CUSTOMS AND EXCISE

CUSTOMS ACT

Appeal from Federal Court decision (2018 FC 1118) allowing two applications for judicial review made by respondent — Federal Court setting aside decisions made by Canada Border Services Agency (CBSA) denying respondent's claims for duty remission made under *Textile and Apparel Remission Order, 2014*, SOR/2014-278 (TARO 2014) — In 1988, Department of Finance introducing series of remission orders, intended to help Canadian textile, apparel manufacturers face challenges of increased international competition — Program allowed listed companies to import certain goods duty-free as long as meeting conditions specified in orders — Orders superseded in 1997-1998 by updated versions to comply with *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, December 17, 1992, [1994] Can. T.S. No. 2) — New version setting capped annual remission entitlement for each listed company; six remission orders forming basis of TARO program — Many manufacturers began looking for ways to earn benefits of program as Canadian manufacturers without being obliged to start or expand importing business — For many years, officials of Department of Finance, CBSA allowed eligible Canadian manufacturers to contract with Canadian importers so that Canadian manufacturers could take advantage of their remission entitlements — Respondent filing evidence that Department of Finance officials approving of such practice — Later, CBSA discovering irregularities in administration of TARO program regarding transfer of remission entitlements between several companies — Suspended processing of all TARO program claims, undertaking review of program — Thus, respondent's claims for duty remission on goods imported in 2006, 2007, 2008, 2009 held in abeyance — After program review undertaken program, CBSA developing, issuing Memorandum D8-11-7 in 2012 (Policy on the Transfer of Entitlement Pursuant to the Textile and Apparel Remission Orders), which explains how entitlements to remission of customs duties pursuant to remission orders may be transferred — Memorandum also recognizing possibility of entering into partnering agreements subject to some conditions — Outlining procedures to be followed when importer name change necessary due to error on part of importer or CBSA — Procedures also had to comply with Act, s. 7.1 requirements — TARO 2014 enacted to correct situation found in review; governed program from 2008 to 2012, year TARO program ended; enacted to ensure that eligible manufacturers received full entitlement to remission up to 2012 — Remission to eligible companies subject to certain conditions — Respondent, one of eligible companies listed in TARO 2014 — Three of respondent's drawback claims relevant for purpose of appeal, each of which was accompanied by name change request — Two of respondent's claims essentially resubmissions of past drawback claims that had been refused by CBSA in 2016 because respondent did not provide proper documentation required — Claims were resubmitted accompanied by additional letters, arguments but respondent not providing substantiating documents required by Memorandum for their name change requests — In September 2017, senior CBSA official denying both of respondent's resubmitted claims on basis that documents provided not meeting requirements — On judicial review, Federal Court finding in favour of respondent, determining that decision made in breach of CBSA's duty of fairness in addition to being arbitrary, unreasonable — Found that respondent had legitimate expectation based on clear, unambiguous, unqualified regular practice that CBSA would accept respondent's name change requests, approve drawback claims — In denying claims without detailed reasons, Federal Court found CBSA treated respondent unfairly — Also found that CBSA's decision unreasonable because lacking justification, transparency, intelligibility — Whether Federal Court erring in application of reasonableness standard of review to CBSA's decision — Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 released after hearing in present

appeal, dealing with standard of review — *Vavilov* giving much importance to justification of decision — Directing reviewing court to examine reasonableness of administrative decision in terms of legal, factual constraints on decision maker's discretion — Constraints bearing on reasonableness of decision include governing statutory scheme, evidence before decision maker, past practices, decisions, etc. —Memorandum very clear on what documentation required in support of name change application — CBSA having to comply with Act (s. 7.1) by ensuring that person who causes goods to be exported to Canada truly importer before it could approve retroactively importer name change request — However, respondent claiming that CBSA's impugned decisions at odds with past practices, past decisions — Both respondent's 2011, 2012 claims rejected without any explanation or justification as to why those claims ought to be treated differently from earlier ones — Was particularly egregious considering that previous claim had been accepted on basis of same information given by respondent — While CBSA not bound to follow same course of action followed in past, entitled to modify policies to comply with Act, in circumstances of present case, CBSA should have provided respondent with explanation respecting its departure from past practice — CBSA decisions not reasonable in light of important contextual consideration in present case — Not sufficient to claim, *ex post facto*, that decisions made by CBSA official complying with rationale, purview of statutory scheme under which decisions made — In light of impact of decisions on respondent, CBSA had to provide it with explanation as to why past practice not followed; presumably, why post-importation partnering agreement would be contrary to Act, s. 7.1, would undermine customs scheme when such agreements had been accepted without question in past — Accordingly, on basis of recent teachings of Supreme Court in *Vavilov*, open to Federal Court to hone in on fact that CBSA official made no reference to his earlier decision or to longstanding departmental practice of accepting name change requests without certain supporting documentation — Thus, Federal Court right in concluding that CBSA's decisions lacking justification, transparency, intelligibility — Federal Court not erring in finding that CBSA decision not to accept name change requests unreasonable — If anything, conclusion bolstered by *Vavilov* with its insistence on need for reasonable decision to be justified in light of legal, factual constraints bearing on decision— Decision maker cannot deviate from earlier decisions or from longstanding past practice, especially when too late for those affected by these decisions to adjust their behaviour accordingly, without providing reasonable explanation for that departure — As for Federal Court's finding that CBSA's refusal to accept respondent's importer name change requests made contrary to its legitimate expectations, respondent not raising duty of fairness before Federal Court — As matter of fairness, courts should constrain themselves to grounds raised in pleadings — While respondent arguing unfairness in relation to its legitimate expectations, not sufficient to squarely raise procedural fairness *per se* — Clear from transcript hearing that parties never joined issue on that question; therefore, error of law for Federal Court to conclude that appellant violated respondent's legitimate expectations — Nevertheless, Federal Court's procedural analysis really substantive review in disguise — Conclusion respecting procedural fairness nothing more than restatement of conclusion on substantive reasonableness — Also, doctrine of legitimate expectations cannot give rise to substantive rights — Past practices, therefore, could not ground legitimate expectation that request for name change to importer of record would be granted in future even if such practice established — Court may only grant appropriate procedural remedies in event that conditions for application of this doctrine met — Moreover, legitimate expectations only one of factors to be considered in determining what procedural fairness requires in given context — In case at bar, no suggestion that respondent not given fair procedure, including notice, opportunity to provide additional substantiation for its claims — Therefore, Federal Court erred in concluding that decision of CBSA not to grant name change requests made in breach of CBSA's duty of fairness—Respondent's remissions claims returned to CBSA for redetermination in accordance with reasons — Appeal dismissed.

CANADA (ATTORNEY GENERAL) V. HONEY FASHIONS LTD. (A-407-18, 2020 FCA 64, de Montigny J., reasons for judgment dated March 19, 2020, 22 pp.)