Federal Court  Cour fédérale

Date: 20221011

Docket: T-1489-19
Docket: T-411-21

Citation: 2022 FC 1390

Ottawa, Ontario, October 11, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

9209654 CANADA INC.

Applicant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This decision addresses two applications for judicial review. The application in Court File T-1489-19, commenced by the Applicant, 9209654 Canada Inc., on September 11, 2019, challenges two decisions issued by the Canada Border Services Agency [CBSA], dated August 15, 2019 and August 20, 2019 [respectively the August 15 Decision and the August 20 Decision, and together the August Decisions]. The August Decisions have been described variously as

intended to amend, supplement, or update a detailed adjustment statement issued to the Applicant on July 10, 2019 [the Original Decision].

[2] The application in Court File T-411-21, commenced by the Applicant on March 5, 2021, challenges the Original Decision, which required the Applicant to pay duties and interest stemming from the importation of frozen chicken on July 11, 2013, without paying applicable duties.

[3] For the reasons explained in more detail below, these applications are dismissed. Independent of the August Decisions, I find the Original Decision to be reasonable, as the justification for the decision was sufficiently explained to the Applicant. As such, there is perhaps no practical impact of the Court considering the reasonableness of the August Decisions. I have nevertheless performed that analysis and find that the August Decisions are also reasonable, as CBSA was entitled to rely on an exception to the *functus officio* doctrine in issuing those decisions.

II. **Background**

[4] The background facts that have led to these applications for judicial review involve the Applicant's effort to rely on the Duties Relief Program [DRP], implemented under section 89 of the *Customs Tariff*, SC 1997, c 36 [Tariff], which represents one of several trade incentive programs available to Canadian businesses. The purpose of the DRP is to support Canadian businesses competing internationally by exempting them from paying duties on imported goods if the goods are subsequently exported within a prescribed period of time. Participation in the

DRP is dependent on obtaining a certificate, often referred to in the record in this motion as a license, prior to importation of goods.

[5] The Respondent, the President of the Canada Border Services Agency, alleges that, on three separate occasions when the Applicant imported goods, it self-declared the goods as qualifying for duty relief pursuant to a license issued under section 90 of the Tariff, notwithstanding that it did not hold such a license. However, these proceedings relate only to an importation that occurred on July 11, 2013, as the Respondent acknowledges that any claims for duties arising from earlier importations are time-barred.

[6] In 2018, CBSA conducted a trade compliance verification of a third party company and its use of its license under section 90 of the Tariff. During its verification, CBSA discovered that, at the time of the 2013 importation referenced above, the Applicant relied upon that third party's license to import the relevant goods into Canada without paying duties.

[7] On February 19, 2018, CBSA sent a letter to the Applicant, alleging that it had imported these goods without paying duties using the third party's license on three separate occasions, including during the 2013 importation. It requested that the Applicant adjust the customs declarations for the transactions associated with each importation and pay outstanding duties and interest.

[8] On February 26, 2018, CBSA sent a revised letter, restricting its earlier request solely to the 2013 importation, because the applicable six-year limitation period had lapsed for the other

two importations. It reiterated that the Applicant was obliged to adjust the declaration and pay the duties and interest associated with the 2013 importation. CBSA communicated further with the Applicant on this subject between February 2018 and June 2019.

[9] The Respondent states that, between June and July 2019, CBSA attempted to issue an assessment to the Applicant related to the 2013 importation but experienced technical difficulties in doing so, because the Applicant no longer had an active business number in CBSA's system. On July 10, 2019, immediately before the expiry of the six-year limitation period applying to the 2013 importation, CBSA issued the Original Decision, which stated in part:

> Client also known as Janes Family Foods imported frozen chicken into Canada using a duties relief license that did not belong to them. Under the duties relief program only the company that the license was issued to may use it to import goods. License number 87-016T0567 belongs to Cara Operations. On July 11, 2013 Janes Family Foods used license number 87-016T0567 without authorization to import goods into Canada duty free. The duty remitted was $230,634.46. Janes Family Foods did not make any corrections to the entry or notify CBSA of the unauthorized use of the license. The issue was identified during a verification of license 87-016T0567 and Cara Operations. Cara Operations was unaware of the unauthorized use of their license.
>
> A request for a further re-determination respecting this decision may be made within 30 days of the date of decision on this notice, on Form B2, pursuant to subsection 60(1) of the Customs Act. The President may, in exceptional circumstances, extend this time limit up to one additional year pursuant to section 60.1 of the Customs Act.
>
> Your correction filed under section 32.2 of the Customs Act has been accepted and as such is treated as a re-determination under subsection 59(1)(A) of the Customs Act. This notice is issued under subsection 59(2) of the Customs Act. The Canada Border Services Agency reserves the right to further review and re-determine at a later date under subsection 59(1)(B) of the Customs Act.

[10] Janes Family Foods, as referenced in the Original Decision, is the business name of the Applicant, which appears in the style of cause as a numbered company. Cara Operations is the third party referenced earlier in these Reasons.

[11] The Respondent asserts in this proceeding that the Original Decision mistakenly referred to provisions of the *Customs Act*, RSC 1985, c 1 (2nd Supp) [Act], and should have instead referred to provisions of the Tariff. The referenced provisions of the Act provide for a multi-step administrative review process for issues of tariff classification, value for duty, origin, and marking of imported goods, and are unrelated to the DRP that is at issue in this proceeding.

[12] In emails dated July 30, 2019, and August 1, 2019, in response to questions from the Applicant's customs broker about the Original Decision, CBSA clarified that the Original Decision was issued pursuant to sections 89 and 118 of the Tariff.

[13] On August 15, 2019, CBSA issued the August 15 Decision, which the Respondent describes as representing an amendment or supplement to the Original Decision in the form of a revised detailed adjustment statement. The August 15 Decision states it is made to update the authority for the detailed adjustment statement (*i.e.*, the Original Decision) to section 118(1) of the Tariff.

[14] On August 20, 2019, CBSA issued the August 20 Decision, a separate detailed adjustment statement that broke down the duties and interest that were owed and acknowledged

that CBSA had received the Applicant's payment of the amount identified in the Original Decision.

[15] The Applicant subsequently pursued several initiatives related to these decisions, in addition to the applications for judicial review now being addressed. On September 9, 2019, it requested a further re-determination of the Original Decision pursuant to section 60 of the Act. On September 16, 2019, CBSA informed the Applicant that it could not issue a further re-determination of the Original Decision under section 60 of the Act, as there had never been a re-determination made pursuant to section 59 of the Act. On December 5, 2019, the Applicant filed a Notice of Appeal with the Canadian International Trade Tribunal [CITT], claiming that the Respondent had refused to exercise its jurisdiction by not issuing a decision under section 60 of the Act. On February 8, 2021, the Tribunal dismissed the Applicant's appeal for lack of jurisdiction (*9029654 Canada Inc dba Sofina Fine Foods v President of the Canada Border Services Agency*, (8 February 2021) AP-2019-038 (CITT)).

[16] As previously noted, on September 11, 2019, the Applicant filed its first Notice of Application in this Court, seeking judicial review of the August Decisions (Court File T-1489-19). On March 5, 2021, the Applicant filed its second Notice of Application, challenging the Respondent's Original Decision (Court File T-411-21). These applications were consolidated by Order dated May 10, 2021, and argued together on September 27, 2022.

[17] I note that the parties' arguments in these applications do not address the merits of CBSA's position that the Applicant unlawfully used the license of the third party to import

chicken without paying duties. The Applicant emphasizes that, although it has not raised arguments of this nature, it does not concede the validity of CBSA's position. Rather, these applications raise arguments surrounding the Original Decision's error in citing the wrong statutory authority for the assessment therein and CBSA's subsequent efforts to correct that error through the August Decisions issued after the expiry of the applicable limitation period.

III. **Issues and Standard of Review**

[18] The Applicant submits that its applications for judicial review raise the following issues:

A. Did the Respondent issue a decision under section 59 of the Act?

B. Did the Applicant have the right to appeal the section 59 decision?

C. Was the Respondent entitled to decline to issue a decision in respect of the Applicant's appeal filed under section 60 of the Act?

D. Is the section 59 decision, which assessed the Applicant additional duties and interest, a correct and valid decision?

E. Can a correction be used to change the authority for the assessment from section 59(1) of the Act to section 118(1) of the Tariff?

[19] The Respondent submits that the issue in these applications is the reasonableness of the Original Decision, as subsequently amended or supplemented by the August Decisions, including taking into account the effect of the limitation period. Consistent with this articulation of the issue, the Respondent takes the position that, notwithstanding the fact the Applicant has separately challenged the Original Decision, the August 15 Decision and the August 20 Decision, ultimately there was only one administrative decision made by CBSA - the Original Decision as amended or supplemented by the August Decisions.

[20] The parties agree on the standard of review that applies to these applications, with one exception. The parties both rely on principles surrounding the doctrine of *functus officio,* and the Applicant takes the position that the interpretation of this doctrine is a question of law governed by the standard of correctness. The Respondent argues that the standard of reasonableness applies to this question, and the parties agree that, otherwise, these applications are governed by the reasonableness standard.

[21] On the point in dispute, the Applicant relies on the decision in *Canadian Association of Film Distributors and Exporters v Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc*, 2014 FCA 235 [*SODRAC*] at paragraph 58, in which the Federal Court of Appeal held that the interpretation of the *functus officio* doctrine was a question of law reviewable on the correctness standard. However, I agree with the Respondent's position on this point, that this authority has been superseded by the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. At paragraphs 16 to 18, *Vavilov* explains the presumptive reasonableness standard that applies to

administrative decision-making and exceptions to that presumption, including certain categories of questions to which the correctness standard applies. These exceptions include general questions of law of central importance to the legal system as a whole. However, as the Respondent submits, the Applicant has not advanced arguments in support of a position that the interpretation of the doctrine of *functus officio* falls within this or any other exception.

[22] I will therefore apply the standard of reasonableness in these applications. Against the backdrop of that standard, and having considered the parties' respective written and oral submissions, I consider the following issues to represent an appropriate framework for the adjudication of these applications, including consideration of the Applicant's principal arguments as captured in its articulation of the issues set out above:

A. Is the Original Decision reasonable?

B. To the extent they require consideration independent of the Original Decision, are the August Decisions reasonable?

IV. **Analysis**

A. *Legislation*

[23] The following provisions of the Act and the Tariff are raised in the arguments in these applications:

Customs Act, RSC 1985, c 1 (2nd Supp)	Loi sur les douanes, SRC 1985, ch 1 (2e suppl.)
Correction to declaration of origin	**Correction de la déclaration d'origine**
32.2 (1) An importer or owner of goods for which preferential tariff treatment under a free trade agreement has been claimed or any person authorized to account for those goods under paragraph 32(6)(a) or subsection 32(7) shall, within ninety days after the importer, owner or person has reason to believe that a declaration of origin for those goods made under this Act is incorrect,	32.2 (1) L'importateur ou le propriétaire de marchandises ayant fait l'objet d'une demande de traitement tarifaire préférentiel découlant d'un accord de libre-échange, ou encore la personne autorisée, sous le régime de l'alinéa 32(6)a) ou du paragraphe 32(7), à effectuer la déclaration en détail ou provisoire des marchandises, qui a des motifs de croire que la déclaration de l'origine de ces marchandises effectuée en application de la présente loi est inexacte doit, dans les quatre-vingt-dix jours suivant sa constatation :
(a) make a correction to the declaration of origin in the prescribed manner and in the prescribed form containing the prescribed information; and	a) effectuer une déclaration corrigée conformément aux modalités de présentation et de temps réglementaires et comportant les renseignements réglementaires;
(b) pay any amount owing as duties as a result of the correction to the declaration of origin and any interest owing or that may become owing on that amount.….	b) verser tout complément de droits résultant de la déclaration corrigée et les intérêts échus ou à échoir sur ce complément.….
Re-determination or further re-determination	**Révision et réexamen**
59 (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may	59 (1) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut :
(a) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods at any time within	a) dans le cas d'une décision prévue à l'article 57.01 ou d'une détermination prévue à l'article 58, réviser l'origine, le classement tarifaire ou la valeur en douane des marchandises importées, ou procéder à la révision de la décision sur la conformité des marques de ces marchandises, dans les délais suivants :

(i) four years after the date of the determination, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1, or

(i) dans les quatre années suivant la date de la détermination, d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1,

(ii) four years after the date of the determination, if the Minister considers it advisable to make the redetermination; and

(ii) dans les quatre années suivant la date de la détermination, si le ministre l'estime indiqué;

(b) further re-determine the origin, tariff classification or value for duty of imported goods, within four years after the date of the determination or, if the Minister deems it advisable, within such further time as may be prescribed, on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1 that is conducted after the granting of a refund under paragraphs 74(1)(c.1), (c.11), (e), (f) or (g) that is treated by subsection 74(1.1) as a re-determination under paragraph (a) or the making of a correction under section 32.2 that is treated by subsection 32.2(3) as a re-determination under paragraph (a).

b) réexaminer l'origine, le classement tarifaire ou la valeur en douane dans les quatre années suivant la date de la détermination ou, si le ministre l'estime indiqué, dans le délai réglementaire d'après les résultats de la vérification ou de l'examen visé à l'article 42, de la vérification prévue à l'article 42.01 ou de la vérification de l'origine prévue à l'article 42.1 effectuée à la suite soit d'un remboursement accordé en application des alinéas 74(1) c.1), c.11), e), f) ou g) qui est assimilé, conformément au paragraphe 74(1.1), à une révision au titre de l'alinéa a), soit d'une correction effectuée en application de l'article 32.2 qui est assimilée, conformément au paragraphe 32.2(3), à une révision au titre de l'alinéa a).

Notice requirement

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further redetermination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons
…..

Avis de la détermination

2) L'agent qui procède à la décision ou à la détermination en vertu des paragraphes 57.01(1) ou 58(1) respectivement ou à la révision ou au réexamen en vertu du paragraphe (1) donne sans délai avis de ses conclusions, motifs à l'appui, aux personnes visées par règlement
…..

Request for re-determination or further redetermination

60 (1) A person to whom notice is given under subsection 59(2) in respect of goods

Demande de révision ou de réexamen

60 (1) Toute personne avisée en application du paragraphe 59(2) peut, dans les quatre-

may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing
…..

vingt-dix jours suivant la notification de l'avis et après avoir versé tous droits et intérêts dus sur des marchandises ou avoir donné la garantie, jugée satisfaisante par le ministre, du versement du montant de ces droits et intérêts, demander la révision ou le réexamen de l'origine, du classement tarifaire ou de la valeur en douane, ou d'une décision sur la conformité des marques
…..

Customs Tariff, SC 1997, c 36
Relief

89 (1) Subject to subsection (2), sections 95, 98.1 and 98.2 and any regulations made under section 99, if an application for relief is made within the prescribed time, in accordance with subsection (4), by a person of a prescribed class, relief may be granted from the payment of duties that would but for this section be payable in respect of imported goods that are

(a) released and subsequently exported in the same condition in which they were imported;

(b) released, processed in Canada and subsequently exported;

(c) released and directly consumed or expended in the processing in Canada of goods that are subsequently exported;

(d) released, if the same quantity of domestic or imported goods of the same class is processed in Canada and subsequently exported; or

(e) released, if the same quantity of domestic or imported goods of the same class is directly consumed or expended in the processing in Canada of goods that are subsequently exported.
….

Tarif des douanes, LC 1997, ch 36
Exonération

89 (1) Sous réserve du paragraphe (2), des articles 95, 98.1 et 98.2 et des règlements visés à l'article 99 et sur demande présentée dans le délai réglementaire en conformité avec le paragraphe (4) par une personne appartenant à une catégorie réglementaire, des marchandises importées peuvent, dans les cas suivants, être exonérées, une fois dédouanées, des droits qui, sans le présent article, seraient exigibles :

a) elles sont ultérieurement exportées dans le même état qu'au moment de leur importation;

b) elles sont transformées au Canada et ultérieurement exportées;

c) elles sont directement consommées ou absorbées lors de la transformation au Canada de marchandises ultérieurement exportées;

d) la même quantité de marchandises nationales ou importées de la même catégorie est transformée au Canada et ultérieurement exportée;

e) la même quantité de marchandises nationales ou importées de la même catégorie est directement consommée ou absorbée lors de la transformation au Canada de marchandises ultérieurement exportées.
….

Certificate

90 (1) Subject to regulations made under paragraph 99(e), the Minister of Public Safety and Emergency Preparedness may issue a numbered certificate to a person of a prescribed class referred to in section 89.

Amendment, suspension, etc., of certificate

(2) The Minister of Public Safety and Emergency Preparedness may, subject to regulations made under paragraph 99(e), amend, suspend, renew, cancel or reinstate a certificate issued under subsection (1).
….

Failure to comply with conditions

118 (1) If relief from, or remission of, duties is granted under this Act, other than under section 92, or if remission of duties is granted under section 23 of the Financial Administration Act and a condition to which the relief or remission is subject is not complied with, the person who did not comply with the condition shall, within 90 days or such other period as may be prescribed after the day of the failure to comply,
(a) report the failure to comply to an officer at a customs office; and

(b) pay to Her Majesty in right of Canada an amount equal to the amount of the duties in respect of which the relief or remission was granted, unless that person can provide evidence satisfactory to the Minister of Public Safety and Emergency Preparedness that

(i) at the time of the failure to comply with the condition, a refund or drawback would

Certificat

90 (1) Le ministre de la Sécurité publique et de la Protection civile peut, sous réserve des règlements visés à l'alinéa 99e), délivrer un certificat numéroté à une personne appartenant à l'une des catégories réglementaires énumérées à l'article 89.

Modification du certificate

(2) Le ministre de la Sécurité publique et de la Protection civile peut, sous réserve des règlements visés à l'alinéa 99e), modifier, suspendre, renouveler, annuler ou rétablir le certificat.
….

Inobservation des conditions

118 (1) Si, en cas d'exonération ou de remise accordée en application de la présente loi, sauf l'article 92, ou de remise accordée en application de l'article 23 de la Loi sur la gestion des finances publiques, une condition de l'exonération ou de la remise n'est pas observée, la personne défaillante est tenue, dans les quatre-vingt-dix jours ou dans le délai réglementaire suivant le moment de l'inobservation, de :

a) déclarer celle-ci à un agent d'un bureau de douane;

b) payer à Sa Majesté du chef du Canada les droits faisant l'objet de l'exonération ou de la remise, sauf si elle peut produire avec sa déclaration les justificatifs, que le ministre de la Sécurité publique et de la Protection civile juge convaincants, pour établir un des faits suivants :

i) au moment de l'inobservation de la condition, un drawback ou un remboursement

otherwise have been granted if duties had been paid, or	aurait été accordé si les droits avaient été payés,
(ii) the goods in respect of which the relief or remission was granted qualify in some other manner for relief or remission under this Act or the Financial Administration Act.	ii) les marchandises sont admissibles à un autre titre à l'exonération ou à la remise prévue par la présente loi ou à la remise prévue par la Loi sur la gestion des finances publiques.

B. *Is the Original Decision reasonable?*

[24] I will begin my consideration of the reasonableness of the Original Decision by addressing the Applicant's arguments to the effect that the Original Decision represents a decision under section 59 of the Act; that the Applicant had the right to appeal the section 59 decision; and that the Respondent was not entitled to decline to issue a decision in respect of the Applicant's appeal filed under section 60 of the Act.

[25] Particularly in light of the Applicant's articulation of its positions at the hearing of this application, I find no merit to any of these arguments. The Applicant's counsel explained at the outset of his submissions that section 59 of the Act was not the correct legislative authority for CBSA to use in issuing the Original Decision. Rather, CBSA's authority to issue the assessment in the Original Decision was conferred by section 118 of the Tariff. It is also clear that the Original Decision's reference to the Applicant having filed a correction under section 32.2 of the Act was erroneous. The parties are in agreement on these points, and their oral submissions were premised thereon. It would be inconsistent with both parties' positions for the Court to conclude that the Original Decision is properly construed as a decision under section 59 of the Act. Moreover, and consistent with the parties' agreement on these points, section 59 relates to

decisions on the origin, tariff classification, value for duty, or marking of goods, and it is abundantly clear that the assessment that is the subject of the Original Decision has nothing to do with any of those subjects.

[26] It follows from the fact that the Original Decision does not represent a decision under section 59 of the Act that there is no merit to the Applicant's argument that it had the right to appeal that decision. The right of appeal to which the Applicant refers (which is technically a right conferred by section 60 of the Act to request a re-determination) applies to decisions made under section 59 of the Act on the origin, tariff classification, value for duty, or marking of goods. As the Original Decision does not represent a decision under section 59 of the Act, it is not subject to the process set out in section 60 of the Act. It also naturally follows that the Respondent was entitled to decline to issue a decision in respect of the appeal that the Applicant previously filed under section 60 of the Act as one of its initiatives to challenge the Original Decision.

[27] In arriving at these conclusions, I am also conscious that the applications presently before the Court seek judicial review of the Original Decision and the August Decisions. They do not seek review of any decisions that CBSA can be characterized as having made in connection with the Applicant's initiatives under section 60 of the Act. I nevertheless state these conclusions in the interests of being attentive to the Applicant's arguments.

[28] Turning to more substantive analysis, I consider the principal question before the Court to be whether the Original Decision can be characterized as reasonable, notwithstanding that it cites

the wrong legislative authority for the assessment therein. In challenging the reasonableness of the decision, the Applicant focuses significantly on the evidence of the issuing CBSA officer and communications to which he was a party. This officer, Mr. Victor Tressler, who holds the title of Senior Officer of Trade Compliance at the Operations Branch of CBSA, swore the affidavit on which the Respondent relies in these applications and was subsequently cross-examined by the Applicant's counsel. Relying on the transcript of his cross-examination and evidence in the certified tribunal record, the Applicant refers the Court to the following:

A. On July 9, 2019, Scott McCormick, a Senior Program Advisor, Programs Branch, with CBSA copied Mr. Tressler on an email which referred to subsection 118(1) of the Tariff as the authority for issuance to the Applicant of the assessment that CBSA was contemplating;

B. Mr. Tressler testified in cross-examination that, after preparing the Original Decision in draft, he reviewed the text therein that he inputted personally (also described as officer's notes), identifying that the importer had used a license without authorization, but he did not see the computer-generated portion of the text that included the reference to the assessment being issued under section 59 of the Act;

C. Mr. Tressler explained that he was at or beyond the end of his work day when finalizing the Original Decision and that, in the haste of generating the document within the time bar, an error was made in selecting the legislation identified in the

system's drop-down menu, i.e. by selecting section 59 of the Act instead of section 118 of the Tariff;

D. Mr. Tressler became aware of his error following the receipt of email inquiries from the Applicant's customs broker in late July 2019. As a result of those emails and communications with his manager, Mr. Tressler realized there was an error that needed to be corrected. That correction was made only on August 15, 2019 (through the August 15 Decision).

[29] Based on this evidence, the Applicant submits that Mr. Tressler was negligent or worse in failing to abide by Mr. McCormick's advice, failing review to the draft Original Decision with sufficient care to ensure that it reflected the correct statutory authority, and/or failing to identify and correct the error more quickly.

[30] The Respondent acknowledges that this error was made, as does its witness, Mr. Tressler. However, I am not convinced that the Applicant's arguments, that the circumstances of the error amount to some sort of breach of a standard of care, are particularly relevant to the Court's task on judicial review, which is to review the reasonableness of the decision.

[31] *Vavilov* represents the leading jurisprudential guidance on the nature of reasonableness review of administrative decision-making. As the Supreme Court explains, a reasonable decision, to which a reviewing court is required to defer, is one that is based on an internally coherent and rational chain of analysis, justified in relation to the facts and law that constrain the decision-

maker (at para 85). Administrative decisions must be justified, intelligible and transparent, not in the abstract, but to the parties subject to them (at para 95). However, written reasons provided by an administrative body must not be assessed against a standard of perfection. Failure to include all the arguments, statutory provisions, jurisprudence or other details that a reviewing judge might prefer is not on its own a basis to set the decision aside. The review of an administrative decision cannot be divorced from its institutional context or the history of the proceedings (at para 91).

[32] It is clear from *Vavilov* that the fact a decision does not expressly reference the statutory authority under which it is made is not on its own a basis to find the decision unreasonable. However, in the case at hand, we have not only a failure to include the relevant statutory authority but also an incorrect reference to inapplicable authority. It is therefore necessary to consider the Original Decision as a whole, taking into account the record surrounding its issuance, to assess whether it affords the Applicant the justification that reasonableness review requires.

[33] Within the text of the Original Decision itself (the significant portions of which are reproduced earlier in these Reasons), the paragraph that Mr. Tressler describes as his officer's notes (the first paragraph of the reproduced portion) expressly refers to the Applicant having imported frozen chicken into Canada using a duties relief license that did not belong to it. This paragraph identifies the duty remitted in the amount of $230,634.46 and notes that the Applicant did not make any corrections to the entry or notify the CBSA of the unauthorized use of the license.

[34] The record before the Court also includes communications between CBSA and the Applicant, commencing in February 2018, which identified CBSA's concerns that the Applicant had benefited from the remission of duty under a license that it was not authorized to use. On both February 19, 2018 and February 26, 2018, CBSA wrote to the Applicant, explained the nature of the DRP, and advised that CBSA's records indicated the Applicant had without authorization used a license under the DRP for particular transactions identified in this correspondence. These letters advised the Applicant that, for these transactions, it was required to pay all applicable duties and taxes, failing which CBSA would assess all duties and taxes owing including interest. As noted earlier in these Reasons, the difference in the two letters is that the second letter was restricted to the one transaction that was no longer time-barred.

[35] The record also includes additional documentation, described by Mr. Tressler as a Record of Events and a Timeline of Events, which he explains identify additional communications between CBSA and the Applicant between February 2018 and June 2019 regarding its unauthorized use of the DRP license. These documents contain notes, which do not necessarily appear to be verbatim communications, and it appears that some of the communications were internal within CBSA or were with the third-party license holder rather than the Applicant. However, other communications do appear to be with the Applicant and provide at least some additional support for the Respondent's contention that CBSA had communicated to the Applicant, in advance of issuance of the Original Decision, the nature of the assessment to which the Applicant was subject.

[36] I note that I have not identified any obvious references to section 118 of the Tariff in these communications between CBSA and the Applicant. However, the Respondent also relies on a communication with the Applicant's customs broker on August 1, 2022, approximately three weeks following the issuance of the Original Decision, in which CBSA expressly explained that the Applicant had used a duty relief license without authorization and expressly referenced subsection 118(1) of the Tariff. The Respondent notes that this communication from CBSA was prompted by an inquiry by the Applicant's own broker, and the Respondent refers the Court to *Kik Custom Products Inc v CBSA*, 2020 FC 462 [*Kik*] at paragraphs 62 to 69, as authority for relying on post-decision communications of this sort in assessing reasonableness.

[37] The Court's reasoning in *Kik* turned in part on analysis of the doctrine of *functus officio* (at para 67). I will return to this doctrine later in these Reasons when analyzing the reasonableness of the August Decisions. However, the Court's reliance on the post-decision correspondence, to inform its assessment of the reasonableness of the decision under review, also took into account the fact that this correspondence was initiated by representatives of the applicant on the applicant's behalf. In that case, the applicant's representative had sought clarification surrounding the decision from the CBSA officer who made the decision, and the Court held that, having initiated the very communications in question, the applicant could not insist that they not be considered in assessing the reasonableness of the officer's decision (at para 68). The Court also concluded that it was important to bear in mind that the fundamental issue under consideration in judicial review was whether the officer justified the decision to the applicant (at para 89, applying *Vavilov* at para 95).

[38] I consider this reasoning sound and to support reliance on CBSA's August 1, 2019 communication with the Applicant's customs broker in considering the reasonableness of the Original Decision. As explained in *Kik* at paragraph 65, this sort of post-decision communication from a decision-maker, that helps to explain why a decision was made, can be distinguished from the sort of after-the-fact justifications for a decision that are sometimes advanced in response to an application for judicial review and may not have even been in the mind of the decision-maker at the time the decision was made.

[39] In my view, the combination of the content of the Original Decision itself and the portions of the record canvassed above that both pre-date and post-date the Original Decision are clearly sufficient to demonstrate the reasoning underlying the decision and to withstand reasonableness review. Indeed, even in the absence of the post-decision communications, I would conclude that the record supports the reasonableness of the Original Decision. In other words, even in the context of the incorrect reference to the statutory authority upon which CBSA was relying in issuing the assessment, its explanation of the factual basis for the decision would be sufficient for the Applicant to understand the reason for the assessment.

[40] I therefore find the Original Decision reasonable and will dismiss the Applicant's application for judicial review challenging that decision.

[41] Before leaving this issue, I note that the Applicant has advanced an argument that the incorrect statutory reference in the Original Decision caused it prejudice because, in reliance on the decision's reference to section 59 of the Act, the Applicant paid the assessed duties as a

precondition to its efforts to pursue a re-determination. The Applicant's argument is based on the requirement in section 60(1) of the Act that all amounts owing be paid before making a request for re-determination. There is no similar requirement to make payment as a precondition to seeking judicial review of an assessment under section 118(1) of the Tariff.

[42] The Respondent makes several submissions in response to this argument. These include the position that, following receipt of the Original Decision, the Applicant was entitled to seek the benefit of legal advice as to the nature of the decision and the appropriate method for, and preconditions to, a challenge. The Respondent also asserts CBSA's position that, pursuant to the assessment under section 118(1) of the Tariff, there was a debt owing by the Applicant for the assessed duties, and there is no basis for the Applicant to argue that it has been prejudiced by having paid that debt. The Respondent also emphasizes that the current proceeding is an application for judicial review, not an action by the Applicant for damages.

[43] While there is some merit to all these submissions, the most determinative is the Respondent's point that this is an application for judicial review, which involves an assessment of justification in accordance with the principles of *Vavilov* as canvassed earlier in these Reasons. I do not find the Applicant's argument particularly relevant to that analysis.

C. *To the extent they require consideration independent of the Original Decision, are the August Decisions reasonable?*

[44] Having concluded that the Original Decision is reasonable, there is perhaps no practical impact of the Court considering the reasonableness of the August Decisions. The Original

Decision was issued within the relevant six-year limitation and, as I have found that it is reasonable without need for recourse to whatever amendment, supplement, update, or other effect may be attributed to the August Decisions, there is no basis for the Court to interfere with CBSA's assessment of the Applicant.

[45] However, as the Applicant has separately sought judicial review of the August Decisions, I will briefly consider the parties' principal arguments in relation thereto. I note that, while the application in Court File T-1489-19 challenged both the August 15 Decision and the August 20 Decision, the parties' arguments focused upon the former as the decision which formally identified CBSA's reliance on section 118(1) of the Tariff. My analysis will also focus upon those arguments.

[46] The Applicant's arguments revolve principally around the principle of *functus officio*.As explained by the Supreme Court of Canada in *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 [*Chandler*] at p 860, this principle relates to the general rule that a final decision of a court cannot be reopened, subject to two exceptions: (a) where there had been a slip in drawing it up; and (b) where there was an error in expressing the manifest intention of the court. The Applicant submits that neither of these exceptions applies to the case at hand, as a result of which CBSA unreasonably concluded that it had the authority to issue the August 15 Decision.

[47] The Applicant relies significantly on *SODRAC*, in which the Federal Court of Appeal held that the Copyright Board had erred in concluding that it had authority to reopen a matter

before it in order to correct a palpable error in its decision (at para 69). Seizing on the meaning of the term “palpable” as referring to an error that is obvious (see *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46), the Applicant argues that CBSA’s error in referring to the incorrect statutory authority in the Original Decision qualifies as palpable. On this basis, the Applicant submits that CBSA had no authority to attempt to correct that error through the August 15 Decision.

[48] In my view, the Applicant’s argument demonstrates a misunderstanding of the analysis in *SODRAC*. It was not the fact that the Board’s error in its original decision could be characterized as palpable that deprived the Board of authority to reopen its decision. Clearly the categories of errors that fall within the exceptions to *functus officio* identified in *Chandler* have the potential to be palpable. An error in either *Chandler* category can be either obvious or not. What matters is not whether a particular error qualifies as obvious once discovered, but rather whether the error falls within one of the two categories. The Federal Court of Appeal in *SODRAC* held that the Board was unable to reopen its decision, not because the error in its decision was palpable but because the Board relied on the fact that the error was palpable in concluding that it had authority to revisit its decision, notwithstanding that the error did not fall within the recognized exceptions to the *functus officio* principle.

[49] Turning to the *Chandler* exceptions, the Respondent does not argue that the incorrect statutory reference in the Original Decision falls within the first exception as a slip or clerical error. However, the Respondent submits that the second exception applies, as the record demonstrates that the CBSA’s manifest intention was to issue an assessment under section 118 of

the Tariff resulting from the Applicant's failure to pay applicable duties in reliance on its improper use of a third party's license under the DRP.

[50] I note that the Respondent also relies on jurisprudence to the effect that the principle of *functus officio* either does not apply at all to non-adjudicative administrative decision-makers such as CBSA or applies to such decision-makers much less stringently (see *Kik* at para 67, citing *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3). While the Applicant raises no compelling arguments opposing the application of this jurisprudence, in my view, it is not necessary to dimension with any precision whether or how stringently *functus officio* applies in the particular case at hand.

[51] Rather, even if the principle of *functus officio* applies, I agree with the Respondent's submission that the record demonstrates the requisite manifest intention on the part of CBSA to invoke the second *Chandler* exception. In arriving at this conclusion, I have considered the Applicant's submission that, in reviewing the record for evidence of CBSA's intention, the Court should not consider evidence that post-dates the Original Decision. The Applicant relies on *MacDonald v. Canada*, 2020 SCC 6 [*MacDonald*] at paragraph 22:

> 22 A long line of jurisprudence supports the conclusion that the characterization of a derivative contract as a hedge turns on the contract's purpose. Purpose is ascertained objectively (*Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62 (CanLII), [2001] 2 S.C.R. 1082, at para. 54). While subjective manifestations of purpose may sometimes be relevant, the taxpayer's stated intention, as Noël C.J. noted, is not determinative. The taxpayer's conduct is generally more revealing than "*ex post facto* declarations" of the taxpayer (Vern Krishna, *Income Tax Law* (2nd ed. 2012), at p. 161; see also Jinyan Li, Joanne Magee and J. Scott Wilkie, *Principles of Canadian Income Tax Law* (9th ed. 2017), at p. 296). As the cases demonstrate, the primary source

> of ascertaining a derivative contract's purpose is the linkage between the derivative contract and any underlying asset, liability or transaction purportedly hedged. The more closely the derivative contract is linked to the item it is said to hedge, the stronger the inference that the purpose of the derivative contract was hedging.

[52] As will be apparent from this passage, *MacDonald* does not address directly to the question whether a court, in considering a decision-maker's manifest intention for purposes of the exception to the *functus officio* principle, should take into account evidence that post-dates the decision. However, there is other authority that can be interpreted as supporting the Applicant's position. In *Nova Scotia Government and General Employees Union v Capital District Health Authority*, 2006 NSCA 85 at paragraph 42, Justice Cromwell (then of the Nova Scotia Court of Appeal) provided the following guidance as to how this exception should be applied:

> 42. Stating this exception is one thing. Applying it is another. While I would not attempt to state exhaustively how the exception should be applied, it is safe to say that the best indication of the tribunal's "manifest intent" will generally be found in the reasons for its initial decision. Unless some disharmony or contradiction is apparent between the allegedly erroneous choice of words and that intent, the language chosen by the tribunal in its initial decision should stand. So, for example, in *Rogers Sugar*, the arbitrator's initial award had not specifically addressed the relevance of fractions of years for determination of severance pay but his award on its face appeared to take away entitlement for fractions of years which the predecessor agreement had granted. It was apparent that this could not have been his intent and he was found to have the authority to correct this error. Similarly, in *Canadian National Railway Co. v. Canada (National Transportation Agency)* (1989), 96 N.R. 378 (F.C.A.), the Court carefully reviewed the agency's initial decision as a whole to determine whether the contentious language had erroneously expressed its manifest intent. The Court asked itself whether "[t]aken by themselves, these words ... [were]... out of harmony with the overriding intention that seems to be otherwise expressed ...": at para. 20. To carry out that analysis, the initial decision must be read as a whole and in the context of

> the issues presented and the positions of the parties: *Joyce, supra*; *Rogers, supra*.

[53] While Justice Cromwell notes that the guidance in this passage is not intended to be exhaustive, it does explain that, in assessing the manifest intention of a decision-maker, a court should focus upon the reasons in the decision itself, although also in the context of the issues presented and the positions of the parties. While this language contemplates recourse to portions of the record outside the decision itself, I do not read it as necessarily suggesting that recourse to include events that follow the issuance of the decision. I also regard such a limitation as logical. As the nature of the exercise involves identifying a decision-maker's intention, precisely for the purpose of considering the validity of steps taken after the issuance of a decision, it follows that post-decision events would not typically form part of the analysis of intention.

[54] That said, the evidence in the case at hand, on the basis of which I have concluded above that the Original Decision was justified and is therefore reasonable, also supports the conclusion that it was CBSA's manifest intention to issue an assessment of duty arising from the fact the Applicant had used a duty relief license without authorization. I noted earlier in these Reasons that, even in the absence of the post-decision communications, I would conclude that the record supports the reasonableness of the Original Decision, in that it provides sufficient explanation for the Applicant to understand the basis for CBSA's assessment. Similarly, I find that the content of the Original Decision, as supplemented by the record pre-dating the decision, demonstrates CBSA's manifest intention in issuing the assessment and supports the conclusion that it was therefore reasonable for CBSA, under the exception recognized in *Chandler*, to issue the August 15 Decision to identify the correct statutory authority.

[55] As such, I find no reviewable error in connection with the August Decisions, and the application for judicial review in respect of those decisions must also be dismissed.

V. **Costs**

[56] At the hearing of this application, the parties were encouraged to attempt to reach agreement on a lump sum figure for costs, to be awarded to the successful party in the application. Counsel advised that the parties had agreed on a figure of $5000.00. I consider this to be an appropriate figure, and my Judgment will award costs in that amount to the Respondent.

JUDGMENT IN T-1489-19 AND T-411-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's applications are dismissed.

2. The Respondent is awarded costs in the all-inclusive amount of $5000.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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