. Specifically, the *NAFTA* includes Article 303, which addresses restrictions on drawback and duty deferral programs. Paragraph 1 of Article 303 provides that refunds, waivers or reductions of customs

duties is generally limited to the lesser of (i) the total amount of customs duties paid upon the importation of the good and (ii) the total amount of customs duties paid to another *NAFTA* member if that good is subsequently exported to that particular member's territory. This is referred to colloquially as the "lesser of" rule.

[17] Under the "lesser of" rule, if the rate of customs duties on goods exported from Canada to the United States or Mexico is zero, then a Canadian exporter cannot be granted relief on any duties paid for importing those goods into Canada: see *Dominion Sample Ltd, v Canada (Customs and Revenue Agency)*, 2003 FC 1244 at para 15 [*Dominion Sample*].

[18] There is an exception to this rule. Paragraph 6(b) of Article 303 of the *NAFTA* provides that duty relief is permitted when the imported goods that are subsequently exported to another party to the agreement are in "the same condition" as they were in when they were imported into the first party's territory. This idea is incorporated into domestic Canadian law. Under section 89(1)(a) of the *Customs Tariff*, SC 1997, c 36, customs duty relief can be granted when imported goods are "released and subsequently exported in the same condition in which they were imported."

[19] In relevant part, paragraph 6(b) of Article 303 states:

6. This Article does not apply to:	**6.** Le présent article ne s'applique pas:
b) a good exported to the territory of another Party in the same condition as when imported into the territory of the Party from which the	**b)** à un produit exporté vers le territoire d'une autre Partie dans le même état qu'au moment de son importation sur le territoire

good was exported (processes such as testing, cleaning, repacking or inspecting the good, or preserving it in its same condition, shall not be considered to change a good's condition).	de la Partie d'où le produit a été réexporté (l'essai, le nettoyage, le réemballage, l'inspection ou les méthodes de préservation ne sont pas réputés modifier l'état d'un produit).

[20] The use of the English phrase "such as" suggests that this is a non-exhaustive list. In other words, a process like the ones listed Article 303.6(b) also "shall not be considered to change a good's condition" even if it is not listed in Article 303.6(b). While originally arguing otherwise in its Memorandum of Fact and Law, at the hearing of this application the respondent conceded that the list of processes in Article 303.6(b) is non-exhaustive. (While nothing in the French version of the provision corresponds directly to the phrase "such as," the Spanish version of the provision is the same as the English.)

[21] To promote consistent interpretation of the agreement, the parties to the *NAFTA* adopted the *Uniform Regulations for Chapter 3 and 5 of the NAFTA* [*Uniform Regulations*]. The "same condition" exception is addressed in Section F, Article X, paragraph 8 of the *Uniform Regulations* as follows:

8. For purposes of Article 303.6(b) of the Agreement, the circumstances under which a good shall be considered to be in same condition include the following:	**8.** Aux fins de l'alinéa 303(6)b) de l'Accord, les circonstances dans lesquelles un produit est jugé être dans le même état incluent :
(a) mere dilution with water or another substance;	**a)** une simple dilution avec de l'eau ou une autre substance;
(b) cleaning, including	**b)** le nettoyage, y compris

removal of rust, grease, paint or other coatings;	l'enlèvement de la rouille, de la graisse, de la peinture ou d'autres revêtements;
(c) application of preservative, including lubricants, protective encapsulation, or preservation paint;	**c)** l'application d'un produit de préservation, y compris un lubrifiant, une encapsulation ou un revêtement protecteur;
(d) trimming, filing, slitting or cutting;	**d)** le rognage, le limage, le découpage ou le coupage;
(e) putting up in measured doses, or packing, repacking, packing [*sic* packaging] or repackaging; or	**e)** la présentation en quantités mesurées, l'emballage ou le remballage du produit, l'empaquetage ou le rempaquetage du produit;
(f) testing, marking, labelling, sorting or grading, provided that such operations do not materially alter the characteristics of the good.	**f)** l'essai, le marquage, l'étiquetage, le tri ou le classement, pourvu que de telles opérations n'altèrent pas, de façon substantielle, les caractéristiques du produit.

[22] The use of the phrase “include the following” (“*incluent*”) suggests that this is a non-exhaustive list as well. This is also now conceded by the respondent.

[23] It will be apparent that Article 303.6(b) does not require a good to stay exactly the same to avoid the “lesser of” rule. Some of processes listed there (e.g. cleaning or preserving a good) could be said to change the condition of the good but this does not bar the application of the “same condition” exception. Paragraph 8 of the *Uniform Regulations* adds to this list of allowable processes.

[24] As paragraph 8 of the *Uniform Regulations* is drafted, the phrase "provided that such operations do not materially alter the characteristics of the good" ("*pourvu que de telles opérations n'altèrent pas, de façon substantielle, les caractéristiques du produit*") appears to modify only the kinds of operations listed in sub-paragraph (f), as opposed to all the other kinds of operations or processes listed in paragraph 8 as well. Despite this, it is common ground that whether an operation or process has materially altered the characteristics of a good is an appropriate test for determining whether the good has remained in the same condition for purposes of Article 303.6(b) of the Agreement.

[25] Unlike Article 303.6(b), none of the operations or processes listed in paragraph 8 of the *Uniform Regulations* are deemed to leave the condition of a good unchanged. Thus, apart from those specifically listed in Article 303.6(b) and others like them, if applying an operation or process – even one of those listed in paragraph 8 – materially alters the characteristics of the good, the "same condition" exception to the "lesser of" rule does not apply. Nevertheless, the list of operations and processes in paragraph 8 provides helpful examples of the sorts of things that can leave a good in the same condition for purposes of customs duty relief, as long as they do not materially alter the characteristics of the good. (I note parenthetically that the terms "operation" and "process" appear to be used interchangeably in this area. Nothing in the present case turns on whether what the applicant does with the imported container products is an operation or a process.)

[26] It is also common ground that the rationale for this restriction on customs duty relief in the *NAFTA* is, at least in part, to prevent parties to the agreement from giving a competitive

advantage to companies engaged in manufacturing in their territory by indirectly subsidizing the companies through excessive duty relief. This concern does not arise if the good in question departs the party's territory in the same condition as it was in when it arrived. In such a case, no manufacturing has occurred. Hence the "same condition" exception to the "lesser of" rule. At the same time, it is recognized that companies should be able to deal with imported products in certain ways without loosing the benefit of the "same condition" exception. To help ensure that this exception is interpreted and applied consistently, the parties to the *NAFTA* adopted Article 303.6(b) of the Agreement and paragraph 8 of the *Uniform Regulations.* Both offer some indication of what the parties to the agreement consider to be an allowable operation or process and what they consider not to be allowable. In Canada, officials with CBSA determine on which side of this line a given operation or process falls.

[27] CBSA has prepared memoranda to explain the operation of its duty drawback and duties relief programs. For present purposes, Memorandum D7-4-3 – NAFTA Requirements for the Duty Drawback and the Duties Relief Programs (dated may 27, 2015), is particularly germane. It is the sort of document an administrative agency like CBSA will adopt to encourage greater uniformity in decision making and to guide the work of frontline decision makers (cf. *Vavilov* at para 130).

[28] The following four points are found in the memorandum under the heading "Same Condition Processes."

[29] First, the *NAFTA* "allows full drawback or deferral of customs duties on goods exported in the same condition in which they were imported. Imported goods may undergo certain operations in Canada and still be considered to be exported in the same condition."

[30] Second, the memorandum states:

> The following are examples of minor operations that are permissible provided the operation does not materially alter the characteristics of the good. Such operations include:
>
> (a) mere dilution with water or another substance;
>
> (b) cleaning, including removal of rust, grease, paint or other coatings;
>
> (c) the application of a preservative, including lubricants, protective encapsulation, or preservation paint;
>
> (d) trimming, filing, slitting, or cutting;
>
> (e) putting up in measured doses, or packing, repacking, packaging, or repackaging; or
>
> (f) testing, marking, labelling, sorting, or grading.

[31] It will be apparent that this list tracks the list found in paragraph 8 of the *Uniform Regulations*. Interestingly, the phrase "provided the operation does not materially alter the characteristics of the good" is applied to all the operations or processes listed there and not only to those listed in sub-paragraph (f).

[32] Third, the memorandum states: "Goods may be used in an operation in many different ways. The determination of whether any operation qualifies as a same condition process or results in the material alteration of the goods must be addressed individually." (An affidavit

from another Senior Program Officer filed by the respondent on this application confirms that the "determination of whether an operation qualifies as a same condition process or results in a material alteration of the goods is addressed by CBSA on a case-by-case basis.")

[33] Fourth, the memorandum includes an appendix providing examples to illustrate "whether a good that has been subject to a minor process may be considered to be in the 'same condition'." These examples include the following:

- Adding water to juice concentrate creating an intermediate juice concentrate but not a juice would be considered to be same condition.

- Adding water to a juice concentrate creating a juice would be considered to be both material alteration and a process.

- Adding linseed oil to paint in liquid form for ease in mixing is considered to be same condition.

- Adding linseed oil to a paint paste to create a liquid paint would be considered to be both material alteration and a process.

- Packaging imported sugar in individual serving size packets is considered to be same condition.

- Packing the sugar packets in lots of 100 is considered to be same condition.

[34] CBSA also prepared a Duty Relief Administration Manual dated January 2013 to assist its decision makers. It includes "Appendix B – Examples of Canadian and United States

Rulings." The applicant relies on one scenario in particular from Appendix B to support its position that the plastic container products it imports are not materially altered by its operations or processes. A second scenario described in Appendix B may also be pertinent to the present matter.

[35] These two scenarios are the following (I have numbered them for convenience):

> *Scenario One*
>
> > Plastic bottles, plastic caps, labels and liquid flavouring are imported. The bottles are filled with the product and the containers sealed with the caps. The bottles are labelled ready for export. The plastic bottles, plastic caps, and labels are considered to be "same condition" when exported.
>
> *Scenario Two*
>
> > Luncheon meat cans are imported with lids separate. The cans are filled with raw meat, the lids are attached by crimping. The filled cans are then cooked in retorts before packing and exporting. The cans and lids are used in the process of creating a canned meat product this [sic] do not qualify for same condition.

[36] In an affidavit filed in support of this application for judicial review, Derek Kroft, Vice-President – Tax of KIK Custom Products, states that Appendix B was included with the company's August 2018 request for a same condition ruling. The respondent did not offer any evidence to contradict this. However, the respondent asserts in its Memorandum of Fact and Law that Appendix B has been removed from the current version of the manual (which is now entitled the Trade Incentives Manual). The respondent did not provide any evidence supporting this assertion either, nor did the respondent provide any evidence concerning when this alleged change occurred. In any event, as will be seen, Scenario One in particular was the subject of

discussion in the emails exchanged between the applicant's representatives and the officer. I will return to the question of the significance of Appendix B below.

[37] Further, the standard template for submitting a request for a same condition ruling to CBSA includes a guide to same condition rulings as an appendix. The guide states that a "product is considered to be manufactured when it has been Materially Altered." It goes on to provide illustrative scenarios for, on the one hand, goods that are considered to be materially altered (and therefore manufactured) and, on the other hand, goods that are not considered to be materially altered (and therefore not manufactured). For example, painting a shaped automobile fender stamping with a final finish coat of paint is a material alteration while painting a metal object with primer paint which needs a subsequent application of finish coat of paint is not. Several of the scenarios in the appendix are also found in Memorandum D7-4-3.

[38] In response to this application for judicial review, the respondent filed a certificate signed on January 28, 2019, by the officer who made the decision at issue. The officer identifies the documents that were considered when the decision was made and provides copies of the documents. Included among them are three decision letters pertaining to same condition ruling requests relating to different types of container products. (The letters are redacted to remove information that could identify the companies involved.) The officer states that these letters "were used as precedent in making the decision on KIK Custom Products Same Condition ruling request." All three were authored by the same officer who made the decision at issue here. One letter concerned coconut oil and empty jars imported from India. Once in Canada, the coconut oil was placed in the empty jars and sealed, labelled, and packaged for export. Another letter

concerned bottles and caps "imported from various companies specializing in pharmaceutical applications." Once in Canada, the bottles were filled with medicine, labelled, packaged in bulk, and shipped to different locations. The third letter addressed two different requests. One request concerned plastic casings for pressed cosmetic powder. The other concerned plastic casings for hair conditioning products. In all of these other cases, the officer concluded that the processes applied to the container products were not allowable.

[39] Finally, the parties agree that the concept of a "material" alteration of the characteristics of a good is intended to capture the idea of a change in the good's characteristics that is "significant" or "to an important degree" – as opposed to simply a change in the matter or stuff of which the thing is made. A change in the matter or stuff of which something is made can be sufficient to constitute a material alteration (e.g. adding linseed oil to paint paste to create liquid paint) but it is not necessary (e.g. cutting linoleum and vinyl flooring tiles into sample-sized pieces is a material alteration even though the good is still made of linoleum or vinyl). The latter example was the process at issue in *Dominion Sample*. In that case, Justice Blais (as he then was) interpreted the idea of a material alteration of the characteristics of a good to mean "that some operations, such as cutting or trimming, can occur while maintaining the good in the same condition, as long as the good has not been made different to a considerable degree, such that it loses its distinguishing features or qualities" (at para 31). Neither party takes issue with this understanding. The parties also agree that the "characteristics" of a good include not only its physical properties but also more abstract properties such as the good's function and intended market or end-user.

[40] The nub of the issue between the parties is whether the officer's determination that the applicant's processes result in a material alteration of the characteristics of the goods meets the requirements of justification, transparency and intelligibility. I turn to this now.

IV. DECISION UNDER REVIEW

A. *The November 30, 2018, decision letter*

[41] After noting that the purpose of the letter "is to convey a 'same condition' process ruling" and then identifying the applicable legal authorities and policy documents, the officer breaks down the reasons for the ruling into three main parts under the following headings: Allowable Processing, Goods and Process, and Finding.

[42] Under the heading Allowable Processing, the officer states the following:

> A certain degree of processing is allowable in Canada without changing the "same condition" status of the goods provided:
>
> 1. All processes performed are named in Article 303 or the Uniform Regulations.
>
> 2. The processing does not materially alter the characteristics of the goods.
>
> The only allowable processes are "repacking or inspecting the good, or preserving it in its same condition," along with:
>
> a) mere dilution with water or another substance;
>
> b) cleaning, including removal of dust, grease, paint or other coatings;
>
> c) application of preservative, including lubricants, protective encapsulation, or reservation [*sic* – preservation] paint;
>
> d) trimming, filing, slitting or cutting;

> e) putting up in measured doses or packing, repacking, packaging or repackaging; or
>
> f) testing, marking, labelling, sorting or grading.

[43] Under the heading Goods and Process, the officer states the following:

> The client imports plastic container products (bottles, tubes, caps and lids) and fills them with body care or sunscreen products, seals and packs for shipping to the end user in the United States with a small percentage going to Australia.

[44] Under the heading Finding, the officer states:

> The CBSA finds the processes applied to the goods are not allowable.

[45] Apart from what is set out above, no other explanation for this finding is provided in the decision letter.

[46] The balance of the letter addresses the implications of the ruling – in particular, that duty relief is limited to the "lesser of" rule – and potential recourse for the company by way of an "appeal" to this Court. The officer also adds the following: "If you have any questions or wish to provide additional information, please contact the undersigned or our office as soon as possible."

B. *Subsequent email correspondence between the applicant and the officer*

[47] As noted, the officer's decision was originally conveyed in a letter dated November 8, 2018. The request for a same condition ruling was submitted by KPMG LLP on

behalf of Gail Kesner, the Controller for KIK Custom Products. Accordingly, the decision letter was addressed to Ms. Kesner but it was sent via email to the company's representative with KPMG, David Decaire.

[48] On November 30, 2018 – the date the letter was received by KPMG – John Pajek, Senior Manager, Trade & Customs Practice with KPMG, wrote to the officer to request that the decision letter be re-issued to allow sufficient time for the applicant to consider its position on an "appeal" of the decision. Mr. Pajek also asked the officer to "please explain what simple packaging is."

[49] The officer responded immediately, leaving a voicemail for Mr. Pajek and sending a follow-up email. The officer agreed to reissue the decision letter under the date of November 30, 2018, and attached the revised letter to the email. The officer also added the following by way of clarification of the basis for the decision:

> To clarify, your client's items are not considered "same condition" for the purposes of NAFTA Article 303 as they are not exported in the same condition as imported. Your client is importing empty containers, filling them with a substance, thus creating a new product. You no longer have an empty vessel, you have a completed product. The vessel is required for the product, without the tubes there is no vessel for the sunscreen or body lotion, so it has become part of the final product. This is not simple packaging. If your client received a bulk shipment of nails, and while in Canada separated the nails in packs of 10, this would be considered simple packaging.

The officer invited Mr. Pajek to get in touch again if further clarification was required.

[50] Later the same day, Mr. Pajek replied, asking: "Is the CBSA open to discussion on this matter or are you forcing the issue to the courts?"

[51] On December 4, 2018, the officer responded that "[i]f there is something you feel your client has missed and you would like to present that, we can reconsider. The normal process is for the appeal to come to the courts but I always like to assist where I can to avoid that."

[52] Mr. Pajek responded in turn on December 12, 2018, that he was "working on gathering information on the same condition issue." In view of the time of year, he asked if it would be possible to send additional submissions to the officer by the second week in January 2019.

[53] The officer responded on December 13, 2018, that "[u]nfortunately since there are outstanding claims, we must process the application as originally filed. That being said, if the process changes or if you feel you have new evidence to present that will change the outcome of our decision, you are free to re-apply. You can submit the application directly to me at this email address."

[54] On December 14, 2018, Mr. Pajek sent the following email to the officer:

> When I read the following it supports our position. What am I missing?
>
> > Plastic bottles, plastic caps, labels and liquid flavouring are imported. The bottles are filled with the product and the containers sealed with the caps. The bottles are labelled ready for export. The plastic bottles, caps, and labels are considered to **be "same condition"** when exported.

Although Mr. Pajek does not say so in the email, this example (apart from added emphasis) is from Appendix B to the 2013 CBSA manual. It is what I have called Scenario One.

[55] The officer responded to Mr. Pajek that "these are examples used for illustrative purposes only. Each case is examined on its own merits and ruled accordingly." The officer also indicated that he would discuss the matter with some colleagues and get back to Mr. Pajek.

[56] On December 17, 2018, the officer wrote to Mr. Pajek to seek confirmation that the body lotion and sunscreen are Canadian made goods. Mr. Pajek replied that the "products are made by KIK in Canada and then packaged and exported or sold domestically." The officer in turn replied as follows:

> I will discuss further with my colleagues but this is the immediate distinction between the example you highlighted from our internal manual and your client's operation. The example given in the manual involves all items being imported from a non-NAFTA originated country, so it can be argued that it is repackaging. Your client does not import the substance going into the tube, therefore it can be considered further processing.

[57] Later the same day, Lisa Zajko, a colleague of Mr. Pajek's at KPMG, wrote the following in an email to the officer:

> To clarify, although the example refers to the containers and product being imported, it is only the containers (and caps/labels) that are referred to as being "same condition." For illustrative and contrast purposes, the product (when also imported) is referred to as being not same condition due to combining of ingredients. Whether the product is imported or not, the examples clearly show that the containers/caps/labels are same condition separate from the treatment of product (the latter of which we are not claiming on in our case). Surely it cannot be intended that if we were to move production of the actual product outside Canada and away from domestic production, then the company would be in a better position than where they are making the product here and using imported containers? I also note that these examples are from the "assembly" section of the manual and not the packing/packaging section, such that even in a manufacturing/assembly context, the containers should qualify.

[58] In reply, the officer wrote the following:

> After discussing this with senior colleagues, we do not agree on your interpretation of the legislation as you continue to quote an example from a CBSA internal document. In our opinion, the operations listed in your original application do not qualify for "same condition" drawback.

[59] In other email correspondence, Mr. Pajek pointed out that the applicant's processes had been considered by CBSA as "simple packaging" for many years. However, as the officer attempted to clarify with him, this was the first time the applicant had received a "same condition" process ruling for these particular goods. The applicant has not suggested otherwise in the present application.

[60] Matters went no further with the officer. The applicant commenced this application for judicial review on December 31, 2018.

V. ANALYSIS

A. *What should be considered in assessing the reasonableness of the decision?*

[61] A reviewing court must, of course, consider an administrative decision maker's reasons for deciding the matter in issue as he or she did. But the court "must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" (*Vavilov* at para 94). Depending on the nature of the matter in dispute and the issues raised on review, the court might need to consider "the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body" (*ibid.*). These things "may

explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency" (*ibid.*). Accordingly, the reviewing court must read the reasons given by an administrative decision "with sensitivity to the institutional setting and in light of the record" (*Vavilov* at para 96).

[62] Disputes have arisen in the present case with respect to two parts of the record: first, the email exchanges between the officer and representatives of the applicant after the decision was released; and second, Appendix B to the January 2013 CBSA Duty Relief Administration Manual.

[63] As noted above, the applicant's initial position was that the decision letter must stand or fall on its own and that it was not open to a reviewing Court to consider the email exchanges that came after it in assessing the reasonableness of the decision. Although the applicant moderated this position at the hearing of this application, given the importance of the emails to the result I have reached, I will take a moment to explain why, in my view, it is appropriate to consider them in assessing the reasonableness of the decision.

[64] An administrative decision maker cannot use an affidavit filed on judicial review to improve on the reasons for a decision that were originally provided: see *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 46-47 [*Sellathurai*]. Were it otherwise, a party challenging the decision on judicial review would be asked to hit a moving target (*Sellathurai* at para 47). The present case presents a different sort of scenario, however.

[65] There can be a fine line between post-decision communications from a decision maker that help explain why the decision was made and after-the-fact justifications for a decision that were not provided in the original reasons and, perhaps, were not even in the mind of the decision maker at the time the decision was made. As my colleague Justice Fothergill has observed, "[t]here is a difference between the issuance of supplementary reasons as a valid exercise of an officer's discretion to reconsider an initial decision, and as an illegitimate attempt to justify a poorly-crafted decision" (*Vakurov v Canada (Citizenship and Immigration)*, 2016 FC 859 at para 2). Undue openness to after-the-fact reasons, particularly those that appear only after an application for judicial review has been commenced, can create the wrong incentives for decision makers and would discourage efficient and effective administrative decision making. In the present case, however, I am satisfied that it is appropriate to consider the emails between the officer and the applicant's representatives in assessing the reasonableness of the officer's decision.

[66] In addition to the general principles stated in paragraph 61, above, I rely on the following specific features of this case in reaching this conclusion.

[67] First, as was emphasized in *Vavilov*, an assessment of the reasonableness of a decision must be mindful of the administrative context in which it was made (at para 91). Strict adherence to the principle that the final reasons for a decision are the only reasons that may be considered on judicial review might be appropriate when reviewing the decision of an adjudicative administrative decision maker (just as, for example, there is a bar to trial judges in criminal cases supplementing their final reasons for judgment: see *R v S(RD)*, [1997] 3 SCR 484

at 523). On the other hand, more flexibility may be warranted when, as is the case here, one is dealing with a non-adjudicative administrative decision maker who follows less formal procedures and to whom the principle of *functus officio* applies much less stringently, if at all (cf. *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3).

[68] Second, the exchange of emails was initiated by representatives of the applicant on the applicant's behalf. Through its representatives, the applicant sought clarification from the officer about why the "same condition" claim had been rejected. The applicant also effectively asked the officer to reconsider the decision by offering further submissions with a view to persuading the officer to reach a different result. The officer engaged with these submissions but maintained the original determination. Having initiated the very communications in question, the applicant cannot now insist that they should not be considered in assessing the reasonableness of the officer's decision. This exchange is not only part of the history of the matter in respect of which the decision was rendered; it is a part of the history which the applicant itself created through its follow-up contacts with the decision maker.

[69] Third, one must not lose sight of the fundamental issue here: Did the officer justify the decision to the applicant? See *Vavilov* at para 95. The officer's responses to the inquiries and further submissions from the applicant's representatives are part and parcel of the justification for the decision that was given to the applicant. Importantly, the officer was responding to inquiries and further representations from the applicant's representatives in connection with the original request for a ruling. The officer was not responding to an application for judicial review of the decision, something that had not yet been commenced at the time of the exchanges.

[70] The second point of contention is the significance of Appendix B to the January 2013 CBSA Duty Relief Administration Manual. As noted above, there appears to be some dispute about the current status of this document in CBSA decision making. As well, the respondent also submits that the manual "is an internal CBSA administrative document that has no bearing on the reasonableness of the Decision in this case."

[71] It is not necessary for me to resolve the dispute about the current status of Appendix B. Even if it is no longer meant to be considered by decision makers, it still provides examples based on past Canadian and US rulings that offer insight into what kinds of operations or processes will be found to result in the material alteration of goods and what kinds will not. As well, Scenario One was put to the officer by the applicant's representatives. They cited its conclusion to support their position; in response, the officer attempted to explain why he had reached a different conclusion.

[72] It is common ground that requests for same condition rulings must be determined on a case-by-case basis. No one has suggested that any of the illustrative examples in Appendix B (including Scenario One) were somehow binding on the officer (cf. *Dorel* at para 23). But perhaps more importantly for present purposes, I cannot agree with the respondent's submission that Appendix B "has no bearing" on the reasonableness of the officer's decision. Part of what can be required for a decision to be justified, intelligible and transparent is for it to explain why the result reached is not the same as that reached in an ostensibly similar case. Such an explanation is particularly important when the affected party is actually aware of and, indeed, relies on that other case to support its position. This is simply the converse of the principle that

an administrative decision maker cannot "expect that its decision would be upheld on the basis of internal records that were not available to [an affected] party" (*Vavilov* at para 95). To repeat, "reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*ibid.*). The officer had a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). This included explaining why a different result was reached in the applicant's case compared to Scenario One.

B. *Is the decision unreasonable?*

[73] No issue is raised concerning the officer's factual understanding of the applicant's processes. The sole issue in dispute is the reasonableness of the officer's determination that those processes do not leave the container products in the "same condition" for purposes of customs duty relief.

[74] In *Vavilov*, the majority distinguished between two types of fundamental flaw that can make a decision unreasonable (see para 101). One is "a failure of rationality internal to the reasoning process" of the decision maker. The other arises "when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it." The majority also noted that while failures of reasonableness need not be characterized in this way, these categories can be helpful when discussing whether a decision is unreasonable or not. This is the case here.

[75] As set out in the November 30, 2018, decision letter, the officer concluded that the processes the applicant applied to the container products were not allowable ones. In making this determination, the officer treated the lists of allowable processes found in the relevant *NAFTA* documents as exhaustive rather than illustrative. The respondent accepts that this was an error. In post-*Vavilov* terms, this is the type of logical error or failure of rationality that could very well lead to a finding that the decision is unreasonable (cf. *Vavilov* at paras 101-04). The respondent contends, however, that the determinative issue is whether the processing done by the applicant materially alters the characteristics of the container products and, according to the respondent, the officer reasonably determined that they do despite this error.

[76] I agree that this is the determinative issue. Had I limited my consideration of the officer's analysis of it to the November 30, 2018, letter, I would have found that the decision is unreasonable. The explanation offered in the letter is fundamentally flawed. But when the officer's erroneous understanding of the relevant lists as being exhaustive instead of merely illustrative is removed from the analysis in the decision letter, the officer's conclusory statement that "the processes applied to the goods are not allowable" does not meet the requirements of justification, transparency and intelligibility. However, as I have already explained, the November 30, 2018, letter should not be read in isolation. When the letter is read together with the officer's other communications with the applicant's representatives and against the pertinent legal backdrop, one can see that the officer's determination rests on a sounder foundation than that expressed in the decision letter itself. The decision meets the requirements of justification, transparency and intelligibility.

[77] As set out above, the applicant's main argument to the officer was that its process is "simple packaging" and this does not materially alter the characteristics of the goods in question. The difficulty with this argument – as the officer attempted to explain, although not in exactly these terms – is that it rests on an equivocation about what is being packaged.

[78] Arguably, putting skin care and sunscreen products into plastic containers does not change the condition of the skin care and sunscreen products; however, this is irrelevant because the applicant did not request a "same condition" ruling in relation to those products. The goods in question in the duty drawback claim are the plastic storage container products (bottles, tubes, caps, and lids). If the applicant was only dealing with these goods by, for example, breaking larger lots of plastic storage products into smaller ones and then repackaging them, this arguably would be a "same condition" process (as the officer attempted to illustrate with the example of the nails). But that is not what the applicant is doing. Rather, the applicant is filling the empty plastic containers with another product – the body care and sunscreen products. As the officer explained in his November 30, 2018, email, by filling the empty containers with these products and then closing them with caps or lids, the applicant is "creating a new product." Even if the applicant repackages and exports the plastic container products in different lots than they arrived in at the applicant's plant, the applicant is not exporting empty containers or loose caps or lids. In the officer's view, by filling the imported empty containers and then placing caps or lids on them, the applicant creates new products of which the container products are a part.

[79] Once the plastic containers are filled and sealed, their physical characteristics may not have changed (apart from their weight) but they have still changed in a material respect: by

becoming part of a consumer product (i.e. body care and sunscreen products packaged for purchase by consumers), they are now fulfilling their intended function. It is beside the point that the applicant only claimed a drawback for the plastic container products. They are as essential to the products the applicant exports as what they contain. The applicant's clients would have no use for either empty containers or unpackaged body care or sunscreen products. It is the two together that meets the needs of the applicant's clients and, in turn, the needs of the end users of the exported products. As the officer explained, the applicant "is importing empty containers, filling them with a substance, thus creating a new product. You no longer have an empty vessel, you have a completed product. The vessel is required for the product, without the tubes there is no vessel for the sunscreen or body lotion, so it has become part of the final product. This is not simple packaging."

[80] This explanation provides a degree of justification, intelligibility and transparency that is lacking in the November 30, 2018, letter. It is also consistent with the constraints that bear on "same condition" determinations generally.

[81] In *Vavilov* the majority observed that "[w]hether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable" (at para 131). Here, the officer's determination that, by creating a different product, the applicant's processes brought about material alterations in the characteristics of the goods that were originally imported is consistent with similar determinations (either actual or hypothetical) found in the record.

[82] For example, while obviously different in many ways, the applicant's processes are similar in relevant respects to those of the producer of canned luncheon meats dealt with in Scenario Two (see paragraph 35, above). Since the imported cans and lids at issue there had been used to create something else – a canned meat product – they were no longer in the same condition.

[83] The officer's determination is also consistent with those reached concerning casings for cosmetic powder and hair conditioning products found in one of the precedent letters the officer considered (admittedly, those determinations were made by the same officer who made the present decision). The substance put into the containers was not "complete" without the presence of the casings that are used to create a consumer product. Filling the casings had significantly altered their characteristics. The same can be said about the applicant's process of filling the empty containers with body care and sunscreen products. It also creates a new consumer product. It does so by changing in a material way an essential feature of the imported containers – the fact that they were empty. The officer reached a similar conclusion in the case involving the coconut oil jars dealt with in one of the precedent decision letters.

[84] The officer's determination in the present case is also consistent with one of the very few cases decided by this Court in this area. In *Dominion Sample*, Justice Blais upheld a determination that cutting imported linoleum and vinyl flooring into sample sizes did not leave the goods in the same condition. Rather, the characteristics of the goods had been changed "to a considerable degree;" what had once been flooring had become a sample book (see *Dominion Sample* at para 32). Similarly, as a result of the applicant's processes, what had once been mere

storage containers (and caps and lids) had become body care and sunscreen consumer products. Unlike the flooring in *Dominion Sample*, the purpose or function of the container products at issue here has been realized rather than changed completely. Nevertheless, this type of change can also reasonably be determined to be a material change.

[85] As the respondent notes, one indication that the change brought about by the applicant's processes is a material one is that the target customer for the empty container products (companies like the applicant's) is quite different from the target customer for the products produced with them (consumers of body care and sunscreen products). That being said, this is only one consideration and it may not be determinative. Many products imported in bulk by wholesalers will have a different target market once the wholesaler has repackaged them for retailers yet this is a paradigmatic example of an operation of process that does not change the condition of goods (see sub-paragraph 8(e) of the *Uniform Regulations*). The officer himself recognized this when he offered the example of repackaging nails that had been imported in bulk. Similarly, one finds in the list of same condition process examples in CBSA Memorandum D7-4-3 "packaging imported sugar in individual serving size packets is considered to be same condition." One also finds examples like this in the appendix to the standard form for same condition ruling requests (e.g. cutting a coil of wire into shorter lengths for packing into retail boxes). Thus, the officer found in another case that there is no material change in the characteristics of imported coconut oil that is placed in smaller containers (even though the officer also found that there is a material change with respect to the jars themselves). In short, simply preparing a product for a new target market (e.g. retail consumer versus packager) is not

sufficient to result in a material alteration of the product's characteristics but creating a new product with the imported product can be.

[86] The officer's determination might appear to be inconsistent with Scenario One from Appendix B to the 2013 Duties Relief Administration Manual. Indeed, this is a key part of the applicant's argument, initially to the officer and now on judicial review. There are at least three answers to this. First, as the officer emphasized, applications for "same condition" rulings are determined on their own merits on a case-by-case basis. Previous rulings are not binding. Second, Scenario One appears to be an outlier when compared to the other determinations concerning container products reviewed above. Third, and perhaps most importantly, there is no indication in the brief synopsis that the decision actually addressed whether the process applied to the plastic bottles and caps had created a different product. Any inconsistency between the officer's decision here and Scenario One (which may be more apparent than real given how little we know about the underlying decision) falls well short of demonstrating that the result here is untenable.

[87] I should note that I do not find persuasive the officer's attempt to distinguish Scenario One on the basis that it was drawn from an "internal" document. As discussed above, whether the document is "internal" or not, it sets out relevant examples based on prior rulings. Given the applicant's reliance on Scenario One, it was entitled to an explanation for why a different result was reached in its case. I am satisfied that the officer's other explanations for the two different results meet the requirements of justification, intelligibility and transparency. The mere existence of the case described in Scenario One does not make the result reached here

untenable. In these circumstances, the fact that Scenario One was drawn from an "internal" document is beside the point.

[88] Finally, the officer also considered the fact that the body care and sunscreen products the applicant puts in the containers are not imported to be a relevant difference between the applicant's case and Scenario One. This was apparently because all of the goods in question in Scenario One – including the contents with which the containers were filled – were imported. This issue only arose towards the end of the officer's email exchanges with the applicant's representatives. Considering the precedent letter finding that filling imported jars with imported coconut oil was not an allowable process *vis-à-vis* the jars, the result in the present case may well have been the same if the applicant also imported the products it puts in the containers. In any event, since I have found that there are sufficient reasons to justify the result here despite the result in Scenario One, it is not necessary to consider this additional basis upon which the officer sought to distinguish Scenario One from the case before him.

[89] For all of these reasons, I am satisfied that, while the November 30, 2018, letter falls well short of what is required, the officer's other communications justified the result to the applicant in a transparent and intelligible way. The applicant has not persuaded me that the officer's determination is untenable in light of the constraints that bear upon it. There is, therefore, no basis for me to interfere with that determination.

VI. COSTS

[90] Usually, the successful party is awarded costs. The applicant, however, has asked that costs not be awarded in favour of the respondent in the event that this application is dismissed. The applicant bases this request on four considerations: (1) the officer clearly erred in the November 30, 2018, letter by treating the lists of "same condition" processes as exhaustive rather than illustrative; (2) the respondent acknowledged this error only at the eleventh hour; (3) the same condition ruling represents a reversal of how CBSA had treated the applicant's processes in the past; and (4) the present application is a form of test case litigation which was brought to clarify the law governing "same condition" determinations.

[91] I am not persuaded that the usual practice governing costs should not be followed in this case. The applicant did not have a vested right to have its processes always treated the same way by CBSA. Significantly, this was the first time the processes in issue were the subject of a "same condition" ruling. Even if the result represents a change in how CBSA views the applicant's processes, this is a determination CBSA was entitled to make. Further, the present judgment may well be of interest to more than just the immediate parties. Indeed, I understand that at least one matter (*Crystal Claire Cosmetics Inc v President of the Canada Border Services Agency* – Federal Court File No T-1559-19) has been held in abeyance pending my decision. However, the applicant stood to reap a significant financial benefit if its position on this application prevailed. It is not the sort of public interest litigant who should be excused from paying costs when it is the losing party. The officer's legal error in the November 30, 2018, letter certainly gave merit to the application for judicial review but, as can happen, that error was insufficient to

subvert the result. As for the respondent's late breaking change of position, this can be taken into account when the parties work out between themselves (as I fully expect they will be able to do) the quantum of costs to which the respondent is entitled.

VII. CONCLUSION

[92] For these reasons, the application for judicial review is dismissed with costs.

JUDGMENT IN T-15-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed with costs.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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