Federal Court  Cour fédérale

Date: 20200603

Docket: T-967-19

Citation: 2020 FC 656

Ottawa, Ontario, June 3, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

FOSTER FARMS LLC AND FOSTER POULTRY FARMS, A CALIFORNIA CORPORATION

Applicants

and

MINISTER OF INTERNATIONAL TRADE DIVERSIFICATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Foster Farms LLC and Foster Poultry Farms [together, Foster Farms], operate poultry farming corporations in the United States and Canada and import poultry products in Canada. Following a verification of Foster Farms' import activities in Canada, the Canada Border Services Agency [CBSA] discovered that, between 2014 and 2016, multiple shipments of chicken products were misclassified by Foster Farms at the time of their

importation into Canada. The reclassification of the imported goods resulted in a duty assessment exceeding $8 million.

[2] Foster Farms applied to the Minister of International Trade Diversification [Minister] to obtain retroactive supplemental import authorization permits [SIPs] for those shipments of chicken products [Permit Application]. In a decision issued in May 2019 [Decision], the Executive Director for Supply-Managed Trade Controls at Global Affairs Canada, in her capacity as delegate for the Minister, denied Foster Farms' request, as the circumstances regarding the importation of the improperly classified chicken products did not qualify as either exceptional or extraordinary.

[3] Foster Farms have now brought an application for judicial review challenging the Decision. Foster Farms claims that, in rendering the Decision, the Minister breached his duty of procedural fairness and natural justice in four different ways. Foster Farms contend that: 1) the Minister failed to provide them notice of the assertion, set out in the Memorandum for Action prepared for this matter [MOA], that Foster Farms had not explained the reason for their customs classification error; 2) the MOA failed to refer to the facts, mentioned by Foster Farms in their Permit Application, showing the reasons for having made an inadvertent error when importing the chicken products; 3) the Minister failed to provide them notice of the assertion, also set out in the MOA, that requests for SIPs which are based upon the existence of "extraordinary and unusual circumstances" (as was Foster Farms' Permit Application) are generally granted only where the chicken products are in short or limited supply; and 4) the Minister failed to properly consider the Permit Application in light of the applicable administrative policy, in that he

conflated two grounds contained in such policy, namely, short and limited supply and extraordinary and unusual circumstances.

[4] Foster Farms ask this Court to declare the Minister's Decision invalid or unlawful, to quash it, set it aside and refer it back to the Minister for redetermination.

[5] Foster Farms submit that the sole issue raised by this application for judicial review is whether the Minister breached his duty of procedural fairness and natural justice by making the Decision in a manner that warrants vitiating his conclusions. At the hearing before this Court, Foster Farms confirmed that they were solely challenging the Decision on grounds of procedural fairness, even though some of their arguments appeared to question, at least indirectly, the reasonableness of the Decision. The Minister responds that Foster Farms' application should be dismissed as no breach of procedural fairness tainted the Decision. In addition, the Minister maintains that the Decision was reasonable.

[6] For the reasons that follow, I will dismiss Foster Farms' application for judicial review. I detect no breach of procedural fairness in the decision-making process followed by the Minister in the circumstances. The Minister's Decision is highly discretionary and the level of procedural fairness owed to Foster Farms falls at the lower end of the spectrum. In this context, Foster Farms were not entitled to receive the type of prior notices they claim was owed to them by the Minister. Nor were there grounds to justify their alleged legitimate expectation to receive a preliminary decision from the Minister. I am also satisfied that the Decision was justified and intelligible, and that the Minister considered all relevant information in his Decision. The reasons

contained in the May 2019 letter and in the underlying MOA demonstrate that the Decision is based on an internally coherent and rational chain of analysis, and that it is justified in relation to the facts and law that constrain the Minister. There are therefore no grounds to justify the Court's intervention.

II. Background

A. *Factual context*

[7] Between 2014 and 2016, Foster Farms imported around 2.3 million kilograms of certain chicken products into Canada. These chicken products were food preparations based on meat from broiler chicken, and are known as corn dogs.

[8] Following the verification of Foster Farms' import activities, CBSA found that multiple shipments of these chicken products had been incorrectly identified as "spent fowl" (a non-import controlled product) rather than "broiler chicken" (an import controlled product) at the time of their importation into Canada. "Spent fowl" is a duty-free product, whereas "broiler chicken" is subject to duties at rates ranging from 238 to 253% when imported without a permit from the Minister. Further to the verification, the CBSA required Foster Farms to correct the classification and issued a duty assessment in the amount of $8,263,089.25 [Assessment Amount]. Foster Farms admit that the chicken products at issue were misclassified.

[9] On August 10, 2018, Foster Farms submitted its Permit Application, requesting that the Minister issues retroactive SIPs pursuant to subsection 8.3(3) of the *Export and Import Permits*

Act, RSC 1985, c E-19 [EIPA]. The issuance of the said SIPs would allow for the duty assessment to be substantially reduced. The Permit Application outlined the Minister's jurisdiction to grant a permit, detailed the classification of the chicken products, and described the business environment related to the import and sale of corn dogs in Canada. In the Permit Application, Foster Farms requested that the Minister make the decision relating to their request.

[10] In the Permit Application, Foster Farms laid out four grounds supporting their request for retroactive SIPs: 1) the goods were chicken corn dogs manufactured largely from Canadian chicken inputs which were further processed in the United States; 2) Foster Farms had not made an application for an import permit authorization allocation because of inadvertence and their mistaken belief that the goods were entitled to duty-free tariff treatment; 3) Foster Farms was eligible for partial duty relief under the Canadian Goods Abroad Program during the relevant period; and 4) there were "extraordinary and unusual circumstances" within the meaning of the *Notice to Importers No. 865 - Chicken and Chicken Products - Supplemental Imports (Items 96 to 104 on the Import Control List)* dated December 15, 2014 [Notice 865], warranting the granting of the Permit Application. Throughout their application letter, Foster Farms notably insisted on the fact that the meat portion of the imported corn goods was primarily comprised of chicken inputs originating from Canada and that granting the SIPs would not likely adversely affect Canadian businesses.

[11] Upon receipt of the Permit Application, Mr. Blair Hynes, deputy director and acting executive director within the Supply-Managed Trade Controls Division of Global Affairs Canada [GAC], delegated the primary review of the file to Mr. Guy Giroux, the officer responsible for

the administration of the tariff rate quota [TRQ] and supplemental import policies for chicken and chicken products under the EIPA.

[12] On August 16, 2018, at the request of Foster Farms, Mr. Hynes held a conference call with them and their counsel. During this call, Mr. Hynes asked Foster Farms to provide some further information in support of their Permit Application. Foster Farms submitted the additional materials requested by GAC on August 21, 2018, and updated the said materials on September 26, 2018.

[13] After evaluating the further materials and Foster Farms' Permit Application, Mr. Giroux drafted the MOA in which he recommended that the Minister rejects the request and denies issuing the retroactive SIPs. The MOA recommended to refuse the requested SIPs because the Permit Application did not meet the "extraordinary or unusual circumstances" component of the supplemental imports policy for chicken and chicken products.

[14] In the MOA, Mr. Giroux referred to the Minister's broad discretion with respect to the issuance of retroactive SIPs, specifying that the exercise of such discretion must take into account all relevant factors. He notably referred to the purpose for which the chicken products at issue were placed in the *Import Control List*, CRC, c 604 [Import Control List] at ss 101, 110, namely to "support supply management".

[15] In his considerations for the recommendation to the Minister, Mr. Giroux indicated that SIPs sought for "extraordinary or unusual circumstances" have normally been authorized to

address two types of situations: 1) “to meet short to medium term Canadian market needs resulting from emergencies such as destruction of Canadian poultry flocks due to avian influenza”; and 2) “to address chronic lack of domestic supply of products that may not be domestically produced in Canada, such as ultra-kosher dairy products”. Mr. Giroux then referred to the rationale provided by Foster Farms for their failure to initially request import permits and noted that Foster Farms provided “no explanation as to why the finished product manufactured with Canadian broiler chicken imported by Foster Farms was declared as spent fowl at the time of re-export into Canada”. Mr. Giroux concluded that the circumstances presented by Foster Farms did not “qualify as either exceptional or extraordinary in so far as these considerations are normally applied”, and did not warrant the issuance of retroactive SIPs.

B. ***The Decision***

[16] The Minister’s Decision to refuse the Permit Application and the requested SIPs was communicated by a short letter, extending over one page and a half.

[17] In the Decision, the Minister first outlined the law and regulations applicable to Foster Farms’ request, namely, the EIPA, its regulations, and the Minister’s policies set out in the Notice 865. The Minister then explained that the Notice 865 provides for six categories of supplemental import authorizations for chicken and chicken products. These categories notably include, under section 10.1 of the Notice 865, authorization to import chicken and chicken products under “extraordinary or unusual circumstances”. The Minister noted his understanding that Foster Farms had incorrectly identified multiple shipments of chicken products as spent fowl rather than broiler chicken at the time of import into Canada, and that Foster Farms were

requesting the SIPs under this “extraordinary or unusual circumstances” component of the Notice 865.

[18] After laying out the applicable law, the Minister then listed the four grounds advanced by Foster Farms for the issuance of the retroactive SIPs, as follows:

> 1) The goods were manufactured at Foster Farms’ manufacturing facility using broiler chicken inputs, which originated from Canada;
>
> 2) Foster Farms did not submit an application for a chicken or a chicken product import allocation because of inadvertence and not as a result of an intention to deceive;
>
> 3) During the relevant period, Foster Farms could have applied for partial duty relief in respect of the goods under the Canadian Goods Abroad Program; and
>
> 4) There are “extraordinary or unusual circumstances” within the meaning of Notice 865 that warrant the issuance of the requested retroactive SIPs.

[19] The Minister explained that requests for SIPs invoking extraordinary and unusual circumstances are evaluated on their individual merits. The Minister specified that such requests “are normally authorized to address short to medium term Canadian market needs resulting from emergencies such as destruction of Canadian poultry flocks due to avian influenza, or to address chronic lack of domestic supply of products that may not be domestically produced in Canada”.

[20] The Minister concluded that Foster Farms’ circumstances regarding the importation of improperly classified chicken products into Canada, as presented in their Permit Application, did not qualify as either exceptional or extraordinary, and thus denied Foster Farms’ request.

C. *Relevant statutory framework*

[21] Imports of chicken and chicken products into Canada are subject to controls under the EIPA and the Import Control List. Accordingly, an import permit is required for shipments of chicken and chicken products to enter Canada. Import permits are generally issued to allocation holders under a TRQ. Within the TRQ, chicken and chicken products may be imported at a low rate of duty. By contrast, imports in excess of the TRQ are normally subject to high duty rates ranging from 238% to 253%. The Minister may, at his discretion, issue SIPs for imports of chicken and chicken products outside the TRQ and apart from the import access quantity.

[22] The relevant provision of the EIPA is section 8.3, and more specifically subsection 8.3(3) dealing with SIPs. The provision reads as follows.

Import permits — allocation	**Licences en cas d'allocation**
8.3 (1) Notwithstanding subsection 8(1), where goods have been included on the Import Control List for the purpose of implementing an intergovernmental arrangement or commitment and the Minister has determined an import access quantity for the goods pursuant to subsection 6.2(1), the Minister shall issue a permit to import those goods to any resident of Canada who has an import allocation for the goods and applies for the permit, subject only to compliance with and the application of such regulations made pursuant to section 12 as it is reasonably	**8.3 (1)** Malgré le paragraphe 8(1), en cas d'inscription de marchandises sur la liste des marchandises d'importation contrôlée aux fins de la mise en œuvre d'un accord ou d'un engagement intergouvernemental, s'il a déterminé la quantité de marchandises bénéficiant du régime d'accès en application du paragraphe 6.2(1), le ministre délivre à tout résident du Canada qui a une autorisation d'importation et qui en fait la demande une licence pour l'importation des marchandises, sous la seule réserve de l'observation des règlements d'application de

necessary to comply with or apply in order to achieve that purpose.

l’article 12 qui sont nécessaires à ces fins.

Import permits — no allocation

Licences en l’absence d’allocation

(2) Notwithstanding subsection 8(1), where goods have been included on the Import Control List for the purpose of implementing an intergovernmental arrangement or commitment and the Minister has determined an import access quantity for the goods pursuant to subsection 6.2(1), but has not issued import allocations for the goods, the Minister shall

(2) Malgré le paragraphe 8(1), en cas d’inscription de marchandises sur la liste des marchandises d’importation contrôlée aux fins de la mise en œuvre d’un accord ou d’un engagement intergouvernemental, s’il a déterminé la quantité de marchandises bénéficiant du régime d’accès en application du paragraphe 6.2(1), mais n’a pas délivré d’autorisation d’importation, le ministre délivre :

(a) if in the opinion of the Minister the import access quantity has not been exceeded, issue a permit to import those goods to any resident of Canada who applies for the permit, or

a) s’il est d’avis que la quantité de marchandises n’a pas été atteinte, à tout résident du Canada qui en fait la demande une licence pour leur importation, sous la seule réserve de l’observation des règlements d’application de l’article 12 qui sont nécessaires à ces fins;

(b) issue generally to all residents of Canada a general permit to import those goods, subject only to compliance with and the application of such regulations made pursuant to section 12 as it is reasonably necessary to comply with or apply in order to achieve that purpose.

b) aux résidents du Canada une licence de portée générale autorisant l’importation des marchandises, sous la seule réserve de l’observation des règlements d’application de l’article 12 qui sont nécessaires à ces fins.

Supplemental import permits	**Licences — quantité additionnelle**
(3) Notwithstanding subsection 8(1) and subsections (1) and (2) of this section, where goods have been included on the Import Control List and the Minister has determined an import access quantity for the goods pursuant to subsection 6.2(1), the Minister may issue	**(3)** Malgré le paragraphe 8(1) et les paragraphes (1) et (2), en cas d'inscription de marchandises sur la liste des marchandises d'importation contrôlée, s'il a déterminé la quantité de marchandises bénéficiant du régime d'accès en application du paragraphe 6.2(1), le ministre peut
(a) a permit to import those goods in a supplemental quantity to any resident of Canada who applies for the permit, or	**a)** délivrer à tout résident du Canada qui en fait la demande une licence pour l'importation des marchandises en quantité additionnelle ou
(b) generally to all residents of Canada a general permit to import those goods in a supplemental quantity, subject to such terms and conditions as are described in the permit or in the regulations.	**b)** aux résidents du Canada une licence de portée générale autorisant leur importation en quantité additionnelle, sous réserve des conditions prévues dans la licence ou les règlements.

[23] Section 8.5 of the EIPA further allows the Minister to issue retroactive permits, including SIPs.

[24] Turning to the Notice 865, it sets out the policies and practices pertaining to the issuance of supplemental import authorizations for chicken and chicken products. It identifies six categories of authorizations. The first five relate to specific situations relating to domestic market shortages, domestic sourcing constraints, manufacture of new products, re-exports and test marketing for new products. The last category covers authorizations under "extraordinary or unusual circumstances" (the category under which Foster Farms made their Permit Application).

Section 10 of the Notice 865 relates to those extraordinary or unusual circumstances, and reads as follows.

10. Authorization to Import Chicken and Chicken Products under Extraordinary or Unusual Circumstances	**10. Autorisation d'importer du poulet et des produits du poulet en cas de circonstances extraordinaires ou inhabituelles**
10.1. Other applications for authorization for supplemental imports due to extraordinary or unusual circumstances will be evaluated on their individual merits.	**10.1.** Les demandes d'autorisation d'importations supplémentaires d'un produit présentées dans des circonstances extraordinaires ou inhabituelles seront évaluées chacune selon son mérite propre.

D. *Standard of review*

[25] In *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada [SCC] set out a revised framework for determining the standard of review with respect to the merits of administrative decisions (*Vavilov* at para 10). In that decision, the SCC articulated a new approach to determining the applicable standard of review, holding that administrative decisions should presumptively be reviewed on a standard of reasonableness, unless either the legislative intent or the rule of law requires that the standard of correctness be applied (*Vavilov* at paras 10, 17).

[26] The *Vavilov* decision did not deal directly with issues of procedural fairness, and the approach to be taken on this front has therefore not been modified (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether

a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 43).

[27] However, the Federal Court of Appeal [FCA] has recently affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question for the reviewing courts, and the courts must be satisfied that procedural fairness has been met. When the duty of an administrative decision maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing courts to verify whether the procedure was fair having regard to all of the circumstances (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77). It is up to the reviewing courts to make that determination and, in conducting this exercise, the courts are called upon to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54).

[28] Therefore, it is fair to say that the ultimate question raised when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct". It is rather whether, taking into account the

particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard and a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51-54).

III. Analysis

[29] As mentioned above, Foster Farms allege that, in rendering his Decision, the Minister breached the applicable requirements of procedural fairness in four different ways: 1) by failing to provide them notice of the assertion, set out in the MOA to the Minister, that they had not explained the reasons for their customs classification error; 2) by failing to refer, in the MOA, to the facts contained in the Permit Application showing that they had made an inadvertent error when importing the chicken products; 3) by failing to provide them notice of the position, also set out in the MOA and in the Decision, that permit applications seeking relief based on "extraordinary or unusual circumstances" were generally granted where the goods are in short supply or limited supply; and 4) by failing to properly consider the Permit Application in light of the policy set out in the Notice 865 and by conflating two different grounds contained in such policy, namely, short or limited supply and extraordinary or unusual circumstances.

[30] Despite the fact that, at the hearing before the Court, Foster Farms reiterated that they were only raising procedural fairness concerns against the Decision, it became apparent, during their counsel's oral submissions, that many of their arguments in fact questioned the substance of the Decision and its reasonableness. I will therefore discuss both the procedural fairness and reasonableness issues in these reasons.

A. *Preliminary matter*

[31] A preliminary matter must however be addressed before dealing with the issues disputed by Foster Farms. On October 24, 2019, the Minister brought a motion to strike portions of Mr. Satinder Bains' affidavit [Bains Affidavit], which was sworn July 26, 2019 and submitted by Foster Farms in support of their application for judicial review. The Minister claims that certain portions of the Bains Affidavit contain material that is irrelevant, opinion and/or argumentative. During the hearing of this application before the Court, both parties confirmed relying entirely on their written submissions on this preliminary matter. As such, I have decided this issue in light of the arguments made by the parties in their motion materials.

[32] The Minister first maintains that the Bains Affidavit contains information which does not fall within any category of allowable affidavit evidence on an application for judicial review. It is well recognized that, in applications for judicial review, the general rule is that materials which were not in front of the decision maker cannot be considered by the reviewing court, except for limited exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*] at paras 19-20). Those limited exceptions extend to materials that: 1) provide general background assisting the reviewing court in understanding the issues; 2) demonstrate procedural defects or a breach of procedural fairness in the administrative process; or 3) highlight a complete absence of evidence before the decision maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23, 25; *AUCC* at paras 19-20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 [*Nshogoza*] at paras 16-18).

[33] The Minister further submits that, even if they were to fit within these limited exceptions and be admissible despite not being materials which were before the Minister at the time of the Decision, numerous paragraphs of the Bains Affidavit are inadmissible because they contain opinion and argument, contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106 [Rules]. Rule 81 stipulates that affidavits shall be confined to facts within the personal knowledge of the deponent, and must be delivered "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 [*Quadrini*] at para 16). In light of the foregoing, the Minister specifically takes issue with paragraphs 1, 7, 14 to 16, 19, and 20 to 22 of the Bains Affidavit.

[34] In response, Foster Farms assert that Mr. Bains duly provided his written testimony, as he had the requisite testimonial capacity. Furthermore, they note that, whereas Mr. Bains is employed under the title of "customs expert", the fact that he is referred to as such in his affidavit does not mean that the Bains Affidavit was tendered as expert opinion evidence. According to Foster Farms, the impugned portions of the Bain Affidavit provide a factual narrative which is relevant to the issues raised in their application for judicial review, and the Court should receive it in its entirety as evidence. Specifically, they respond that paragraphs 1 and 7 fall in the general background exception identified in *AUCC*, whereas paragraphs 14 to 16, 19, and 20 to 22 are relevant as they fit within the second exception and assist to demonstrate that the Minister violated his duty of procedural fairness. Foster Farms also note that the affidavit of Mr. Blair Hynes [Hynes Affidavit], tendered as evidence in support of the Minister's response to the application for judicial review, appears to be an attempted response to the impugned paragraphs of the Bains Affidavit. In particular, they refer to paragraph 10 of the Hynes

Affidavit, in which Mr. Hynes denies that the release of "preliminary decisions" was ever a practice of GAC decision makers.

[35] It is well established that the Court may strike all or parts of affidavits where they are abusive or clearly irrelevant, or where they contain opinions, arguments or legal conclusions (Quadrini para 18; *Cadostin v Canada (Attorney General)*, 2020 FC 183 [*Cadostin*] at para 36). The general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 14; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB*] at para 78). Expert evidence is an exception to this general rule barring opinion evidence. The main rationale for excluding lay witness opinion evidence is that it is not helpful to the decision maker and may be misleading (*White Burgess* at para 14). As admitted by Foster Farms, Mr. Bains is not an expert in the technical sense, and they did not tender the Bains Affidavit as expert opinion evidence. Mr. Bains was therefore a lay witness and the Bains Affidavit was submitted to "provide the narrative of facts which is relevant to [their] application for judicial review".

[36] The SCC has recognized that "[t]he line between 'fact' and 'opinion' is not clear" (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed some freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the FCA recently stated that, in the context of a proceeding before the Competition Tribunal (a specialized administrative decision maker),

opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (*TREB* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, the evidence may be accepted by a court or an administrative decision maker even if it is opinion evidence (*TREB* at para 80; *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 at paras 105-108).

[37] Furthermore, it has been recognized that lay witnesses can provide opinions about their own conduct and their own business (*TREB* at paras 80-81). The FCA however specified that there are limits to such lay opinion evidence: "lay witnesses cannot testify on matters beyond their own conduct and that of their businesses in the 'but for' world" and they "are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the 'but for' world, nor do they have the experiential competence" (*TREB* at para 81). In other words, when a witness had an opportunity for observation and was in a position to give real help to the decision maker, the evidence may be admissible and the real issue will be the assessment of weight.

[38] A careful reading of the Bains Affidavit leads me to conclude that some of the impugned paragraphs could fall within the limited exceptions set out in *AUCC*. As such, I am satisfied that paragraphs 1, 7 and 19 provide some background assisting the Court in understanding the issues before it. In the same vein, I accept that, to some extent, paragraphs 7, 14 to 16 and 20 to 22

could assist to determine whether the Minister violated his duty of procedural fairness. However, many of those paragraphs are riddled with opinions, rather than referring to only facts. For example, at paragraphs 14 to 16 of his affidavit, Mr. Bains refers to other cases involving dairy inputs and relating to a different industry to draw the conclusion that, in his view, the fact that GAC granted a meeting in those other import permit applications suggests that Foster Farms should also have been provided with a similar opportunity. Turning to paragraphs 20 to 22, Mr. Bains refers to what, in his view, is "the custom course and practice of decision-making" in SIP applications, and claims that such practice entails providing applicants with an interim report or a proposal letter setting out a proposed decision and providing them with an opportunity to deal with any concerns on the part of the decision maker before a final decision is made. Such statements rest on Mr. Bains' own assessment of practices by government officials in different files and offer an opinion that the decision-making process followed for Foster Farms was inconsistent with previous customs of government officials. Instead of testifying on facts relevant to Foster Farms' application for judicial review before the Court, Mr. Bains refers to his career experience and familiarity with the custom, course and practice of Government of Canada officials respecting the process of making decisions relevant to importers and taxpayers. His testimony in that respect has the typical attributes of expert opinion evidence. In sum, he is trying to extrapolate from his personal knowledge and experience in another, distinct industry, and draws conclusions allegedly applicable to Foster Farms' situation.

[39] However, Mr. Bains was not qualified as an expert witness and I agree with the Minister that paragraphs 14 to 16 and 20 to 22 of his affidavit contain improper opinions, arguments and legal conclusions regarding the issues before the Court. In my view, they go far beyond what the

case law mentioned above has recognized as acceptable lay opinion evidence. As such, I agree that they were not properly included in the Bains Affidavit and that they cannot be considered by the Court.

[40] In such a situation, the Court has the discretion of striking the impugned paragraphs or of giving them no weight or probative value (*CBS Canada Holdings Co. v Canada*, 2017 FCA 65 at para 17; *Cadostin* at para 36; Abi-Mansour v Canada (Attorney General), 2015 FC 882 at paras 30-31). For the sake of efficiency, I have opted to exercise my discretion to give no weight or probative value to those paragraphs of the Bains Affidavit in these reasons. This will be discussed further below when addressing the issue of legitimate expectations.

B. ***Procedural fairness***

[41] The four different breaches of procedural fairness raised by Foster Farms can in fact be regrouped under two separate headings. On the one hand, Foster Farms allege that the administrative law principle of *audi alteram partem* entitled them to be given prior notice by the Minister before the Decision was made. In their various arguments, Foster Farms claim that they were not given notice on several matters ultimately retained or considered by the Minister in his Decision, such as the fact that no explanation was given for the customs classification error, the grounds for the inadvertent error, and the fact that SIPs for "exceptional or unusual circumstances" were normally granted in situations of short supply or limited supply. On the other hand, Foster Farms claim that they had a legitimate expectation to be given an opportunity to respond to the Minister's concerns before the Decision was made (*Baker* at para 26).

[42] For the reasons that follow, I am not persuaded by Foster Farms' submissions on their alleged breaches of procedural fairness. I instead find that, throughout the process followed by the Minister and GAC, Foster Farms were afforded the appropriate level of procedural fairness required by the circumstances of the matter, were provided with an adequate notice of the case they had to meet, and had a full and fair opportunity to respond.

(1) The scope of the duty

[43] It is well recognized that the requirements of the duty of procedural fairness are "eminently variable", inherently flexible and context-specific (*Vavilov* at para 77; *Dunsmuir* at para 79), and that they "[do] not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53). The actual level and content of the duty of procedural fairness, and whether a decision is procedurally fair, must therefore be determined on a case-by-case basis (*Baker* at para 21). It is also important to underline that, in any situation, procedural fairness strictly relates to the process followed by the decision maker (*Baker* at para 26). It does not create substantive rights nor does it entitle a person to a given outcome. In other words, the duty to act fairly is not related to the merits or content of a decision, or to a particular result in the treatment of a matter, and Foster Farms cannot claim to have a right to the Minister agreeing with them.

[44] The purpose of the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully, and to have them considered by the decision

maker (*Baker* at para 22). In general terms, the administrative process followed by a decision maker will be fair when it offers the affected parties a right to be heard and a full opportunity to know and to respond to the case against them.

[45] The specific procedural requirements that the duty of procedural fairness imposes are determined with reference to all the circumstances, and the nature and scope of the duty will vary depending on various factors. In *Baker*, the SCC identified a non-exhaustive list of factors that inform the content of the applicable level of procedural fairness required in a given set of circumstances (*Baker* at paras 23-27; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115; *Varadi v Canada (Attorney General)*, 2017 FC 155 at paras 51-52). Those factors include: 1) the nature of the decision being made and the process followed in making it; 2) the nature of the statutory scheme; 3) the importance of the decision to the individual or individuals affected; 4) the legitimate expectations of the person challenging the decision; and 5) the choices of procedure made by the administrative decision maker itself.

[46] Foster Farms advance that a higher level of procedural fairness is required in this case because the impact of the Decision may mitigate a significant tariff assessment of over $8 million (*Kane v Bd. of Governors of U.B.C.*, [1980] 1 SCR 1105 [*Kane*] at p 1113), and because the EIPA does not provide an appeal provision (*Baker* at para 24; *7687567 Canada Inc. v Canada (Foreign Affairs and International Trade Canada)*, 2013 FC 1191 [*7687567 Canada*] at para 49). Applying the *Baker* factors to the Decision, I am not persuaded by Foster Farms' arguments. I instead find that, on the contrary, a minimum level of procedural fairness was owed to Foster Farms in the circumstances.

[47] The first *Baker* factor refers to the nature of the decision being made and the process followed in making it. The closer an administrative process (and decision) resembles a court process, the higher the level of procedural fairness will be (*Baker* at para 23). In this case, the nature of the process arriving to the Decision does not resemble a court process, as the Minister was tasked with making a highly discretionary decision based on his opinion on whether certain Canadian market needs regarding imports of chicken products justified granting the Permit Application before him. This is a discretionary decision made from a Ministerial position, as opposed to an adjudicative decision. This suggests a situation calling for a lower level of procedural fairness. This Court has indeed concluded that the Minister's broad discretion to issue permits pursuant to section 8 of the EIPA suggest that only a minimal duty of procedural fairness is owed (*Ultima Foods Inc. v Canada (Attorney General),* 2012 FC 799 [*Ultima Foods*] at para 87).

[48] The second factor relates to the role of the decision within the statutory scheme, the statutory language itself and the institutional and social context. These elements all inform the processes owed to a party (*Baker* at paras 22, 28). A statute should not be read as to insert procedural steps that do not exist or are not contemplated. In this case, neither the EIPA nor its regulations provide any procedural steps in the consideration of requests for retroactive SIPs by the Minister. For instance, the EIPA does not provide for a right to meetings with the Minister or his delegates, nor a right of reply for the permit applicants. As stated by counsel for the Minister, the statutory process set out in section 8 of the EIPA is meant to ensure that applicants make their entire case in their initial applications, and put their best foot forward in their application materials. That said, I acknowledge that, since no appeal procedure is provided within the statute

and the Minister's Decision is determinative of the issue, this second factor weighs in favor of some procedural protections (*Baker* at para 24).

[49] The third *Baker* factor is the importance of the decision to the individuals affected. Generally, the more important a decision is to an affected individual, the greater the level of procedural fairness that will be mandated. Foster Farms argue that the Decision is of major importance to them because of its significant financial impact of over $8 million, and hence that a higher level of procedural fairness applies. However, I point out that this factor refers to the importance of the decision to the lives of *individuals* affected, such as situations where an individual's freedom, ability to work, or risk of physical harm are at stake (*Baker* at para 25; *Kane* at p 1113). Here, Foster Farms are corporations, not individuals, and Foster Farms' financial interests are somewhat dissimilar to situations where the jurisprudence retained the importance of a decision to the individuals affected as a significant factor calling for a heightened level of fairness and procedural rights. In the present case, the Decision involves economic interests and therefore does not affect fundamental rights *per se*. That said, I am prepared to accept that the Decision is not negligible for Foster Farms and that this is a factor that cannot be overlooked when assessing whether sufficient explanations should have been given for the Decision (*7687567 Canada* at para 49). However, it cannot receive the same weight, in terms of the required level of procedural fairness, as situations where decisions affect the lives of individuals affected. I pause to observe that the *7687567 Canada* decision relied on by Foster Farms was a case where no reasons were given with no comments or notes from the decision maker.

[50] The next factor mentioned by *Baker* is the legitimate expectations of the person challenging the administrative decision. In essence, if a legitimate expectation is found to exist with respect to a procedure to be followed, it will affect the content of the duty of fairness owed to the individuals affected by the decision (*Baker* at para 26). In the present case, as discussed in more detail below, I cannot identify a legitimate expectation of a particular practice or process to which Foster Farms may have been entitled, apart from the fact that the Minister had to follow the requirements of the Notice 865. No clear and convincing evidence supports that unqualified representations had been made, or that an established conduct or practice existed, such that it could have caused Foster Farms to have a legitimate expectation of any specific process for the Minister's decision-making. On this point, I agree with the Minister that, even if I were to accept that, in other previous cases, a right to reply was provided by the Minister to a SIP applicant (as stated in the Bains Affidavit for situations in the dairy industry), the fact remains that requests for SIPs are to be determined on a case-by-case basis pursuant to the EIPA.

[51] The last *Baker* factor refers to the decision maker's process and the choice of procedures made in a given case. Where, as here, the statute is silent on the procedural mechanisms and the decision maker has expertise in determining what procedures are appropriate in the circumstances, the Minister's selected procedures for decision-making should be respected. This militates in favour of a level of procedural fairness located towards the lower end of the range. In the case of Foster Farms, there was no need to follow processes or give reasons comparable to those given by a court. All that was required was to explain the rationale for the Decision, including the legal basis, according to the facts of the case. In such circumstances, the Minister simply had to give a comprehensible justification for his Decision.

[52] In light of the foregoing, and after balancing the various *Baker* factors against the particular circumstances surrounding Foster Farms' Permit Application, I conclude that the level of procedural fairness owed to Foster Farms resides at the lower end of the spectrum.

(2) The notice requirement

[53] I now turn to the claims for a notice requirement. Foster Farms allege that the Minister violated procedural fairness by failing to provide them prior notices on several fronts and that they were not given an opportunity to respond and to address these issues before the Minister rendered his Decision. In support of their submissions, Foster Farms rely on administrative case law which recognized that, in certain cases, the principle of *audi alteram partem* imposes on a decision maker a duty to provide notice (*Supermarchés Jean Labrecque Inc v Flamand*, [1987] 2 SCR 219 [*Labrecque*] at p 233; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*] at para 104). They submit that the substantive requirements of notice will only be satisfied if the administrative decision maker lets the affected person know the essentials of the evidence on the principal issue it has to decide, so that the affected person may have a reasonable opportunity to make representations on that issue and to respond to the arguments presented in opposition (*Scott v Nova Scotia (Rent Review Commission)*, 81 DLR (3d) 530 (NSCA) at para 59).

[54] Foster Farms more specifically complains of the failure of the Minister to give them prior notice of the assertion, contained in the MOA, that they had not explained why the misclassification had occurred. Foster Farms maintain that the emphasis placed on this lack of explanation invited the Minister to draw negative inferences, namely that Foster Farms

intentionally misclassified its imported goods to avoid tariff costs. Foster Farms submit that these would be unfair inferences and that they should have been notified of this lack. They argue that they were denied a meaningful opportunity to address this issue with the Minister before the denial of the retroactive SIPs.

[55] Foster Farms also contend that the Minister further violated procedural fairness when it failed to provide them notice of the position, set out in the MOA to the Minister and in the Decision, that SIP applications based upon the existence of extraordinary or unusual circumstances were generally granted “only” where the goods are in short or limited supply. Foster Farms submit that the words “short supply” or “lack of supply” do not appear in the Notice 865, and that they should have been given the opportunity to respond to this issue before the denial of the SIPs. They further maintain that their Permit Application did not expressly deal with the issue of limited domestic supply, because the Notice 865 does not use such wording.

[56] I disagree with Foster Farms and I am not convinced by their submissions. Further to my review of the evidence and the applicable law, I am instead satisfied that, in the context of a permit application, Foster Farms were provided with an adequate notice of the case they had to meet. Furthermore, Foster Farms knew what the process before the Minister would entail, they had notice of the information required from them, and they had a fair and full opportunity to provide further information.

(a) ***No right to a prior notice***

[57] In essence, Foster Farms argue that, once applicants provide reasons for which SIPs should be granted in their permit applications, the Minister has to provide such applicants another opportunity to explain why the SIPs should be awarded to them if the Minister happens to disagree with the applicants' submissions. With respect, this is not the case.

[58] The *audi alteram partem* rule refers to the requirement that persons be given sufficient information to provide them with a reasonable and meaningful opportunity to answer the case against them before the decision maker renders his or her decision. In *R v Rodgers*, 2006 SCC 15 [*Rodgers*], the SCC refused to acknowledge that notice and participation are "themselves principles of fundamental justice", or that they are invariable constitutional norms. Rather, the SCC ruled that procedural fairness entails a context-sensitive approach, and "[n]otice and participation may or may not be required to meet this norm" (*Rodgers* at para 47). As such, whether a notice is required to meet the duty of procedural fairness must be determined on a case-by-case basis, adopting the contextual approach set out in *Baker*.

[59] Moreover, the object of notice is to ensure that the persons directly affected by a pending decision are provided with *sufficient* information and opportunities to meet the case against them. However, what is sufficient varies with each case, informed by the level of procedural fairness due in the circumstances. The Court must therefore determine, while adopting a contextual approach, whether, in the context of requests for SIPs, the duty of procedural fairness required

that the Minister allows Foster Farms to address the absence of explanation or the question of short or limited supply.

[60] The notice requirement dictates that applicants be provided with the information necessary to build and present their best case to a decision maker, taking into account the factors that are likely to be considered and the process involved. Such notice requirement does not extend to draft decisions or memoranda written to inform a decision maker. Unless new and relevant information comes to the decision maker's attention that would influence the disposition, there is no requirement to go back to the applicant for further commentary (*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398 [*Uniboard*] at paras 21-22; *Canadian Cable Television Assn v American College Sports Collective of Canada Inc*, [1991] 3 FC 626 at paras 31-37).

[61] In *Ultima Food*s, the applicants had argued that their view was not adequately described in the memorandum sent to the Minister. The Court ruled that there was no breach of procedural fairness by the Minister because the duty owed was at best minimal, and did not include the right to make representations:

> [99] I find there was no duty to hear the Applicants' views for two reasons. First, the Minister's broad discretion to issue Permits that suggests there is, at best, only a minimal duty of fairness. Second, given the confidential nature of the Chobani Application process, the Applicants would not, in the normal course, have had any opportunity to make submissions to the Minister. This means, in my view, that the minimal duty of fairness would not have included the right to make representations.

[62] I am mindful of the fact that, in *Ultima Foods*, the applicants were parties opposing the issuance of SIPs under subsection 8.3(3) of the EIPA to a third-party yogurt producer. Therefore, this precedent must be applied with caution to the present case. However, the Court's finding in relation to the Minister's broad discretion to issue SIPs under subsection 8.3(3) of the EIPA remains relevant to determine the content of the duty of procedural fairness owed to Foster Farms in the present case.

[63] The Court is aware of no precedents supporting Foster Farms' assertion that the duty of procedural fairness in the context of import permit applications under section 8.3 of the EIPA requires the decision maker to give an opportunity to an applicant to respond to the decision maker's concerns. Indeed, Foster Farms has not directed the Court to any precedent to that effect.

[64] In my view, in a context such as this one where the level of procedural fairness is located towards the lower end of the range, a fair process does not encompass a duty to give notice of how a decision maker has actually interpreted and applied his or her discretionary authority, and if so, in what circumstances. Nor does it imply a duty to inform the applicants about results achieved in other cases or about existing precedents.

[65] Rather, administrative case law regarding permit applications provides that applicants generally carry the duty to ensure that no deficiencies exist within their applications (*Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 32; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 52). Analogies are never perfect, but they can be informative. The jurisprudence dealing with study permits or work permits in immigration

matters has repeatedly established that procedural fairness does not impose a duty to provide notice to the applicants regarding the deficiencies of their applications or concerns about it (*Chowdhury v Canada (Citizenship and Immigration)*, 2019 FC 1417 [*Chowdhury*] at para 10; *Masam v Canada (Citizenship and Immigration)*, 2018 FC 751 at para 11). In such situations, procedural fairness does not generally give applicants the right to address concerns that might arise from the materials submitted. In the context of these permit applications which are subject to a high level of discretion, decision makers do not have a duty or legal obligation, in the exercise of their discretion, to seek to clarify a deficient application, to apprise an applicant about concerns arising directly from the legislation or regulations, to provide the applicant with a running score at every step of the application process, or to offer further opportunities to respond to continuing concerns or deficiencies (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 23). To impose such an obligation would be akin to giving advance notice of a negative decision, an obligation that the Court has expressly rejected on many occasions with respect to administrative decision makers ruling on work permits or study permits. It is well recognized that the onus is on permit applicants to put together applications that are convincing, anticipate adverse inferences contained in their evidence and address them.

[66] Similarly to the situation for work permits or study permits, there are no legal rights to SIPs, the burden was on the Foster Farms to establish their entitlement to such exceptional permits, the decision typically has a less serious impact on the applicants compared with the removal of a benefit, and there is a public interest in containing administrative costs.

[67] While in some exceptional cases, providing notice may be required as an exception to the general rule (*Chowdhury* at para 11; *Li v Canada (Citizenship and Immigration)*, 2012 FC 484 at para 32), I find that this is not such a case. There is no ambiguity in the EIPA to support that procedural fairness in the context of SIPs issuance under section 8.3 of the EIPA requires the decision maker to give an opportunity to the applicant to respond to its concerns. In sum, Foster Farms was not entitled to the form of notice requirement they are claiming.

(b) ***Adequate notice was given***

[68] In any event, I am satisfied that Foster Farms were provided with an adequate notice of the case they had to meet.

[69] First, Foster Farms were provided a *de facto* notice of the case against them because they were fully aware and informed of what the discretionary SIPs issuance process entails. Foster Farms were represented and assisted by experienced counsel throughout the process, they knew that SIP issuance is highly discretionary, and they appropriately provided lengthy submissions in their Permit Application. In this case, Foster Farms were obviously well aware of the potential tax assessment they were facing, from the very start of the process. I pause to underscore that their detailed Permit Application was provided to the Minister along with the MOA, and was thus before the Minister when he rendered his Decision.

[70] In addition, the principle of a notice requirement dictates that applicants be provided with the information necessary to build and present their best case to a decision maker, taking into account the factors that are likely to be considered and the process involved. Here, Foster Farms

had access to the EIPA and its regulations, to the Notice 865 as well as to other notices to importers regarding goods listed in the Import Control List and subject to restrictive conditions of import. With this information available to them, Foster Farms had to put their best foot forward in their Permit Application and could not simply wait for the Minister to express his concerns before providing their evidence or arguments in support of their request.

[71] Furthermore, the record shows that Foster Farms were granted a meeting after issuing their Permit Application, further to their request. As such, Mr. Hynes held a conference call with Foster Farms and their counsel on August 16, 2018. Following this call, Foster Farms were able to provide the additional information requested by Mr. Hynes during the call and made further written submissions on two different occasions, on August 21, 2018 and September 26, 2018. Through their written submissions, both initial and supplementary, and in the phone call with GAC officials, Foster Farms had a clear and fair opportunity to meet the case against them.

[72] In light of the lower level of procedural fairness due in the circumstances, I am satisfied that Foster Farms sufficiently knew the case they had to meet, received all relevant documents and had a fair opportunity to respond to the Minister's concerns.

(c) ***The lack of explanation***

[73] Foster Farms takes particular exception with the excerpt of the MOA stating that Foster Farms had failed to provide explanations regarding their classification error. With respect, Foster Farms' argument on this front is without merit.

[74] It is worth citing what the MOA specifically stated in that regard, at paragraph 10. The MOA indicated that the rationale provided by Foster Farms in their Permit Application and in their submissions "provides no explanation as to why the finished product manufactured with Canadian boiler chicken imported by Foster Farms was declared as spent fowl at the time of re-export to Canada".

[75] Further to my review of the Permit Application and the record, I have no doubt that this observation made in the MOA is accurate. While Foster Farms argued that the chicken products at issue were misclassified by inadvertence, it remains that they were misclassified in such a way that they attracted no tariff. In addition, the Permit Application contains multiple references to the fact that Foster Farms mistakenly believed that, since their corn dogs were manufactured with broiler chicken meat of Canadian origin, they were entitled to duty-free treatment. But Foster Farms provided no explanation as to why, in this context where Canadian broiler chicken inputs were used, the category "spent fowl" (which attracted no duties) was chosen and not "broiler chicken" (which would have attracted duties). When the sentence is read in its entirety, it looks obvious to me that the lack of explanation related to the choice of the "spent fowl" classification, instead of "broiler chicken". The statement on the absence of explanation for the choice of "spent fowl" mentioned in the MOA and provided to the Minister thus reflected a correct reading of the Permit Application. I further observe that the Minister had specifically noted in the Decision the statement by Foster Farms that they had no intention to deceive. In light of this, Foster Farms' suggestion that, as drafted, the MOA invited the Minister to draw negative inferences about their intention appears totally ill-founded and baseless.

[76] All of this information was placed before the Minister, and the fact that Foster Farms had not provided reasons for classifying the goods as “spent fowl” was not new relevant information that could affect or influence the Decision. It was not something that Foster Farms were unaware of at the time of their Permit Application. There is simply no breach of procedural fairness or of any right to be heard here. The absence of explanation was an accurate observation made by GAC officials on the contents of the Permit Application made by Foster Farms.

[77] Again, the Minister had no duty to go back to Foster Farms and give them a second chance to explain why, in a context where they repeatedly refer to the Canadian origin of the broiler chicken inputs used in the imported corn dogs, they nonetheless elected to classify their imports as spent fowl and not broiler chicken.

(d) ***Limited domestic supply***

[78] Foster Farms also argue that they ought to have been given notice of the examples provided to the Minister regarding the circumstances in which permits are “normally” granted for extraordinary or unusual circumstances. In the Decision, the Minister specified that such SIP requests “are normally authorized to address short to medium term Canadian market needs resulting from emergencies such as destruction of Canadian poultry flocks due to avian influenza, or to address chronic lack of domestic supply of products that may not be domestically produced in Canada”. This wording echoed what had been mentioned in the underlying MOA.

[79] There is no requirement in law that a Minister provide an applicant with all examples of other cases in which permits have been granted, especially in circumstances where the Minister

has a wide-ranging discretion and where permits are specifically granted based on their individual merits. What is extraordinary or unusual in a particular case will vary and the legislation, regulations and policies cannot account for all possible scenarios. The duty of procedural fairness does not imply a duty to inform applicants about other specific cases or precedents, or to give applicants a roadmap of how a discretion has been exercised by the decision maker. As the language used in the Decision clearly illustrates, the two situations singled out by the Minister were examples and were not meant to be exhaustive.

[80] I would add that the Decision states that such requests for SIPs under the "extraordinary and unusual circumstances" component are "normally authorized" in the circumstances described in the reasons. Contrary to Foster Farms' allegations, the Decision does not say "only". The reasons thus imply that these circumstances are not exhaustive and that there may be other, less frequent, situations where authorization under that category could arise. On this note, Mr. Hynes' cross-examination supports the fact that the Minister was not misled on applying the Notice 865 or was not led to think that the examples of the extraordinary or unusual circumstances category provided in the MOA were exhaustive or exclusive.

[81] Mr. Hynes explained that the instances reflective of the "normal practice" were given to provide examples to inform the Minister. Not all possible situations were listed. Rather, simply those that were easily identifiable and relatable to a decision maker were outlined. The Minister had no obligation to list all possible reasons for which the Permit Application was denied, nor to give all possible examples of where a permit may have been approved. In coming to his Decision, the Minister gave some examples of where permits may be issued under the

extraordinary or unusual circumstances category but did not suggest these examples were complete or comprehensive.

[82] Contrary to the argument put forward by counsel for Foster Farms at the hearing before the Court, I am not persuaded that the Minister deviated from the Notice 865 or "narrowed the goal posts" by providing the examples of "normal" authorizations. He simply indicated where permit applicants have been successfully aiming if they want to score in the "extraordinary and unusual circumstances" net. The requirement was, and has always been, to demonstrate the existence of extraordinary and unusual circumstances in the context of the Notice 865.

(e) ***Absence of prejudice***

[83] I add one other observation. In order for a procedural defect to constitute a breach of procedural fairness opening the door to the Court's intervention, it must result in some form of prejudice for the applicant complaining about such defect, even in cases where it can be difficult to obtain evidence to that effect (*Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4 at para 49; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 [*Taseko Mines*] at para 62; *Uniboard* at para 24; *Pounall v Canada (Border Services Agency)*, 2013 FC 1260 at para 20).

[84] In *Taseko Mines*, the FCA clarified that, where a party invokes a breach of the *audi alteram partem* principle in cases involving a minimal duty of procedural fairness, a possibility of prejudice must arise from the alleged failure (*Taseko Mines* at paras 60-62):

> [61] Thus, *Kane* cannot be used in support of the idea that a mere apprehension of a breach of procedural fairness is sufficient to justify intervention. *Kane* considered an existing breach; not only was the Board of Governors presented new information (in the sense that the party had not been given an opportunity to address it earlier), but that information was "necessary" for the resulting decision. While it is true that "actual prejudice" need not be shown for a breach to be found, there still needs to be a "possibility" of prejudice on the face of the record. This is particularly true in a case such as this one, where the degree of procedural fairness owed is minimal. The judge therefore applied the correct approach when he stated that "a party must show that a possibility of prejudice arose from such a meeting or submission in order to constitute a breach of the *audi alteram partem* principle" (Reasons, at para. 71).
>
> [Emphasis added]

[85] In other words, Foster Farms had to show that, had it known about the fact that retroactive SIPs will normally be granted under extraordinary and unusual circumstances when there is a chronic lack of domestic supply, they would have fitted within the said circumstances and exception. In this case, nothing in Foster Farms' Permit Application even obliquely suggested that the extraordinary and unusual circumstances they were invoking had anything to do with the supply conditions in the Canadian market for corn goods. The main arguments put forward by Foster Farms in their Permit Application to explain their inadvertent misclassification error revolved around the Canadian origin of the chicken broiler inputs used in the imported corn dogs. Moreover, Foster Farms did not provide, in their application for judicial review, any evidence with respect to a potential limited domestic supply of the chicken products at issue in Canada, and at no point did they attempt to demonstrate a "possibility" of prejudice on the face of the record (*Taseko Mines* at para 61).

[86] There is nothing on the record before me in terms of evidence showing what Foster Farms' response would have been had it be given notice that permit applications raising the extraordinary and unusual circumstances are generally accepted in one of the two situations outlined in the Decision. Stated differently, there is no evidence showing that the result could have been different had Foster Farms known or been told that SIPs sought for extraordinary or unusual circumstances are normally granted in cases of a chronic lack of domestic supply of products that may not be domestically produced in Canada.

[87] In its written submissions, Foster Farms assert that the word "short supply" or "lack of supply" do not appear in the Notice 865, and they claim that they should have been given the opportunity to respond to this issue with the Minister before the denial of SIPs. However, for this alleged failure to provide notice to amount to a violation of the duty of procedural fairness, in a context where the duty falls at the lower end of the spectrum, Foster Farms had to show that had it known about the allegedly "narrowed goal posts", it would have been able to demonstrate that it fits within the "normal" instances where SIPs have effectively been granted by the Minister. Foster Farms failed to demonstrate such possibility of prejudice.

[88] I pause to point out that the examples provided by the Minister should not come as a surprise or be unexpected. The "extraordinary and unusual circumstances" is the residual category of SIP authorizations contained in the Notice 865. This component has to be read in the overall context of that policy, which allows the Minister to authorize imports over and above the import access quantities, "particularly if he judges that the importation of these products is required to meet Canadian market needs". As is the case for products on the Import Control List,

the driving concern is supply management and how supply can respond to Canadian market needs. The other five authorizations are indeed all related to supply concerns prompted by particular Canadian market requirements such as shortages, constraints in domestic sourcing of certain products or testing for new products.

[89] In their Permit Application, Foster Farms had mentioned their mistaken belief that the chicken products were entitled to duty-free treatment because they were primarily manufactured from chicken inputs that originated from Canada. Misclassification errors, even if they are prompted by inadvertence or by the Canadian content of inputs being used in the imported products, bear no relation with conditions affecting the Canadian market or supply constraints for certain chicken products. These may have been legitimate explanations for Foster Farms' classification error, but they have no resemblance with the situations covered in the Notice 865 and with the actual wording and intent of that policy.

(3) Legitimate expectations

[90] I now move to Foster Farms' claim of legitimate expectations. Foster Farms submit that the Minister violated procedural fairness because they had a legitimate expectation that the MOA would fully consider and mention the facts, stated by Foster Farms in the Permit Application, that the misclassification of the chicken products was caused by inadvertence. They complain that they were not given the opportunity to clarify the facts surrounding their classification error. More generally, in the oral representations before the Court, counsel for Foster Farms maintained that procedural fairness and the principle of legitimate expectations entitled Foster Farms to receive notice from the Minister prior to the issuance of the Decision.

[91] I do not agree and find that no issue of legitimate expectations arises here. Foster Farms' argument on this front is without merit and simply amounts to an attempt to give the doctrine of legitimate expectations a scope it does not have.

[92] Foster Farms correctly states that the doctrine of legitimate expectation is an extension of the rules of natural justice and procedural fairness (*Reference re Canada Assistance Plan (B.C.),* [1991] 2 SCR 525 at p 557). Where the doctrine applies, it implies certain procedural entitlements in relation to administrative decision-making (*C.U.P.E. v Ontario (Minister of Labour),* [2003] 1 SCR 539 [*CUPE*] para 131; *Canada (Attorney General) v Mavi* [2011] SCC 30 [*Mavi*] at para 69; *Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 [*Agraira*] at para 94).

[93] As explained by the SCC in *Agraira*, the doctrine of legitimate expectations provides that, if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. While truly reasonable or legitimate expectations may affect what procedural fairness protections are required, an expectation will only meet that threshold if it is based on a decision maker's "clear, unambiguous and unqualified" representation, conduct or established practice (*Agraira* at paras 94-95; *Mount Sinai Hospital Center v Québec (Minister of Health and Social Services),* 2001 SCC 41 [*Mount Sinai*] at para 29). Furthermore, the doctrine of legitimate expectations does not create substantive rights, and it cannot hinder the discretion of a decision maker responsible for applying the law

(*Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at pp 557-558; *Nshogoza* at paras 41-42). In addition, the representations must be within the scope of the government official's authority, they must be "procedural in nature" and they must "not conflict with the decision maker's statutory duty" (*Mavi* at para 68; *CUPE* at para 131; *Mount Sinai* at para 29).

[94] An important tenet of the doctrine of legitimate expectations is that it cannot operate to defeat a statutory prohibition on the process contended for (*Lidder v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 212 (FTD), 136 NR 254 at para 28). As stated by the Court in *Yoon v Canada (Citizenship and Immigration)*, 2009 FC 359 [*Yoon*], "no legitimate expectation can exist that is contrary to express provisions" of a regulation (*Yoon* at para 20). In other words, the doctrine cannot be used to "counter Parliament's clearly expressed intent to confer an authority to a decision-maker" (*Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 19). In no case can a public authority place itself in conflict with its duty and forego the requirements of the law (*Nshogoza* at para 42; *Oberlander v Canada (Attorney General)*, 2003 FC 944 at para 24).

[95] In the present case, there is no evidence of "clear, unambiguous and unqualified" representations made to Foster Farms, or that there was a conduct or established practice that could have caused them to have legitimate expectations of any specific process. On the contrary, there is a total absence of any representations made by the Minister or of a practice by GAC or CBSA officers.

[96] Foster Farms argue that Mr. Bains' experience on a "like" file and experience observing some practices of government agencies provide sufficient grounds to establish legitimate expectations. In his affidavit, Mr. Bains claims to have become familiar with the custom, course and practice of government of Canada officials respecting the process of making decisions relevant to importers and taxpayers. Mr. Bains says he has worked as a CBSA verification officer and has issued interim verification reports setting out a proposed decision and providing importers with an opportunity to address any concerns before making a final decision. In his affidavit, Mr. Bains also refers to dairy import files where counsel for the applicant was given an opportunity to meet with GAC officials and to discuss the probable decision. Through this process, says Mr. Bains, the applicant in that case was able to speak to GAC's concerns and was provided, effectively, a right of reply. Based on those statements supported by limited evidentiary facts, Mr. Bains submits that the custom, course and practice of decision-making is to provide the person concerned with an interim report or a proposal letter setting out a proposed decision and to also provide them with an opportunity to deal with any concerns on the part of the decision maker before a final decision is made. I am not persuaded by the argument.

[97] First, Mr. Bains is a lay witness and he did not file his affidavit as an expert witness. He was not qualified as an expert witness, through either education or experience. He therefore cannot provide opinion evidence and, as stated above, I am not giving weight to those portions of the Bains Affidavit as it is inadmissible lay opinion evidence. Moreover, and in any event, even if I were to give weight and probative value to that evidence, the examples offered by Mr. Bains are unhelpful to Foster Farms. Decisions on SIPs are made on a case-by-case basis pursuant to the EIPA and the applicable policies. In fact, the Notice 865 clearly provides that "authorization

for supplemental imports due to extraordinary or unusual circumstances will be evaluated on their individual merits". What happened on unrelated files regarding different products and a different industry does not amount to evidence of an "established" practice with respect to the treatment of retroactive SIPs for chicken products. Furthermore, Mr. Bains' evidence is directly countered by Mr. Hynes, a current GAC manager who was involved in Foster Farms' Permit Application. In his affidavit filed in support of the Minister's response to Foster Farms' application for judicial review, Mr. Hynes specified that, while departments (other than GAC) may have processes by which "preliminary" decisions may be provided to applicants, it is not, nor was it at the time of Foster Farms' Permit Application, nor has it ever been the practice of GAC decision makers to do so when making decisions or recommendations related to requests for retroactive SIPs. Mr. Hynes was questioned on this statement by counsel for Foster Farms when he was cross-examined on his affidavit, and he did not resile from it. His evidence on the absence of any established practice in the specific context of Foster Farms' Permit Application stands uncontradicted. I find it far more convincing than the general, unrelated evidence tendered by Mr. Bains.

[98] In sum, based on the evidence before me, and even if I was to accept Mr. Bains' lay opinion evidence, I am therefore not persuaded that, on a balance of probabilities, Foster Farms has established the existence of "clear, unambiguous and unqualified" representations that could open the door to the application of the doctrine of legitimate expectations. In addition, the legitimate expectation claimed by Foster Farms would run contrary to the large discretion given to the Minister under section 8 of the EIPA and to the express provisions of the Notice 865 on

"extraordinary and unusual circumstances". In such a case, the doctrine of legitimate expectations cannot apply.

(4) Issue of no reference to inadvertent error

[99] In addition to their claims about the notice requirements and the legitimate expectations, Foster Farms also allege that the Minister failed to meet the required level of procedural fairness because the MOA did not make reference to the fact that their Permit Application mentioned that Foster Farms had made an inadvertent error when importing its chicken products. More specifically, Foster Farms maintains that the MOA omitted to fully and fairly set out the facts explaining the context and reasons for the inadvertent error, as those were set out in the Permit Application. As mentioned above, Foster Farms had indicated in their request that the inadvertent error was due to their mistaken belief that the chicken products were entitled to duty-free treatment because they were primarily manufactured from chicken that originated from Canada. They complain that they were not given the opportunity to clarify the facts surrounding their classification error.

[100] With respect, I do not see how the failure to mention, in the MOA, the facts underlying the inadvertent error can amount to a breach of procedural fairness.

[101] The Permit Application, in which Foster Farms made their argument regarding inadvertence, was attached to the MOA sent to the Minister and was always available for the Minister's consideration. There is no doubt that both the MOA and the Permit Application were before the Minister when he made the Decision. And there is no evidence suggesting that the

Minister relied only on the MOA. On the contrary, the Minister specifically cites and refers to Foster Farms' Permit Application in the Decision. Furthermore, the Decision expressly mentions that "inadvertence" was one of the grounds specifically advanced by Foster Farms in support of their Permit Application. Clearly, this element was not ignored by the Minister. Moreover, further to my review of the MOA, I find it clear that GAC was fully aware of Foster Farms' claim that the inadvertent error resulted from their mistaken belief that the chicken products could be imported duty-free because they were manufactured with Canadian broiler chicken inputs. In other words, the rationale for the inadvertent error was before the Minister when he made the Decision, and the fact that no specific reference was made to this portion of the Permit Application in the MOA or in the Decision cannot constitute a breach of procedural fairness.

[102] In any event, as counsel for the Minister rightly argued, if the issue of the inadvertent error is relevant, how the Minister treated it and whether the Minister failed to consider a relevant factor in his decision making is a question with respect to the substance of the decision and is not a matter of procedural fairness. It relates to the reasonableness of the Decision.

(5) Conclusion on procedural fairness

[103] In the circumstances, and for all the reasons detailed above, I do not detect any breach of the principles of procedural fairness in the decision-making process followed by the Minister. Quite the contrary. I am satisfied that Foster Farms were well aware of the substance of the case against them and that they had multiple opportunities to respond to the evidence found by the Minister and to understand the case they had to meet. Foster Farms' contention, that they were not given a proper opportunity to be heard and to address the case against them, does not reflect

the actual contents of the Decision or the facts surrounding the treatment of their Permit Application. I am convinced that the administrative process followed by the Minister achieved the level of procedural fairness required by the circumstances of this matter, and that it was not procedurally or otherwise unfair.

C. *Reasonableness*

[104] While, both in their written representations and at the hearing before the Court, Foster Farms attempted to classify all errors allegedly committed by the Minister as falling within the category of procedural fairness, I agree with the Minister that many of their arguments were more reminiscent of grounds questioning the reasonableness of the Minister's Decision. As such, whether the Minister came to an improper conclusion on the basis of his misapplication of the EIPA or whether he improperly considered relevant or irrelevant factors in making his Decision are questions of fact and law subject to the standard of reasonableness. I will therefore briefly deal with Foster Farms' arguments under the reasonableness lens.

[105] In sum, for the reasons detailed below, I do not find any indicia of unreasonableness in the Minister's Decision.

(1) The *Vavilov* test

[106] As mentioned above, in *Vavilov*, the SCC articulated a new approach to determining the applicable standard of review, holding that administrative decisions should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law

requires otherwise (*Vavilov* at paras 10, 17). I am satisfied that neither of these two exceptions apply in the present case, and that there is no basis for derogating from the presumption that reasonableness is the applicable standard of review for the Minister's Decision.

[107] 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; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at paras 2, 31). *Vavilov*'s revised framework for reasonableness requires the reviewing court to take a "reasons first" approach to judicial review (*Canada Post* at para 26). Where a 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). 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). However, "it is not enough for the outcome of a decision to be *justifiable* […] the decision must also be *justified*" (*Vavilov* at para 86).

[108] Before a decision can be set aside on the basis that it is unreasonable, the reviewing courts must be satisfied 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).

[109] An assessment of the reasonableness of a decision must be robust, but remain sensitive to and respectful of the administrative decision maker (*Vavilov* at paras 12-13). Reasonableness review is an approach meant to ensure that the reviewing courts only intervene in administrative matters "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is anchored in the principle of judicial restraint and in a respect for the distinct role and specialized knowledge of administrative decision makers (*Vavilov* at paras 13, 75, 93). In other words, the approach to be followed by the reviewing courts is still one of deference, especially with respect to findings of facts and the weighing of evidence. Absent exceptional circumstances, the reviewing courts will not interfere with an administrative decision maker's factual findings (*Vavilov* at para 125).

[110] I should add that the written reasons given by an administrative decision maker must not be assessed against a standard of perfection (*Vavilov* at para 91). Reasons do not need to be comprehensive or perfect. They only need to be comprehensible and justified.

(2) Exercise of discretion

[111] I agree with the Minister that the Decision was reasonable as the Minister's discretion to make the Decision is uncircumscribed, and the Minister properly applied the relevant legislative scheme and policies in his decision-making.

[112] The EIPA establishes an import control list of goods to, among other things, restrict the importation of certain goods into Canada to support the protection of long-term health of supply management in Canada. Pursuant to the statutory legislative regime in place, most chicken

products are controlled for import into Canada (*Customs Tariff*, SC 1997, c 36, Schedule at 1601; Import Control List at ss 101, 110; *Import of Chickens Permit*, SOR/79-72). In that context, the EIPA allows the Minister to issue permits for importation.

[113] Elements that will generally be relevant in evaluating whether a given decision is reasonable include whether any specific constraints are imposed by the governing legislative scheme, such as statutory definitions, principles or formulas that prescribe the exercise of discretion (*Vavilov* at para 108). Here, subsection 8.3(3) of the EIPA states the Minister may issue a permit to import otherwise controlled goods on a supplemental basis. Neither the EIPA nor its regulations limit the categories for which the Minister may approve SIPs, or establish principles or formulas prescribing how the Minister should exercise his discretion. Indeed, in *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge*], the SCC broadly interpreted the scope of the Minister's discretion pursuant to section 8 of the EIPA. This Court further recognized that the Minister's power under subsection 8.3(3) of the EIPA is a discretionary one that is "situated to the unfettered end of the spectrum" (*Ultima Foods* at para 87). In other words, the EIPA provides for broad, open-ended and highly qualitative language, clearly contemplating that the Minister is to have flexibility in interpreting the legislative scheme and in issuing permits such as SIPs.

[114] It is well established that courts should not interfere with the exercise of a discretion by a statutory authority merely because the courts might have exercised the discretion in a different manner had they been charged with that responsibility. Where the statutory discretion has been exercised in good faith and in accordance with the principles of natural justice, and where

reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere (*Maple Lodge* at pp 4, 8).

[115] Foster Farms submit that, in the exercise of his discretion, the Minister misapplied the Notice 865. I disagree. First, policies such as the Notice 865 do not hold the force of law. Second, I find that the relevant portions of the Notice 865 were reasonably and properly considered and applied by the Minister in this case.

[116] A policy cannot confine the exercise of discretion conferred by the EIPA (*Maple Lodge* at pp 6-7). To give policies or guidelines a constraining power would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. This Court has indeed recognized that policies do not impose legal obligations on public authorities (*Glowinski v Canada (Treasury Board)*, 2006 FC 78 at para 43; *Byer v Canada*, 2002 FCT 518 at paras 2-4; *Girard v Canada (Ministre de l'Agriculture)* (1994), 79 FTR 219 at para 37).

[117] In *Ultima Foods*, the Court explained that Notices to Importers (such as the Notice 865) are series of policies which outline the criteria to be considered in exercising the Minister's discretionary power to issue permits under subsection 8.3(3) of the EIPA (*Ultima Foods* at para 31). Although the applicants in that case criticized the way the Minister applied the relevant policy, they acknowledged that the said policy is not binding upon the Minister (*Ultima Foods* at para 34). In *7687567 Canada*, while referring to another Notice to Importers, the Court similarly affirmed that policies cannot be applied as if they were legal rules (*7687567 Canada* at para 73). In fact, a decision which would be made solely by reference to the mandatory prescription of a

guideline or policy could be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered (*Maple Lodge* at p. 7).

[118] While the Minister must, in his decision-making, consider factors outlined in the EIPA and in associated regulations, if any, there are no legal requirements to follow policies such as the Notice 865.

[119] In any event, I am satisfied that, in this case, the Notice 865 was reasonably interpreted and applied by the Minister in reaching his Decision.

[120] Foster Farms specifically chose to submit their Permit Application under the residual category set out in paragraph 4.1(f) of the Notice 865, namely the authorization to import chicken and chicken products under "extraordinary or unusual circumstances". This category is the last of six categories of import authorization detailed in the Notice 865. The five other categories listed in paragraphs 4.1(a) to (e) of the Notice 865 are: chicken for resale due to domestic market shortages; dark chicken meat not supplied by the chicken farmers of Canada's Market Development program; chicken under the Import-to-Compete program; chicken under the Import for Re-Export program; and chicken and chicken products for the purpose of test marketing. Unlike these five other categories which are extensively detailed and discussed in the Notice 865, the category chosen by Foster Farms is not so rigorously defined: section 10.1 simply summarily states that "[o]ther applications for authorization for supplemental imports due to extraordinary or unusual circumstances will be evaluated on their individual merits."

[121] In the Decision, the Minister expressly discussed the Notice 865 and the extraordinary or unusual circumstances category under which Foster Farms applied for the retroactive SIPs, borrowing the language used in the policy. In the Decision letter, the Minister expressly noted the grounds advanced by Foster Farms in their Permit Application for the issuance of the SIPs, including the fact that the chicken products at issue were manufactured using broiler chicken inputs originating from Canada and the inadvertent error. The Minister then explained that extraordinary and unusual circumstances are evaluated on their individual merits, and that such requests are normally authorized to address two types of situations: short to medium term Canadian market needs resulting from emergencies such as destruction of Canadian poultry flocks due to avian influenza, or chronic lack of domestic supply of products that may not be domestically produced in Canada.

[122] I am satisfied that, in so deciding, the Minister considered relevant factors, exercised his discretion to interpret and apply its authority under section 8.3(3) of the EIPA in consideration of the Notice 865, and provided clear and unambiguous reasons which referred to the appropriate sections of the EIPA and the grounds set out in Foster Farms' Permit Application. I again underline that the introductory paragraph of the Notice 865 states that the Minister may, at his discretion, authorize imports of chicken and chicken products apart from the import access quantity, "particularly if he judges that the importation of these products is required to meet Canadian market needs". Indeed, the five more specific categories of authorizations described in the Notice 865 all respond to situations which are somehow related to supply constraints or particular needs of the Canadian market. In the same vein, the two examples given by the Minister to illustrate when requests for permits under the more general "extraordinary or unusual

circumstances" are normally authorized reflect situations driven by Canadian market needs and supply constraints. More generally, I also observe that one of the purposes of the EIPA and the Import Control List is to restrict the importation of certain goods, including chicken products, to ensure the protection of a sustainable supply management in Canada.

[123] By contrast, the circumstances advanced by Foster Farms in their Permit Application – i.e. corporate inadvertence, the Canadian birthplace of the chicken inputs, and an apparent lost opportunity to apply for partial relief – bear no relation to Canadian market needs or supply constraints issues. In this context, I fail to see how it could have been unreasonable (or unfair) for the Minister to conclude that the circumstances presented by Foster Farms regarding the importation of its improperly classified products into Canada did not qualify as either exceptional or extraordinary under the Notice 865.

[124] Foster Farms has not pointed to any evidence in the record suggesting that the Minister considered irrelevant information or failed to evaluate relevant information in the exercise of his discretion.

[125] Foster Farms also complains of the fact that the Minister or the MOA did not sufficiently discuss or address some of the arguments and grounds put forward in their Permit Application. This argument is without merit. I accept that Foster Farms may have preferred to have a more detailed Decision and more elaborated reasons. But it is well recognized that decision makers are presumed to have weighed and considered all the arguments and evidence presented to them unless the contrary is shown (*Kanagendren v Canada (Citizenship and Immigration),* 2015 FCA

86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). Even a failure to mention a particular argument or piece of evidence does not mean that it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), and decision makers are not required to refer to every constituent element supporting their conclusions.

[126] In conducting a reasonableness review of factual findings, it is not the Court's role to reassess the relative importance given by a decision maker to any relevant factor or piece of evidence. Factual findings deserve deference and are entitled to judicial restraint by the reviewing courts. In other words, Foster Farms have not persuaded me that the Minister's conclusions were not based on the evidence that was actually before him (*Vavilov* at para 126), or that the Minister has fundamentally misapprehended or failed to account for the evidence before it.

(3) Issue of conflation

[127] Foster Farms allege that the Minister conflated the extraordinary or unusual category with the first category listed in the Notice 865, namely domestic market shortages. They argue that rather than considering their Permit Application as distinct from domestic market shortage (the first category), the Minister simply conducted a domestic market shortage analysis, thus "conflating" the two categories.

[128] I do not agree. There is no evidence that the Minister mistook the last category for the first, or that he misapplied the extraordinary or unusual circumstances category. The Minister

simply found that the circumstances provided by Foster Farms did not qualify as extraordinary or unusual.

[129] I again underscore that the residual "extraordinary and unusual circumstances" category must be read in the entire context of the Notice 865. The introductory paragraph of that policy generally states that the Minister may authorize supplemental imports of chicken and chicken products if he judges that the importation of these products is "required to meet Canadian market needs". So the market needs and the supply constraints are overarching concerns that generally underlay the permit authorizations contemplated by the Notice 865. It is therefore not surprising, and certainly not irrelevant or unreasonable, for the Minister to have considered that issues of limited domestic supply permeate into the residual category of "extraordinary or unusual circumstances".

[130] Far from reflecting any form of conflation, the Decision is instead illustrative of a reasonable assessment of Foster Farms' request which took into account relevant factors underlying the Notice 865.

(4) Conclusion on reasonableness

[131] 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). I am satisfied that this is the case here, and Foster Farms have not persuaded me that there are sufficiently serious shortcomings in the Minister's Decision or in the

underlying MOA such that the Decision could be said to lack the requisite degree of justification, intelligibility and transparency (*Vavilov* at paras 96-97, 100).

[132] This is not a situation where there is a flawed logical process by which the facts were drawn from the evidence, or where the Minister has fundamentally misapprehended or failed to account of the relevant evidence, or made a finding that was contrary to the overwhelming weight of the evidence (*Vavilov* at para 126; *Dunsmuir* at para 47). The Minister had all the facts before him and considered relevant factors. The errors alleged by Foster Farms do not display a fatal flaw in the overarching rationality or logic and do not lead me to lose confidence in the outcome reached by the Minister (*Canada Post* at paras 52-53; *Vavilov* at para 122).

[133] Further to *Vavilov*, the reasons given by a decision maker are the starting point of the analysis. They are the principal tool allowing the administrative decision makers "to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner" (*Vavilov* at para 79). Here, I am satisfied that the Decision explains the conclusions reached by the Minister in a transparent and intelligible manner (*Canada Post* at paras 28-29; *Vavilov* at paras 81, 136; *Dunsmuir* at para 48), and the reasons allow me to understand the basis on which he refused the SIPs sought by Foster Farms.

IV. Conclusion

[134] For the reasons detailed above, Foster Farms' application is dismissed. In an application for judicial review like this one, the role of the Court is to review the legality of the Minister's Decision and to determine whether it was reasonable and based on a fair process. Having

reviewed the Decision and the MOA, I am satisfied that the Minister's conclusions are anchored in an internally coherent and rational chain of analysis and that the Decision is justified in relation to the facts and law that constrain the Minister. Furthermore, taking into account the particular context and circumstances of this Permit Application, I find that the process followed by the Minister and GAC was fair and offered Foster Farms a right to be heard and a full opportunity to know and to respond to the case against them. There was no breach of any principle of procedural fairness.

[135] At the hearing before the Court, the parties agreed that costs in the lump-sum, all-inclusive amount of $3,000 shall be granted to the successful party. Accordingly, Foster Farms will be ordered to pay costs in that amount to the Minister.

JUDGMENT in T-967-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs in the all-inclusive, agreed upon lump-sum amount of $3,000 are awarded to the Minister of International Trade Diversification.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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