

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200319

Docket: A-407-18

Citation: 2020 FCA 64

**CORAM: BOIVIN J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

HONEY FASHIONS LTD

Respondent

Heard at Montréal, Quebec, on November 6, 2019.

Judgment delivered at Ottawa, Ontario, on March 19, 2020.

REASONS FOR JUDGMENT BY:

DE MONTIGNY J.A.

CONCURRED IN BY:

**BOIVIN J.A.
GLEASON J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20200319

Docket: A-407-18

Citation: 2020 FCA 64

**CORAM: BOIVIN J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

HONEY FASHIONS LTD

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal from a decision of Justice Zinn of the Federal Court (the Applications Judge) dated November 7, 2018, which granted two applications for judicial review made by Honey Fashions Ltd. (Honey Fashions, or the respondent). The Federal Court set aside the decisions made by the Canada Border Services Agency (CBSA), which denied Honey Fashions'

claims for duty remission made under the *Textile and Apparel Remission Order, 2014*, SOR/2014-278 (TARO 2014).

[2] The central issue is whether it was unreasonable for the CBSA to apparently reverse an administrative practice and deny name change requests to designate Honey Fashions as importer of record of goods that had been previously imported by others, so that Honey Fashions could obtain remissions under the TARO 2014 program. For the reasons that follow, I have concluded that, in light of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), the Federal Court did not err in quashing these two decisions of the CBSA. The appeal should therefore be dismissed.

I. Facts

[3] All goods imported to Canada are subject to the provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the *Customs Tariff*, S.C. 1997, c. 36, the *Excise Act, 2001*, S.C. 2002, c. 22, the *Excise Tax Act*, R.S.C. 1985, c. E-15, and the *Special Import Measures Act*, R.S.C. 1985, c. S-15, by which customs duties and taxes are assessed. However, the Governor in Council may, on recommendation of the responsible minister, remit all or a portion of the customs duties by way of a remission order.

[4] In 1988, the Department of Finance introduced a series of remission orders, intended to help Canadian textile and apparel manufacturers face the challenges of increased international competition. This program allowed listed companies (eligible companies) to import certain goods duty-free as long as they met the conditions specified in the orders. As a result, it was

thought that Canadian manufacturers could rationalize their production by specializing in only a few lines while earning remission credits to import complimentary goods, thereby allowing Canadian apparel manufacturers to market a complete fashion line.

[5] In 1997-98, these orders were superseded by updated versions to comply with the *North American Free Trade Agreement* (NAFTA). The new version of the program set a capped annual remission entitlement for each listed company, based on the total amount of remission that each manufacturer had received in 1995. The six remission orders listed below formed the basis of the TARO program:

- *Tailored Collar Shirts Remission Order, 1997* (SOR/97-291);
- *Outerwear Greige Fabrics Remission Order, 1998* (SOR/98-86);
- *Shirting Fabrics Remission Order, 1998* (SOR/98-87);
- *Outerwear Apparel Remission Order, 1998* (SOR/98-88);
- *Blouses, Shirts and Co-ordinates Remission Order, 1998* (SOR/98-89); and
- *Outerwear Fabrics Remission Order, 1998* (SOR/98-90).

[6] Many manufacturers preferred to focus on manufacturing textiles and apparel in Canada. They had limited, if any, interest in becoming importers. As a result, they began looking for ways to earn the benefits of the program as Canadian manufacturers without being obliged to start or expand an importing business. It appears that for many years, officials of the Department of Finance and of the CBSA allowed eligible Canadian manufacturers to contract with Canadian importers so that Canadian manufacturers could take advantage of their remission entitlements,

all with the goal of ensuring that the benefits of the remission program would flow to the Canadian manufacturers.

[7] As evidence of that practice, the respondent filed the affidavit of Stephen Yanow, the president of a blouse manufacturer which used the TARO program and whose main business between 1998 and 2012 was matching eligible Canadian manufacturers with Canadian importers who imported qualifying goods. He testified that officials of the Department of Finance approved of that practice, and attached as an exhibit to his affidavit a memorandum (for information) from an official of that Department to that effect. The Applications Judge quoted that memorandum in full at paragraph 10 of his reasons. The memorandum addressed the emerging practice of “remission brokers”, which it described in the following way:

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

Appeal Book, vol. 2, p. 447

[8] The Department official advised that such a possibility was contemplated at the inception of the program, and that such a practice was in compliance with the conditions set out in the remission Orders and the *Customs Act*:

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

Appeal Book, vol. 2, p. 448

[9] In the summer of 2010, the CBSA discovered irregularities in its administration of the TARO program regarding the transfer of remission entitlements between several companies. It suspended the processing of all TARO program claims in the fall of 2010, and undertook a comprehensive Quality Assurance Review (QAR) of the program. As a result, Honey Fashions' claims for duty remission on goods imported in 2006, 2007, 2008 and 2009 were held in abeyance.

[10] The QAR confirmed three errors committed by the CBSA, one of which being that the CBSA had been permitting certain eligible companies to transfer their remission entitlement, presumably for a fee, to other companies in cases it should not have. Once these irregularities were discovered, the CBSA developed and issued Memorandum D8-11-7 on November 28, 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 the remission orders may be transferred. It explains that the entitlements of an eligible manufacturer cannot be bought, sold or transferred, but can be re-allocated permanently to another company when that other company acquires, purchases or otherwise takes control of the operation of the eligible manufacturer.

[11] The above-mentioned memorandum additionally recognizes the possibility of entering into “partnering agreements”. Paragraph 5 of the Memorandum states as follows:

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

[12] Such an agreement is subject to some conditions, one of which is that the agreement must be finalized and dated “prior to the release of the imported goods by the CBSA” (Memorandum D8-11-7, at para. 5(b)).

[13] Paragraph 6 of the Memorandum also seemingly allows a party that has imported goods and paid the duty on those goods to be subsequently replaced as the importer of record by an eligible manufacturer, by way of a name change request. Such a name change request must be made at the same time and on the same form as the claim for remission by the eligible manufacturer. This paragraph reads in part as follows:

If goods that are subject to a partnering agreement and for which remission is or will be claimed have already been imported and accounted for in the name of the other company (i.e., the owner or purchaser), it will be necessary to amend the importer name before remission will be approved. In such cases, a name change request must be submitted in accordance with instructions set out in CBSA Memorandum D17-2-3, *Importer Name/Account Number or Business Number Changes*.

[14] Memorandum D17-2-3, referenced in Memorandum D8-11-7, outlines the procedures to be followed when an importer name change is necessary due to error on the part of the importer or the CBSA. Pursuant to section 7.1 of the *Customs Act*, all information provided to the CBSA must be “true, accurate and complete”. Paragraphs 14 to 22 of this Memorandum set out the

procedure to be followed where the incorrect party has been named as the importer of record but where the true importer was entitled to conditions, exemptions and/or privilege (such as remission of duties under TARO). Paragraph 22 provides that the name change request must be:

- (a) supported by documents (e.g., purchase orders, commercial invoices, cancelled cheques, fax transmissions, written correspondence), which clearly indicate the claimant's interest and the part played by the claimant in the import transaction;
- (b) supported by a letter from the importer of record, disclaiming involvement in the importation; and
- (c) supported by a clear and complete explanation of why the party named as the importer on the original accounting document was so named, and why the importer/broker/agent now believes that a second party is the true importer.

[15] The CBSA recognized that the errors identified in the QAR were entirely its fault. Since Schedule 1 manufacturers who received remissions had relied in good faith on representations made and authorizations issued by CBSA officials, and had made business decisions accordingly, the CBSA concluded that it would be unfair to revoke the authorizations and seek to collect the duty that had been remitted.

[16] To correct the situation, TARO 2014 was enacted. It governed the administration of the TARO program from 2008 until 2012, the year the TARO program ended. TARO 2014 was designed to ensure that eligible Schedule 1 manufacturers received their full entitlement to remission up to 2012. Remissions to the companies listed in Schedule 1 to the Order were subject to the following conditions: a) the goods were imported into Canada between January 1, 2008 and December 31, 2012; b) the erroneous authorization for the remission must have been issued by the CBSA on or before December 31, 2012; and c) an application for the remission is received by the CBSA on or before the deadline set out in Schedule 2 of the Order. The

conditions from the six original and separate TARO programs were also incorporated into TARO 2014.

[17] Honey Fashions is one of the companies listed on Schedule 1 of TARO 2014. Three of its drawback claims are relevant for the purpose of this appeal, each of which was accompanied by a name change request:

- Claim 262903 related to goods imported in 2009. It was filed on November 22, 2010 – before the QAR and before TARO 2014. It was held in abeyance during the review process and approved by Gilles Cormier, a CBSA official, on April 30, 2015;
- Claim M270228 for \$68,512.48, dated October 19, 2016, related to imports occurring in 2011 and sought remission pursuant to the *Outerwear Apparel Remission Order*;
- Drawback claim M270217 for \$3,071,133.83, dated December 23, 2016, related to imports occurring in 2012 and sought remission pursuant to the *Blouses, Shirts and Co-Ordinates Remission Order*.

[18] The last two claims were essentially resubmissions of past drawback claims that had been refused by the CBSA in February and August 2016 because they did not provide the proper documentation required in accordance with Memorandum D17-2-3. The resubmitted claims were accompanied by additional letters and arguments, but Honey Fashions did not provide the substantiating documents required by the Memorandum for their name change requests. On September 6, 2017 a senior official of the CBSA denied both of the resubmitted claims, on the basis that the documents provided “do not clearly establish that the name change is the result of

an error of the importer or the [CBSA] or that the terms of Memorandum D17-2-3 have been met” (Appeal Book, vol. 1, pp. 175 and 292).

II. The impugned decision

[19] Applying the reasonableness standard, the Federal Court found in favour of Honey Fashions. Reasoning that the decision to deny Honey Fashions the remissions under the TARO program stands or falls with the decision not to accept the name change requests, the Court focused on that decision and determined that it was made in breach of the CBSA’s duty of fairness in addition to being arbitrary and unreasonable.

[20] The Federal Court found that Honey Fashions had a legitimate expectation, based on a clear, unambiguous and unqualified regular practice, that the CBSA would accept their name change requests and approve the drawback claims. In denying the claims without detailed reasons for what the Federal Court characterized as a “change in the procedure for changing the importer of record”, the CBSA treated Honey Fashions unfairly (Reasons, at paras. 43-48).

[21] The Federal Court also found that the CBSA’s decision was unreasonable because it lacked justification, transparency and intelligibility. In the Federal Court’s view, there was no material difference between the claim filed in 2010 and the claims filed in 2015 (and refiled in 2016). Although acknowledging that CBSA officials are not subject to the doctrine of *stare decisis*, the Federal Court found the decision to grant the former but deny the latter without additional explanation to be arbitrary, and thus unreasonable.

III. Issues

[22] In my view, the only issue to be decided by this Court is whether the Applications Judge erred in its application of the reasonableness standard of review to the CBSA's decisions. The parties have also challenged the Applications Judge's ruling on procedural fairness but for reasons developed below, I do not think that issue need be addressed here, if only because it appears to be a mere restatement of the conclusion on substantive reasonableness.

[23] The Federal Court's finding that the CBSA has jurisdiction to determine the identity of the importer of goods into Canada is not under appeal.

IV. Preliminary Matter

[24] The original appellants in this appeal were the Attorney General of Canada and the President of the Canada Border Services Agency. They were the unsuccessful respondents in the application for judicial review in the Federal Court.

[25] According to Rule 303 of the *Federal Courts Rules*, S.O.R./98-106, however, the Attorney General of Canada should have been the only respondent in the Federal Court. As a result, the Attorney General of Canada is the only proper appellant in this Court. The style of cause should therefore be amended to reflect that change, and the President of the Canada Border Services Agency should be removed as an appellant.

V. Analysis

[26] After the hearing of this appeal, the Supreme Court of Canada released its decision in *Vavilov*. This Court thus requested further written submissions from the parties with respect to the applicable standard of review. There is no dispute between the parties that when this Court sits on appeal of a decision by the Federal Court reviewing an administrative decision, our task is to determine whether the application judge correctly identified the appropriate standard of review and applied it correctly: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47 [*Agraira*]. In the case at bar, both parties agree that reasonableness remains the applicable standard of review.

[27] Understandably, the appellant and the respondent focus on different aspects of the *Vavilov* decision. The appellant acknowledges that where a decision maker departs from longstanding practices or established internal authority, the departure must be explained in its reasons. However, the appellant argues that the CBSA did not break with its longstanding practices because it has consistently considered importer name change requests in the context of its evaluation of remission claims under TARO. In the appellant's view, Honey Fashions' longstanding practice of submitting post-importation name change requests without substantiating evidence must not be conflated with the CBSA's past decisions to accept its request without substantiating evidence.

[28] The respondent retorts that the majority in *Vavilov* stressed the importance of justification for administrative decision makers, and that a more robust form of review is called for to ensure

consistency and to guard against the threat of arbitrariness. Accordingly, in the respondent's view, the Federal Court was right to focus on the CBSA's reasons and on the need for the CBSA to explain its abrupt policy change. Relying more explicitly on paragraph 131 of *Vavilov*, the respondent stresses that one of the factors constraining the reasonableness of a decision is the need to provide explanations when a decision departs from longstanding practices or established internal decisions. Needless to say, Honey Fashions strongly disagrees with the appellant's submissions that past practices and internal decisions are not the same.

[29] In my view, the respondent rightly points to the importance given by the Supreme Court in *Vavilov* to the justification of a decision. To the extent that reasons have been provided, the reviewing court must pay close attention to those reasons to ensure that the decision is the result of an "internally coherent and rational chain of analysis" (*Vavilov*, at para. 85). In other words, the reasons may be as important as the result. As the majority stated at paragraph 86:

In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[30] In addition to the reasons provided, *Vavilov* directs the reviewing court to examine the reasonableness of an administrative decision in terms of the legal and factual constraints on the decision maker's discretion. Among the constraints that bear on the reasonableness of a decision are the governing statutory scheme, the evidence before the decision maker, past practices and past decisions, and the impact of the decision on the affected individual. I will turn to each of these factors as they are the most relevant to the resolution of this dispute.

[31] Because they exercise delegated authority, administrative decision makers must obviously act within the powers they receive by statute; accordingly, the governing statutory scheme is of crucial importance in determining the reasonableness of their decisions. In that respect, the range of discretion given to a decision maker will be of particular interest in assessing whether they have acted within the confines of the law.

[32] In the case at bar, the appellant claims that the CBSA's decisions comply with the rationale and purview of the statutory scheme under which the decisions were made, namely section 7.1 of the *Customs Act* and the TAROs. For situations like this, the D8-11-7 Memorandum directs parties to file name change requests "in accordance with instructions set out in CBSA Memorandum D17-2-3". In each of the remission claims at issue, Honey Fashions provided accounting documentation that identified another company as importer of the qualifying goods. The drawback claims included letters noting the CBSA's memorandum on importer name changes, and indicating that "incorrect party has been named as importer of record" (Tevel affidavit, Appeal Book, vol. 1, Tab 7, Ex. E, pp. 332, 341-342, 351, 354 and 362).

[33] The D17-2-3 Memorandum is very clear on what documentation is required in support of a name change application (see paragraph 14, above). A pre-importation partnering agreement would have been acceptable substantiating evidence, as well as any documents clearly establishing that the claimant was the true importer. Honey Fashions did not provide the necessary documentation; instead, it tried to rely on a declaration that it was assuming the obligations of importer of record with the consent of the original importer (Appeal Book, vol. 1, pp. 300, 387).

[34] I agree with the appellant that for the CBSA to comply with the *Customs Act*, it had to ensure that the person who causes the goods to be exported to Canada was truly the importer before it could approve retroactively an importer name change request. This is consistent with section 7.1 of the *Customs Act*, which requires that all information provided to the CBSA shall be true, accurate and complete, and with the plain and ordinary meaning of “importer”. There is certainly an argument to be made that if the CBSA is precluded from excluding post-importation involvement and is forced to accept name change requests on the basis of a partnering agreement entered into after the goods are effectively imported to Canada, it would be constrained from performing its regulatory functions of verification and would be acting contrary to section 7.1 of the *Customs Act*.

[35] If the reasonableness of the decisions under review were to be assessed on the sole basis of their conformity with the overall legislative scheme pursuant to which they were made, they might pass muster. The decisions of the CBSA are arguably consistent with the *Customs Act* and the applicable TAROs. To that extent, they may be considered reasonable in the abstract.

[36] The respondent claims, however, that the impugned decisions of the CBSA are at odds with past practices and past decisions. Relying on testimonial and documentary evidence, Honey Fashions argued that there was a consistent and longstanding departmental practice of accepting post-importation name changes on the basis of post-partnering agreements. The Applications Judge accepted that evidence in the following terms:

[47] The uncontradicted evidence before the Court is that Honey Fashions has participated in the TARO Program since its inception, that it was not a major importer of apparel but took full advantage of its entitlements under the program by becoming the importer of record of goods previously imported by others. It did

so by filing a name change with the CBSA to record it as the importer of record, with the agreement of the initial importer. This procedure was accepted and arguably endorsed by the CBSA. Until the decisions under review were made “CBSA officials consistently accepted the name change notification to change the importer of record, and processed Honey Fashions’ remission applications on the basis that Honey Fashion was the importer of record.” The change in the procedure for changing the importer of record had dramatic consequences to Honey Fashions.

[37] In its initial submissions, the appellant stressed that the doctrine of *stare decisis* does not apply to administrative decision makers, and that they are not required to explain the differences between two separate decisions. Following the release of *Vavilov*, counsel recognized that departures from longstanding practices or established internal authority must now be explained, but argued that there was no such departure in the case at bar. In a somewhat specious argument, counsel contends that the CBSA’s practice has not changed in the context of a claim for remission of customs duties because its decision to accept the name change in the past is not a practice but a substantive outcome. To quote from their written submissions (at paragraph 6 of their January 31, 2020 letter), “[e]ssentially, Honey Fashions conflates *their* alleged long-standing practice of submitting post-importation name change requests without substantiating evidence, with the CBSA’s past *decisions* to accept their request without substantiating evidence”. In my view, this is a distinction without a difference and, as such, an argument without merit.

[38] First of all, I note that the Supreme Court uses “past practices” and “past decisions” interchangeably in *Vavilov*, and is more concerned with the need for coherence and justification than with semantics. What matters is that like cases be treated alike and that outcomes shall not be dependant on the identity of the individual decision maker (at para. 130). In that spirit, it

matters not whether a course of action is labelled as “past practices” or “past decisions”. Of course, I agree with the appellant that the CBSA must always be able to exercise its discretion to determine how and when verification for compliance is conducted, and to consider importer name change requests in the context of its evaluation of remission of customs duty claims under TARO. However, if the evidence establishes that the CBSA has consistently allowed importer name change requests for remission of customs duties without requiring substantiating evidence showing pre-importation partnering agreements, these past decisions amount to past practices (both for Honey Fashions and the CBSA).

[39] As previously mentioned at paragraph 18 of these reasons, both the 2011 and 2012 claims were rejected without any explanation or justification as to why those claims ought to be treated differently from earlier ones. This is particularly egregious considering that the 2009 claim had been accepted on the basis of the same information given by Honey Fashions (although admittedly on the basis of the pre-QAR policies and before CBSA issued the D8-11-7 Memorandum). Once again, this is not to say that the CBSA was bound to follow the same course of action it had followed in the past. CBSA was indeed entitled to modify its policy in order to comply with the *Customs Act*, provided that in so doing, its interpretation is reasonable. However, in the circumstances of this case, the CBSA should have provided an explanation to Honey Fashions with respect to its departure from past practice. As the Supreme Court stated in *Vavilov* (at para. 131):

We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[40] I am therefore of the view that the decisions of the CBSA were not reasonable in light of this important contextual consideration in the present case. It was not sufficient to claim, *ex post facto*, that the decisions made by the CBSA official complied with the rationale and purview of the statutory scheme under which they were made. In light of the impact of the decisions on the respondent, CBSA had to provide it with an explanation as to why the past practice was not followed and, presumably, why a post-importation partnering agreement would be contrary to section 7.1 of the *Customs Act* and would undermine the customs scheme when such agreements had been accepted without question in the past. Accordingly, on the basis of the recent teachings of the Supreme Court in *Vavilov*, it was open to the Federal Court to hone in on the fact that the CBSA official made no reference to his earlier decision or to the longstanding departmental practice of accepting name change requests without certain supporting documentation. I therefore agree with the Federal Court's conclusion that the CBSA's decisions lack justification, transparency and intelligibility.

[41] Finally, the appellant challenges the Federal Court's factual finding that the CBSA had a policy dating back from the inception of the TARO program of approving post-importation name changes. They argue that, in the absence of direct evidence, the Federal Court could only consider serious, precise and concordant presumptions, the like of which do not arise from this record. The respondent, on the other hand, asserts that there was direct evidence as well as supportive indirect evidence allowing the Applications Judge to find that the CBSA "arguably endorsed" such a practice.

[42] I accept the appellant's submission that the testimonies of Bernie Tevel and Stephen Yanow are not sufficient to establish that the CBSA was aware of and endorsed Honey Fashions' practice to claim duty remission on goods previously imported by others. These individuals could certainly testify that the CBSA routinely accepted name change notifications changing the name of the importer of record on the customs entry forms from the original importer to the Canadian manufacturer, without any indication as to whether the agreement was made prior to or after the importation. But they cannot purport to know what the CBSA was aware of at the time these decisions were made, and in particular whether the CBSA was aware that the importer name changes were based on post-importation agreements. This is precisely why the Federal Court was careful to state that this procedure was accepted "and arguably endorsed" by the CBSA (Reasons, at para. 47).

[43] This is not the only basis, however, upon which the Federal Court came to the conclusion that there is direct evidence that the CBSA consistently accepted post-importation name change notifications to allow Schedule 1 manufacturers to claim remissions for goods previously imported by others. It noted that this administrative process was not flagged during the QAR as an unacceptable or illegitimate practice, and was not objected to in the course of the audits to which Honey Fashions was subjected at least three times (Reasons, at para. 48). These factual findings are entitled to a high degree of deference.

[44] The appellant further submits that the Federal Court improperly relied on indirect evidence (primarily an internal memorandum from a Minister of Finance official dated April 26, 1993, and Memorandum D8-11-7) to conclude that the CBSA accepted post-importation name

change notifications. I agree with the appellant that these two documents are inconclusive and would be insufficient, in and of themselves, to establish that the CBSA has endorsed and condoned post-importation name change agreements. However, this is beyond the point.

[45] First of all, it is not at all clear that the Federal Court relied on that evidence to reach its conclusion. There was enough direct evidence to the same effect in the record. More importantly, Memorandum D8-11-7 could not have been offered as proof of the CBSA practice, since it was only released in late 2014. It could only be presented as being consistent with the alleged CBSA practice and in support of the direct evidence. Ultimately, I find the indirect evidence of little help for the resolution of the questions before us.

[46] In light of all the foregoing, I am of the view that the Federal Court did not err in finding that the decision by the CBSA not to accept the name change requests was unreasonable. If anything, that conclusion is bolstered by the recent decision of the Supreme Court in *Vavilov*, with its insistence on the need for a reasonable decision to be justified in light of the legal and factual constraints that bear on that decision. A decision maker cannot deviate from earlier decisions or from a longstanding past practice, especially when it is too late for those affected by these decisions to adjust their behaviour accordingly, without providing a reasonable explanation for that departure.

[47] As for the Federal Court's finding that the CBSA's refusal to accept Honey Fashions' importer name change requests were made contrary to its legitimate expectations, I need not say much. I agree with the appellant that the respondent did not raise the duty of fairness before the

Federal Court either in its Notices of Application, in its Memoranda of Fact and Law, or at the hearing. Allegations were made that the decisions being challenged were unfair and arbitrary, but these arguments were meant to substantiate the purported unreasonableness of the decisions, not a breach of procedural fairness.

[48] As a matter of fairness, courts should constrain themselves to the grounds raised in the pleadings. As the Supreme Court stated in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 at para. 9, “each party is entitled to know and respond to the case that it must answer”. I accept that the respondent did argue unfairness in relation to its legitimate expectations, but this was not sufficient in my view to squarely raise procedural fairness *per se*. It is clear from a transcript of the hearing that the parties never joined issue on that question (see, in particular, Appeal Book, vol. 2, at pp. 629, 657 and 671), and it was therefore an error of law for the Federal Court to conclude that the appellant violated Honey Fashions’ legitimate expectations.

[49] Be that as it may, the Federal Court’s procedural fairness analysis was really a substantive review in disguise. Its conclusion with respect to procedural fairness appears to be nothing more than a restatement of its conclusion on substantive reasonableness, as is readily apparent from these two findings:

- Procedural fairness: The Federal Court found “a clear, unambiguous and unqualified regular administrative practice of the CBSA that the name change... would be accepted”. On this basis, Honey Fashions had a legitimate expectation that the CBSA would accept its subsequent name change applications. The decision was unfair because it departed from previous decisions without explaining why (Reasons, at para. 46).

- Substantive reasonableness: CBSA’s decisions were unreasonable because it did not accept the name change applications in spite of its previous decisions and the “long-standing departmental practice” (Reasons, at para. 53).

[50] Finally, I also agree with the appellant that the doctrine of legitimate expectations cannot give rise to substantive rights: *Agraira* at para. 97; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 at p. 557; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 75. Past practices, therefore, could not ground a legitimate expectation that a request for a name change to the importer of record would be granted in the future even if such a practice is established. The Court may only grant appropriate procedural remedies in the event that the conditions for the application of this doctrine are met: see *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 131.

[51] Moreover, legitimate expectations is only one of the factors to be considered in determining what procedural fairness requires in a given context: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 22-28. In the case at bar, there is no suggestion that Honey Fashions was not given a fair procedure, including notice and an opportunity to provide additional substantiation for its claims. I find, therefore, that the Federal Court erred in concluding that the decision by the CBSA not to grant the name change requests was made in breach of its duty of fairness.

VI. Conclusion

[52] For all of the above reasons, I would dismiss the appeal, maintain the judgment of the Federal Court, and return the remission claims of Honey Fashions to the CBSA for redetermination in accordance with these reasons, the whole with costs in this Court and in the Court below. I would amend the style of cause and remove the President of the Canada Border Services Agency as an appellant. The style of cause on these Reasons and on the Judgment should reflect this amendment.

“Yves de Montigny”

J.A.

“I agree
Richard Boivin J.A.”

“I agree
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-407-18

STYLE OF CAUSE: THE ATTORNEY GENERAL OF
CANADA v. HONEY FASHIONS
LTD

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: NOVEMBER 6, 2019

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

DATED: MARCH 19, 2020

APPEARANCES:

Stéphanie Lauriault
David Di Sante

FOR THE APPELLANT

Peter Kirby
Alexandra Logvin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin
Deputy Attorney General of Canada

FOR THE APPELLANT

Fasken Martineau DuMoulin LLP
Montréal, Quebec

FOR THE RESPONDENT