Federal Court  Cour fédérale

Date: 20110221

Docket: T-5-10

Citation: 2011 FC 204

Ottawa, Ontario, February 21, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

UNITED PARCEL SERVICE CANADA LTD.

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a Ministerial Decision made under section 129 of the *Customs Act* (the Act). The Minister decided to uphold the Canadian Border Services Agency's (CBSA) determination that the United Parcel Service Canada Ltd. (UPS) contravened the Act by failing to provide CBSA with an opportunity to inspect 174 shipments and further determined that the demand for payment of a $522,000 penalty was justified.

[2] For the reasons set out below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, UPS, is a courier company that delivers a high volume of parcels shipped from outside Canada to consignees in Canada.

[4] The *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.), gives the CBSA the authority to examine shipments imported into Canada in order to ensure that the goods comply with customs legislation. As an importer, UPS is required to report all goods imported into Canada to the CBSA.

[5] Under the Low Value Shipping Program (LVS), which applies to imported goods valued from $20.01 to $1600, UPS daily submits cargo release lists to the CBSA. These lists detail all the shipments that UPS has received, or expects to receive that day. CBSA reviews the list and determines which items CBSA wants to inspect once they arrive at the sufferance warehouse. The selected items are segregated from the other parcels, which are released to be delivered. The list is initially provided electronically and then later burned onto a CD-ROM and submitted to the CBSA.

[6] On April 4, 2005, the CBSA's Targeting and Risk Analysis Unit conducted a risk analysis of the cargo described on the UPS cargo release lists stored on these CDs. CBSA officers noticed

additional tracking numbers under the heading “Dutiable manifest no data was found on the following” and “Count of packages Scanned Not Keyed (SNK)”. CBSA became concerned that these numbers were related to shipments that were “scanned” into the sufferance warehouse but not reported to the CBSA.

[7] The CBSA contacted UPS to inquire about the SNKs. UPS explained that the SNKs were numbers created at their export sites. However, UPS was unable to explain why there was no information accompanying these numbers.

[8] As a result, the CBSA conducted a desk audit of the transactions involving the UPS sufferance warehouse in Richmond, B.C. between April 2004 and April 2005. 9,789 SNKs were identified during this period. The CBSA decided to focus on 20 CDs for the months of February, March and April 2005 which identified 604 SNKs.

[9] In their written submissions, UPS details the shipping and tracking procedure applied to packages imported into Canada. Every package is “scanned” at the export site using a handheld device. To ensure accuracy, another employee manually verifies that all the information required for the package to be shipped internationally is in the UPS Computer System. This employee will key in any missing information. Packages that are scanned, but not keyed in by the second employee remain in a “suspense state” in the system.

[10] A Scan report is generated daily by UPS listing all packages expected to enter to Canada on that day. This list includes all packages scanned into the Computer System, regardless of whether

or not the package has been keyed in. “Suspense state” information is therefore included. The UPS Computer System generates exception notifications where the information scanned from a bar-coded label does not match any information relating to a package tracking number. These exception notifications appear on the reports as the SNKs.

[11] UPS contends that SNKs occur due to a number of circumstances, including instances where customers re-use packaging without removing the old bar-coded shipping labels. If an old barcode is inadvertently scanned and the information in the system relating to the old barcode is not deleted, an SNK is generated.

[12] It is UPS’s position that an SNK in and of itself does not identify a package that was not otherwise entered into the UPS computer system, but is rather an electronic artefact or a redundant reference to a package already reported to the CBSA.

[13] The daily cargo release lists sent to the CBSA did not include the list of SNKs. According to UPS, the SNKs are directed to a UPS employee in the discrepancy-resolution group who is supposed to check each SNK. However, UPS claims that UPS staff at the Richmond B.C. sufferance warehouse inadvertently included the list of SNKs when burning the daily cargo release lists onto CD-ROM.

[14] Nevertheless, on April 25, 2005 CBSA issued a written request for explanations regarding the SNKs and evidence of legal disposition of these packages. The Respondent describes possible explanation for the SNKs in their written submissions, such as: “shortages”, when a package that

was expected to arrive is reported but does not arrive; or “overages”, when an unexpected package enters Canada. In both of these instances, UPS would be able to provide evidence to satisfy the CBSA that unreported goods had not entered Canada.

[15] UPS was able to provide information requested by the CBSA for 479 of the SNKs identified. Of the 479 responses, 331 showed some evidence of legal disposition. As for the remaining 273 SNKs, CBSA found that UPS failed to provide information in a timely manner.

[16] UPS was later able to provide evidence for a further 110 shipments, but was still unable to provide evidence of legal disposition with respect to the remaining 163 packages.

[17] The Respondent claims that UPS’s own computer system shows that these shipments were either scanned in at the sufferance warehouse or delivered to an address in Canada.

[18] On September 19, 2005, UPS’s manager at the Vancouver Airport wrote an e-mail to the CBSA explaining that UPS had identified the root cause of the issue and had implemented corrective action. The categories of packages responsible for the SNKs were “goods gone astray” – goods destined within the U.S. or exported from the U.S. going to overseas destinations and delivered into Canada due to human error; “goods originally exported from Canada to various destinations worldwide, and then returned to Canada for whatever reason”; and “domestic goods… misdirected to the U.S.” and returned to Canada. It seems that most of these packages were forwarded to their destination without being first reported to the CBSA.

[19] The Administrative Monetary Penalty System (AMPS) is meant to ensure compliance with the reporting requirements relating to the importation of goods into Canada. Under AMPS persons who fail to properly report importations can be subject to penalties.

[20] When a penalty is assessed against a person under the AMPS, the person receives a Notice of Penalty Assessment (NPA) from the CBSA describing the infractions and the penalties incurred. On October 5, 2005, the CBSA decided to issue a single NPA in respect of the 163 SNKs (the Original Penalty). The 163 SNKs were found to be a violation of C358, a specific infraction under the AMPS applied whenever a customs officer believes that a shipment was removed from a customs facility prior to the authorisation of, or release by, CBSA. Since there was no information on the value of the SNK generating packages, they were each assigned a nominal value of $1.00.

[21] The decision to issue a single NPA instead of 163 individual NPAs was made in consultation with several CBSA officials. After further consultation, the CBSA decided that it would be more appropriate to issue individual NPAs for each occurrence. The Respondent contends that this decision was taken in part to allow CBSA to cancel an entire NPA if UPS was able to provide satisfactory evidence of legal disposition since at the time, CBSA's computer system did not allow the cancellation of individual infractions within one NPA.

[22] The Applicant submits that in early November a CBSA employee visited the sufferance warehouse and, without authorization, physically removed the only copy of the Original Penalty from a UPS employee's desk before anyone had a chance to photocopy it.

[23] The CBSA determined that there were an additional 11 infractions of C358 subsequent to the issuance of the Original Penalty and replaced the Original Penalty with 174 individual NPAs on November 11, 2005 (the Replacement Penalties). The CBSA demanded payment of $522,000. In the Issuing Officer Report attached to the replacement NPAs the CBSA explained that after further consultation with the AMPS Policy and Program group, it was decided that the Original Penalty was to be cancelled and re-issued with individual assessments. According to the report, the cancellation was due to an administrative error during the processing of the Original NPA.

[24] Pursuant to subsection 129(1) of the Act, UPS submitted a Request for Ministerial Decision regarding the Replacement Penalties.

[25] The CBSA prepared a Case Synopsis and Reasons for Decision setting out UPS's submissions and the CBSA's responses regarding the Replacement Penalties.

[26] By letter dated December 4, 2009 the Minister communicated his decision that there was a contravention under the Act and the Customs Regulations and that the Replacement Penalties assessed under contravention C358 were justified. The Minister demanded payment of $522,000. It is this demand for payment that is the subject of this application for judicial review.

B. *Impugned Decision*

[27] The Minister decided that there had been a contravention of the Act, and that the penalties as assessed under Code C358 on the NPAs were justified. The Minister took into consideration

several facts before deciding to uphold the penalties. Although UPS claimed that the $522,000 penalty was punitive, the Minister decided to maintain the penalties as assessed based on the fact that the verification process was limited to a period of time from February to March 2005 and only 604 SNKs, whereas the audit had identified 9,798 SNKs on 237 CDs for the period from April 2004 and April 2005. The Minister found that UPS's failure to allow the CBSA to review these shipments compromised the CBSA's mandate and thus the penalty was justified.

II. Issues

[28] The Applicant submits the following issues:

(a) Did the Minister act beyond his statutory authority:

(1) in assessing the Original Penalty for an amount in excess of the $3,000 AMPS maximum and the $25,000 statutory maximum under section 109.1 of the Act? and

(2) having cancelled the Original Penalty under subsection 127.1(1) of the Act, in assessing the Replacement Penalties for the same subject matter as the Original Penalty not for the purpose of eliminating or reducing the Original Penalty but for the purpose of increasing it?

(b) Did the Minister fail to act in accordance with the principles of procedural fairness by taking into account irrelevant matters (i.e., the SNKs) while failing to take into account relevant matters such as the indeterminate nature of the SNKs and the true nature of the contraventions?

[29] The Respondent, on the other hand, submits that the issues in this application are:

(a) The permissible scope of an application to challenge a decision under section 133 of the *Customs Act*;

(b) The reasonableness of the Minister's decision to maintain the penalty as assessed; and

(c) The effect of cancelling the original Notice of Penalty Assessments (NPA) and the issuance of multiple NPAs.

[30] In my view, the issues are best summarized as:

(a) The permissible scope of this application for judicial review

(1) The reasonableness of the Minister's decision to maintain the penalty as assessed; and

(b) The statutory jurisdiction of the Minister regarding:

(1) The maximum allowable penalty

(2) Cancellation of a NPA

III. Argument and Analysis

A. *Permissible Scope of the Application*

[31] The Applicant submits that the Minister violated his duty of procedural fairness in determining that the 174 SNKs were proof of a violation of Contravention C358. The Applicant's position is that in deciding that there was a contravention of the Act or the Regulations with respect to the Notice served, the Minister acted on the basis of presumed, unsubstantiated and erroneous

findings of fact and erroneous conclusions of law. The Applicant bases this argument on their contention that the SNKs do not independently establish that goods were removed from a UPS sufferance warehouse without prior CBSA authorization, the required basis for finding a Contravention C358. The Applicant submits that by continuing to base his demand for payment on the incorrect assumption that SNKs independently establish that goods were removed from a UPS sufferance warehouse, the Minister relied on irrelevant matters.

[32] The Respondent argues that this argument is, in essence, a challenge to the Minister's finding that, under the provisions of section 131, there was a contravention of the Act. The Respondent's position is that such a challenge is beyond the jurisdiction of this Court in an application for judicial review.

[33] The Applicant made use of section129 of the Act, which provides for persons on whom a notice is served to "request a decision of the Minister under section 131". The structure of the Act provides that in responding to such a request, the Minister may make two separate decisions.

[34] Firstly, under subsection 131(1) the Minister decides whether or not there has been a contravention of the Act or regulations. Subsection 131(3) provides a statutory appeal for this decision as laid out in section 135. The section 131 decision cannot be judicially reviewed, rather, according to the provisions of section 135, an appeal must be the subject of an action in the Federal Court. Subsection 131(3) states:

Judicial review	Recours judiciaire
(3) The Minister's decision under subsection (1) is not	(3) La décision rendue par le ministre en vertu du paragraphe

subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).	(1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).

[35] Subsection 135(1) provides:

135 (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.	135. (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.
(emphasis added)	(notre soulignement)

[36] If in responding to a request for a decision, the Minister decides that there has been a contravention, then the Minister may make a second decision relating to the amount of penalty owed. Section 133 of the Act allows the Minister to remit any portion of the penalty assessed under section 109.3, or demand that an additional amount be paid.

[37] The Respondent's position, therefore, is that the provided statutory appeal route ousts the jurisdiction of this Court to review a section133 decision by way of an application for judicial review. The Respondent asserts, correctly in my view, that UPS should have brought an action under section 135 within 90 days of notice of the decision in order to challenge the Minister's holding that there has been a contravention.

[38] As support for this position, the Respondent cites *ACL Canada Inc. v Canada (Minister of National Revenue - MNR)*, (1993) 68 FTR 180, 107 DLR (4th) 736 (F.CTD). In that case, Justice Andrew MacKay stated at para54:

> In my view, Parliament has insulated from appeal the penalty imposed in the event there is found to be a contravention of the Act. That may seem surprising since the penalty will often be the primary concern of the person whose goods are seized under the Act or who is served with a notice and demand for payment under s.124. Yet that simply carries on a long-standing regime under Customs Acts of the past, at least in relation to goods seized, for the goods are forfeited to Her Majesty at the time of the contravention of the Act (s. 122), and terms of any remission, where the Act or regulations are contravened, have been considered beyond the role of the Court to review. (*Lawson et al. v. The Queen*, [1980] 1 F.C. 767 F.C.T.D. (per Mahoney J. at 772)).

[39] The scope of this application for judicial review is therefore limited to determining whether or not the Minister's decision to maintain the amount of the penalty assessed is reasonable. UPS's submissions regarding an alleged violation of the duty of procedural fairness in determining that there was a contravention in the first place, is not for this Court to review. However, when considering the penalty applied, to quote Justice MacKay in *ACL*, above, again at para 55:

> This does not mean that the discretion vested in the Minister in relation to penalties is unlimited. The Act and regulations specify maximum penalties, and the determination of a penalty will not be beyond the jurisdiction of the Court in terms of remedies for judicial review of administrative decisions, primarily in regard to the duty of fairness. In the result, I am persuaded that while the Court has no jurisdiction under s. 135 to review the penalty imposed where there is an infraction of the Act, it does have jurisdiction, under ss. 18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7 as amended by S.C. 1990, c. 8, ss. 4, 5, to consider whether the discretion to impose penalties, consequent upon a contravention of the Act, has been exercised in accordance with the law.

(1) Standard of Review

[40] The Respondent submits that the Minister's decision should be reviewed on a standard of reasonableness for the following reasons:

(i) Parliament did not intend a right of appeal and the only way to review the penalty or forfeiture amount imposed is by way of judicial review. This indicates a high level of deference;

(ii) The Minister has expertise with respect to the administration of penalties under the Act and his expertise is related to the matter before him;

(iii) Section 133 is discretionary;

(iv) The purpose of the Act is to regulate the importation of goods into Canada and the duties payable on such goods. The Act also sets penalties for contraventions of the Act and regulations to uphold the customs system and to ensure compliance; and

(v) The question is highly factual and involves broader issues of public policy.

[41] UPS argues, and this Court agrees, that procedural fairness ought to be reviewed on the correctness standard. However, based on the above reasoning, UPS's procedural fairness argument is not within the scope of review on this application.

[42] Even if the procedural fairness arguments were before the Court, by way of arguing that the Minister based the decision to maintain the penalties as assessed, which is presently reviewable, on irrelevant information, UPS has not persuaded me that the SNKs are in fact, irrelevant. The SNKs are the basis of the entire audit and subsequent NPAs and penalties. UPS has not been able to

convince the CBSA in the six years since the initiation of this process that the SNKs are irrelevant, and they are unable to convince this Court now – either because such a finding is outside the scope of review or because I cannot see how the Minister failed to meet his duty of procedural fairness to the Applicant by relying on the SNKs. The Applicant was able to make presentations, and know the case they needed to meet. The caselaw cited by the Applicant (*Elwell v Canada (Minister of National Revenue - MNR)*, 2004 FC 943, 2004 DTC 6543) is largely inapplicable to the present matter. That decision deals with an applicant who was found to have been denied procedural fairness by the CCRA due to the Minister's inability to produce any documentary evidence that it had sent the applicant notices it claimed to have sent numerous times in a matter rife with examples of poor communication between the parties and significant delay.

[43] It is therefore, a matter of determining whether the Minister's decision regarding the penalty amount is reasonable.

[44] The Respondent submits that the Minister based his decision on the fact that the amount charged represented only a fraction of the amount that that would have likely been demanded if the CBSA had undertaken a broader audit. The Respondent argues that given the scale of the offence as well as its severity, the Minister's discretion to maintain the penalty amount cannot be said to be unreasonable.

[45] I agree with the Respondent's submissions on this point. The Minister's decision is transparent and intelligible. This Court will not overturn it for lack of compliance with the demands of the reasonableness standard.

B. *Did the Minister Exceed his Statutory Authority?*

(1) The Statutory Maximum Penalty

[46] The Applicant submits that the Minister exceeded his statutory authority in cancelling the Original Penalty, and replacing it with an increased penalty.

[47] The Applicant argues that the Minister erred in demanding payment that exceeded the statutory and AMPS maximum penalties. Subsection 109.1(1) of the Act provides that a person who fails to comply with any provision of the Act, or certain regulations, is liable to a penalty of not more than $25,000.

Designated provisions	Dispositions désignées
109.1 (1) Every person who fails to comply with any provision of an Act or a regulation designated by the regulations made under subsection (3) is liable to a penalty of not more than twenty-five thousand dollars, as the Minister may direct.	109.1 (1) Est passible d'une pénalité maximale de vingt-cinq mille dollars fixée par le ministre quiconque omet de se conformer à une disposition d'une loi ou d'un règlement, désignée par un règlement pris en vertu du paragraphe (3).

[48] The CBSA Master Penalty Document provides that for Contravention C358 the maximum penalty that can be imposed is the greater of $3,000 or 20% of the value for duty on a third and subsequent occurrence of the contravention.

[49] AMPS penalties provided for by subsection 109.1(1) are assessed under 109.3(1). This subsection requires that a written notice of assessment be sent to anyone who is liable for a penalty under section 109.1.

Assessment	Cotisation
109.3 (1) A penalty to which a person is liable under section 109.1 or 109.2 may be assessed by an officer and, if an assessment is made, an officer shall serve on the person a written notice of that assessment by sending it by registered or certified mail or delivering it to the person.	109.3 (1) Les pénalités prévues aux articles 109.1 ou 109.2 peuvent être établies par l'agent. Le cas échéant, un avis écrit de cotisation concernant la pénalité est signifié à personne ou par courrier recommandé ou certifié par l'agent à la personne tenue de la payer.

[50] The Original Penalty notice demanded payment of $489,000. The Applicant submits that this amount is in excess of the statutory maximum described in 109.1.

[51] From reading the record, I understand that the Applicant sought to adduce evidence on the cross-examination of Robert Carmichael that the CBSA cancelled the Original Penalty when they realized that it violated the statutory maximum penalty. When the Applicant pressed the affiant on the issue, he speculated that the "administrative error" that prompted the cancellation was simply the most applicable choice of generic descriptor required by the administrative system used to cancel the NPA. The affiant maintained that the CBSA could have either issued a single NPA or multiple NPAs.

[52] The Respondent's submissions on this point argue that the Applicant has made a technical argument over the meaning of "penalty". It is the Respondent's position that one NPA may contain

many contraventions, and it is each contravention or penalty and not the NPA itself that is subject to the statutory maximum.

[53] I agree with the Respondent. I can see nothing in the legislation, and no justification in the Applicant's submissions, to support the contention that each NPA can only contain one contravention or penalty. It is obvious from the record that the CBSA debated about how to proceed, whether by a single NPA to cover all SNKs, or individual NPAs for each SNK. Each SNK was given a nominal value of $1. In light if the scale of the contravention, the CBSA then applied the AMPS maximum of $3000 to each SNK to arrive at the amount demanded.

[54] I cannot say that the Minister exceeded his statutory jurisdiction in upholding the $522,000 penalty.

(2) The Effect of Cancelling the Original Penalty

[55] The Applicant argues that the Minister's decision to cancel the Original Penalty and issue a Replacement Penalty that exceeded the Original Penalty amount is governed by section 127.1 of the Act. This section entitles the Minister to cancel a penalty issued under section 109(1):

Corrective measures	Mesures de redressement
127.1 (1) The Minister, or any officer designated by the President for the purposes of this section, may cancel a seizure made under section 110, cancel or reduce a penalty assessed under section 109.3 or an amount demanded under	127.1 (1) Le ministre ou l'agent que le président désigne pour l'application du présent article peut annuler une saisie faite en vertu de l'article 110, annuler ou réduire une pénalité établie en vertu de l'article 109.3 ou une somme réclamée en vertu

section 124 or refund an amount received under any of sections 117 to 119 within thirty days after the seizure, assessment or demand, if	de l'article 124 ou rembourser un montant reçu en vertu de l'un des articles 117 à 119, dans les trente jours suivant la saisie ou l'établissement de la pénalité ou la réclamation dans les cas suivants :
(a) the Minister is satisfied that there was no contravention; or	a) le ministre est convaincu qu'aucune infraction n'a été commise;
(b) there was a contravention but the Minister considers that there was an error with respect to the amount assessed, collected, demanded or taken as security and that the amount should be reduced.	b) il y a eu infraction, mais le ministre est d'avis qu'une erreur a été commise concernant la somme établie, versée ou réclamée en garantie et que celle-ci doit être réduite.

[56] Aside from subsection 127.1 there is no other provision in the Act giving the Minister the authority to cancel penalties. Subsection 127.1 does not allow the Minister to re-issue penalties in respect of the same contravention, nor is there any other provision enabling the Minister to act in such a way. So it is the Applicant's position that in cancelling the penalty in accordance with subsection 127.1, the Minister must have decided that either a) there was no contravention, or b) there was a contravention but there was an error with respect to the original amount assessed and it should therefore be reduced. The Minister therefore erred in issuing the Replacement Penalty for an increased amount.

[57] The Respondent submits that the Applicant makes an overly technical argument. There was no cancellation of the penalty as provided for by subsection 127.1, rather the Minister simply

reissued the same penalties for the same amount, for the same infractions. At the hearing, the Respondent argued that the penalties themselves were never cancelled, only the original NPA was cancelled and then reissued as individual NPAs. The penalties themselves always remained the same. Eleven additional penalties were issued for contraventions discovered subsequent to the issuance of the original penalty. The record makes it clear that the Minister did not decide that there was no contravention, and there was no error that would account for a consideration penalty reduction. The Respondent submits that the reason why the original NPA was cancelled is largely irrelevant.

[58] Based on the affidavit evidence, the CBSA originally decided to issue one NPA with 163 occurrences to reduce the amount of documentation. After further consideration, the CBSA decided that it would be better to issue 163 individual NPAs due to the CBSA's computer system's inability to cancel individual occurrences within a single NPA.

[59] Given my conclusion that nothing in the Act precludes one NPA from including several contraventions, each contravention being individually subject to the statutory maximum penalty, I am unable to see how the Applicant has suffered any prejudice in the reissuance of multiple NPAs for penalties of the same amount. While it might be true that nothing in the Act explicitly grants the CBSA or the Minister the authority to reissue penalties in a different administrative form, or to cancel NPAs, I am guided by the modern principles of statutory interpretation –

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> (as cited *in Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21)

In reading the applicable provisions together, there is nothing that suggests that an NPA should be conflated with a penalty. The Applicant's submission that the Minister's acted without jurisdiction in reissuing an NPA is unfounded.

[60] I also take note of the Respondent's submission that the Applicant only raised the argument based on section 127 in the application for judicial review. The Applicant never raised this issue with the Minister's delegate when seeking a Ministerial Decision under section 129 of the Act.

[61] Even if the Minister had no authority to cancel the Original Penalty outside the scheme provided for in subsection 127.1, I am persuaded by the Respondent's submissions that this is a technical irregularity wherein no substantial wrong has occurred. The Respondent asks the Court to use the discretion provided under paragraph 18.1(5)(a) of the *Federal Courts Act* which provides:

Defect in form or technical irregularity	Vice de forme
(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.
(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and	

[62] In my view this is an appropriate matter in which to use this discretion

[63] In the alternative, if the cancellation of the Original Penalty was in error, the Respondent submits that the Applicant seeks an inappropriate remedy. The Applicant contends that the Minister acted without authority in cancelling the Original Penalty and Issuing the Replacement Penalty, and so the demand for payment should be quashed. The Respondent, on the other hand, submits that if the Minister acted without authority, it is appropriate for the Court to undo what was done. In this case, that would mean un-cancelling the Original Penalty. If this Court takes that route, there is nothing to prevent the Minister from issuing NPAs for the subsequent 11 infractions after the fact. Therefore, the result is the same and the Applicant is still subject to the same demand for payment.

IV. Conclusion

[64] In consideration of the above, this application for judicial review is dismissed. There is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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