Federal Court  Cour fédérale

Date: 20100531

Docket: T-70-09

Citation: 2010 FC 591

Ottawa, Ontario, May 31, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

YM (SALES) INC.

Applicant

and

THE MINISTER OF INTERNATIONAL TRADE and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, YM Sales Inc. (YM) applies for judicial review of the decision made by the Minister of International Trade communicated by the December 16, 2008 letter from Ms. Katharine Funtek, Director, Trade Controls Policy Division of the EICB refusing YM's application to amend import permits. The amendments would qualify the permits for preferential tariffs and result in the remittance of some $1.5 million.

[2] YM is an importer of apparel goods and had originally obtained the import permits for the goods as apparel originating in North America and thus exempt from import duty under the North American Free Trade Agreement (NAFTA). However, the Canadian Customs and Revenue Agency (CCRA) was not satisfied the goods originated in all respects from the NAFTA free trade zone and issued Detailed Adjustments Statements (DAS). The effect of the DAS issued meant the goods were subject to a duty at the Most Favoured Nations (MFN) rate.

[3] YM applied to amend its import permits on the basis the apparel goods were manufactured in North America from threads and yarn originating outside the free trade zone. The amendment, if approved, would allow the goods to be treated as exempt from duty under a Tariff Preferential Level (TPL) exception provided for in NAFTA if the goods were within the annual quota allowed for such goods. No issue arises as the manufacture of the apparel goods in the NAFTA zone or the availability of the quota at the time of import.

[4] The Minister refused to amend the 281 import permits previously issued to YM. This was the second refusal to amend the YM's import permits in question.

[5] For reasons that follow, I am dismissing this application for judicial review.

BACKGROUND

[6] In order to fully appreciate the issues in this matter it is first necessary to review the legislative scheme, the factual history and the previous judicial review.

LEGISLATIVE SCHEME

[7] In 1994 Canada, Mexico and the United States agreed to establish a North American free trade area to eliminate barriers to trade and facilitate cross-border movement of goods between the territories of the Parties. The North America Free Trade Agreement (NAFTA) was implemented in Canada by legislative enactment, in this instance, the *Export and Import Permits Act* R.S.C. 1985, s. E-19 as amended (EIPA).

[8] Article 502 of NAFTA requires importers in each territory, if they claim preferential NAFTA tariff treatment, to make a written declaration based on a valid certificate of origin that the goods imported qualify as originating goods. Originating apparel must have been cut and sewn (assembled) in North America from fabric and yarn (inputs) produced in North America. The certificate of origin is provided by the exporter which provides the goods to the importer.

[9] Annex 300-B, Appendix 6.B to NAFTA makes an exception for apparel manufactured from non-originating inputs. It states:

> Each Party shall apply the rate of duty applicable to originating goods … up to the annual quantities specified … to apparel goods … 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. …

[10] The Minister draws most of his powers, in giving effect to NAFTA, from the EIPA.

[11] Section 5 of the EIPA authorizes the Governor in Council to establish an Import Control List (ICL) for various specified purposes including implementation of intergovernmental arrangements such as NAFTA.

[12] Section 14 of the EIPA provides that no person shall import goods included on an ICL unless he has an import permit issued under the EIPA.

[13] Section 5.2 (1) of the EIPA provides that some goods may be listed on the ICL specifically to monitor the quota levels agreed on in NAFTA, it reads in part:

> 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 … importation of any goods in respect of which a specified quantity is eligible each year for the rate of duty provided for … in accordance with Appendix 6 of Annex 300-B of NAFTA, … the Governor in Council may, by order and without reference to that quantity, include those goods on … the Import Control List… in order to facilitate the collection of that information.

[14] Generally the Minister has discretion over issuing import permits pursuant to sections 8(1). However, if the Minister lists the goods solely for the purpose of collecting information subsection 8(2) requires him to issue a permit:

> 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.
>
> (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 with or apply in order to achieve that purpose.

[15] The Minister is required to issue a permit and section 8.2 adds that regulations enacted respecting the issuance of a permit to collect information may only be applied to the degree it is reasonably necessary to comply with the purpose of collecting information.

> 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 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.

[16] However, the Minister has discretion with respect to the amendment of import permits pursuant to section 10 of the EIPA:

> 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.
>
> (2) If a permit has been issued under this Act to any person for … importation of goods that have been included on 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 5.4(6), (7) or (8), and
>
> (a) the person furnished, in or in connection with his application for the permit, information that was false or misleading in a material particular,
>
> …
>
> (d) it becomes necessary or desirable to correct an error in the permit,
>
> …
>
> 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.

[17] Section 12 provides the Governor in Council may make regulations concerning:

> (*b*) respecting information to be supplied by persons to whom permits, import allocations, export allocations, certificates or other authorizations have been issued or granted under this Act and any other matter associated with their use;
>
> …
>
> (*c*) respecting the issue of, and conditions or requirements applicable to, general permits or general certificates;
>
> …
>
> (*c.3*) respecting the application, for the purposes of this Act or any provision thereof, of any regulations made under the *Customs Tariff* respecting the origin of goods;

> …
> (*f*) generally, for carrying out the purposes and provisions of this Act.

[18] The *Import Permits Regulations*, (SOR/79-5) provides:

> 3. A resident of Canada may apply for a permit to the Minister by furnishing the following information:
>
> > (a) the applicant's name and address;
> > …
> > (e) the country of origin of the goods;
> > (f) the country from which the goods are imported;
> > …
> > (k) any information requested by the Minister in any case where, in his opinion, the information furnished by the applicant requires clarification or the description of the goods to be imported is not in sufficient detail.

[19] Section 85 of the *Import Control List* [C.R.C., c. 604] was adopted pursuant to section 5.2 of the EIPA in order to give effect to Appendix 6.B of Annex 300-B of NAFTA. Section 85, sometimes referred to as Item 85, reads:

> 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.

[20] The *Customs Tariff Act*, (1997, c. 36) is also relevant. An importer of non-originating goods from a NAFTA country would be assessed custom duties at the MFN rate. The importer 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 Act.* The remission order provides:

> 1. The definitions in this section apply in this Order.
>
> "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.
>
> ...
>
> 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,
>
> (a) at the time that the goods are accounted for under 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;

[21] The form of the exporter's certification of non-originating textile goods is provided in the schedule to the regulation and reads:

> I, the exporter of the goods referred to in the attached invoice or sales agreement, hereby certify that those goods comply with the applicable requirements specified in Appendix 6 of Annex 300-B to Chapter Three of the North American Free Trade Agreement.

FACTS

[22] YM is a Canadian corporation trading in “fast fashion”. It imports finished apparel for children, youth and adults from third party suppliers. Between 1998 and 2001, YM imported apparel into Canada for sale in approximately 325 of its Canadian stores.

[23] YM initially declared the goods were “NAFTA originating” based on exporter certificates.

[24] The CCRA reviewed 281 selected imports and disputed the apparel was NAFTA originating. It issued Detailed Adjustment Statements (DAS) for the goods in question and imposed duty under the MFN tariff rates.

[25] After unsuccessfully appealing the DAS adjustments, YM applied to retroactively amend its import permits to comply with Appendix 6.B of Annex 300-B of NAFTA which provided an exception for apparel goods that are made from non-originating inputs, but assembled in North America. If approved, YM would be entitled to remission of the duty it paid at the MFN rate.

[26] YM explains it made an error based on a misunderstanding of the NAFTA rules of origin. YM blames its customs broker for bad advice to claim the apparel was NAFTA originating.

[27] YM filed over 3,000 applications to amend import permits in 2001 and 2002 for transactions in which it had mistakenly accounted for goods as NAFTA-originating based on erroneous certificates of origin. The YM amendment applications were to change the import permits to reflect non-originating inputs status.

[28] YM's amendment applications involved completion of an import permit application form and filing an Exporter's Certification of Non-originating Textile Goods (ECNO) cross referenced with YM's commercial invoices. The Minister's delegate allowed most of these amendment applications. None of these applications involved the 281 imports the CCRA DASed.

[29] By 2005 the Minister only denied the 281 amendment applications that had previously been DASed.

PREVIOUS JUDICIAL REVIEW

[30] YM applied for judicial review of the Minister's 2005 decision refusing YM's amendment application of its import permits. In 2008, Justice Strayer granted the application for judicial review.

[31] Justice Strayer concluded the Minister's 2005 decision was based on an indiscriminate policy to refuse all import permit amendment applications considered non-voluntary, in other words, DASed. Justice Strayer concluded the Minister fettered his

discretion by refusing the amendments because of that policy and failed to assess the merits of each application to see if it qualified for TPL remissions.

[32] Justice Strayer quashed the Minister's decision and referred YM's amendment requests to qualify for TPL treatment back to the Minister and his delegates for a decision in accordance with his reasons.

[33] Following Justice Strayer's 2008 judgment, EICB officials reconsidered YM's applications.

DECISION UNDER REVIEW

[34] On December 16, 2008, the Minister's delegate, Ms. Funtek, informed YM the Minister was again refusing its applications to amend the remaining 281 DASed import permits.

[35] Ms. Funtek conveyed the Minister's decision by letter on December 16, 2008. She began by stating the Minister reconsidered the import permit amendment applications on the basis set forth by Justice Strayer.

[36] In coming to his decision the Minister had before him a Memorandum for Decision dated October 29, 2008. This was essentially a briefing note that reviewed the EICB findings, considered the Minister's options and recommended refusing the applications. Since the Minister did not give reasons, I consider this document and Ms.

Funtek's letter as setting out the reasons for his decision. *Sketchley v. Canada*, [2006] 3 F.C.R. 39 (FCA) at para 36 – 39.

[37] Ms. Funtek acknowledged YM had indicated its incorrect identification of the origin of the goods at the time of import was the result of YM's earlier misunderstanding of the NAFTA origin eligibility requirements. She noted government officials had explained the NAFTA requirements. She stated:

> In particular, YM had ample, subsequent opportunities to provide documentation from its suppliers, if it existed. In the end, YM never supplied information that is needed to establish that the goods in question were cut and sewn from a NAFTA territory from yarn or fabrics made outside the NAFTA territory.

[38] The Minister's delegate stated the contemporary records filed by YM obtained from its suppliers did not support YM's claim for TPL benefits. YM's exporter's certifications of non-originating textile goods were deficient. Without contemporary records of inputs the accuracy of the certificates could not be verified. In addition, certificates where suppliers stated the information on their exporter's certification was accurate "to the best of their knowledge" or "to the best of our ability" were considered deficient.

[39] The Minister's delegate also advised that responses to CCRA questionnaires compiled from YM suppliers regarding sourcing of inputs attesting to U.S. or Mexican origin inputs did not establish YM's eligibility for TPL benefits.

[40] Ms. Funtek concluded by stating the Minister denied YM's 281 amendment applications because YM failed to provide sufficient evidence to satisfy the Minister the apparel was eligible for the TPL program, that is, apparel cut and sewn from fabric and yarn originating from outside the NAFTA free trade zone.

STANDARD OF REVIEW

[41] The Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 is often cited in the context of judicial review for two principles. The first is there are only two standards of review: correctness and reasonableness (*Dunsmuir*, para. 45). The Court teaches the standard of correctness will apply to questions of law, while questions of mixed fact and law, and questions of fact will be reviewed on a standard of reasonableness. The second principle is not every case requires a standard of review analysis; courts may look to the jurisdiction and apply the standards they find there (*Dunsmuir*, para. 57).

[42] In *YM (Sales) Inc. v. Canada (Minister of International Trade)* 2008 FC 78, (*YM (Sales) Inc.*) Justice Strayer addressed the same issues and facts that are now before this Court. After considering the standard of review he stated:

> 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.

[43] I agree with Justice Strayer and find the appropriate standard of review in this case is reasonableness.

DISCUSSION

Applicant

[44] YM alleges the Minister required a nearly impossible standard of proof. This standard rendered the Minister's decision unreasonable because by asking the company to provide "contemporaneous records of import" the Minister required YM to prove the information underlying its application to the standard of "certitude". It contends this standard is not authorized by statute.

[45] YM submits the effect of this modified standard of proof was the Minister improperly refused to accept the new ECNOs as substantiating YM's TPL claims.

[46] YM also submits the EICB's contention that contemporaneously apparel input records were required due to the conflict between earlier claims for NAFTA origination and later claims for TPL eligibility is inherently flawed. It argues that the Minister's power to ask for "any information" to clarify other information should be read narrowly so as not to include business records. It argues this burden was not imposed on its other retroactive amendment applications.

[47] YM states while four of its suppliers responded to the NAFTA questionnaires, they were misguided with respect to the NAFTA rules of origin. However, YM adds

these questionnaires were provided by YM as part of its duty of litigation disclosure and not in support of its amendment applications and are irrelevant because they were not before the Minister. Moreover, the suppliers' general responses were not in conformity with instructions on the face of the document and the more detailed answers simply indicated the apparel inputs were purchased in NAFTA territory and did not address the question of the origin of the inputs. YM submits the Minister unfairly characterizes the information in the NAFTA questionnaires.

[48] YM also submits the Minister unfairly characterized the ECNOs as six years out of date when the gap was less than six years being two years with respect to three suppliers, two to four years with respect to the remainder and a smaller number that ranged to up to five years.

[49] Finally, YM submits the Minister took into account irrelevant financial considerations in his 2008 decision, namely that a favourable decision meant a possible remittance of $1.5 million for YM and some $22 million for other importers in similar circumstances.

Respondents

[50] The Respondents argue the Minister acted reasonably by demanding contemporaneous records proving the apparel inputs were non-originating in the face of conflicting information about their provenance. It argues the question is whether the Minister weighed the evidence reasonably.

[51] EICB officials asked YM for any relevant records including contemporaneous records at the onset of dealings with YM. They also afforded YM further opportunity to provide “any documentary evidence that the imported apparel was produced from fabrics or yarn produced or obtained outside the NAFTA free trade area”. The Respondents say it was not unreasonable for the Minister to have requested contemporaneous records to assist in his determination of TPL eligibility or to have considered the absence of such records in making his decision. The Applicant declined the offer to submit additional information; relying on its initial applications.

[52] The Respondents noted the ECNOs attached to each application were signed one to six years after importation and at that earlier time the exporters had certified the apparel was NAFTA originating being wholly produced in the United States. The Respondents submitted:

> Accordingly, in respect of each amendment application, two clearly contradictory certifications had been put forward. YM did not provide any documents or other records made contemporaneously with the sale and/or import of the Apparel to corroborate the contents of one certificate over another.

[53] The Respondents contend YM neither asked its suppliers for information confirming the origin of the fabric or yarn, nor did YM provide contemporaneous records to corroborate its claims. Such records being what YM ought to have on hand when engaged in international trade.

[54] The Respondents point to specific flaws in several ECNOs. Some are qualified by the exporter as being “to the best of my knowledge”. In other cases exporters had gone out of business. Further still, several ECNOs appearing to indicate non-originating countries revealed on closer inspection to have been corrected with liquid paper. Below the correction ’United States’ appears to have been written in. Several other applications were missing commercial invoices confirming the exporter and the quantities imported. The Respondents contend these flaws support the Minister’s conclusion the information contained therein could not be verified.

[55] The Respondents also submit the Minister’s reconsideration is consistent with Justice Strayer’s reasons. It cites Justice Strayer’s criticism:

> 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. (emphasis by Respondents)

The Respondents argue EICB officials took a fresh look and gave serious regard to the evidence before it. It points to Ms. Funtek’s instructions to find “anything” within the applications substantiating the permits qualified for TPL treatment.

[56] The Respondents assert the bad brokerage advice YM relied on did not form the basis of its decision, but it had “implications”. It was this bad advice that prejudiced the company’s ability to later substantiate its ECNOs in amendment applications.

[57] Finally, the Respondents deny the Minister based his decision on financial considerations since such information is provided as a matter of general practice. The recommendation to the Minister as set out in the EICB's memorandum to the Minister makes clear the recommendation for denial is based on the complete lack of reliable evidence concerning the origin of the apparel inputs.

ANALYSIS

[58] The Minister's discretion in this case comes from the statutory scheme.

[59] Canada's international trade obligations are reflected in section 8 of the *EICA*. In order to monitor Canada's quota level of non-originating textile goods those goods are included on the Import Control List. The Minister must issue import permits for those goods freely because they are listed for information purposes in the spirit of free trade. They are not listed for other purposes such as public safety like firearms or pharmaceuticals, where the Minister enjoys discretion over the issuance of permits.

[60] The Applicant asks me to find this free trade purpose informs each step of the permit process. From application to amendment, where the purpose of an item's inclusion on the ICL is to monitor quotas, licenses should be issued and amended with bare minimum hindrance.

[61] Justice Strayer was faced with the same question and found the statute does not demote the minister to a “bean-counter” with the sole purpose of making sure no more goods cross the border than the quota allows.

[62] Subsection 8(2) of the Act requires the Minister to issue permits. However, I do not consider this provision renders the Minister powerless to look behind the ECNO and other supporting documentation to ensure compliance with the terms of Canadian law and NAFTA.

[63] Section 10 provides the Minister with discretion when amending permits. While the Minister must respect the spirit of freer trade when amending permits, section 12 and the relevant regulations provides the Minister with the power to require, “any information requested by the Minister in any case where, in his opinion, the information furnished by the applicant requires clarification or the description of the goods to be imported is not in sufficient detail.”

[64] It seems to me, the purpose of this scheme is to ensure free trade and prevent the Minister from deviating from the international agreement. But the terms of the international agreement still apply. The apparel must be made of non-originating inputs and assembled in North America to qualify for TPL treatment. If the Minister could not look behind the information provided by an exporter/importer, he would not be in a position to ensure the free trade system and its permissible exceptions were being

observed. The Minister is entitled to request further information for the purpose allowed in the regulations.

[65] The same goes for honest mistakes, which is the case here. Just because the mistake was honest, doesn't mean an importer should gain a *de facto* benefit of the doubt exempting it from information that it could otherwise be required to provide.

[66] The regulations do not limit the scope of information the Minister may seek as long as it is for clarification or to complete insufficient detail. I find the legislation and regulations authorize the Minister to ask for further information to clarify or establish the validity of the certificates of origin whether or not the goods were DAS'ed.

Reason to Require Additional Information

[67] I consider both Ms. Funtek's letter and the memorandum to the Minister as constituting the reasons behind this decision. It is clear EICB officials had three concerns:

1. DAS adjustments on import goods for which a NAFTA origin was claimed often established the NAFTA origin could not be substantiated because the importer or its suppliers had no records concerning inputs; it was therefore unlikely the importer or its suppliers could substantiate TPL eligibility;

2. YM's suppliers had previously claimed NAFTA origins for the very goods for which they now claimed non-NAFTA origins; and

3. the new Certificates of Origin were made several years after the date of import.

[68] In respect of the last item, the greatest delay was that of the StreetBeat applications which were six years after the date of import. YM has dropped those claims from its application. Nevertheless, there is no dispute the other certificates were made after the goods were imported.

[69] Given the above, I find the Minister and his officials had reason to seek further information confirming the validity of the Certificates of Origin.

Not Required of Other Amendment Applications

[70] YM submits that the Minister has applied a higher standard of proof by requiring contemporaneous records of the origins of inputs for the 281 DAS'ed goods when ECNO's were sufficient for the approved 3000 amendment applications by YM on the voluntary permit amendments.

[71] YM stresses providing documents proving the country of origin of the fabrics and yarns is a difficult exercise since it relies on third party suppliers who are not always willing to share their confidential commercial information. The Memorandum for Decision to the Minister confirms that substantiating a TPL claim can be onerous where the manufacturer is not integrated with the distributor. That may be, however the rules are clear. The requirements for TPL exception are essential to benefit from the trade advantage. Just because something is difficult to comply with is no reason for non-compliance.

[72] The ECNO's provided by the exporters are a source of information and a form of evidence about the country of origin for the fabrics and yarns. By such forms the exporter provides information and certifies the country of origin to officials. In the vast majority of cases, ECNOs are sufficient for the Minister's purpose. It should be remembered the Minister approved 3000 amendment applications with ECNOs alone.

A Higher Standard of Proof

[73] In *YM (Sales) Inc.* Justice Strayer found the Minister had *either* based his decision on policy to summarily deny amendment applications for DASed permits *or* he applied a standard of proof that made amending the permits impossible.

[74] YM submits in this review that the Minister imposed a higher standard of proof that required "contemporaneous records of inputs" to prove with "certitude" the origin of the fabric and yarns in the imported apparel.

[75] It submits this imposition is a higher standard on YM's amendment applications than is reasonable. However, I find the use of the word "certitude" by Ms. Funtek was in relation to those ECNOs which deviated from the form of ECNO required by regulation. These ECNOs indicated the exporter was completing the form "to the best of his knowledge" instead of the prescribed language from the exporter certifying compliance.

[76] I do not find the Minister requested certitude, rather the officials asked for any proof that substantiated TPL eligibility and offered YM the opportunity to provide more information, an opportunity YM declined.

[77] With the benefit of an amplified record based on the Minister's compliance with Justice Strayer's instructions it seems clear to me on this time around the Minister neither applied an indiscriminate policy, nor applied a higher standard of proof.

[78] Justice Strayer was clear, and I agree, the Minister could not impose a "higher standard of proof" for the sole reason the permits were DASed. This is in keeping with the Supreme Court of Canada's finding in *F.H. v. MacDougall*, 2008 SCC 53 at para. 40 that there is only one civil standard of proof in Canada – the balance of probabilities.

No Fault

[79] Section 10 (2)(a) of the EIPA permits amendments to permits where a person furnished false or misleading information and 10 (2)(d) provides for corrections of errors. The effect of these provisions is, as Justice Strayer observed, not to reject defective permits out of hand for negligence, but to allow for their correction. These corrections do not require a higher standard of proof as applying a higher standard of proof in light of the legislation would be incorrect or unreasonable.

[80] In this instance, the Minister accepted YM's explanation for the deficiency of its permits. Nothing suggests the Minister increased the standard of proof, in light of YM's error, beyond the balance of probabilities allowed in the statutory scheme.

Irrelevant Considerations

[81] Finally, YM submits the Minister took into account irrelevant financial considerations in his 2008 decision, namely the possible remittance of $1.5 million for YM and roughly $22 million for importers in similar circumstances. I do not see that the Minister should be unaware of the financial implications of his decision. I find that the recommendation as set out in the EICB's Memorandum for Decision to the Minister makes clear the recommendation for denial is based on the lack of reliable evidence concerning the origins of the inputs.

CONCLUSION

[82] I conclude the Minister was entitled by the regulatory scheme to request further information concerning the apparel goods in question and he had sufficient reason to make the request for further information concerning the origin of the apparel fabric and yarns. The requested information required of YM was not provided. In coming to his decision, the Minister did not impose a higher standard of proof nor did he take into account irrelevant considerations.

[83] Accordingly, YM's application for judicial review does not succeed. The application for judicial review is dismissed.

[84] Costs are awarded to the Respondents.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondents.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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