Federal Court  Cour fédérale

Date: 20230913

Docket: T-1217-22

Citation: 2023 FC 1238

Ottawa, Ontario, September 13, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

MAZDA CANADA INC.

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Canada Border Services Agency [CBSA] dated May 24, 2022, denying the Applicant's claim for a refund of customs duties on imported vehicle parts that were defective.

[2] The Applicant, Mazda Canada Inc. [Mazda], asserts that: (i) the decision is unreasonable as the prescribed information regarding disposal of the defective parts at issue was provided to the CBSA, despite not being in the prescribed form; and (ii) the CBSA breached the principles of procedural fairness by breaching Mazda's legitimate expectations.

[3] For the reasons that follow, the application for judicial review shall be dismissed.

II. The Legislative Framework

[4] Goods imported into Canada are subject to the payment of duties. Section 76 of the *Customs Act,* RSC, 1985, c 1 (2nd Supp), provides that a person who paid duties on imported goods that are defective may apply to the Minister of Public Safety and Emergency Preparedness [Minister] for a refund of all or part of those duties if the goods have been disposed of in a manner acceptable to the Minister or exported:

Refunds for defective goods	**Marchandises défectueuses**
76(1) Subject to any regulations made under section 81, the Minister may, in such circumstances as may be prescribed, grant to any person by whom duties were paid on imported goods that are defectives, are of a quality inferior to that in respect of which duties were paid or are not the goods ordered, a refund of the whole or part of the duties paid thereon if the goods have, subsequently to the importation, been disposed of in a manner acceptable to the Minister at no	76(1) Sous réserve des règlements pris en vertu de l'article 81, le ministre peut, dans les circonstances prévues par règlement, accorder à une personne le remboursement de tout ou partie des droits qu'elle a payés sur des marchandises importées qui, d'une part, sont défectueuses, de qualité inférieure à celle pour laquelle il y a eu paiement ou différentes des marchandises commandées et, d'autre part, après leur importation, ont, sans frais pour Sa Majesté du chef du Canada, été aliénées conformément à

expense to Her Majesty in right of Canada or exported.	des modalités acceptées par le ministre, ou ont été exportées.
Subsections 74(2) and (3) and 75(1) apply	Applications des paragraphes 74(2) et (3) et 75(1)
76(2) Subsections 74(2) and (3) and 75(1) apply, with such modifications as the circumstances require, in respect of refunds under this section.	76(2) Les paragraphes 74(2) et (3) et 75(1) s'appliquent, compte tenu des adaptations de circonstance, aux remboursements visés au présent article.

[5] The prescribed form for an application for a refund of duties is a *Form B2, Canada Customs – Adjustment Request*.

[6] In order to obtain a refund pursuant to section 76, subsection 74(3)(b) of the *Customs Act* provides that the person making the application for a refund must demonstrate that the defective goods were disposed of in a manner acceptable to the Minister or exported by filing a prescribed form containing the prescribed information.

[7] Additionally, sections 36 to 39 of the *Refund of Duties Regulations* SOR/98-48 [*Regulations*] govern the granting of refunds of duties pursuant to section 76 of the *Customs Act*. Section 38 of the *Regulations* sets out the evidence that must be submitted in support of an application for a refund of duties on goods under this provision. In particular, subsection 38(d) provides that the prescribed form verifying the exportation or disposal of the goods must be completed. Section 38 provides as follows:

Evidence in Support of Application	**Justificatifs**
38 An application for a refund of duties must be supported by	**38** La demande de remboursement des droits doit être accompagnée :
(a) a written statement by the exporter, vendor or manufacturer of the goods confirming that the goods are defective, are of a quality inferior to that in respect of which duties were paid or are not the goods ordered and identifying the nature of the defect or inferior quality or the goods that were actually ordered, as the case may be;	**a)** d'une attestation écrite provenant du fabricant, de l'exportateur ou du vendeur des marchandises confirmant que celles-ci sont défectueuses, de qualité inférieure à celles pour lesquelles il y a eu paiement ou différentes des marchandises commandées, et indiquant la nature de la défectuosité ou ce en quoi les marchandises sont de qualité inférieure, ou précisant les marchandises qui ont été réellement commandées, selon le cas;
(b) a copy of any document relating to a refund or credit given by the vendor of the goods to the importer or owner, showing the amount of any refund of the purchase price or of any credit given in respect of the goods;	**b)** d'une copie de tout document relatif à un remboursement ou à un crédit accordé par le vendeur des marchandises à l'importateur ou au propriétaire et indiquant le montant de tout remboursement du prix d'achat ou de tout crédit offert pour les marchandises;
(c) in the case of goods of inferior quality or that are not the goods ordered, a copy of the invoice, purchase order, contract or other document that shows the goods that were actually ordered; and	**c)** dans les cas de marchandises de qualité inférieure ou de marchandises différentes de celles qui ont été commandées, d'une copie de la facture, du bon de commande, du contrat ou de tout autre document sur lequel figurent les marchandises qui ont été réellement commandées;
(d) a copy of the prescribed form verifying the exportation or disposal of the goods.	**d)** d'une copie du formulaire réglementaire confirmant que les marchandises ont été réexportées ou confirmant leur destination.
[Emphasis added.]	

[8] CBSA Memorandum D6-2-3, entitled "Refund of Duties", sets out the CBSA's policy and procedures governing the refund of duties under subsection 76(1). The memorandum provides that

the "prescribed form" referenced in the *Customs Act* and *Regulations* that verifies the exportation or disposal of defective goods is *Form E-15, Certificate of Destruction/Exportation* [Form E15]. In particular, paragraphs 50-51 of Memorandum D6-2-3 provide:

> 50. Where it is the wish of the importer/owner that the goods be destroyed in Canada, destruction shall take place at the importer's/owner's expense under CBSA supervision.
>
> 51. It will be the responsibility of the claimant to describe the goods on the Form E15, Certificate of Destruction/Exportation, in such a manner that they can be related to a specific CBSA accounting document and the relative refund claim together with the supporting documentation.

[9] The *Customs Act* and its various regulations also outline a number of obligations that importers have concerning record keeping and ensuring those records are available to the CBSA. Subsection 40(1) of the *Customs Act* and sections 2 and 4 of the *Imported Goods Records Regulations*, SOR/86-1011, require importers to maintain any records in respect of commercial goods for a period of six years following the importation of those goods, including any records that relate to the disposal of commercial goods or refunds of duties. Pursuant to section 4 of the *Imported Goods Records Regulations*, importers' books and records must be kept in such a manner as to enable CBSA to perform audits of the records and to obtain or verify the information on which a determination of the amount of the duties paid, payable, refunded or relieved was made. Importantly, paragraph 42(2)(a) of the *Customs Act* specifies that a CBSA officer may inspect, audit or examine any record relating to the administration or enforcement of the *Act*:

Inspections

42(2) An officer, or an officer within a class of officers, designated by the President for the purposes of this section, may at all reasonable times, for any purpose related to the administration or enforcement of this Act,

(a) inspect, audit or examine any record of a person that relates or may relate to the information that is or should be in the records of the person or to any amount paid or payable under this Act;

(b) examine property in an inventory of a person and any property or process of, or matter relating to, the person, an examination of which may assist the officer in determining the accuracy of the inventory of the person or in ascertaining the information that is or should be in the records of the person or any amount paid or payable by the person under this Act;

(c) subject to subsection (3), enter any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any records are or should be kept; and

(d) require the owner or manager of the property or business and any other person on the premises or place to give the officer all reasonable assistance and to answer truthfully any question, and, for that purpose, require the owner, manager or other person designated by the owner or manager to attend

Enquêtes

42 (2) L'agent chargé par le président, individuellement ou au titre de son appartenance à une catégorie d'agents, de l'application du présent article peut à toute heure convenable, pour l'application et l'exécution de la présente loi :

a) inspecter, vérifier ou examiner les documents d'une personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres de la personne ou qui devraient y figurer, soit à toute somme à payer par la personne en vertu de la présente loi;

b) examiner les biens à porter à l'inventaire d'une personne, ainsi que tout bien ou tout procédé de celle-ci ou toute matière la concernant dont l'examen peut aider l'agent à établir l'exactitude de l'inventaire de la personne ou à contrôler soit les renseignements qui figurent dans les documents de la personne ou qui devraient y figurer, soit toute somme payée ou à payer par la personne en vertu de la présente loi;

c) sous réserve du paragraphe (3), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus, ou devraient être tenus, des documents;

d) requérir le propriétaire du bien ou de l'entreprise, ou la personne en ayant la gestion, ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre véridiquement à toutes les questions et, à cette fin, requérir le

at the premises or place with the officer.	propriétaire ou la personne ayant la gestion de l'accompagner sur les lieux.

[Emphasis added.]

[10] Subsection 43(1) of the *Customs Act* also allows the Minister to compel the production of any records by any person for any purpose related to the administration or enforcement of the *Act*.

III. Background

[11] Mazda has approximately 164 car dealerships across Canada. Mazda has a parts warranty for buyers such that the seller or manufacturer of a product will remove and replace any parts that are found to be defective. In accordance with Mazda's warranty policy, each dealer is responsible for the destruction of defective parts in respect of the Mazda vehicles it sells.

[12] On January 6, 1996, Mazda entered into an arrangement with Revenue Canada – the predecessor to the Canada Customs and Revenue Agency and the CBSA – governing the manner in which defective goods refund claims would be addressed, so as to "relieve Mazda Canada Inc. of the obligation to adhere to the strict, transaction by transaction, paper requirements as laid out in Customs Memorandum D6-2-2 for purposes of refund for defective car parts on imported vehicles, replaced under warranty and subsequently destroyed" [1996 Agreement]. The 1996 Agreement provided, among other things, that: (i) for ease of administration, a *K32 - Drawback Claim* form [K32 Form]would be accepted as the prescribed form for refund information from Mazda; and (ii) Revenue Canada would accept Mazda's corporate warranty program "as adequate substitution for the form E-15".

[13] On February 21 and 23, 2017, the CBSA advised Mazda's trade representative that the CBSA's policy regarding refunds for defective parts under subsection 76(1) of the *Customs Act* had changed and that importers were now required to file a hardcopy B2 Form for adjustment requests rather than file a K32 Form for drawback claims to obtain refunds as previously permitted by the 1996 Agreement. Moreover, the email sent to Mazda's trade representative on February 21, 2017 forwarded an internal CBSA email which stated that the 1996 Agreement was "not valid anymore".

[14] On May 31, 2018, Mazda filed an application with the CBSA to claim refunds of duties on defective imported vehicle parts, pursuant to subsection 76(1) of the *Customs Act*. Mazda submitted a Blanket B2 Authorization Application [Blanket Application]. A blanket authorization is an administrative process by which an importer can apply to the CBSA for an authorization to file several similar adjustment or refund requests for a given period of time in the form of a single application. The Blanket Application covered ten applications for refunds of duties that were submitted to the CBSA between May 17, 2018 and March 4, 2019. In the "Adjustment Reason(s) and Legislative Authority or Authorities" field on the application, Mazda's trade representative wrote, "Warranty claims were originally done by way of drawback. Starting from Feb, 2017, CBSA requested to submit the claims in the form of Blanket B2s under 76(1) of the Customs Act".

[15] On December 19, 2019 and January 9, 2020, the CBSA issued a series of ten decisions refusing Mazda's applications for refunds of duties.

[16] On January 26, 2021, Mazda filed an application for judicial review of the ten decisions. The application for judicial review was resolved on the consent of the parties and Mazda's Blanket Application was returned for reconsideration by a different CBSA officer [Officer].

[17] On May 13, 2021, the Officer sent a letter requesting that Mazda provide supporting documentation in relation to a list of sample import transactions identified in the Blanket Application [Request Letter]. The Officer requested the following evidence in support of Mazda's refund claim (as prescribed in section 38 of the *Regulations*):

> Your application has been reviewed and the CBSA now requires the following supporting documentation for the B3 transactions identified below. Pursuant to subsection 40(1) of the *Customs Act*, please provide the following documentation and/or records for each transaction line identified in the charts in Appendices A-J inclusive.
>
> (a) a written statement by the exporter, vendor or manufacturer of the goods confirming that the goods are defective, are of a quality inferior to that in respect of which duties were paid or are not the goods ordered and identifying the nature of the defect or inferior quality or the goods that were actually ordered, as the case may be;
>
> (b) a copy of any document relating to a refund or credit given by the vendor of the goods to the importer or owner, showing the amount of any refund of the purchase price or of any credit given in respect of the goods;
>
> (c) in the case of goods of inferior quality or that are not the goods ordered, a copy of the invoice, purchase order, contract or other document that shows the goods that were actually ordered; and
>
> (d) a copy of the prescribed form verifying the exportation or disposal of the goods.

[18] On May 17, 2021, Mazda's counsel sent a response letter to the CBSA concerning their Request Letter and sought clarification regarding the information required.

[19] On May 26, 2021, the Officer replied, advising that, with respect to bullet point (d) of the Request Letter, "a copy of the prescribed form verifying the exportation or disposal of the goods" was referencing Form E15. In the event Mazda did not have an E15, the Officer asked what other alternative proof of destruction Mazda had that it could provide to CBSA.

[20] By email dated May 31, 2021, Mazda's counsel replied stating:

> The agreement dated January 5, 1996 between CBSA and Mazda Canada provides that the books and records of Mazda Canada are satisfactory to the Minister to prove destruction of defective parts. It is for this reason that the E15 certificate has not been provided.
>
> It is to be noted that all defective parts are destroyed at each dealer once a month. For obvious reasons, neither Mazda Japan nor Mazda Canada want these defective parts to find their way back into the market.

[21] On June 10, 2021, Mazda's counsel provided the CBSA with a copy of a letter from Mazda's parent company in Japan that stated:

> To Whom It May Concern,
>
> All parts removed from Japanese made vehicles which are subsequently imported to Canada and duty paid by Mazda Canada ("MCI"), are properly described by the "Memorandum on Manufacturer's Warranty" which is an addendum to the master distribution agreement between Mazda Japan ("Mazda") and MCI are considered to be defective or inferior goods for the purposes of the Customs Act.
>
> MCI retains documentation and auditable corporate records as specified in the agreement for each part that is removed under warranty.

[22] On June 16, 2021, the Officer had a telephone conversation with Mazda's counsel to provide further clarification regarding the supporting documentation required for Mazda's refund claim. The Officer's Memo to File related to that conversation provides that the Officer confirmed that the 1996 Agreement was no longer in effect and that the applications were being reviewed pursuant to the requirements of section 76 of the *Customs Act*.

[23] On June 24, 2021, the Officer sent an additional request letter [Second Request Letter] to Mazda's trade representative asking Mazda to provide the required supporting documentation by July 16, 2021. The Officer provided Mazda with additional information regarding the documentation required. Regarding bullet point (d), the Officer stated that the prescribed form verifying the export or disposal of the goods was Form E15, but if that were not available, Mazda could instead provide "the documents that were used to record the destruction and disposal of the part". The Officer indicated that a determination would be made as to whether the information was sufficient to substantiate the disposal of the goods.

[24] On June 25, 2021, Mazda's counsel called the Officer in response to the Second Request Letter and stated that there was no legislative basis for requesting some of the information. During the telephone conversation, the Officer again provided further clarification regarding the information requested and the requirements in the *Regulations*. The Officer reiterated that in the absence of E15 Forms, Mazda should submit "any documents that they may have" to show that the defective parts had been destroyed.

[25] On July 13, 2021, the Officer and Mazda's counsel had another telephone call further clarifying the documentation required. Mazda asked for an extension of the deadline to provide the requested documents. The Officer granted an extension to August 3, 2021.

[26] On July 19, 2021, Mazda's trade representative sent the CBSA information in relation to the warranty claims made by vehicle owners for the defective parts for each of the 10 requested sample transactions.

[27] On August 10, 2021, Mazda's trade representative sent the CBSA the commercial invoices for each of the ten requested sample transactions, as per the Officer's Request Letter and Second Request Letter under bullet point (c). The following day, on August 11, 2021, the Officer replied to the email with additional questions about the source data and requesting it be provided within the week. The Officer also asked if Mazda was able to provide anything with respect to destruction and disposal.

[28] On October 6, 2021, the Officer held a conference call with Mazda's counsel and trade representative to discuss the supporting documentation provided to the CBSA. With respect to destruction and disposal of defective parts, Mazda representatives explained to the Officer that it performs internal audits of dealers to confirm destruction and disposal. The Officer asked what records were kept with respect to destruction and disposal, if any records are maintained when an internal audit is completed and how long these records are maintained. Mazda's representatives stated that they would make inquiries with Mazda. Again, Mazda's counsel referenced the 1996 Agreement, noting that one of the reasons for the arrangement was so that Mazda did not have to

bring parts to a CBSA site for destruction. Mazda's counsel noted that Mazda was serious about removal and disposal of defective parts as there would be serious consequences if those parts were not properly disposed of and ended up in the after-market.

[29] On October 20, 2021, Mazda's trade representative sent the CBSA further data regarding the warranty claims made for the defective vehicle parts with respect to some of the requested sample transactions.

[30] On October 26, 2021, Mazda's representative sent the CBSA a copy of a document entitled "Dealer Operational Review: County Mazda – 58524" [Sample Audit Report]. In its email, Mazda's representative stated: "I have included a sample audit report for your records to show that the dealers are audited by Mazda Canada to ensure the parts are destroyed and the amounts being charged back are 100% correct."

[31] On November 3, 2021, Mazda's trade representative sent the CBSA a copy of Mazda's accounting, bank and warranty statements in relation to the credit given by Mazda Japan to Mazda in respect of the defective parts. Mazda's trade representative wrote in the email that he hoped they had provided everything the Officer required "to allow these claims in accordance with the existing agreement between Mazda Canada and the CBSA."

[32] On November 16, 2021, a telephone conference call was held between Mazda's counsel and trade representative and the Officer to discuss the outstanding issues and supporting documentation. The Officer communicated that he would soon be issuing a final decision letter to

Mazda denying the refund because Mazda had failed to demonstrate that the defective parts had been destroyed or disposed of as set out in subsection 38(d) of the *Regulations*.

[33] On November 17, 2021, Mazda's counsel emailed the Officer noting this conversation and requested to make written representations on this point as a matter of procedural fairness prior to the issuance of the Officer's decision letter in the hope it might change the Officer's position. Mazda's counsel requested three or four days to provide these submissions to the Officer.

[34] Later that same day – November 17, 2021 – the Officer sent Mazda's counsel and trade representative an email setting out the outstanding documents and information required by the CBSA to substantiate Mazda's claims. The Officer noted that he would accept Mazda's response and explanation as to the outstanding issues and provided Mazda a week to respond. The Officer requested the following information with respect to the destruction or disposal of each of the ten sample transactions be provided by November 26, 2021:

> With respect to destruction and disposal of the goods, please provide the prescribed form, Form E15, Certificate of Destruction/Exportation, or any document containing exactly the same information that shows destruction under CBSA supervision and the audit trail and records to support that this has taken place for the ten sampled B3 transactions already identified. In short, evidence of traceability to the disposal and destruction of the specific sample is required.
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> [Emphasis added.]

[35] On November 24, 2021, Mazda's representative sent an email to the Officer responding to some of the CBSA's requests and providing further documents. Regarding the Officer's request

for documentation of destruction or disposal by either Form E15 or else any other document verifying the disposal of the goods, the email stated as follows (referring to the previous Sample Audit Report):

> Mazda Canada dealers enter into a binding agreement with Mazda Canada to audit and adhere to corporate policies surrounding destruction of the parts removed from the vehicles under warranty. The dealers are audited by Mazda Canada for compliance with the warranty program and reported on to corporate. We have provided a copy of one of the reports that details the warranty parts destruction process. All warranty parts are destroyed and discarded at no expense to her majesty [sic] after 60 days from the date of the warranty department SV286 form. The parts are all traceable as being destroyed by the approval of the warranty claim itself by Mazda Canada. The Minister has agreed that Mazda Canada's corporate warranty processes and systems are sufficient to track destruction.

The final sentence appears to reference the 1996 Agreement.

[36] On December 24, 2021, Mazda's counsel emailed the Officer requesting a telephone conversation prior to the Officer's issuance of a decision letter. On January 5 and 6, 2022, the Officer and his Acting Manager each held telephone conversations with Mazda's counsel. During these telephone calls, they reiterated that the outstanding issue in Mazda's claims for refunds of duties was the absence of records documenting the destruction or disposal of the defective goods, as had been requested for several months.

[37] Later in the day on January 5, 2022, Mazda's counsel emailed both the Officer and his Acting Manager stating:

> Thank you for speaking with me this am. I understand that the CBSA is not satisfied that Mazda has proven destruction of the parts that were found to be defective. I will arrange for the necessary affidavits from Mazda Canada and at least one of its authorized distributors to explain the identification of the defective parts and their destruction. It will take a few weeks to draft these affidavits and have them signed and notarized. They will then be sent to you. I understand that the CBSA may remain of the opinion that such affidavits do not satisfy the CBSA. I would like the affidavits to be part of the record before the Federal Court for purposes of the judicial review.
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> [Emphasis added.]

[38] On January 27, 2022, Mazda's counsel sent the Officer two affidavits. The first affidavit was sworn by Rob Lunn, the National Manager of Warranty Operations at Mazda. In his affidavit, he describes Mazda's general policy and procedures for destroying defective parts related to any warranty claims and confirms that Mazda dealers must accept the terms and conditions of the policy and procedures in order to become dealers. The second affidavit was sworn by Ernie Hubley, a Senior Parts Director of a Mazda dealership in Halifax, Nova Scotia. In his brief affidavit, he states:

> 3. I am knowledgeable about the Warranty Policy and Procedures Manual (the "Manual").
>
> 4. The Dealership has agreed to be bound by the terms of the Manual.
>
> 5. The Manual requires that the Dealership tags each defective part with the vehicle identification number ("VIN") from which it is taken and places same in a Ten Bin system which is recorded in a computer under the control of Mazda Canada Inc.
>
> 6. The Dealership destroys defective parts in accordance with the Manual.

[39] Neither Mr. Lunn nor Mr. Hubley provide any direct evidence about the actual destruction of the defective parts covered by Mazda's Blanket Application.

IV. The Decision at Issue

[40] On May 24, 2022, the CBSA issued its final decision letter rejecting Mazda's Blanket Application for claims for refunds of duties. The Officer concluded that Mazda had not met all of the conditions as set out in subsection 76(1) of the *Customs Act* and section 38 of the *Regulations*. For the purpose of this application for judicial review, the relevant portion of the Officer's reasons provided as follows:

> [Mazda] showed how through their agreements with their parent company (Mazda Japan), they are required to destroy and dispose of the defective parts. [Mazda] provided a sample report that showed they conduct an internal audit of the dealership. [Mazda] provided an affidavit from a Mazda dealer and another affidavit from [Mazda]. [Mazda] did not provide Form E15, Certificate of Destruction/Exportation for each of the samples required in the June 24, 2021 CBSA letter, which is the prescribed form to confirm the exportation or disposal of the goods. Based on the information provided, [Mazda] did not demonstrate that it had established and maintained books and records to create an audit trail to support its claim that the vehicle parts had been destroyed or disposed. The existence of agreements on Mazda corporate policy, an internal audit report selected by [Mazda], and the affidavits provided did not establish that [Mazda] maintained books and records (including Form E15) to establish an audit trail to make evident the traceability to the disposal and destruction of a specific sampled part. On this basis, the claims made under subsection 76(1) are denied because evidence has not been provided that the goods have been disposed of in a manner acceptable to the Minister.

V. Preliminary Issue

[41] In support of this application for judicial review, Mazda relies on a further brief affidavit from Mr. Lunn sworn September 8, 2022. Paragraph 5 of his affidavit states:

> 5. Attached as Exhibit 1 to this my Affidavit is a list of refund claims for defective parts for which Respondent has paid the refund claims.

[42] The Respondent asserts that paragraph 5 and Exhibit 1 are inadmissible and should not be considered by the Court as that evidence was not before the Officer when they rendered their decision and is, in any event, irrelevant.

[43] As a general rule, materials that were not before the decision-maker are not admissible on judicial review [see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19]. The Federal Court of Appeal has recognized certain exceptions to this general rule, such as where the new evidence: (i) provides general background that might assist the Court in understanding the issues relevant to the judicial review; (ii) is necessary to bring procedural defects to the Court's attention; or (iii) highlights the complete absence of evidence before the administrative decision-maker [see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97–98; *Maltais v Canada (Attorney General)*, 2022 FC 817 at para 21].

[44] Although counsel for Mazda did not address this issue in his brief oral submissions, I find that Mazda seeks to rely on this evidence in support of its legitimate expectation claim. As such, I find that it falls within the exception related to "procedural defects". Accordingly, I find that the evidence is admissible.

VI. Issues

[45] This application for judicial review raises the following issues:

1. Whether the decision denying Mazda's claims for a refund of duties based on an absence of evidence that the goods had been disposed of in a manner acceptable to the Minister was reasonable; and

2. Whether the CBSA breached the principles of procedural fairness by breaching Mazda's legitimate expectations.

VII. Standard of Review

[46] With respect to the first issue, when a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[47] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "…what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[48] With respect to the second issue, the standard of review for issues relating to procedural fairness is best reflected by the correctness standard, even though, strictly speaking, no standard of review is being applied [see *Canadian Pacific Railway Company v Canada (Attorney General)*,

2018 FCA 69 at paras 34–35, 54–55]. The Court must ask whether the procedure was fair having regard to all the circumstances, and the ultimate question is "whether the applicant knew the case to meet and had a full and fair chance to respond" [see *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at paras 54, 56; *Maltais v Canada (Attorney General)*, *supra* at para 19].

VIII. Analysis

A. The decision was reasonable

[49] Mazda's submissions in its memorandum of fact and law detailing its position as to why the decision is unreasonable were disjointed and counsel for Mazda's oral submissions were extremely brief, as counsel ceased making submissions on this issue upon being questioned by the Court. Mazda's general contention is that the Officer's decision is unreasonable as Mazda provided evidence of the destruction of the defective parts, regardless of whether the evidence came in the form of a Form E15. Although the exact evidence is not particularized in Mazda's memorandum of fact and law, at the hearing of the application, counsel for Mazda confirmed that the evidence that Mazda relies on in support of its assertion that Mazda provided evidence of destruction is the affidavit evidence from Mr. Hubley and Mr. Lunn. The affidavits confirm Mazda's general policy of destroying defective parts related to warranty claims and the dealers' adherence to that policy, coupled with evidence of credits being given to Mazda by Mazda Japan for the defective parts. Mazda asserts that the "natural inference" from the totality of this evidence is that the parts were destroyed, otherwise the credit would not have been paid.

[50] It must be recalled that the evidence that must be submitted to support a subsection 76(1) refund application is specified in section 38 of the *Regulations* and includes the submission of the prescribed form verifying the exportation or disposal of the goods. CBSA Memorandum D6-2-3 provides that the prescribed form is Form E15. The CBSA repeatedly informed Mazda of the requirement to file Form E15 to verify the exportation or disposal of the defective parts. The CBSA even gave Mazda the option of providing the audit trail and records showing that the defective parts from the ten transactions had been disposed of, in the event that the E15 Forms were not available. It must also be noted that the alternative accounting records requested by the CBSA are ones that Mazda is already legally obligated to maintain under subsection 40(1) of the *Customs Act* and paragraph 2(1)(c) of the *Imported Goods Records Regulations*, and which must be made available to the CBSA and maintained in a manner that would enable the CBSA to verify the information on which the determination of the amount of a refund is made [see the *Imported Goods Records Regulations*, *supra* at s 4; *Customs Act*, *supra* at ss 42(2)(a), 43(1)].

[51] Notwithstanding the numerous opportunities given to Mazda, Mazda provided only generalized information regarding the disposal of defective parts and no evidence of disposal of the specific defective parts at issue. In such circumstances, I see nothing unreasonable in the CBSA's determination that evidence had not been provided to establish the parts had been disposed of in a manner acceptable to the Minister. In the face of the statutory requirement to produce such evidence and keep records of disposal, Mazda's suggestion that the CBSA was unreasonable for refusing to draw an "inference" about the disposal of the parts is simply untenable.

[52] To the extent that Mazda is asserting that the Officer's insistence on a Form E15 rendered the decision unreasonable, there is no merit to this assertion. The certified tribunal record makes it clear that the Officer did not, in fact, require strict compliance with the submission of the form, but rather offered to accept other evidence demonstrating that Mazda had disposed of the defective parts. The problem for Mazda is its failure to provide actual evidence of disposal of the parts at issue, be it in a Form E15 or otherwise.

[53] In its written submissions, Mazda asserts that proof of disposal of the defective parts can be found in Mazda's books and records and that it was the CBSA's "duty to verify same". Again, Mazda points to no specific portion of its books and records in support of this assertion, nor the source of the alleged CBSA duty to verify such supporting evidence. To the contrary, the legislative framework places the onus on Mazda to provide the prescribed information in support of its refund request.

[54] Accordingly, I find that Mazda has failed to demonstrate that the CBSA's determination that Mazda did not provide that the parts had been disposed of in a manner acceptable to the Minister was unreasonable.

B. There was no breach of Mazda's legitimate expectation

[55] The doctrine of legitimate expectation is an extension of the rules of natural justice and procedural fairness. The doctrine provides that, where a government official makes representations within the scope of their authority to an individual about an administrative process that the

government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision-maker's statutory duty [see *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 29-30; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 78; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 131].

[56] Generally speaking, government representations will be considered "clear, unambiguous and unqualified" where, had such representations been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement [see *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 69].

[57] However, the doctrine of legitimate expectations applies to the process by which a decision is reached, not the outcome of the decision [see *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97]. The doctrine does not create substantive rights, and it cannot hinder the discretion of a decision-maker responsible for applying the law [see *Re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC), [1991] 2 SCR 525 at pp 557-558; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 41-42]. Where the conditions for the application of the doctrine of legitimate expectation are satisfied, the Court may only grant appropriate procedural (as opposed to substantive) remedies to respond to the "legitimate" expectation [see *CUPE v Ontario (Minister of Labour)*, *supra* at para 131; *Canada (Attorney General) v Honey Fashions Ltd*, 2020 FCA 64 at para 50].

[58] Mazda asserts that the CBSA had historically granted Mazda refunds of duties for defective parts without a Form E15 based on the 1996 Agreement and as such, Mazda had a legitimate expectation that the Blanket Application would be similarly approved without the need for Mazda to file an E15 Form confirming disposal of the defective parts. Mazda asserts that there was no evidence before the Court that the 1996 Agreement had been revoked.

[59] At the hearing of the application for judicial review, counsel for Mazda continued to assert that there was no evidence in writing that the 1996 Agreement had been revoked. In response, I noted that the certified tribunal record included a number of documents recording discussions with counsel for Mazda (the same counsel appearing before me on this application), during which he had been expressly told that the 1996 Agreement no longer applied. I asked him what he had to say in response, to which he responded that he had nothing to say and abruptly concluded his oral submissions.

[60] I find that there is no merit to Mazda's legitimate expectation argument. First, there is no evidence before the Court from anyone at Mazda stating that, in submitting the Blanket Application, Mazda had an expectation that the 1996 Agreement would continue to apply. I find that this, on its own, is fatal to Mazda's argument.

[61] However, the argument is flawed in other critical respects. Mazda's legitimate expectation must have been grounded in clear, unambiguous and unqualified representations by the CBSA as to the procedure that would be followed. In this case, I find that the certified tribunal record demonstrates that there was no clear, unambiguous and unqualified representation that the CBSA

would continue to follow the 1996 Agreement in processing the Blanket Application. To the contrary, the certified tribunal record demonstrates that Mazda and its representatives were told in February of 2017 (prior to filing its Blanket Application) and numerous times thereafter, that the 1996 Agreement was no longer in effect and that a Form E15 was required, including by way of the clear statement in the Second Request Letter that Mazda had to provide the Form E15 or alternatively, accounting records verifying the disposal of the defective parts. Accordingly, regardless of what Mazda's expectation was, it ought to have changed as a result of the CBSA's repeated communications.

[62] Further, the fact that Mazda's representatives engaged with the CBSA and responded to its communications with additional evidence demonstrates that Mazda no longer had any expectation that the procedure set out in the 1996 Agreement would be followed.

[63] I find that Mazda's evidence from Mr. Lunn in his September 8, 2022 affidavit – attaching "a list of refund claims for defective parts for which Respondent has paid the refund claims" – is of no assistance to Mazda in attempting to establish that Mazda had a legitimate expectation. Mr. Lunn provided no details as to what Mazda submitted in support of those claims and whether they were in fact approved pursuant to the procedure prescribed by the 1996 Agreement. Moreover, the final claim listed by Mr. Lunn was submitted in January of 2017, prior to the February 21 and 23, 2017 exchanges with the CBSA confirming that a new procedure had to be followed.

[64] The present case is not one where Mazda thought that a specific process would be followed by the CBSA and it was not followed, without warning to Mazda. Mazda was told before the

decision was made that the procedure prescribed by the 1996 Agreement would not be honoured and then given numerous opportunities to provide the Form E15 before a decision was rendered. Moreover, the CBSA did not require strict compliance with filing the prescribed Form E15, given that the CBSA had not required Mazda to follow the procedures set out in Memorandum D6-2-3. The CBSA offered to consider any evidence that Mazda had regarding the disposal of the parts at issue, including through accounting records, and engaged in numerous back and forth discussions with Mazda's representatives about concerns with Mazda's evidence and how they could be remedied.

[65] As noted above, even if Mazda could establish that it had a legitimate expectation that the 1996 Agreement would be honoured and it did not need to provide a Form E15, Mazda would only be entitled to a procedural remedy, not a substantive one. I find that Mazda was provided with every opportunity to address the gap in its evidence, such that there would be no further procedural remedies to give them.

[66] In the circumstances, I am not satisfied that Mazda has demonstrated any denial of procedural fairness by the CBSA. Mazda was provided with adequate notice of the case it had to meet and had a full and fair opportunity to respond thereto.

IX. Conclusion

[67] I am not satisfied that Mazda has demonstrated any basis for the Court's intervention and accordingly, the application for judicial review shall be dismissed.

X. Costs

[68] In advance of the hearing, the parties agreed that the successful party should be awarded their costs in the amount of $4,500.00. I find that the parties' agreement is reasonable and accordingly, the Respondent shall be awarded their costs of the application in the amount of $4,500.00.

JUDGMENT in T-1217-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicant shall pay to the Respondent their costs of the application, fixed in the amount of $4,500.00.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1217-22
STYLE OF CAUSE:	MAZDA CANADA INC. v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
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REASONS FOR JUDGMENT AND JUDGMENT:	AYLEN J.
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APPEARANCES:

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