

**Date: 20071130**

**Docket: T-854-07**

**Citation: 2007 FC 1263**

**Ottawa, Ontario, November 30, 2007**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**HARPREET GREWAL**

**Applicant**

**and**

**MANAGER CUSTOMS PROCESSING CENTRE**

**ON BEHALF OF THE SOLICITOR GENERAL OF CANADA**

**CANADA BORDER SERVICE AGENCY**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Harpreet Grewal (the Applicant) seeks Judicial Review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of two decisions made on March 12, 2007 by Managers of the Customs Processing Centre on behalf of the Solicitor General of Canada, the Canada Border Services Agency (CBSA) and the Minister of Public Safety and Emergency Preparedness (Respondents). The decisions denied Ministerial Review of the cancellation of the Applicant's

participation in the Fast and Secure Trade Program and the Commercial Driver Registration Program.

## **BACKGROUND**

### ***(i) The Fast and Secure Trade Program***

[2] The Fast and Secure Trade Program (FAST) is a joint Canada-United States initiative involving the CBSA and United States Customs and Border Protection (CBP). Shipments for pre-approved companies, transported by approved carriers using registered drivers, are cleared through customs and immigration in both countries with greater speed than other shipments. Often dedicated lanes are available at border points. FAST participants must meet the requirements of both the CBSA and CBP.

[3] The FAST Application Form (number RC4317(E) Rev. 05) (the FAST Application) includes the following:

#### **Who qualifies?**

You may qualify to participate in the program if you are a citizen or permanent resident of the United States or Canada, age 18 or over and possess a valid driver's license. You must be admissible to Canada and the United States under applicable immigration laws. However, you **may not** qualify if you:

- provide false or incomplete information on your application;
- have been convicted of a criminal offence;
- **have been found in violation of customs or immigration law; or**

- fail to meet other requirements of the FAST Commercial Driver Program.

Both countries must approve your application. If you do not meet the requirements of both countries, your application will be denied.

[my emphasis]

[4] Approved FAST applicants receive a document entitled Commercial Driver Program Participant's Guide number RC4319(E) Rev. 06 (the FAST Guide). It states on page 3 that cardholders must, *inter alia*, comply with all CBSA legislation.

[5] The FAST Guide also has a section entitled Penalties. It reads as follows:

#### **Penalties**

**CBSA and CBP officers will strictly enforce the law.** Any time you enter Canada or the United States you are subject to compliance and enforcement checks. If you are found in violation of any condition of the FAST program, or of any law of Canada or the United States, **officers may:**

- **revoke your FAST Commercial Driver card. If your card is revoked, you must wait 90 days before you can re apply to the FAST Commercial Driver Program;**
- seize any undeclared goods and the vehicle you used to transport those goods;
- issue penalties;
- initiate administrative procedures; and
- initiate criminal prosecution.

[my emphasis]

(ii) *The Commercial Driver Registration Program*

[6] The Commercial Driver Registration Program (CDRP) is a Canadian CBSA programme designed to streamline the customs clearance process for commercial freight transporters entering Canada from the United States. The CBSA claims that the CDRP offers efficient and effective clearance to low-risk goods handled by pre-approved importers, carriers and commercial drivers.

[7] The CBSA website about the CDRP (the CDRP Website) states the following:

To qualify for CDRP, applicants must:

- Provide true and complete information on the application;
- Be admissible to Canada under the *Immigration and Refugee Protection Act* and have no criminal record which has not been pardoned;
- **Not have violated customs or immigration laws;**
- Be deemed to be of good character, meaning that the CBSA is confident you will comply with program obligations.

[my emphasis]

**CDRP Driver Responsibilities**

As an approved CDRP participant, you must:

- **Comply with the *Customs Act* and regulations, the *Immigration and Refugee Protection Act* and regulations, as well as the other laws administered by the CBSA or *Citizenship and Immigration Canada;***

[my emphasis]

...

**Are there penalties for non-compliance?**

**Your acceptance in the CDRP is a privilege.** The CBSA will periodically review your application and occasionally examine your vehicle to ensure you are complying with CDRP requirements, as well as customs and immigration legislation. **The CBSA will strictly enforce the law.**

**Penalties for non-compliance may include the following:**

- **Revocation of membership privileges for CDRP** participants who fail to comply with program requirements and procedures; and
- Monetary penalties against CSA-approved carriers who use a non-registered driver for CSA clearance.

[my emphasis]

**(iii) *The Presentation of Persons (2003) Regulations, SOR/2003-323 (the Regulations)***

[8] The Regulations are made pursuant to the *Customs Act*, R.S.C. 1985 c. 1 (2<sup>nd</sup> Supp.) (the Act). Part II of the Regulations is entitled Presentation in Alternative Manners and describes the situations in which FAST and CDRP authorizations may be issued by the Minister. Section 6.2(c) says that FAST authorization cannot be given to an applicant who has been suspended or cancelled during the 90 days before the date of their current application.

[9] The Regulations also deal with the suspension and cancellation of authorizations. In this regard section 22 reads as follows:

**Grounds**

**22.** (1) The Minister **may** suspend or cancel an authorization if the person

(a) no longer meets the requirements for the issuance of the authorization;

(b) **has contravened the Act**, the *Customs Tariff*,

**Motifs**

**22.** (1) Les motifs de suspension ou d'annulation d'une autorisation par le ministre sont les suivants :

a) la personne autorisée ne remplit plus les conditions pour l'obtention de l'autorisation;

b) elle **a contrevenu à la Loi**, au *Tarif des douanes*,

the *Export and Import Permits Act* or the *Special Import Measures Act*, or any regulations made under any of those Acts; or

à la *Loi sur les licences d'exportation et d'importation* ou à la *Loi sur les mesures spéciales d'importation*, ou à un règlement pris sous leur régime;

(c) has provided information that was not true, accurate or complete for the purposes of obtaining an authorization.

c) elle a fourni des renseignements faux, inexacts ou incomplets en vue d'obtenir une autorisation.

(2) [Repealed, SOR/2006-154, s. 15]

(2) [Abrogé, DORS/2006-154, art. 15]

[my emphasis]

[je souligne]

#### Notice of suspension or cancellation

(3) Immediately after cancelling or suspending an authorization of a person, the Minister shall send written notice of, and the reasons for, the cancellation or suspension to the person at their latest known address.

#### Avis de suspension ou d'annulation

(3) Le ministre transmet sans délai à la personne autorisée dont il suspend ou annule l'autorisation, à sa dernière adresse connue, un avis écrit et motivé l'informant de la suspension ou de l'annulation.

#### Return of authorization

(4) A person whose authorization is cancelled or suspended shall

#### Remise de l'autorisation écrite

(4) La personne autorisée dont l'autorisation est suspendue ou annulée :

(a) on receiving a notice under subsection (3), immediately and in accordance with it, return to the Minister the written authorization and any other thing relevant to the authorization that is specified in the notice; or

a) soit, sur réception de l'avis, remet sans délai au ministre, conformément à l'avis, l'autorisation et toute chose s'y rattachant qui est indiquée dans celui-ci;

(b) on being advised of the suspension or cancellation in person by an officer, immediately return to the officer the written authorization and any other thing relevant to it that is specified by the officer.

b) soit, si elle en est avisée en personne par un agent, remet sans délai à celui-ci l'autorisation et toute chose s'y rattachant que précise l'agent.

#### Effective date of suspension or cancellation

(5) The suspension or cancellation of an authorization becomes effective on the earlier of the day on which an officer advises in person of the suspension or cancellation and 15 days after the day on which notice of the suspension or cancellation is sent.

#### Application de la suspension ou de l'annulation

(5) La suspension ou l'annulation de l'autorisation s'applique quinze jours après l'envoi de l'avis ou, s'il est antérieur, le jour où un agent en avise en personne la personne autorisée.

[10] Finally section 23 provides for a review. It reads:

23. A person whose application for an authorization is rejected or whose authorization is suspended or cancelled

23. La personne dont la demande d'autorisation est refusée ou dont l'autorisation est suspendue ou annulée

may request a review of the decision by sending written notice of their request to the Minister within 30 days after the day on which the application was rejected or the cancellation or suspension becomes effective.

peut demander la révision de la décision en transmettant un avis écrit au ministre dans les trente jours suivant le jour du refus ou celui où s'applique la suspension ou l'annulation.

## **THE APPLICANT'S EXPERIENCE**

[11] The Applicant held membership cards for both programs. They entitled him to access alternative and speedy inspections for customs and immigration purposes. The cards gave special privileges and were issued on the basis, *inter alia*, that the Applicant would abide by the Act.

[12] On January 24, 2007, the Applicant violated section 12 of the Act. After a day trip to the United States, he failed to report a 1.14 litre bottle of scotch which he had hidden in his pants (the Violation). The irony is that both parties acknowledge that, had he declared the liquor, no duty or taxes would have been payable.

[13] Following considerable resistance by the Applicant, a Customs Officer seized the bottle and fined the Applicant \$1000 under the Act (the Seizure). In addition, the officer confiscated the Applicant's FAST card. The officer also gave the Applicant a copy of the Narrative Report he prepared about the Seizure. In my view, it served as reasons which explained both the Violation and the Seizure.

[14] The Applicant had a right to appeal the Violation and the Seizure under the Act but he chose not to do so and paid the fine.

[15] By letters dated January 30, 2007 from security officers writing on behalf of FAST and CDRP, the Applicant was advised that his memberships in both programs had been revoked because he had "...been found in violation of customs law..." (the Cancellations). It appears, based on computer records, that both cards were cancelled on January 30, 2007. The Respondents' affidavit which was sworn by Mary Louise Bozanich on July 12, 2007 (the Respondents' Affidavit) indicates that these cancellations were "automatic". The letters also advised the Applicant that he could request a review of the Cancellations by writing to the CBSA within thirty days.

[16] On January 31, 2007, the Applicant used his CDRP card at Canada Customs on a return trip from the United States. At that time, a customs officer confiscated his CDRP card.

[17] On February 7, the Applicant sought review of both Cancellations saying that the Violation was unintentional, that inability to communicate was a factor and that the cancellations were disproportionate to the infraction. The Applicant noted that this was his first violation, and that his livelihood as a truck driver and ability to support his family depended on his membership in the FAST and CDRP programs.

[18] On March 6, 2007, the Review Committee of six Customs Officers and Managers met to consider the Applicant's requests for reviews of the Cancellations. When considering his case, the Committee used a one-page document entitled a "FAST\CDRP Pending Refusal Worksheet" (the Worksheet). However, the section of the Worksheet which was relevant and which dealt with Customs Violations was not completed. It read:



**CUSTOMS VIOLATIONS [Circle & Check One]**

Approve

Reject

Refer to Review Committee

	<b>Applicant does not have a Customs Seizure within the last three years</b>
	Applicants with Customs Seizure in the last three years eligible if
	→ Customs infraction is a Level 1 seizure action where the Value of the Non-contraband goods is less than or equal to \$200 CAD
	→ <b>Quantity of alcohol that is less than or equal to 2L Liquor; 2L Wine; 4 Doz. Beer.</b>
	→ Quantity of tobacco that is less than or equal to 400 Cigarettes; 800 Grams of Tobacco; 800 Tobacco Sticks (does not include cigars)
	Other:

[my emphasis]

[19] The document ended as follows:

**REGIONAL REVIEW COMMITTEE [Circle One]**

Approve

Reject

Refer to Review Committee

Comments	May re-apply Jan 24, 2010 (handwritten)
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Signed by

Date Mar 6/07 (handwritten)

(two members of the Review Committee signed)

[20] The Review Committee's decisions were communicated to the Applicant's lawyer in two letters dated March 12, 2007 (the Review Decisions).

[21] The body of the letter dealing with FAST read:

We have received and reviewed your request dated 2007/02/16, submitted on behalf of your client, for the re-consideration of their

application to participate in the Free and Secure Trade (FAST) Program.

Our findings of the circumstances surrounding your client's file do not allow us to revise this decision at this time. Due to the nature and timeframe of the customs seizure **your client will be eligible to re-apply for FAST 2010/01/24.**

(the FAST Decision)  
[my emphasis]

[22] The body of the letter dealing with the CDRP read:

We have reviewed your request of 2007/02/16, submitted on behalf of your client for the reconsideration of their application to participate in the Commercial Driver Registration Program (CDRP).

Due to the nature and timeframe of the customs seizure, we are unable to reverse our decision at this time. However, **your client can re-apply to participate in the CDRP once 90 days have passed since the date of notification of denial.**

(the CDRP Decision)  
[my emphasis]

### *Standard of Review*

[23] The Review Committee was not asked to consider whether the Violation occurred and whether the Seizure was lawful. Rather, it was asked to consider whether the Cancellations were the appropriate penalty in the circumstances.

[24] Both parties submitted that correctness is the appropriate standard of review for the Review Decisions. However, I was not persuaded by their submissions given that the issue was the appropriate penalty.

[25] I will therefore consider the four factors to be taken into account in a pragmatic and functional analysis:

*(i) Absence of Privative Clause*

[26] The Act does not include a privative clause and there is no right of appeal from a decision on penalty. These facts produce a neutral result. However, decisions of the Review Committee are subject to judicial review. For that reason, this factor suggests less deference.

*(ii) Expertise*

[27] A decision about the appropriate penalty is driven by the facts of a particular case. A Review Committee would not likely have more expertise than the Court in assessing the severity of a violation. This suggests less deference.

**(iii) *Statutory Purpose***

[28] The penalty imposed can reasonably be expected to have a deterrent effect both on the driver who is directly affected and on the wider trucking community. As well, the interests of Canadian businesses who need efficient cross-border transportation and the Canadian public's interest in safety and national security must be considered in deciding whether to suspend or cancel FAST and CDRP cards. In my view, this factor suggests greater deference.

**(iv) *The Nature of the Problem***

[29] The penalty to be imposed once a violation has occurred is a matter of discretion in that section 22 of the Regulations provides that the Minister "may" cancel or suspend an authorization (i.e. FAST or CDRP) if the *Act* is violated. In my view, this factor favours a deferential approach.

[30] For these reasons, I have concluded that the standard of review is reasonableness. In other words, do the Review Decisions withstand a somewhat probing analysis? In my view they do not for the following reasons.

(i) *The Regulations were breached*

[31] The Regulations make it clear in subsection 22(1) that the initial suspension or cancellation of a FAST or CDRP card is a discretionary decision. However, the Respondents' Affidavit states in paragraph 8 that:

Since the Applicant violated the Act, the CBSA **automatically** **cancelled** his participation in all Alternative Inspection Programs, which include FAST and CDRP...

[my emphasis]

[32] This passage indicates that no discretion was exercised to determine whether a cancellation or a suspension was the appropriate penalty. It is clear that the Regulations intend an applicant to have the benefit of an initial discretionary decision about whether to cancel or to suspend his privileges and, if suspension is chosen, consideration should be given to its length.

[33] In this case, the Applicant was deprived of the benefit of a first discretionary decision. In my view, the failure to follow the requirements of the Regulations meant that the Cancellations were unlawful. In effect there were no decisions for the Review Committee to consider. It was therefore acting without jurisdiction when it made the Review Decisions.

**(ii) No Reasons were given for the Review Decisions**

[34] The Applicant was not told why the Review Committee denied him suspensions and was provided with no explanation for the prohibition on applying for FAST before January 24, 2010. Given that these decisions affected his livelihood, an explanation for the harsh result was required (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 25).

**(iii) The Conditions Imposed in the Review Decisions were not lawful**

[35] Respondents' counsel confirmed that there is no legislative or regulatory authority for the imposition of the three-year ban on the Applicant's ability to reapply for FAST. As noted above, the only restriction is found in paragraph 6(2)(c) of the Regulations. It prohibits reapplications for FAST for ninety days. Further, there is no provision in the Regulations which justifies any bar to reapplication for CDRP. Thus, the 90-day restriction imposed on the Applicant's reapplication was improper.

[36] I have additional concerns about the Review Committee's process and the confiscation of the Applicant's FAST card which I feel is important to express in *obiter*.

**(i) *The Review Decisions may not have been reasonable***

[37] The Worksheet suggests that the Review Committee did not consider the fact that the Worksheet indicates that applicants for FAST and CDRP are eligible for the programs if the quantity of alcohol seized in the three previous years is less than 2 litres. This is because seizures of such small amounts are not considered significant (see paragraph 18 above). In this case, the size of the Applicant's bottle was only 1.14 litres. For this reason, it may be that the Violation in this case is not a bar to membership in FAST or CDRP.

**(ii) *Discretion may not have been exercised***

[38] The Review Decisions may not have involved an exercise of discretion. The use of a worksheet with "Pending Refusal" in the title suggests that the outcome was predetermined and the fact that the Worksheet was not completed also suggests that discretion was not exercised as required.

**(iii) *Confiscation of the FAST card was improper***

[39] The Customs Officer had no authority to confiscate the FAST card at the border on January 24, 2007 because, as of that date, the Applicant's FAST privileges had not been cancelled. Subsection 22(4)(b) of the Regulations only empowers an officer to ask for custody of cancelled or

suspended cards and they had not been cancelled on January 24<sup>th</sup>. Cancellation did not occur until January 30, 2007.

### **THE APPROPRIATE ORDER**

[40] Normally on a successful application for judicial review, an order would be made requiring reconsideration of the decision under review. However, this case poses a special problem because the Cancellations which were under review by the Review Committee are nullities. This means that there is no penalty to be reconsidered by the Review Committee.

[41] For this reason, I have ordered that the process start anew with an initial discretionary consideration of penalties under subsection 22(1) of the Regulations. Thereafter, if the Applicant wishes to seek a review of those decisions under section 23 of the Regulations, it will be open to him to do so.



**JUDGMENT**

**UPON** reviewing the material filed and hearing the submissions of counsel for both parties in Toronto on Tuesday, August 28, 2007;

**THIS COURT ORDERS AND ADJUDGES that** for the reasons given above:

1. The Review Decisions and the Cancellations are hereby quashed.
2. The Minister is to exercise discretion under subsection 22(1) through a delegate who has not previously worked on the Applicant's file. That person is to decide whether suspensions or cancellations of FAST and CDRP are the appropriate response to the Violation and reasons are to be provided for the decisions.
3. The Minister's decisions are to be mailed to the Applicant's counsel by registered mail on or before Friday, January 24, 2008.
4. Pending release of the decisions described in point 3, the Applicant's FAST and CDRP privileges are to be considered suspended.

Since costs were not sought, there will be no order as to costs.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-854-07

**STYLE OF CAUSE:** HARPREET GREWAL v. MANAGER CUSTOMS  
PROCESSING CENTRE ET AL

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** AUGUST 28, 2007

**REASONS FOR ORDER  
AND ORDER:** SIMPSON, J.

**DATED:** NOVEMBER 30, 2007

**APPEARANCES:**

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