Date: 20080122

Docket: T-351-05

Citation: 2008 FC 78

Ottawa, Ontario, this 22nd day of January, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

YM (SALES) INC.

Applicant

and

MINISTER OF INTERNATIONAL TRADE and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review of a decision made on behalf of the Minister of International Trade (Minister) and announced in a letter of February 14, 2005, addressed to the Applicant. The decision in question was made pursuant to the *Export and Import Permits Act* RSC 1985, s. E-19 as amended (EIPA), refusing to amend some 1,200 import permits previously issued to the Applicant (YM) so as to admit goods as entitled to the Tariff Preference Level (TPL).

FACTS

[2] YM is an importer and retailer of apparel which it generally describes as “Fast Fashion”. It operates 205 retail outlets across Canada. The imports in question were all manufactured in the United States and imported from there. This case involves provisions of the North American Free Trade Agreement (NAFTA) made among Canada, the United States and Mexico, and its implementation and administration in Canada. While the legal framework will be described more fully below it may be said by way of overview that YM had for some years since the adoption of NAFTA been importing apparel with certificates of origin provided by US exporters certifying that such apparel was “originating goods” that is, originating within the United States as one of the parties to NAFTA. On the basis of such certificates, YM obtained import permits under the EIPA. When the goods arrived they were accepted as “originating goods” for customs purposes (that is, as originating within the free trade area) by the Canadian Customs and Revenue Agency (CCRA). With respect to many of YM’s imports between 1998 and 2001, however, CCRA was not satisfied that they were originating goods and it issued Detailed Adjustment Statements (DAS) by which they imposed a duty as if the goods were not subject to free entry to Canada under NAFTA.

[3] YM says that it had acted in good faith on the advice of a customs broker in believing that, as long as such apparel was cut, sewn, and assembled in the United States, this made it originating goods within the meaning of NAFTA. However, it is now common ground that NAFTA requires that such goods undergo “Triple Transformation” in NAFTA territory: that they must be not only cut, sewn, and assembled in North America, but they must be made from a fabric manufactured in

North America from yarn made in North America. YM now believes that many or most of its imports while cut, sewn, and assembled in the United States, are made from fabric and yarn originating outside of North America. It therefore sought to amend its original import permits with respect to the goods which CCRA had "DAS'ed", that is in respect to which it had issued Detailed Adjustment Statements imposing a duty (the duty being equivalent to that of any goods imported from Most Favored Nations (MFN). Such amendments of the original import permits covering these goods were sought so that the amended import permits would classify them as TPL goods. Under NAFTA, textiles and apparels can be given a TPL classification if the apparel is cut, sewn, and assembled in North America even though from fabric and yarn originating outside North America. The effect of apparel being given a TPL import permit is to entitle the importer to a remission of duties otherwise payable at the MFN rate. Although this makes TPL goods importable on the same basis as originating goods, NAFTA imposes an annual quota as to the amount of such apparel that can enjoy the benefit of this preference. It is the responsibility of the Minister to administer the quota, thus satisfying himself that the goods qualify as TPL goods and keeping track of the quantity entering Canada each year.

[4] In this case, when YM applied for amended import permits to give the "DAS'ed" goods TPL status there was prolonged correspondence and meetings between its representatives and officials of the Export and Import Controls Bureau (EICB) of International Trade Canada. This eventually led to the decision made on behalf of the Minister and conveyed to YM's counsel on February 14, 2005, which is the subject of this judicial review. The relevant parts of that decision read as follows:

> All decisions respecting *Export and Import Permit* [*sic*] *Act* (EIPA) authorizations, including decisions respecting TPL benefits, must be consistent with the purposes for which import controls were established. Thus, in the case of TPL benefits negotiated with the United States and Mexico, TPL benefits are available only for eligible goods. TPL eligibility is established by providing documentation that would support a claim for TPL in accordance with NAFTA Annex 300-B, Appendix 6(B)(1)(a), including that the imported goods were "both cut (or knit to shape) and sewn or otherwise assembled in the territory of a Party from fabric or yarn produced or obtained outside the free trade area."
>
> Having reviewed YM's application for permit amendments that would provide TPL benefits, the Minister has concluded that such amendments would not be consistent with the purposes for which the goods in question are controlled under the EIPA. In particular, YM's submissions have not established eligibility of its imports for TPL benefits. YM's applications for permit amendments are therefore denied.

[5] It should be noted that the decision states that the applications for amendments have been rejected because YM had not "established eligibility of its imports for TPL benefits".

[6] The Minister argues that this was a decision made on the basis of the evidence, or lack thereof, provided by YM as to the origin of the apparel in question and the fabric or yarn of which they were made. He contends that the only direct evidence provided by YM regarding the origin of its imports were the certificates completed by its exporters after the goods in question had been DAS'ed. (This apparently is meant to indicate that such certificates could not be believed because they were in respect of goods which CCRA had already held to be of uncertain origin, CCRA having no adequate evidence before it of their origin). The Minister therefore argues that this was a decision as to the eligibility of the goods for TPL, made due to the lack of evidence to prove eligibility.

[7] YM attacks this decision on essentially two grounds. It contends that the Minister has no jurisdiction to refuse an amendment to an import permit for the purpose of making it a permit for the entry of TPL goods. It asserts that this is a matter of customs law which is administered by the CCRA and its successors. Second, YM says that the decision, if within the jurisdiction of the Minister, was flawed because it was actually based on a policy of the Minister that he would not retroactively grant TPL amendments to import permits where the goods covered by those permits had already been DAS'ed by CCRA. This self-determined policy of the Minister, it argues, improperly fettered his discretion. The Minister denies that such policy, while sometimes enunciated internally, is regarded as binding, but does concede that greater scrutiny is applied to "involuntary" applications for retroactive amendments ("involuntary" because made only after goods imported as NAFTA originating have been refused customs treatment as such (i.e. DAS'ed) by CCRA). YM contends that even if the policy is only one of imposing a higher standard of proof on "involuntary" applications for retroactive amendments, it is a fettering of the Minister's discretion.

[8] Unfortunately, the record discloses substantial evidence that there was such a policy which was operative in this case. It was stated most directly and openly in letters from the Deputy Director of Verification and Compliance, Trade Controls Policy Division, dated July 19, 2001 and April 15, 2002 and addressed to YM's customs broker in relation to YM's request for amended import permits. The operative paragraph in both letters is as follows:

> Please be advised that this department is not prepared to consider the application of retro-active TPL in those instances where an incorrect declaration made at time of entry has not been voluntarily amended prior to action by the Canada Customs and Revenue Agency

> (CCRA). In the instance in question, subsequent to a CCRA investigation, a detailed adjustment statement (DAS) was issued. As such, retro-active TPL is not available for the shipments in question. This office is prepared however to consider fully supported applications for TPL for future imports of similar commodities by your client.

While senior officials of the Respondent have since emphatically denied that this is a general policy inevitably applied to retroactive non-voluntary applications, the documentation on the decision in question here raises serious doubts about that denial. YM had several opportunities to make oral and written submissions in support of its application for retroactive TPL permits to the staff of the Export and Import Controls Bureau (EICB) who reviewed it and made a report and recommendations to the Minister. The first of these internal reports to the Minister was in the form of a memorandum on August 4, 2004. The background material stated *inter alia*:

> Claims for TPL tariff preferences (i.e. TPL claims) are normally made at the time the textile or apparel products are imported. However, International trade Canada (ITCan) also accepts "voluntary" retroactive TPL claims for previously imported goods if, at the time the retroactive claim is submitted: (a) the annual TPL quantities for the years in question have not been exhausted; and, (b) the Canadian Border services Agency (CBSA) has not issued a negative ruling against a NAFTA rule of origin claim made by the importer at the time the goods were imported. Accepting retroactive TPL claims requires the import permits, issued at the time the products were imported, to be amended.

This suggests that an "involuntary" application cannot succeed. The implication is that importers have a responsibility to make informed and knowledgeable decisions in the first place, prior to importation, and if they do not and then submit an application for an amendment as authorized by the EIPA they should not succeed because of their negligence. The recommendation made to the Minister was purely in terms of the policy and read as follows:

> We recommend that:
>
> a) you affirm the policy of denying an application for retroactive tariff preferences under the North American Free Trade Agreement (NAFTA) textile and apparel Tariff Preference Levels (TPLs) if, before the application is made, the Canadian Border Service Agency (CBSA) has issued a ruling that the imports in question are not eligible for the tariff preferences under NAFTA rules of origin claimed by the importer at the time the goods were imported; and
>
> b) you deny YM Inc.'s request that you depart from the above policy.

Apparently, as a result of some concern by the Minister or the department that such a policy had never been published and might be vulnerable on that basis, the matter was reviewed further and a second memorandum was sent to the Minister on December 22, 2004. The background information for this memorandum also stressed the difference between "voluntary" and "non-voluntary" applications for amendments to obtain TPL status. While a passage has been redacted from the memo, it is apparent from the context that the author is speaking of applications for TPL amendments in respect of DAS'ed goods:

> If requested by a company, officials consider additional submissions from a non-NAFTA TPL claimant, such as a non-NAFTA origin certificate and supporting documentation. In practice, officials have never encountered a situation where a company was able to make a successful TPL application in such circumstances. (The current applications from YM are consistent with this pattern.) To do so would require complete origin and processing documentation for the imports and goods in question.

Consequently, the EICB recommendation, following on that of August 4, 2004, was as follows:

> We continue to recommend denial of YM's applications.

It is difficult to interpret these communications as other than conclusions based on the alleged policy which, at the very best, was applied here to create a factual presumption against the validity of a retroactive non-voluntary TPL amendment application. As no clear reasons were given by the Minister in his decision of February 14, 2005 for the conclusion that YM had "not established eligibility of its imports for TPL benefits" one must assume that its rationale is to be found in the background report from the EICB. (See e.g. *Sketchley v. Canada*, [2006] 3 F.C.R. 39 (C.A.) at paras. 36-39).

[9] This conclusion is reinforced by an affidavit of Debra Charmaine Easton, who at the time in question was the Manager of "EPMV" in the EICB, was involved in the assessment of YM's application for retroactive amendments, and had reviewed the file before the Court. She expresses the opinion that the only consideration that was taken into account in making the decision in question here was the issue of "non-voluntary applications": that is, that the applications were made only after the goods in question had been DAS'ed. (See III Applicant's Record, p. 585).

ISSUES

[10] It appears that there are three issues as follows:

(1) Did the Minister of International Trade have any jurisdiction to refuse applications for retroactive TPL amendments?

(2) If so, was that jurisdiction properly exercised in conformity with the law?

(3) What is the standard of review of that decision?

ANALYSIS

[11] It is first necessary to set out as succinctly as possible the complex legal framework within which such decisions are made.

[12] Article 502 of NAFTA requires each Party to require importers in its territory, if they claim preferential tariff treatment, to make a written declaration based on a valid Certificate of Origin that the good qualifies as an originating good. As noted above, apparel, to be an originating good, must have been cut, sewn, and assembled in the territory of a Party, from fabric and yarn produced in the territory of a Party. But Annex 300-B, Appendix 6.B makes special provision with respect to apparel which are not originating goods but which are nevertheless eligible for TPL's. It states as follows:

> Each Party shall apply the rate of duty applicable to originating goods set out in its Schedule to Annex 302.2, and in accordance with Appendix 2.1, up to the annual quantities specified in Schedule 6.B.1 in SME, to apparel goods provided for in Chapters 61 and 62 that are both *cut (or knit to shape) and sewn or otherwise assembled in the territory of a Party from fabric or yarn produced or obtained outside the free trade area*, and that meet other applicable conditions for preferred tariff treatment under this Agreement. The SME shall be determined in accordance with the conversion factors set out in Schedule 3.1.3. (Emphasis added).

The Minister draws most of his powers, in giving effect to NAFTA, from the EIPA. Section 14 provides that no person shall import goods included in an Import Control List (ICL) unless he has an import permit issued under the EIPA. Section 5 of the EIPA authorizes the Governor in Council to establish an ICL for various specified purposes including:

5. (e) to implement an intergovernmental arrangement or commitment…	5. e) mettre en oeuvre un accord ou un engagement intergouvernemental;

Section 5.2(1) provides as follows:

5.2 (1) If at any time it appears to the satisfaction of the Governor in Council that it is advisable to *collect information with respect to the* exportation or *importation* of any goods in respect of which a specified quantity is eligible each year for the rate of duty provided for in the Schedules to Annex 302.2 of NAFTA *in accordance with Appendix 6 of Annex 300-B of NAFTA*, for the rate of duty provided for in the Schedules to Annex C-02.2 of CCFTA in accordance with Appendix 5.1 of Annex C-00-B of CCFTA or for the rate of duty provided for in the Schedule to Annex III.3.1 of CCRFTA in accordance with Appendix III.1.6.1 of Annex III.1 of CCRFTA, as the case may be, the Governor in Council may, by order and without reference to that quantity, *include those goods on* the Export Control List or	5.2 (1) Lorsqu'il est convaincu qu'il est souhaitable d'obtenir des renseignements sur l'exportation ou l'importation de marchandises dont une quantité spécifiée est susceptible chaque année de bénéficier soit du taux de droits prévu par les listes de l'annexe 302.2 de l'ALÉNA conformément à l'appendice 6 de l'annexe 300-B de celui-ci, soit du taux de droits prévu aux listes de l'annexe C-02.2 de l'ALÉCC conformément à l'appendice 5.1 de l'annexe C-00-B de celui-ci, soit du taux de droits prévu aux listes de l'annexe III.3.1 de l'ALÉCCR conformément à l'appendice III.1.6.1 de l'annexe III.1 de celui-ci, le gouverneur en conseil peut, par décret et sans mention de la quantité, porter ces marchandises sur la liste des marchandises d'exportation contrôlée et sur celle des

the Import Control List, or on both, in order to facilitate the collection of that information.	marchandises d'importation contrôlée, ou sur l'une de ces listes, pour que soit facilitée la collecte de ces renseignements.
[Emphasis added]	[Je souligne]

The following sections relate to the powers of the Minister to issue or amend import permits:

8.(1) The Minister *may issue* to any resident of Canada applying therefore *a permit to import goods included in an Import Control List*, in such quantity and of such quality, by such persons, from such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations.	8.(1) Le ministre peut délivrer à tout résident du Canada qui en fait la demande une licence pour l'importation de marchandises figurant sur la liste des marchandises d'importation contrôlée, sous réserve des conditions prévues dans la licence ou les règlements, notamment quant à la quantité, à la qualité, aux personnes et aux endroits visés.
(2) Notwithstanding subsection (1) and any regulation made under section 12 that is not compatible with the purpose of this subsection, if goods are included on the Import Control List solely for the purpose of collecting information pursuant to subsection 5(4.3), (5) or (6) or 5.4(6), (7) or (8), the Minister shall issue to any resident of Canada applying therefore a permit to import those goods, subject only to compliance with and the application of any regulations made under section 12 that it is reasonably necessary to comply	(2) Malgré le paragraphe (1) et tout règlement d'application de l'article 12 incompatible avec l'objet du présent paragraphe, le ministre délivre à tout résident du Canada qui en fait la demande une licence pour l'importation de marchandises figurant sur la liste des marchandises d'importation contrôlée aux seules fins d'obtenir des renseignements en application des paragraphes 5(4.3), (5) ou (6) ou 5.4(6), (7) ou (8), sous la seule réserve de l'observation des règlements d'application de l'article 12 qui sont nécessaires à ces fins.

with or apply in order to achieve that purpose.

8.2 Notwithstanding section 7, subsection 8(1) and any regulation made pursuant to section 12 that is not compatible with the purpose of this section, *if goods are included on the* Export Control List or the *Import Control List solely for the purpose described in subsection 5.2(1),* (2) or (3), the Minister *shall issue* to any resident of Canada applying therefore a permit to export or import, as the case may be, those goods, subject only to compliance with and the application of such regulations made under section 12 as it is reasonably necessary to comply with or apply in order to achieve that purpose.

8.2 Malgré l'article 7, le paragraphe 8(1) et tout règlement d'application de l'article 12 incompatible avec l'objet du présent article, le ministre délivre à tout résident du Canada qui en fait la demande une licence pour l'exportation ou l'importation de marchandises figurant, aux seules fins visées aux paragraphes 5.2(1), (2) ou (3) sur la liste des marchandises d'exportation contrôlée ou sur celle des marchandises d'importation contrôlée, sous la seule réserve de l'observation des règlements d'application de l'article 12 qui sont nécessaires à ces fins.

10. (1) Subject to subsection (3), the Minister *may amend,* suspend, cancel or reinstate *any permit,* import allocation, export allocation, certificate or other authorization issued or granted under this Act.

10. (1) Sous réserve du paragraphe (3), le ministre peut modifier, suspendre, annuler ou rétablir les licences, certificats, autorisations d'importation ou d'exportation ou autres autorisations délivrés ou concédés en vertu de la présente loi.

(2) If a permit has been issued under this Act to any person for the exportation or importation of goods that *have been included on the* Export Control List or the *Import Control List solely for the purpose described* in subsection 5(4.3), (5) or (6), 5.1(1), *5.2(1),* (2) or (3) or

(2) Le ministre peut modifier, suspendre ou annuler une licence, au besoin, lorsqu'il y a eu délivrance, en vertu de la présente loi, d'une licence pour l'exportation ou pour l'importation de marchandises figurant sur la liste des marchandises d'exportation

5.4(6), (7) or (8), and

contrôlée ou sur celle des marchandises d'importation contrôlée aux seules fins visées aux paragraphes 5(4.3), (5) ou (6), 5.1(1), 5.2(1), (2) ou (3) ou 5.4(6), (7) ou (8), et que l'on se trouve dans l'une des circonstances suivantes :

(a) the person furnished, in or in connection with his application for the permit, information that was *false or misleading* in a material particular,

a) la personne qui a fait la demande de licence a fourni, à l'occasion de la demande, des renseignements faux ou trompeurs sur un point important;

(b) the Minister has, subsequent to the issuance of the permit and on the application of the person, issued to the person under this Act another permit for the exportation or the importation of the same goods,

b) le ministre a délivré en vertu de la présente loi, après la délivrance de la licence et à la demande de cette personne, une seconde licence pour l'exportation ou l'importation de ces marchandises;

(c) the goods have, subsequent to the issuance of the permit, been included on the Export Control List or the Import Control List for a purpose other than that described in subsection 5(4.3), (5) or (6), 5.1(1), 5.2(1), (2) or (3) or 5.4(6), (7) or (8),

c) les marchandises ont, après la délivrance de la licence, été portées sur la liste des marchandises d'exportation contrôlée ou sur celle des marchandises d'importation contrôlée à d'autres fins que celles visées aux paragraphes 5(4.3), (5) ou (6), 5.1(1), 5.2(1), (2) ou (3) ou 5.4(6), (7) ou (8);

(d) *it becomes necessary or desirable to correct an error in the permit*, or

d) il est nécessaire ou indiqué de corriger une erreur dans la licence;

(e) the person agrees to the amendment, suspension or cancellation of the permit,

e) le titulaire de la licence consent à la modification, la suspension ou l'annulation.

the Minister *may amend*, suspend or cancel *the permit*, as

is appropriate in the circumstances.	
(3) *Except as provided in subsection (2)*, the Minister *shall not amend*, suspend or cancel *a permit* that has been issued under this Act in the circumstances described in that subsection *unless to do so would be compatible with the purpose of subsection 8(2)* or section 8.1 or 8.2, namely, that *permits to export or to import* goods that have been included on the Export Control List or the Import Control List in those circumstances be issued as freely as possible to persons wishing to export or import those goods and with no more inconvenience to those persons than is necessary to achieve the purpose for which the goods were placed on that List.	(3) Sauf les cas prévus au paragraphe (2), le ministre ne peut modifier, suspendre ou annuler une licence délivrée en vertu de la présente loi dans les circonstances visées à ce paragraphe que dans la mesure compatible avec l'objet du paragraphe 8(2) ou des articles 8.1 ou 8.2, c'est-à-dire que les licences d'exportation ou d'importation de marchandises figurant sur la liste des marchandises d'exportation contrôlée ou sur celle des marchandises d'importation contrôlée dans ces circonstances soient délivrées aussi librement que possible aux personnes qui désirent exporter ou importer les marchandises sans plus d'inconvénients qu'il n'est nécessaire pour atteindre le but visé par leur mention sur cette liste.
[Emphasis added]	[Je souligne]

[13] Item 85 of the ICL has been adopted pursuant to section 5.2 of the EIPA in order to give effect to Appendix 6.B of Annex 300-B of NAFTA, as quoted above, in respect of TPL apparel. This has the effect of requiring import permits for:

> 85.(1) Apparels goods that

> (a) are both cut or knit to shape and sewn or otherwise assembled in Mexico or the United States from fabric or yarn produced or obtained outside the free trade area; and
>
> (b) are not included in another item in this List

[14] An importer of non-originating goods imported from a NAFTA country would have been assessed custom duties at the MFN rate. He is, however, entitled to a remission of that duty pursuant to the *Imports of Certain Textile and Apparel Goods from Mexico or the United States Customs Duty Remission Order*, SOR/98-420, made under the *Customs Tariff*, SC 1997, c. 36. That Order provides as follows:

1. The definitions in this section apply in this Order.	1. Les définitions qui suivent s'appliquent au présent décret.
"apparel" means goods referred to in Chapters 61 and 62 of the List of Tariff Provisions that are cut or knit to shape and are sewn or otherwise assembled in Mexico or the United States from fabric or yarn produced or obtained outside the free trade area. (vêtements)	« filés » Les fils de coton ou de fibres synthétiques ou artificielles visés aux positions nos 52.05 à 52.07 ou 55.09 à 55.11 qui sont filés au Mexique ou aux États-Unis à partir de fibres visées aux positions 52.01 à 52.03 ou 55.01 à 55.07 qui sont produites ou obtenues hors de la zone de libre-échange. (spun yarn)
…	…
3.(2) Remission under section 2 is granted *on the condition* that the *importer* or owner of the goods *provides to a customs officer*, at the request of the officer,	3.(2) La remise visée à l'article 2 est accordée à condition que l'importateur ou le propriétaire des marchandises fournisse à un agent des douanes, sur demande de celui-ci :
3.(2)(a) at the time that the goods are accounted for under	3.(2)a) au moment où les marchandises font l'objet d'une

subsection 32(1), (3) or (5) of the Customs Act or are the subject of an application for a refund of the customs duty, *a certificate issued pursuant to the Export and Import Permits Act* and the Import Certificate Regulations, identifying the quantity available for purposes of remission or refund pursuant to Annex 300-B to Chapter Three of the North American Free Trade Agreement;	déclaration en détail en vertu des paragraphes 32(1), (3) ou (5) de la Loi sur les douanes ou d'une demande de remboursement des droits de douane, un certificat délivré en vertu de la Loi sur les licences d'exportation et d'importation et du Règlement sur les certificats d'importation, indiquant la quantité passible d'une remise ou d'un remboursement en vertu de l'annexe 300-B du chapitre 3 de l'Accord de libre-échange nord-américain;
[Emphasis added]	[Je souligne]

[15] What YM requested in this case was the amendment of general import permits originally issued by the Minister for the goods which had subsequently been DAS'ed by CCRA (i.e. rejected as originating goods). It appears to me therefore that the Minister's power in this matter arises under subsection 10(1) of the EIPA which says that he "may amend … any permit …". The word "may" suggests a discretionary power. The permit he is asked to amend was a general permit, not one originally granted for TPL purposes. Even if one were to view it as having been granted for TPL purposes subsection 10(2) which relates to permits for goods included on the ICL "solely for the purpose described in subsection … 5.2(1) … that subsection states that the Minister may amend … the permit, as is appropriate in the circumstances". Counsel for YM invites me to apply instead, subsection 10(3) which provides that the Minister shall not amend a permit for goods included on the ICL pursuant to (*inter alia*) subsection 5.2(1) of the EIPA, that is for information purposes only, unless such amendment would be compatible with the purpose that permits "be issued as freely as

possible to persons wishing to … import those goods and with no more inconvenience to those persons that is necessary to achieve the purpose for which the goods replaced on that List". In other words, he says the Minister must amend these permits as requested, the only qualification being that the Minister is obliged to count them in order to enforce the quota as prescribed by NAFTA. I do not accept this interpretation. Subsection 10(3) starts out with the words "Except as provided in subsection (2)". Subsection (2) says that the Minister "may amend" a permit, even those issued in respect of an item included in the ICL by virtue of subsection 5.2(1), if *inter alia* "(d) it becomes necessary or desirable to correct an error in the permit…". That is precisely what the Minister has been asked to do here. So even if the permit were truly being sought in relation to goods listed in the ICL for information purposes only, the Minster still has the discretion to amend them in order to correct an error in the permit already issued.

[16] Some reference was made to the possibility that YM's applications for amendments should be regarded as applications for new permits under section 8. Subsection 8(1) says that the Minister "may issue … a permit", and thus his decision here is equally discretionary. YM argues, however, that section 8.2 which is stated to apply "notwithstanding … subsection 8(1) and any regulation made pursuant to section 12 that is not compatible with the purpose of this section" where the item in question is included in the ICL for purposes *inter alia* of subsection 5.2 (1) "the Minister shall issue … a permit … subject only to compliance with in the application of such regulations made under section 12 as it is reasonably necessary to comply with or apply in order to achieve that purpose". As I have indicated, sections 8 and 8.2 appear to me to have no application to the present

case which involves applications for amendments. Even if they do, however, I believe the Minister has a right to refuse a new permit.

[17] All of these provisions are predicated on the goods in question being included on the ICL. That is a determination which, in my view, the Minister must make in each application for a permit or for the amendment of a permit. I cannot read section 8.2 or subsection 10(3) as relieving the Minister from the duty of – indeed preventing him from – making a determination as to whether the goods are indeed included in the List.

[18] I therefore conclude that the Minister had an independent judgment to make on whether the goods covered by these applications for amendments were eligible for TPL treatment as described in Item 85 of the ICL.

[19] YM's position on the Minister's powers was essentially that he is a bean counter, entitled and obliged only to make sure that the quantity of goods to be covered by a TPL permit would not exceed the annual quota for such goods as imposed pursuant to NAFTA. This was part of a more elaborate and complicated analysis on the part of YM to demonstrate that it is the Canada Border Services Agency which has sole responsibility for controlling entry of goods and the collection of revenues. It appears to me that in the first instance it is the Minister, through the grant or refusal of import permits, who has prior control over the entry into Canada of goods from other countries. Upon their presentation at the border, it is then the CCRA which makes a determination as to the imposition of duty or not. TPL goods, as non-originating goods, are susceptible to duties which may be remitted pursuant to the *Imports of Certain Textile and Apparel Goods from Mexico or the*

United States Customs Duty Remission Order quoted above. To obtain a remission, the importer must provide to a customs officer a certificate issued pursuant to the EIPA, that is, by the Minister in order to qualify for the remission. (See the *Remission Order*, *supra*, para. 3(2)(a), quoted in para. 14). Therefore, there is a joint responsibility in the determination of whether an importer is entitled to remission of duties in respect of goods claimed to be TPL eligible. The Order clearly recognizes that the issue of an import permit by the Minister is a prerequisite to remission. There is, of course, co-operation required between the two administrations. For example, section 24 of the EIPA requires customs officers before permitting import or transfer of goods to satisfy themselves that the importer or exporter has not contravened the EIPA.

[20] However one describes the authority of the Minister whereby, according to subsections 8(1) or 10(1), he may issue or amend a permit, that decision clearly involves deciding on whether such goods are eligible for TPL treatment by the criteria spelled out in Annex 300-B, Appendix 6.B of NAFTA as quoted above: that is, he must determine whether they were assembled in the territory of a party from fabric or yarn produced or obtained outside the free trade area. I do not interpret the word “may” as allowing him to ignore this requirement although it might permit him to refuse a permit even if the goods qualify as eligible. I need not decide that issue because the decision in question here, as stated specifically by the letter of decision of February 14, 2005 was as to “eligibility” of these goods for TPL benefits. Obviously the statute leaves the Minister a good deal of choice as to what procedures he applies for making this determination. It is not suggested that such determination should be made by a *quasi*-judicial process. But at a minimum, it should be demonstrable that the decision was taken with a fair regard to the materials before the Minister and that he should not decide it on the basis of irrelevant considerations. The Minister’s decision does

not provide any reasons for his conclusion that these goods were not eligible. Given the amount of material which YM had submitted to the EICB, it is unfortunate that the Minister could not at least have explained why none of this was supportive of eligibility if indeed that were the case. Instead, the Court is obliged to consider the advice given to the Minister by the EICB and assume that it represents the reasons for his decision. That review strongly suggests that the whole mindset of those involved in the decisional process was that an application for retroactive amendments to permits to obtain TLP status was presumptively invalid because it covered goods which had already been DAS'ed. It is suggested in the material that an importer in such circumstances is not entitled to consideration because he should have known that his original presentation to the CCRA of a claim that the goods were originating was inconsistent with NAFTA and its many dispositions. It is further implied that such an importer is at fault for having misrepresented his goods originally and therefore is not entitled to a second chance. I find none of this stated or implied in the legislative framework. Subsection 10(1) of the EIPA specifically gives the Minister a power to amend a permit and paragraph 10(2)(d) authorizes him to do so where "it becomes necessary or desirable to correct an error in the permit …". There is no express or implied authority for the Minister, either automatically to reject an application for an amendment in respect of DAS'ed goods even where there was negligence in the original application for an import permit, or in the presentation to CCRA of an unjustified claim that the goods are originating. In this case the Minister had ample evidence before him that the original misdescription of these goods as originating goods was based on incorrect advice from YM's customs brokerage. But even if it was not, there is nothing to suggest that an application for an amendment by a negligent importer should either be rejected out of hand or made subject to some higher standard of proof. Even though by virtue of the word "may"

in subsections 8(1) and 10(1), the Minister's decision may be broadly described as discretionary, he cannot fetter his discretion by imposing terms for its exercise which are not authorized by legislation: see e.g. *Maple Lodge Farms Limited v. Government of Canada, et al.*, [1982] 2 S.C.R. 2 at 6; *Yhap v. Canada*, [1990] 9 Imm. L. R. (2nd) 243 (F.C.T.D.). While the Minister argues that he did not regard this "policy" as described above as binding, it is clear from reading the record that, in fact, the policy was regarded by his advisors as determinative of these applications or as creating an overwhelming presumptive burden against them. YM also argues that such a policy is invalid because not published. I am not prepared to so hold, but it represents an improper fettering of discretion.

[21] Indeed it appears that in the absence of reasons for the Minister's decision and the absence of references to the extra material submitted by YM, it must be assumed that no regard was paid to it. Or, it must be assumed, a special evidentiary burden was being placed on a "non-voluntary" applicant which is not placed on "voluntary" applicants. The evidence of Thomas John Martin, Vice-President, Finance of YM at all times relevant, was that in 2001 when YM realized that it had been wrongly claiming originating goods status for all its importations, some of which had been DAS'ed and some of which had not been DAS'ed, it instructed its broker to make applications for retroactive TPL treatment. His affidavit states as follows:

> 26. YM's customs broker prepared the approximately 3,300 applications for retroactive TPL import permits transactions which had not been DASed. These applications were filed in 2001 and the first few months of 2002. These applications were effected by the completion of import permit application forms, filing of the exporters' commercial invoices as well as an Exporter Certifications of Non-Originating Textile Goods, cross-referenced to the exporters' commercial invoices.

> 27. This evidence was exactly the same nature as that which YM provided to the EICB in its initial limited volumes/transactions requests for amended import permits for DASed goods which Ms. Friesen denied. This is also the information that is specifically required under Order-in-Council No. 1998-1456 titled *Imports of Certain Textile and Apparel Goods from Mexico, the United States Customs Duty Remission Order* ("TPL remission order"), attached as Exhibit "E" as well as Customs Memorandum D110-4-22, attached as Exhibit "C".
>
> 28. In the course of the next 18 months, most of the retroactive TPL import permit applications for non-DASed goods resulted in the issuance of the new TPL import permits to YM. YM's subsequent requests for adjustment from NAFTA to TPL duty remission were accepted by the CCRA.

That is, the same evidence was accepted for retroactive TPL amendment for non-DAS'ed goods, but rejected for DAS'ed goods. The Minister has not contradicted this evidence. It corroborates the view that the focus of the EICB in the decision under review was not on the adequacy of the evidence but on the fact that with respect to some non-originating goods CCRA had DAS'ed the customs declarations but had not done so with respect to other non-originating goods, the latter being accepted by the Minister as eligible.

[22] It remains to consider the standard of review applicable to the Minister's decision of February 14, 2005. YM argued that the standard should be correctness, but the Minister argued it should be patent unreasonableness. Considering the usual factors, there is not, of course, a privative clause or right of appeal; the decision is subject to review under the *Federal Courts Act*. These factors are said to be neutral in determining the degree of deference required. The Minister must be recognized as having a greater expertise than the Courts in the matter of identifying eligibility of

goods for preferential treatment and this suggests considerable deference to the Minister's decision provided it was made within a proper legal framework. The purpose of the legislation, as I apprehend it, is to implement the promises of free trade made in NAFTA. These promises have been incorporated in law and the administration of import controls must respect the legal criteria while promoting the purposes of the Agreement. This means that less deference is owed to the decisions of the Minister if there is a question of whether those criteria are being observed. Finally, it is said that the nature of the decision of the Minister is discretionary because the word "may" appears in the relevant sections of the EIPA. One must, I think, analyze the power more precisely. I do not think that the word "may" entitles the Minister to ignore the definition of eligibility for this apparel as set out in paragraph 85 of the ICL. To do so is to ignore the opportunity which these U.S. exporters should have to export to Canada, and this Canadian importer should have to import into Canada duty free, such apparel. While I accept the principle approval by the Supreme Court of Canada in *Maple Lodge Farms Limited, supra*, at page 5, that the EIPA does not "create or recognize a legal right to an import permit …" I also note that in that same passage the Court agreed with the Federal Court of Appeal that it is an implication of an item being included in the ICL that "the Minister is to exercise his authority to issue or refuse permits for the purpose" of that item being included in the ICL. It was urged by the Minister that the standard of review here should be that of patent unreasonableness. In support, mention was made of the reasons of two judges in the Supreme Court decision in *Mount Sinai Hospital Center v. Québec*, [2001] 2 S.C.R. 281 that the standard of review for the exercise of a ministerial discretion there should be patent unreasonableness. In that case, however, the discretionary power was to be exercised "in the public interest", the power being that of the Minister to approve health care facilities and their location.

That clearly involved polyvalent issues. In the present case the Minister is not given discretion to grant or refuse import permits simply “in the public interest” but has very specific criteria to apply as set out in Item 85 of the ICL. In my view this involves questions of mixed fact and law in the middle of the decisional spectrum and the proper standard of review should be reasonableness. I am unable to conclude that the Minister’s decision, limited as it was by a policy either to refuse “non-voluntary” applications for retroactive TPL treatment, or to impose on such an applicant a higher standard of proof without serious regard to the evidence, was reasonable.

DISPOSITION

[23] I will therefore quash the Minister’s order of February 14, 2005 and refer the Applicant’s requests for TPL treatment back to the Minister and his delegates for a decision in accordance with these reasons. It is not for the Court either to declare the Applicant entitled to import permits or to order the Minister by way of *mandamus* to issue such permits. It is the Minister who has the power to make these decisions but they must be made with proper consideration to the facts before him. In its statement of “relief sought” in its Memorandum of Fact and Law the Applicant asked me to restrain the Minister and his delegates from issuing retroactive TPL import permits “for TPL qualifying cotton and man-made apparel imported into Canada from the United States during period 1998-2002”. No explanation has been provided as to why this remedy is necessary or appropriate.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The decision made on behalf of the Minister of International Trade and communicated to the Applicant on February 14, 2005 be set aside; and

2. The matter be referred back to the Minister of International Trade for reconsideration in accordance with these Reasons.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Donald H. Pearson Jesse I. Godlman	FOR THE APPLICANT
Karen Lovell Andrea Bourke John C. Clifford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gottlieb & Pearson 30 St. Clair Avenue West, Suite 510 Toronto, Ontario M4V 3A1	FOR THE APPLICANT
Mr. John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT