LEGAL ROAD MAP FOR CARRIERS, SHIPPERS AND OTHERS

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DANIEL L. KISELBACH, PARTNER
DARIN J. HANNAFORD, PARTNER
Miller Thomson LLP
dkiselbach@millerthomson.com
dhannaford@millerthomson.com
www.millerthomson.com

INTERNATIONAL TRADE, CUSTOMS AND COMMODITY TAX

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  - providing advice to the Government of Canada, the governments of foreign countries, or domestic or foreign industries, on the meaning of rulings or recommendations from WTO panels or the Appellate Body or on the manner in which they should be implemented,
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Miller Thomson's ICCP Law Group
International Trade / Customs/ Commodity Tax / Property Tax

We have the expertise and experience necessary to help clients in all aspects of International Trade, Customs, Commodity Tax (Goods and Services Tax "GST" and Provincial Retail Sales Tax "PST") and Property Tax matters. We provide advice to domestic and international corporations on a variety of issues ranging from anti-dumping, countervail (anti-subsidy), safeguards, import and export controls, customs classification and value for duty to government procurement and investment regulation. We also advise on how WTO agreements such as the General Agreement on Tariffs and Trade 1994 (GATT 1994), the General Agreement on Trade in Services (GATS), the Agreement on Trade Related Investment Measures (TRIMS), and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) impact on our clients' day-to-day business activities or strategic decision-making as well as on opportunities for investment. We also advise on GST and PST transactions and act as counsel in dispute resolution (appeals) matters. We provide a practical results-oriented approach to advance planning, resolving disputes and assisting in voluntary disclosures.

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Our ICCP Group of lawyers are part of the National Taxation Group at Miller Thomson assisting clients in a broad range of industries. For further information on any of our services, please contact a member of our group, or visit our website to view comprehensive practice area profiles for our International Trade Law, Customs, Commodity Tax, Property Tax Group. www.millerthomson.com

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- Pursuit or defence of freight loss and damage claims and suits
- Labour, personnel and employment issues
- Transportation insurance
- Truck accident, personal injury, workers' compensation and insurance defense
- Competition advice
- Rate disputes and final offer arbitration
- Corporate, partnership and business transactions

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[1] "Life in the Fast Lane" was written by Daniel L. Kiselbach, partner, International Trade, Customs and Commodity Tax Group and "Shipper and Carrier Liability for Unpaid Bills of Insolvent Freight Forwarders" and "Warehousemen's Rights (and Wrongs)" were written by Darin Hannaford, Transportation Law Group of Miller Thomson LLP, for CITT's Reposition 2010, Vancouver, B.C., October 27 - 29, 2010. Daniel Kiselbach gratefully acknowledges the contribution of Carol Osmond of I.E. Canada and Satinder Bains of KPMG LLP for their contribution. Darin J. Hannaford gratefully acknowledges the contribution of Dan Chapman and Tom Gusa (Student-at-Law). This paper is intended to provide a general outline of information. Readers should not rely upon this paper for the purpose of dealing with legal issues as it is not intended to provide legal advice. Persons seeking legal advice on specific matters should retain qualified legal counsel.

SHIPPER AND CARRIER LIABILITY FOR UNPAID BILLS OF INSOLVENT FREIGHT FORWARDERS

Introduction

When a freight forwarder becomes insolvent with a carrier's bill outstanding, what can the carrier do to ensure that it is not left unpaid? What can the shipper do to ensure it does not pay twice for the same shipment? Historically, the relationship between freight forwarders and carriers has been a symbiotic one. The freight forwarder will contract with the shipper of goods to provide logistic guidance and in turn hire one or more carriers to physically move the goods from point A to point B. A business practice in this area has emerged whereby a freight forwarder will avoid direct communication and billing with a shipper in deference to the freight forwarder who acts primarily as a broker between the shipper and the carrier. This trade practice has greatly streamlined the freight transportation process, as freight forwarders have significantly greater expertise in logistics than do many suppliers, but it has also made it more difficult for carriers and shippers when a freight forwarding company goes bankrupt.

The law has generally supported carriers in their efforts to collect money for the carriage of cargo from shippers where a freight forwarder who made the booking goes bankrupt after having been paid by the shipper.[2] Recently, however, the court has denied recovery to carriers on the basis of equitable considerations. Such equitable considerations centre around a determination of whether an agency relationship has been established as between either:

1. the freight forwarder and the shipper; or,

2. the freight forwarder and the carrier.

Courts will analyze many factors when reaching a determination of who owes what to whom, including: the degree of control the carrier has in choosing with whom it transacts, how the carrier makes its delivery, to whom the carrier looks for payment and extends credit, and to whom the carrier sends invoices, statements, and delivery receipts necessary for payment.[3] The purpose of this paper will be to identify some of those factors to better understand how the court goes about its analysis. More importantly, however, this analysis will serve as a guidebook of sorts to help carriers avoid going unpaid in the eventuality of a bankruptcy of the freight forwarder.

Case Law

Three recent cases provide valuable guidance in determining whether the Shipper or the Carrier receive compensation following the bankruptcy of a freight forwarder.

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[2] *Mediterranean Shipping Co. S.A. v. BPB Westroc Inc*., [2003] F.C.J. No. 1198 at para. 3 [*Westroc*].

[3] *Ibid*. at para. 30.

***Morelines Maritime Agency Ltd. v. IKO Industries Ltd.*[4]**

In *Morelines*, a freight forwarder, Marine Marketing Ltd. ("Marine"), acted as an intermediary between the shipper, IKO, and the carrier, Morelines. IKO contracted with Marine to arrange for shipment of granules for the manufacture of roofing parts from the terminal in Montreal, Quebec to IKO's door in Ham, Belgium. IKO paid Marine for the value of the shipping provided by Morelines, but before Marine could pay Morelines, Marine filed for bankruptcy. Morelines brought an action against IKO for recovery of $48,912 (the amount due for shipping of IKO's cargo to Belgium). The court held that the money was not recoverable against IKO, as Marine was acting as a principal and not as an agent with respect to its relationship with IKO.

In reaching its decision, the Court analyzed the manner in which Marine billed IKO and found that it was an all-inclusive flat rate which included all freight and handling charges. IKO had no detailed knowledge of Marine's subsequent arrangement with Morelines and instead dealt directly with Marine. Furthermore, IKO knew that Marine used at least one other carrier, apart from Morelines, for the shipment of its product. Marine and Morelines agreed to the industry-standard practice whereby Morelines would present Marine with invoices and Marine would then present Morelines with a series of post-dated cheques upon receipt of bills of lading. As a result of this last point, Morelines never advised IKO that it intended to hold IKO responsible for the invoices it sent to Marine.

The Court stated that a freight forwarder can act in one of two ways when dealing with carriers and shippers; either as an agent of the shipper or carrier, or as a principal in itself. In order to properly analyze the case, the court set out definitions of what constitutes an agent and principal:

1. Freight Forwarder as Agent

When acting as an agent, the freight forwarder typically arranges for transportation, pays freight charges, insurance, packing, customs duties, etc. and then charges a fee, usually a percentage of the total expenses. All costs are disclosed to the client.[5]

2. Freight Forwarder as Principal

The freight forwarder will, when acting as principal, arrange carriage in his own name, with his fee payable by the shipper being a straight freight charge. The freight forwarder will then arrange to pay lower freight rates to the carrier and obtain his profit from the difference between the two (i.e. the freight forwarder's commission for brokering the transaction). The freight forwarder may combine the freight of numerous shippers into a single container which can further increase the profit margin of a freight forwarder.[6]

The court analyzed whether the payment by the shipper to the freight forwarder constituted *payment to the carrier* in order to determine for whom the freight forwarder was an agent. Using a previous Federal Court decision as a template, it established that:

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[4] [1999] F.C.J. No. 1939; 94 A.C.W.S. (3d) 413 (T.D.) [*Morelines*].

[5] William Tetley, *Marine Cargo Claims* 3rd ed. (Montreal: Les Editions Yvon Blais Inc., 1988) at p. 692, as quoted in *Morelines*.

[6] *Ibid*.

> Where a debtor [the shipper], instead of paying his creditor [the carrier], chooses to pay a third party [the freight forwarder], he does so at his peril. Where the money is not turned over to the creditor [the carrier], the onus is then on the debtor [the shipper] to establish either:
>
> (1) that the creditor *actually authorized the third party* to receive the money on his behalf, or
>
> (2) that the creditor *held the third party out* as being so authorized, or
>
> (3) that the creditor *by his conduct or otherwise induced the debtor* to come to that conclusion, or
>
> (4) that *a custom of the trade* exists to the effect that in that particular trade and in those particular circumstances, both the creditor and the debtor normally would *expect the payment to be made to the third party* [emphasis added].[7]

This means that when a shipper pays a freight forwarder, that shipper faces a rebuttable presumption that the freight forwarder was merely an agent of the shipper, and, unless it can establish one of the four defences enumerated above, it will then be liable to pay the carrier for its costs. In the instant case, the court found that the carrier, Morelines, both: 1) induced IKO to come to the conclusion that Morelines had authorized Marine to receive the money on its behalf; and 2) that it was a trade custom that IKO would normally pay Marine and not Morelines.

The court found that Marine was acting in the capacity of principal, and that the money paid to it by IKO was not recoverable by Morelines.

The court fixated on Morelines' failure to communicate with IKO until there was a problem with the payment method, and the fact that Morelines conducted a credit check of neither Marine nor IKO. On the totality of the circumstances, it appeared as though the reasonable expectations of all the parties was that Marine would bill IKO for shipping and that IKO would then pay Marine who would then pay Morelines.

Mediterranean Shipping Co. S.A. v. BPB Westroc Inc.

In *Westroc*, a freight forwarder, J.T. Knight ("Knight"), contracted with Mediterranean Shipping Co. ("MSC"), a carrier, for freight of Westroc's goods. After Westroc paid Knight, but before Knight paid MSC, Knight filed for bankruptcy protection. As a result, MSC brought an action for recovery of the $65,187.62 owed to it but never paid by Knight; another case of a carrier suing a shipper for recovery of its lost transportation costs. This time, however, MSC was granted an order for payment of the outstanding money by Westroc.

Unlike the case of the carrier in *Morelines*, MSC was able to establish that Knight was an agent of Westroc, and that it was only trade practice that prevented any direct communications between Westroc and MSC. MSC established that freight forwarders generally insist that carrier representatives not 'go behind' freight forwarders to contact the shipper, especially regarding the

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[7] *CP Ships v. Les Industries Lyon Couduroys Ltee* (1982), 17 A.C.W.S. (2d) 387 at (F.C. T.D.) [*CP Ships*] (as discussed by Tetley in *Maritime Cargo Claims*).

financial arrangements of transportation. Failure to adhere to this practice would result in loss of future referrals and black-listing of the carrier.

Unlike Morelines with respect to IKO, MSC verified Westroc's credit-worthiness and asked for and received a corporate guarantee from Knight of its customer's freight charges along with an acknowledgement that it was acting as Westroc's agent. Furthermore, all of MSC's bills of lading were directed to name Westroc as the shipper, even though they were forwarded, as was the trade custom, to Knight. When payment from Knight was not forthcoming, MSC contacted Knight to demand payment. When Knight refused the terms, MSC told Knight that it had no other choice than to communicate with Westroc to inquire as to why the freight invoices had not been paid. Knight insisted that MSC not contact Westroc and sent a cheque to MSC as partial down payment of the outstanding amount. Only when the cheque bounced did MSC contact Westroc directly.

As the test from *CP Ships* sets out, the burden to establish that its liability had not been released was on Westroc alone. Westroc failed to inform MSC that it did not consider itself responsible for the freight charges. MSC always looked to Westroc for payment, as indicated on their bills of lading. From MSC's perspective, the forbearance shown towards Knight was ultimately for Westroc's benefit. As such, the court held that Knight was acting as a typical freight forwarding agent on behalf of Westroc towards MSC. The court made an important commentary for the consideration of shippers:

> Under the general principles of agency and by operation of law, non-payment by an agent is deemed non-payment by the principal. *Westroc must be taken to have assumed the risk of paying twice if the party it relied upon to perform an essential function of its export program abused its position of trust by converting freight monies received for a designated purpose for its own use*. Westroc ought to have been aware, or should have informed itself, whether the freight forwarder was an established, reputable freight forwarder with substantial assets, or simply a one-person operation with potential liquidity problems. Westroc was clearly in the best position to protect itself against an absconding forwarder [emphasis added].[8]

This places a seemingly large onus on the shipper to ensure that if it makes payment to a freight forwarder which it holds out (or which it may be perceived by a carrier to have been held out) as its agent, it takes a substantial risk of double-payment if that freight forwarder later becomes insolvent or files for bankruptcy protection. The court summarized that Westroc could have investigated the history and reputation of its freight forwarder; it could have insisted that cheques be payable to the carrier and not the freight forwarder; and, before paying the freight forwarder, it could have requested written assurance, such as a bill of lading, indicating MSC was looking only to the forwarder for the payment. It did none of these things and it paid the price as a consequence.

[8] *Westroc*, *supra* note 1 at para. 35.

***Dan Gamache Trucking Inc. v. Encore Metals Inc.*[9]**

The *Encore* case provides a slightly different fact pattern from that of *Morelines* and *Westroc*. In *Encore*, Encore Metals Inc. ("Encore") engaged the services of Matrix SCL Inc. ("Matrix") as its freight forwarder, to transport specialty metals to western Canada and the United States. The carrier, Gamache, was engaged by Matrix to ship goods for Encore via Matrix. Matrix made an assignment into bankruptcy, and failed to pay Gamache prior to making the assignment. In this case, however, Encore did not pay Matrix, but rather Matrix's trustee in bankruptcy after Matrix had made its assignment. The court nonetheless analyzed the case from an agency perspective. It ultimately held that Matrix was acting as a principal for its carriers, who acted as its agents, and as such, Encore was not required to double pay while Gamache was left holding the tab having worked for free.

The primary issue the court had to address here was whether Matrix was acting as an agent of Encore in contracting with the carrier. It reasoned that an agency relationship may be created, either explicitly as an express contract or impliedly by the conduct of the parties. Matrix made a practice of asking for invoices from its carriers and then subsequently distributing payment to each of them, in turn invoicing Encore for each shipment. The invoices from Matrix included amounts for warehousing and reloading in addition to shipping costs: an all-inclusive package. Encore had no knowledge of when Matrix contracted with other carriers to transport goods. Encore dealt exclusively with Matrix to pick up and deliver loads. It followed that when Gamache received directions from Matrix, it did so as though it was receiving instructions from a principal, not an agent.

Encore never represented to Matrix that it had authority to act on Encore's behalf. There is no evidence that Encore had ever intended that Matrix act as its agent either expressly or by conduct. As there was no representation, there could be no detrimental reliance upon that representation, and as such, no agency relationship for Gamache to rely upon in its attempt to recover against Encore. The court found that Gamache, by neither communicating nor invoicing Encore in any way, had, by its conduct, induced Encore to arrive at the conclusion that Matrix was authorized to receive money from Encore on Gamache's behalf. Further, it found that it was standard practice in the industry, as was the case in *Westroc*, for the shipper to pay the freight forwarder, and for the freight forwarder to then pay the carrier. The court summarized that: "[t]he reasonable expectations of all parties was that Matrix would bill Encore for shipping charges, that Encore would pay Matrix, and that Matrix would pay any carriers it had contracted with.[10]

A Hypothetical Example

In order to better illustrate shipper and carrier liability, a hypothetical fact situation may be of some assistance.

A shipper, Acme Manufacturing Inc. ("Acme"), is engaged in the manufacture and sale of neon sign light ballasts from its facility in China. As the majority of its sales are to American land developers in the state of Nevada, it requires the services of a logistics provider. As such, it

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[9] 40 C.B.R. (5th) 235 (B.C. S.C.) [*Encore*].

[10] *Ibid*. at para. 60.

appoints Freight Forwarders Inc. ("FFI") to manage the transportation of its ballasts to North America. FFI offers to coordinate the transport of sixty tons of ballast on a $5,000 per ton basis as FFI's fee, along with the actual shipping costs of the respective rail, ship and truck transport which will be required to be paid to FFI, which Acme accepts. Acme agrees to provide FFI with payment within 10 days of receipt of invoice.

In turn, FFI then engages the services of Carrier Transport Corp. ("Carrier") to transport the goods via ship from the port of Shanghai to Long Beach, California. Prior to agreeing to contract with FFI, Carrier conducts a credit check of both Acme and FFI and finds that they both have good credit ratings. In exchange for the carriage, FFI agrees to pay Carrier's price of $50,000 per ton within 10 days of receipt of invoices from Carrier.

FFI asks that Carrier deal exclusively with it to preserve FFI's relationship with Acme, which it considers to be a very important client. Carrier agrees, but insists that, at a minimum, it be allowed to make it known to Acme that it is providing shipping services for the ballast. Furthermore, Carrier asks for a corporate guarantee of Acme's freight charges and an acknowledgement that it will be acting as Acme's agent. This is, after all, the first time it has dealt with Acme, and it wants to ensure it receives payment on account of the carriage it provides. FFI at first resists, but then reluctantly agrees to these requests, as it needs Carrier's shipping expertise.

As the relationships progress, Carrier provides bills of lading and invoices to FFI, naming Acme as the shipper and including the notation "freight prepaid". At first, FFI pays Carrier in full for its carriage charge. However, with time and financial hardship, FFI is unable to make its payments. Carrier contacts FFI each time FFI is late on payments, asking that it be paid in full. FFI is unable to make further payments, and consequently Carrier is forced to issue a demand letter to FFI to make good its outstanding accounts immediately. Carrier fails to respond, and FFI is then forced to contact Acme directly. Acme informs Carrier that it has made every payment to FFI within 10 days of receipt of invoice, pursuant to their contract.

Carrier then discovers that FFI has been assigned into bankruptcy while still owing Carrier $150,000. Carrier immediately commences legal action against Acme for recovery of its $150,000. The court analyzes the facts and makes a determination that FFI was a true agent of Acme and awards Carrier $150,000. The Court relies upon several key factors in arriving at its decision:

1. The initial agreement between FFI and Acme specified that Acme would be paying a fee to FFI in addition to the actual cost of shipping through one of Acme's carriers. This creates a strong inference that FFI is not providing a full "turnkey" solution for Acme, but rather only helping Acme manage Acme's shipping in exchange for a brokerage commission, thereby acting as Acme's agent.

2. Because FFI indicated that more than one carrier would be used, the court will draw an inference that Acme appointed FFI as its agent. Acme would at that point have constructive knowledge of Carrier's appointment by FFI, if not expressly.

3. Prudent obtained a credit check of both of Acme and FFI, indicating that it understood that FFI was acting as an agent of Acme and not as a principal in itself.

4. The fact that FFI asks Carrier to deal solely with it and not with Acme is a standard trade practice of freight forwarders, and the court will not hold Carrier's failure to contact Acme directly immediately after the first default by FFI against Carrier.

5. The fact that Acme knows that Carrier is providing carriage services for its freight, and that it is not the only carrier FFI is using, leads to an inference that FFI is an agent of Acme.

6. The fact that FFI agrees to sign a corporate guarantee of Acme's ability to pay its freight fees and acknowledges that it will be acting as Acme's agent is perhaps the clearest indicator that FFI is an agent of Acme.

7. The fact that Carrier is submitting the bill of lading to FFI is immaterial in light of the standard trade practice of dealing exclusively with the freight forwarder as established above. It is material, however, that the bill is marked as "freight prepaid", as this indicates that the carrier must look to the shipper and not to the consignee (freight forwarder) of the goods, as a result of the created agency.11

8. The trade practice also precludes any adverse inference from being drawn from the fact that Carrier did not attempt to contact Acme upon FFI's default.

Conclusion

It is important that a carrier establish that it is acting for an agent of a shipper when dealing with a freight forwarder if it fears for the solvency of the freight forwarder.

The task is in many ways more difficult for that of a shipper, because it faces the uncertainty of dealing with a freight forwarder that may be on the verge of insolvency without the shipper ever realizing this is the case until it is much too late. The shipper may wish to establish a close relationship with a freight forwarder, perhaps in the form of pilot projects in order to become more comfortable with the operating procedures and financial stability of a freight forwarder before entering into business with it.

Perhaps the best policy that a shipper could institute would be to pay carriers directly instead of the freight forwarder. In the above hypothetical, Carrier did not ask that it be paid directly by Acme. Perhaps sound business rationale exists for making such a decision, but if it is possible, payment should be made in this way, as it will eliminate the source of conflict altogether. However, a freight forwarder that charges a flat fee for delivery will often wish to conceal its profit margins from the shipper, and in these circumstances, having the shipper pay the carrier may well be problematic without the freight forwarder's consent.

Each of the factors the court would reference in the above hypothetical can be cited as evidence of agency. It is important to note however, that an analysis of an agency relationship will be heavily fact-specific and ultimately difficult to establish in borderline cases. In each of the cases

[11] *CP Ships*, at para. 6 (the court discussed the difference here between the meaning of the words "freight prepaid" and "freight paid in advance" as they were presented in the unreported case of *The owners of the vessel "Chastine Maersk", A/S D/S Svendborg & D/S AF 1912 A/S v. Trans-Mar Trading Co. Ltd.*, Court No. T-1357-74, released on November 6, 1974.).

cited in this paper, neither the shipper nor the carrier bore any moral culpability, *per se*. Rather, the court was put in the unenviable position of attributing liability between two parties that have come to it with essentially clean hands. This could have been avoided had the shippers been able to take steps to pay the carriers directly.

LIFE IN THE FAST LANE

1. INTRODUCTION

The area of customs and trade legislation and policy has been the subject of great change in the last decade. Several examples of these changes are noted below. For example, the Canada Border Services Agency (CBSA) has implemented a new Administrative Monetary Penalty System (AMPS) which is relevant to importers, exporters and carriers. The CBSA is in the process of revising AMPS penalties and this may result in revised penalties which affect carriers. Legislation now requires carriers to provide advance notice of the time and place of arrival and export of certain goods.

In addition, CBSA has taken steps to implement a memorandum of understanding (MOU) which carriers may agree to implement a new report and no load policy. Further, in order to facilitate expedited entry and clearance of goods, the CBSA has entered into programs with the U.S. Customs and Border Protection (CBP). One of those programs is the FAST (free and secure trade) program wherein a FAST approved driver arrives at a port of entry, presents bar-coded documents, one for the driver, the carrier and the importer, for a declared shipment. The following pages set out a discussion of some of these issues. Awareness of them can help to avoid having the CBSA put the brakes on your shipments.

2. THE ADMINISTRATIVE MONETARY PENALTY SYSTEM (AMPS) AND CARRIERS

AMPS is an administrative penalty system designed to encourage compliance with customs and trade legislation. AMPS penalties may be assessed in amounts up to $25,000 per instance. AMPS employs a system of graduated penalties designed to reflect the severity and frequency of the contravention. A Master Penalty Document provides particulars of each contravention.

The Index To The Master Penalty Document (Short Version) shows that there are several AMPS penalties that specifically relate to carriers or persons responsible for the transportation of goods.[12] A chart highlighting relevant AMPS penalties is attached as Appendix "A".

CBSA has initiated a review of the AMPS program. Of importance to service providers (such as carriers), are certain recommendations focused on proposed legislative changes authorizing the application of penalties to third parties. The proposed revisions are designed to ensure that importers and exporters are not adversely affected by contraventions that are not the fault of the importer or exporter. The details of how third party liability will operate has not yet been finalized.[13]

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[12] Index to Master Penalty Document (short version) April 2010.

[13] Memorandum D22-1-1 – Administrative Monetary Penalty System, dated June 22, 2010.

(a) New Carrier – Export Penalty – Fail to Report at the Time, Place and Manner Required[14]

The intention to expand AMPS to include compliance on the part of carriers was evidenced in Customs Notice CN09.001 dated February 2, 2009, in which the CBSA announced the implementation of a new carrier export penalty C369. Penalty 369 was introduced on February 3, 2009. Contravention C369 in part reads as follows:

> Carrier failed to report the export of cargo at the time, the place and/or in the manner prescribed.

The basis for the penalty is subsection 95(1) of the *Customs Act* which indicates that:

> Goods that are exported shall be reported at such time and place and in such manner as may be prescribed.

The *Reporting of Exported Goods Regulations*[15] prescribe a time and place at which, and the manner in which, exported goods must be reported by a carrier. Excerpts of the *Reporting of Exported Goods Regulations* are attached as Appendix "B".

Penalty C369 may be applied when a carrier fails to report the export of any cargo required to be reported to the CBSA, including cargo originating in Canada, and cargo being exported after moving in transit through Canada. Penalty C369 may be applied against any exporting carrier who fails to submit the required cargo documentation, according to the legislative time frames, at the prescribed CBSA export reporting office. A "carrier" is defined as a person or entity, other than the exporter of goods, who transports the goods from Canada and includes couriers.[16]

Penalty C369 is applied against the carrier once per export "movement", meaning the departure of the conveyance from the location in Canada from which the cargo is exported.

(b) Proposed AMPS Penalties

The CBSA has proposed amendments to penalties relating to carriers.[17]

For example, with respect to penalty C366:

> Person failed to report imported goods valued at $1,600 or greater, to customs forthwith at the nearest designated customs office open for business.

The CBSA has proposed as new guidelines:

> Non-compliance occurs when a person fails to report imported goods to customs forthwith at the nearest designated customs office open for business.

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14 Customs Notice CN09-001.

15 *Reporting of Exported Goods Regulations*, SOR/2005 – 23, dated February 1, 2005.

16 Customs Notice CN09-001.

17 Draft Proposed Penalties from the Compliance Management Division, AMPS Policies and Programs, January 11, 2010.

This penalty will apply to a carrier for non-report of importations which are COMAT (company material goods). In these cases the carrier is in fact the importer and carrier. See also contravention C358 the guidelines proposed by CBSA state:

> Non-compliance occurs when a person removes goods from a customs office or sufferance warehouse prior to release or authorization by Customs.
>
> Examples of C358:
>
> - A commercial carrier has been directed by Border Services Officer (BSO) at the Primary Inspection Line (PIL) to report to the customs warehouse on the form Y28 and the carrier fails to report to the warehouse. The goods have been moved from a customs office without authorization.
>
> …
>
> Applied against a carrier for removing goods from a customs office.

(c) Point of Finality – Exports

Enforcement action such as the issuance of an AMPS penalty may be taken against non-compliant carriers once a point of finality has been reached. The point of finality represents the stage of the export process where the intent to export goods from Canada has been demonstrated conclusively and is determined by the reporting requirements set out in the regulations.[18]

The point of finality may be is reached for export control purposes under the *Customs Act* when any of the following occurs:

(a) the exporter or the customs service provider has presented the CBSA with an export declaration for the goods which, unless the CBSA intervenes, is conclusive;

(b) the exporter or the customs service provider neglects to submit an export declaration within the timeframes or other supporting conditions stipulated in the regulations; or

(c) the conveyance or container on or in which the goods are placed begins its continuous journey out of Canada before the export declaration is made.

If the point of finality has not been reached, a CBSA officer cannot detain or seize goods because an infraction has not yet occurred.[19]

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[18] Memorandum D3-1-8 – Cargo-Export Movements, paragraph 52.

[19] Memorandum D20-1-1 – Export Reporting, paragraph 135 and 136.

(d) Business Number (BN) Assignment – Who is Responsible for Export Compliance

A Canadian business number is assigned by the Canada Revenue Agency to an exporter or customs service provider to identify accounts. A "customs service provider" in respect of exported goods means a person who provides to the exporter customs services relating to the exportation of goods other than the sole service of transporting the goods from Canada, and includes an agent of the exporter, a customs broker and a freight forwarder.[20]

A valid BN is mandatory for the completion of all export declarations, including the B13A and the summary report.

Customs service providers who complete export declarations on behalf of exporters, should use the exporter's BN on the export declarations. AMPS penalties are issued against the BN stated on the export declaration.[21]

As noted, importers and exporters may submit declarations to the CBSA on behalf of importers and exporters. Generally, the importer and exporter is ultimately responsible for ensuring that documents have been delivered to the CBSA and compliance requirements have been met. One exception is if and when the carrier allows the BN to be used by the exporter. For example, a Canadian BN is assigned by the Canada Revenue Agency to exporter or a customs service provider to identify accounts. A valid BN is mandatory for the completion of all import and export declarations. Customs service providers who complete export declarations on behalf of exporters, for example, should use the exporter's BN on the export declaration and not their own BN. AMPS penalties are issued against the BN stated on the declaration.[22]

(e) Making an AMPS Redress Request

AMPS penalties may be appealed by making a redress request pursuant to the *Custom Act.* The evidence and submissions required for redress requests will vary according to the circumstances of the case. In general, redress requests involve more detailed submissions and evidence than correction requests. A redress request should therefore include, as a minimum, the type of information required for the making of a correction request, including the following: (a) an outline of the nature of the alleged contravention; (b) an outline of the decision or relief sought; (c) a request for a narrative report from the CBSA officer who issued the AMPS notice of assessment respecting the alleged circumstances; (d) a request for relevant records including notes, memoranda, documents and policies; and (e) a request that the CBSA redress officer provide additional time to allow the person making the request to make submissions and to provide evidence within 30 days after the CBSA provides all relevant documents and records.

Obtaining disclosure of CBSA policy guidelines may be critical to the success of a redress request. CBSA policy guidelines deal with, for example: (a) when the "point of finality has been reached" when a person has been asked to report goods and to make a true, accurate and complete customs declaration; (b) when a penalty should be increased; and (c) the definition of contraventions. A person may apply to the redress officer for disclosure of policy documents or

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[20] Memorandum D20-1-1, page 2, Definition, and page 17, paragraph 17.

[21] Memorandum D20-1-1, paragraph 121 and the notes following.

[22] Memorandum D20-1-1, paragraph 117 – 121, and notes thereunder.

other records. If that response is not satisfactory, a person may seek disclosure of policy documents and records pursuant to the Access to Information Act. If the response to an Access to Information Act request is not satisfactory, a person may make a complaint to the Information Commissioner, and ultimately commence an application for judicial review respecting a decision of the Information Commissioner in the Federal Court.

It is customary to make written submissions after all relevant information is obtained. Written submissions may be supported by written testimony in an affidavit or, on occasion, by statements made during a face-to-face meeting with an adjudicator.

(f) Due Diligence Case Law

The defence of due diligence respecting AMPS contraventions is not expressly provided for under the Customs Act. Case law supports the position that a due diligence defence is available. Authority indicates that unequivocal language is necessary to exclude the application of the defence of due diligence in penalty cases. Facts that may support a due diligence defence include: (a) adherence to industry standards respecting such matters as routine reporting, accounting, payment of duties or movement of goods; (b) implementation of a customs procedures manual; (c) training employees with respect to customs requirements and procedures; and (d) obtaining legal opinions respecting complex valuation, classification and origin issues.

3. NO LOAD-NO REPORT – EXPORTS – MEMORANDUM OF UNDERSTANDING

The CBSA has established MOUs with carriers to implement a "no-report, no-load" policy between carriers and service providers in 2004 and 2005. The CBSA has approximately 308 MOUs with 191 carriers and 118 service providers.[23]

There are 308 carriers and service providers who have signed a MOU with the CBSA indicating that they will only transport goods that are accompanied by an export report bearing the proper declaration code format.[24]

4. NEW PROPOSED CHANGES

New proposed changes to the AMPS system which would potentially affect carriers include contravention C366:

> Person failed to report imported goods to customs forthwith at the nearest designated customs office open for business.

This penalty would apply to a carrier for non-report of importations which are COMAT (company material goods). In those cases the carrier is in fact the importer and the carrier. See attached Draft Guideline Release attached as Appendix "C .

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[23] CBSA Export Programs Evaluation Study: http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2008/exportprog-progexport-eng.html.

[24] CBSA Export Programs Evaluation Study: http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2008/exportprog-progexport-eng.html.

Another proposed change is to penalty contravention C358:

> Person removed goods from a customs office or sufferance warehouse prior to release or authorization by an officer.

The proposal indicates that this penalty could be applied against a carrier for removing goods from a customs office. See attached Appendix "D".

5. ADVANCED NOTICE OF ARRIVAL

The *Reporting of Imported Goods Regulations* deals with advanced notice of arrival. For example, section 13.2 indicates that the owner or person in charge of a vessel that transports specified goods to Canada shall send to the CBSA advanced notice of the time and place of arrival of the vessel in Canada and certain specified information. Section 13.3 indicates that the owner or person in charge of the vessel shall send the notice and information:

(a) if all the specified goods on board the vessel are within cargo containers, at least 96 hours before the arrival of the vessel at a port in Canada;

(b) if all the specified goods on board the vessel are bulk goods, at least 24 hours before the arrival of the vessel at a port in Canada;

(c) if all the specified goods on board the vessel are empty cargo containers that are not for sale, at least 96 hours before the arrival of the vessel at a port in Canada;

(d) if all the specified goods on board the vessel are break bulk goods in respect of which the owner or person in charge are of the vessel has been issued an exemption under section 13.8 and information contained in the exemption is accurate and complete, at least 24 hours before the arrival of the vessel at a port in Canada; and

(e) if none of the specified goods on board the vessel are goods described in paragraphs (a) to (d), at lease 96 hours before the arrival of the vessel at a port in Canada.

6. EXPEDITED ENTRY AND CLEARANCE OF GOODS

(a) Free and Secure Trade (FAST)

FAST is a bi-national program administered by CBSA and the CBP. The Minister may issue an authorization that is recognized in both Canada and the U.S. to a commercial driver who operates or who will be aboard a commercial highway conveyance to present themselves at a land border crossing in an alternative manner under the FAST program.[25] FAST program participants may present themselves in manners described in subparagraph 11(d)(iii) of the *Presentation of Persons (2003) Regulations.* The Alternative Measures are designed to expedite entry and clearance of low-risk commercial drivers.

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[25] *Presentation of Persons (2003) Regulations, supra* note 236, s. 6.2.

A FAST program participant may receive a FAST card that is valid for up to five years provided that he or she complies with applicable laws and meets all terms and conditions of the program.[26] FAST approved commercial drivers may present themselves by means of a FAST card at a designated customs office.[27] When a FAST approved driver arrives at a port of entry, the driver presents bar coded documents (one for the driver, the carrier and the importer) for a declared shipment. The primary inspection line officer at the port of entry can scan the bar codes, and the trade data information relating to the shipment is verified later.[28]

Shipments of eligible goods may be reported under FAST when the commercial driver, the carrier and the importer are FAST authorized.[29]

(b) Eligible Drivers

A commercial driver is eligible for FAST authorization if he or she meets certain conditions. In particular, the individual must be a citizen or permanent resident of either country; be 18 years old or over; possess a valid driver's licence; be admissible to Canada and the U.S.; have provided true accurate and complete FAST application information; have not been convicted of a criminal offence for which he or she has not received a pardon; have not contravened any customs or immigration law; and must meet commercial driver program requirements.

(c) Eligible Carriers

Carriers may be FAST eligible if they have a history of compliance, have entered into an undertaking with CBSA, have signed a Partnership in Protection (PIP) memorandum of understanding (in Canada only) and have committed to the Canada Border Protection's Customs-Trade Partnership Against Terrorism (C-TPAT) program. PIP and C-TPAT are security related programs.[30] The requirements for PIP and C-TPAT approval are, to some extent, harmonized.

(d) Eligible Importers

Importers may be eligible to import goods into Canada under FAST if they have a history of compliance, are permanently established, located and managed within Canada or have a branch office in Canada, and a Customs Self Assessment Program approved importer. The Customs Self Assessment program is designed to facilitate expedited and clearance processes for approved importers. FAST approved importers must sign a PIP memorandum of understanding

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26 Canada Border Services Agency, "Join FAST", online: CBSA <http://www.cbsa-asfc.gc.ca/prog/fast-expres/join-participer-eng.html>.

27 *Presentation of Persons (2003) Regulations*, *supra* note 236, ss. 11(a)(i), (iii).

28 Canada Border Services Agency, "Free and Secure Trade", online: CBSA <http://www.cbsa-asfc.gc.ca/prog/fast-expres/menu-eng.html>.

29 Canada Border Services Agency, "Crossing the Border as a FAST Member", online: CBSA <http://www.cbsa-asfc.gc.ca/prog/fast-expres/using-utilise-eng.html>.

30 Canada Border Services Agency, "Partners in Protect", online: CBSA <http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/menu-eng.html>; U.S. Customs and Border Protection, "C-TPAT Overview", online: U.S. Department of Homeland Security at: http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml>.

and use FAST approved carriers and registered drivers.[31]

(e) Commercial Driver Registration Program (CDRP)

The Minister may issue an authorization that is recognized in both Canada and the U.S. to a commercial driver who operates or who will be aboard a commercial highway conveyance to present themselves at a land border crossing in an alternative manner under the CDRP program.[32] CDRP program participants may present themselves in manners described in subparagraph 11(d)(i) of the *Presentation of Persons (2003) Regulations*. The alternative measures authorized under the CDRP program are designed to expedite entry and clearance of low-risk commercial drivers. The eligibility requirements for the CDRP program are similar to those for FAST.[33]

Persons who are authorized under the CDRP program are entitled to carry goods for carriers who participate in the Customs Self Assessment program which is designed to streamline the import and duties payment process for low-risk importers. CDRP approved drivers must show a CDRP registration card to an officer at a port of entry. CDRP drivers of conveyances with pre-approved CSA goods may usually enter Canada after minimal questioning. They may also make personal declarations by completing a Traveller's Declaration Card.[34]

(f) Suspension or Cancellation of an Authorization

The Minister may suspend or cancel an authorization issued in respect of an accelerated release program. The Minister may do so if the person no longer meets the requirements for the issue of the authorization, has contravened the *Customs Act*, the *Customs Tariff*, the *Export and Imports Permits Act* or the *Special Import Measures Act*, or regulations made under those Acts or has provided untrue, inaccurate or incomplete information for the purposes of obtaining an authorization.[35] After cancelling or suspending an authorization, the Minister must send written notice of and the reasons for the cancellation or suspension to the person at their last known address.[36] The person whose authorization is cancelled or suspended shall, upon receiving notice of the cancellation or suspension, return to the Minister or a CBSA officer the authorization or other things that may be specified.[37] A suspension or cancellation of an authorization is effective on the earlier of the day on which an officer advises a person of the suspension or cancellation and 15 days after the day on which notice of suspension or cancellation is sent.[38]

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31 Canada Border Services Agency Memorandum D17-1-7, "Customs Self Assessment Program for Importers", online: CBSA at paragraph 2 <http://www.cbsa-asfc.gc.ca/publications/dm-md/d17/d17-1-7-eng.pdf>.

32 *Presentation of Persons (2003) Regulations, supra* note 236, s. 6.21.

33 *Presentation of Persons (2003) Regulations, supra* note 236, s. 6.21; see also CBSA document titled "The Commercial Driver Registration Program", online: CBSA at 1-3<http://cbsa-asfc.gc.ca/prog/cdrp-picsc/menu-eng.html>.

34 *Ibid.*, at 1.

35 *Presentation of Persons (2003) Regulations, supra* note 236, s. 22

36 *Ibid.*

37 *Ibid.*, s.22(4).

38 *Presentation of Persons (2003) Regulations, supra* note 236.

(g) Request to the Minister Respecting Suspension or Cancellation of an Authorization

A person whose application for an authorization is rejected or whose authorization is suspended or cancelled may request a review of the rejection, suspension or cancellation decision by sending written notice of the request to the Minister.[39] A notice of a request must be sent to the Minister within 30 days after the day on which the application was rejected or the cancellation or suspension becomes effective. It appears that the decision of the Minister may be challenged by way of a judicial review application in the Federal Court.[40]

(h) Review of Suspension or Cancellation of an Authorization and Request for Ministerial Decision Setting Aside Enforcement Action

Where a suspension or cancellation decision arises in connection with an alleged contravention of any Act or regulation, a person who has commenced a request to review the decision to suspend or cancel an authorization may be required to commence a request for a Minister's decision in order to seek a decision setting aside any enforcement action that gives rise to the suspension or cancellation. In most cases, the person's request for a review of the suspension or cancellation decision will be held in abeyance pending the outcome of the Ministerial review relating to the underlying enforcement action. If the enforcement action (such as a decision to set aside a seizure, ascertained forfeiture or AMPS penalty) is set aside as a result of a Ministerial request, then the person may be entitled to seek renewal or reinstatement of the authorization.[41]

Proposed harmonization of the partners and protection in customs and trade partnership against terrorism (U.S. program) there is a move to further align in both programs in the areas of policies and procedures.

Interim alignment is the phrase which refers to the proposed short term alignment of programs which will include:

1. A single application process (wherein each program will require supplementary information).

2. The sharing of processing decisions between Canada and the U.S.

3. On-site validation.

The goal is to implement short term solutions by December 31, 2010.

Amongst other things, new applicants will follow an aligned process so applicants may apply to be registered with PIP and/or CTPAT by completing one application form. Supplementary information may be required.

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[39] *Grewal v. Canada (Solicitor General)*, 2007 FC 1263, 320 F.T.R. 108 (F.C.).

[40] *Federal Courts Act*, *supra* note 78, s. 18.1.

[41] *Presentation of Persons (2003) Regulations*, *supra* note 236, s.23; *Customs Act*, *supra* note 1, s.129.

Existing members of either PIP or CTPAT may apply to the other program without completing a new application. Current members will not be subject to a site visit on a general basis.[42]

[42] CBSA document titled, "BCCC Trusted Traders Program Subcommittee Meeting, Alignment of PIP and CTPAT", August 25, 2010, Toronto, Ontario.

WAREHOUSEMAN RIGHTS

Introduction

Warehousemen are a crucial part of today's vast commercial reality, and as such all Canadian provinces have developed legislation which afford them protection. The application of this legislation focuses on the warehouseman's right to receive payment for the services they offer, namely, the storage of goods. This legislation limits the warehouseman's risk of non-payment through the application of a statute-based instrument known as a warehouse lien or warehousemen's lien.

This paper will examine how the various provincial statutes deal with the concept of warehouse liens. It will also provide the reader with a basic understanding how these liens are established, the rights that are carried with them, and how their use and enforcement protect those involved in the warehousing industry. This paper will further provide insight into the duties that warehousemen must discharge throughout the storage and lien holding process.

Definitions

Warehousemen

The legal definition of a warehouseman (occasionally referred to as a "warehouser") is virtually identical in all provinces and territories across the country, though there are slight differences in the verbiage used to provide the description. Simply put, a warehouseman is someone who stores the goods of another and gets paid for doing so. The "payment" which is required does not necessarily need to be monetary; it can include the performance of an obligation. This definition is broad and can include everything from a company shipping millions of dollars of goods across the country, to your neighbour to whom you pay five dollars a month in order to park your lawnmower in his garage.

warehouse lien

The concept of protecting an individual's rights with the application of a lien is certainly not a recent development and was judicially considered as early as 1802 by Justice Grose in *Hammonds v. Barclay* (1802), 2 East 227 at 235, where he defined a lien as the:

> "right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied"

The legal definition of a lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. In plain English, this essentially means that while you are being paid to store someone else's goods, those goods belong partially to you until payment for that storage has been made. A warehouse lien is somewhat unique, however, in that it can attach to goods in both a possessory and non-possessory sense as discussed further below.

Common Features in Canadian Warehousemen Legislation

With limited exceptions, all Canadian provinces share basic concepts within their warehousemen legislation. For our purposes, we will reference the British Colombia legislation, the *Warehouse*

Lien Act, [R.S.B.C. 1996] Chapter 480 (the "Act"), to provide examples of the rights and obligations of warehousemen, but most provinces' legislation is substantially similar.

There are three basic rights that stem from warehouse legislation: (1) the right to lien stored goods; (2) the resulting right to sell the goods to cover the cost of storage; and (3) priority in insolvency proceedings. We will examine each of these rights in their respective order and discuss the corresponding obligations.

The warehouse lien

Under section 2 of the Act, the default position of the warehouser is that they will have a lien on goods deposited with them for the purpose of storage. The only way that this will not be the default position is if the goods were deposited by a person who is not the owner and who is not entrusted with possession of the goods. Otherwise, if the goods are deposited for storage by the owner, or by the owner's authority, or by an individual entrusted with possession of the goods, then a lien will be established.

If the goods subject to the lien are deposited not by the owner himself but rather by someone with possession of the goods, the warehouser must provide written notice of the lien to the owner of the goods within two months of the date of the deposit. If the warehouser fails to give such notice, then the lien is void. Section 3 of the Act provides that notice must be given to the true owner of the deposited goods and to any party with a security interest in the goods who has registered a financing statement at the date of deposit. The Act also sets out what this notice must contain, including:

- A brief description of the goods;
- A statement showing the location of the warehouse where the goods are stored and who deposited them; and
- A statement that a lien is being claim against the goods under the Act.

I. <u>The Lien</u>

The amount of the lien is determined by a number of factors. Section 2(2) of the Act sets out that the lien may include charges for the following:

- All charges for storage and preservation of the goods;
- All charges for service costs incurred in relation to the storage, such as interest, insurance, transportation and labour; and
- All reasonable charges for any notice required to be given under the Act, advertisement of sale, and for the sale of the goods if default is made in satisfying the warehouse lien.

Two points must be made in relation to the costs associated with the goods subject to the lien. First, the Courts have held that if no storage rate has been agreed upon between the parties, then a "reasonable rate" should be implied arising from the performance and acceptance of storage

services. Second, any additional charges in relation to the goods must be set at a commercially reasonable rate. The legislation does not set out what this rate includes; however, common sense and common business practice should guide the warehouser's judgement.

Possession

Emphasis should be placed upon the fact that the goods must be deposited with the warehouser in order for a lien to be claimed. Warehouse liens in Canada, with the exception of certain circumstances in provinces such as Ontario and Saskatchewan, are possessory liens. These liens do not allow a warehouser to claim a lien for *past* debt on goods presently in their possession. Once a warehouser is dispossessed of the goods subject to the storage fees, the opportunity to claim a lien is erased.

In *Canadian Freight Assembly Ltd. v. Garden Grove Distribution Ltd.* (2005), 198 Man. R. (2d) 212 the Manitoba Court of Queens Bench was faced with the question of whether a warehouseman can claim a lien on present goods for pasts debts. Garden Grove Distribution Ltd. ("Garden Grove") claimed that Canadian Freight Assembly Ltd. ("CFAL") owed money to Garden Grove for a freight hauling and warehouse contract which was improperly terminated by CFAL. Subsequent to the termination of that initial contract, unrelated goods belonging to CFAL were shipped to Garden Grove in error. Garden Grove refused to return these goods and claimed a lien over them for the amount of the previously unpaid contract.

Though the case also dealt with other bankruptcy law issues, CFAL had commenced an action against Garden Grove for wrongful detention of goods. CFAL asked for an order which would release the goods delivered in error to Garden Grove's warehouse. This application was granted and Garden Grove was ordered to release the goods, notwithstanding it was still owed monies from CFAL.

This case is authority for the fact that a warehouseman *cannot* claim a lien on *present* goods for a *past* debt. It should be noted that the judgement in CFAL relied on *Squamish Terminals Ltd. v. Dutton Pacific Forest Products Ltd.*, a 1980 decision of the British Columbia Supreme Court, which also stood for the same principle.

II. The Sale of Stored Goods

Under section 4 of the Act, a warehouser has the right to recover the unpaid storage fees and expenses by selling the goods subject to the lien at public auction. Prior to engaging in the sale process, the warehouser must provide a written notice to the following individuals:

- The person liable as debtor for the charges for which the lien exists;
- The owner of the goods;
- Any person with a security interest in the goods where a financing statement was registered at the date of deposit of the goods; and
- Any other person known by the warehouser claiming to have an interest in the goods.

If the warehouser intends to enforce its right to sell the goods subject to the lien, upon initiating this process, it must wait a minimum of 35 days in order to complete the enforcement. The notice must provide a brief description of the goods, the location of the warehouse where the goods are stored, the date of their deposit with the warehouser and the name of the person by whom they were deposited, an itemized statement of the balance due, a demand that the charges be paid within no less than 21 days from delivery of the notice, and a statement indicating that unless the charges are paid, the goods will be advertised for sale and sold at public auction at a time and place specified in the notice. Following the 21 days notice, the warehouser must then post an advertisement of the sale at least once a week for two consecutive weeks in a newspaper circulating in the locality where the sale is to be held. The sale must not be held in less than 14 days from the date of the first publication of the advertisement.

Section 6 of the Act requires that any surplus from this sale, after covering storage fees and expenses related to the sale of the goods, must be remitted back to any person entitled to it, together with a statement of account outlining the fees charged. In the alternative, if the surplus is not demanded by the person entitled to it within 10 days after the sale, or if there is an uncertainty about the rights to the surplus, then the surplus must be paid into Court by order with a statement of account showing the amount has been computed.

Finally, section 7 of the Act provides that if at anytime before the actual sale of the goods, any person claiming an interest in the goods may pay the amount, including expenses necessary to satisfy the lien. Upon making this payment, the warehouser must deliver the goods to the person making the payment if they are entitled to possession; otherwise, the warehouser must retain and properly store the goods subject to the terms of the storage contract.

III. Priority in Bankruptcy

One of the most important and powerful features of a warehouse lien is the priority it affords in insolvency situations. In the absence of statutory protection, if a warehouser received goods from a subsequently insolvent entity, its chances of receiving payment for the associated storage fees would be minimal. However, personal property security legislation in every Canadian province affords warehousemen additional protection in these circumstances. For instance, sections 4 and 32 of the British Columbia *Personal Property Security Act* give warehouse liens priority over other creditors' previously attached and perfected security interests.

Non-Possessory Warehouse Liens

Certain jurisdictions within Canada, such as Saskatchewan and Ontario, further limit the warehouser's risk with the application of another statute-based instrument known as a non-possessory lien. This paper will examine the Saskatchewan legislation, the *Commercial Liens Act*, S.S. 2001, c. C-15.1; however, the Ontario legislation is substantially similar.

Under section 6 of this legislation, a warehouseman may assert either a possessory or non-possessory warehouse lien. The non-possessory warehouse lien allows the warehouser to dispossess himself of the goods subject to the lien while still maintaining the ability to enforce his right to payment for storing the goods. However, to enforce these rights, one of two things must have occurred:

1. Upon delivery of the goods, the person requesting the storage of the goods has executed a written document authorizing the warehouser's service, which writing must include a description of the goods subject to the liens; or

2. Upon removing the goods, the person requesting the storage services has provided a signed acknowledgement of an obligation to pay for the storage of the goods which include a description of the goods.

If one of these two conditions is satisfied and the lien remains unpaid, section 15 of the Saskatchewan legislation provides that a non-possessory lien is established, and the warehouser may cause the goods subject to the lien to be seized only by a sheriff. Once the goods are repossessed and 30 days have passed after which the lien becomes payable, the warehouser's rights are similar to those of a possessory warehouse lien holder, including the right to sell and the obligation to remit any surplus to the owner of the goods.

Hypothetical

The application of the legal principles outlined above serves to solidify one's understanding of warehouse liens. To this end, a basic hypothetical has been produced below. Although this example is not intended to cover every intricacy of the applicable statutes, it will serve to provide an overall idea of their purpose, function and applicability.

Assume that special edition "Toronto Maple Leaf Stanley Cup Champion" touques are being manufactured in Northern British Columbia by a clothing company called Insane Concepts Inc. ("Insane Concepts"). Thousands of the touques are being manufactured in BC and shipped across Canada to various warehouses for distribution to retail outlets. Since the inception of the special edition touque, Insane Concepts has engaged the services of a well known warehousing and distribution company to assist them in this process, known as Hoarders Warehousing Inc. ("Hoarders").

Recently, Insane Concepts attempted to fill orders in Calgary and retained the services of a transportation company known as Carrier's Transportation Co. ("Carrier's"). Hoarders has directed Carrier's to pick up the touques from the factory in Northern B.C. and then deliver them to the Hoarders warehouse in Calgary. This was completed; however, complications started to arise between the parties.

Hoarders attempted multiple times to deliver the goods to Insane Concepts' best customer in Calgary but failed in every attempt. The store refused delivery because the Maple Leafs' popularity had plummeted and El Nino kept Calgary's winter mild, rendering touques of all kinds unnecessary. Hoarders kept the products at its warehouse and began charging Insane Concepts a predetermined storage fee for doing so. To make matters worse, it also came to Hoarders's attention that Insane Concepts had failed to pay storage fees relating to a previous shipment where, again, a customer refused to accept delivery of the touques for a lengthy period. This resulted in a large fee accruing for storage. These goods were eventually returned to Insane Concepts. Two months passed and upon realizing that Insane Concepts owed it storage fees for past products not in its possession, as well as the products currently being stored, Hoarders asserted a lien under the Alberta *Warehousemen's Lien Act.*

Insane Concepts asked for its products to be returned as there was still a market for the touques, albeit only a small one in under-developed countries without access to Sportsnet or modern media. Hoarders refused to return the goods, asserting they were subject to a warehouser's lien. Insane Concepts did not have the financial resources to pay the storage fees owed to Hoarders due to the plummeting popularity of their product. Insane Concepts challenged the validity of the lien on two separate fronts.

Insane Concepts first claimed that the legislation required that Hoarders provide notice to it pursuant to section 5(1) of the Act. Insane Concepts alleged that it did not give Carrier's the authority to deposit the goods with Hoarders. They further argued that, as the goods were deposited by Carrier's merely as a party entrusted by the true owner to have possession of the goods, that Hoarders had to provide notice of the liens within two months.

However, in reviewing the legislation, Insane Concepts position with respect to this first ground is untenable. Although it is true that Carrier's is not the actual owner of the goods, the Courts have held that section 5 would not apply to this scenario.[43] The actions of Insane Concepts (i.e. the fact that they hired Carrier's, and Carrier's attended Insane Concepts' factory to obtain the goods with the direction that they were to be taken to Hoarders in Calgary) militates against any direction that Insane Concepts should receive notice. If Carrier's made a stop along the way to Calgary, and deposited the goods at an unauthorized warehouser, only then would a warehouser have to provide notice as set out in section 5 of the Act.

Insane Concepts went on to argue that Hoarders should not be permitted to hold a lien against *present* goods for *past* debt. The Courts in similar circumstances have agreed. Liens under this type of legislation (excepting provinces such as Ontario and Saskatchewan) are possessory liens. As such, these liens require a continuing right of possession and the Courts will not allow a lien to attach to goods already released. Therefore, Hoarders may only assert a lien based on the cost of storing the products that are still actually in its possession. This would assist Insane Concepts substantially, as it would only require the funds to remove the current lien and not preceding liens.

Hoarders also took action to exercise its rights under the Act allowing them to sell the goods belonging to Insane Concepts. This was done in an effort to pay off the monies owed for storage. As provided in section 6 of the Act, Hoarders provided Insane Concepts with a written and detailed notice that the goods would be sold by public auction and fulfilled all the requirements set out in the Act, including the posting of an advertisement. However, prior to the sale of the goods, on the very day the auction was to take place, one of Insane Concepts' high volume customers paid a large receivable. Insane Concepts quickly got in contact with Hoarders and informed them that they would be able to pay the required storage fees to remove the lien, thereby releasing the goods. Hoarders refused to accept the money as they wanted to sell the goods, pay off the storage fees, and keep any anticipated surplus for themselves. Legal counsel to Insane Concepts quickly informed Hoarders that section 9 of the Act allows for the payment of the amount necessary to satisfy the lien, including the expense incurred in arranging for the sale of the goods, at any time prior to their sale. Counsel further advised Hoarders that, according to section 8 of the Act, any surplus gained from the sale of the goods at auction must

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[43] *Hurn v. A & B Traditional Moving & Storage Ltd*., 2001 BCSC 1195

be remitted to the owner of the goods. After reviewing the pertinent sections of the Act and with an understandable desire to rid themselves of this clothing item, Hoarders agreed and returned the goods to Insane Concepts.

In conclusion, Insane Concepts was able to regain possession of their goods only after they discharged the warehouse lien by paying the storage fees owed to Hoarders. Hoarders successfully used the legislation to detain the goods belonging to Insane Concepts in lieu of receiving payment for storage fees. The only downfall of Hoarders was dispossessing themselves of the previous goods received where no lien was established. This example makes it clear that possession is essential in the realm of warehouse liens in most provinces (with the exception of Saskatchewan and Ontario).

Additionally, to take this example one step further, what would happen in a scenario where Insane Concepts became insolvent after delivering the goods to Hoarders? Hoarders will never receive payment for the storage of these previous goods and they will merely become a name on a long list of creditors seeking payment from the receiver appointed to Insane Concepts. The good news is that Hoarders will have a warehouse lien on the goods still in their possession, which entitles them to priority over other creditors, including those who are attached and perfected, even at an earlier date. This results from application of section 32 of the Alberta *Personal Property Security Act.* Hoarders will then be able to assert their rights of sale under the Act for the current storage cost owing, receive payment for the costs associated with the storage of these present goods, and then remit any surplus to the receiver in the bankruptcy proceeding.

Conclusion

If warehouse liens did not exist, the warehouser's risk of non-payment would often times greatly exceed any potential reward for storing the goods. These liens work to provide the warehouser with a temporary property right in the goods stored. If these rights did not exist, it would allow the owner of the stored goods to simply reclaim them without payment or to seek legal action against the warehouseman for detaining them. Furthermore, in an insolvency situation, the warehouseman would have little recourse for collecting receivables from an insolvent customer.

This discussion has demonstrated that liens of this nature require the warehouseman to maintain possession of the goods, with certain jurisdictional exceptions. If the warehouseman is in a jurisdiction that allows for non-possessory liens, the warehouseman must ensure that the formal requirements for establishing a lien are satisfied before dispossessing themselves of the goods. This discussion has also evidenced the primary goal of the warehouse lien – the ability to sell the stored goods to cover the cost of storage. However, in order to avail themselves to the rights accorded to them, warehousemen must ensure they have fulfilled all their obligations to achieve this end, including the specific notice requirements and timelines set out in the legislation.

APPENDIX "A"

RELEVANT AMPS PENALTIES

No.	Legislation	Regulation	Contravention	Penalty Condition	Penalty Basis
C008	*Customs Act* 12(2)		Person (carrier) failed to provide a bar coded cargo control number.	1st - $150 2nd - $225 3rd - $450	Per Instance
C021	*Customs Act* 12(1)		Person (carrier) failed to report imported goods, to customs forthwith in writing at the nearest designated customs office that was open for business.	1st - $2,000 2nd - $4,000 3rd - $8,000	Per Shipment
C033	*Customs Act* 31		Person moved, delivered or exported, or caused to be moved, delivered or exported goods that have been reported but not released, without customs authorization.	1st - $1,000 2nd - $2000 3rd - $4,000	Per Shipment
C036	*Customs Act* 20(1)		Person transported or caused to be transported within Canada goods that have been imported but which have not been released, without having the appropriate bond or security.	1st - -$500 2nd - $$750 3rd -- $1,500	Per Shipment
C037	*Customs Act* 20(1)		Person who transported goods within Canada that have been imported but have not been released, failed to ensure that the conveyance or container which had been sealed by customs remained sealed until authorization from customs to break the seal was received.	1st - -$1,000 2nd - $2,000 3rd - $4,000	Per Container or Conveyance
C039		*Transportation of Goods Regulations* 4(1)(a)	Person transporting goods within Canada that have been imported but have not been released failed to report, as a result of an accident or other unforeseen event, a damaged or broken seal.	1st - $500 2nd - $750 3RD - $1,500	Per Container or Conveyance
C040		*Transportation of Goods Regulations* 4(1)	Person transporting goods within Canada that have been imported but have not been released failed to report, as a result of an accident or other unforeseen event, the removal of goods from a damaged or disabled container or conveyance or has failed to report that the conveyance or container is damaged or disabled and can no longer transport goods.	1st - $300 2nd - $450 3rd - $900	Per Container or Conveyance

No.	Legislation	Regulation	Contravention	Penalty Condition	Penalty Basis
C042	*Customs Act* 21		Person who transports or causes to be transported within Canada goods that have been imported but have not been released failed to afford an officer free access to any premises under his control.	1st - $500 2nd - $750 3rd - $1,500	Per Instance
C043	*Customs Act* 21		Person who transports or causes to be transported within Canada goods that have been imported but have not been released failed to open any package or container of such goods or remove any covering therefrom.	1st - $500 2nd - $750 3rd - $1,500	Per Instance
C044	*Customs Act* 22(1)		Person who is required by subsection 22(1) of the *Customs Act* to keep records in respect of commercial goods, failed to keep records at the specified place for the prescribed period and in the prescribed manner, or failed to make those records available to an officer within the specified time or answer truthfully questions asked by an officer about the prescribed records.	1st - $300 2nd - $450 3rd - $900	Per Instance
C340	*Customs Act* 22(1)		Person who is required by subsection 22(1) of the *Customs Act* to keep records in respect of commercial goods failed to keep records for the prescribed period and in the prescribed manner. This applies when an audit, verification or examination determines that there are no records in existence.	Flat rate - $25,000	Per Instance
C354	*Customs Act* 107.1		A commercial carrier or charterer failed to provide, or provide access to, within the prescribed time, information on any person on board a conveyance prior to the arrival of the conveyance in Canada.	Flat rate - $3,000	Per conveyance
C355	*Customs Act* 107.1		A commercial carrier or charterer failed to provide, or provide access to, within the prescribed time, information on any person on board a conveyance prior to the arrival of the conveyance in Canada.	Flat rate - $0	Per conveyance

No.	Legislation	Regulation	Contravention	Penalty Condition	Penalty Basis
C368	*Customs Act* 95(1)	*Reporting of Exported Goods Regulations*, 9, 10, 12, 16 and 18	Carrier failed to report the conveyance in writing, prior to export, at the export reporting office closest to each place of loading.	1st - $150 2nd - $225 3rd - $450	Per Conveyance Report
C369	*Customs Act* 95(1)	*Reporting of Exported Goods Regulations*, 10, 11, 12 and 13	Carrier failed to report the export of cargo at the time, the place and/or in the manner prescribed.	1st - $500 2nd - $750 3rd - $1,500	Per Export Movement
C371	*Customs Act* 7.1		Person (carrier) failed to use his authorized carrier code or failed to present a letter of authorization when using another bonded carriers' code.	1st - $1,000 2nd - $2,000 3rd - $4,000	Per Instance
C372	*Customs Act* 15		A person failed to report to an officer goods in their possession in respect of which duties have not been paid.	1st - $300 2nd - $450 3rd - $900	Per Occurrence

APPENDIX "B"

EXCERPT OF THE REPORTING OF EXPORTED GOODS REGULATIONS

The *Reporting of Goods Regulations* indicates at section 4:

> Goods that are exported by a customs service provider shall be reported in writing by the customs service provider at an export reporting office before the goods leave Canada if an officer, at the time of exportation, suspects on reasonable grounds that they are being exported contrary to an act of Parliament and, for that reason, request that they be reported.

Sections 10 to 13 set out obligations relating to the reporting of goods by a carrier[44]:

> Goods Other Than the Conveyances Used to Export Them
>
> 10. Subject to sections 11 to 13, all goods that are exported by a carrier, other than the conveyance used to export them, shall be reported in writing by the carrier, before the exportation, at the export reporting office located closest to the place where the goods are loaded on board the conveyance for export.
>
> 11. Goods that are imported into Canada and are exported from Canada after being transported in transit through Canada en route to a non-Canadian destination shall be reported in writing by the carrier before the goods leave Canada
>
> (a) if the goods are exported by mail, at the export reporting office located closest to the post office where the goods are mailed;
>
> (b) if the goods are exported by vessel, at the export reporting office located closest to the place where the goods are loaded aboard the vessel for export;
>
> © if the goods are exported by aircraft, at the export reporting office located closest to the place of departure of the aircraft from Canada;
>
> (d) if the goods are exported by rail, at the export reporting office located closest to the place where the railcar on which the goods are loaded is assembled to form part of a train for export; and
>
> (e) if the goods are exported by any other means, at the export reporting office located nearest the place of exit of the goods from Canada.
>
> 12. Goods that are exported by a carrier by means of a highway conveyance, other than goods described in section 11, are not required to be reported by the carrier unless an officer, at the time of the exportation, suspects on reasonable grounds that they are being exported contrary to an Act of Parliament and, for that reason, requests that they be reported.
>
> 13. (1) Subject to subsection (4), goods that are exported by a carrier by means of a conveyance other than a highway conveyance and that have been or will be reported by the exporter in accordance with these Regulations may be reported by the carrier after their exportation if the carrier
>
> (a) has, before the exportation, given an undertaking in writing to an officer that the carrier is exporting only such goods; and

[44] Memorandum D3-1-8 – Cargo-Export Movements, paragraph 31, 32, 33 and 34.

(b) has on that basis been authorized in writing by that officer to report the goods in accordance with this section.

(2) Goods referred to in subsection (1) shall be reported by the carrier in writing at an export reporting office

(a) if the goods are exported by vessel, within three business days after the departure of the vessel from the place in Canada where it is loaded;

(b) if the goods are exported by rail, within one business day after the day on which the railcar on which the goods are loaded is assembled to form part of a train for export; and

(c) if the goods are exported by aircraft, within one business day after the day on which the aircraft departs from the place in Canada where it is loaded.

(3) In the case of goods referred to in paragraph (2)(a), the carrier must also report the goods in writing to the Chief Statistician of Canada within five business days after the end of the month in which the conveyance departs from Canada.

(4) Goods referred to in subsection (1) shall be reported in writing by the carrier at an export reporting office before the goods leave Canada if an officer, at the time of the exportation, suspects on reasonable grounds that they are being exported contrary to an Act of Parliament and, for that reason, requests that they be reported.

REPORTING BY A CUSTOMS SERVICE PROVIDER

14. Goods that are exported by a customs service provider shall be reported in writing by the customs service provider at an export reporting office before the goods leave Canada if an officer, at the time of the exportation, suspects on reasonable grounds that they are being exported contrary to an Act of Parliament and, for that reason, requests that they be reported.

QUESTIONS & ANSWERS

Program #1: Advance Reporting

Facts

Carrier Co. has contracted to export goods by means of a conveyance from Canada. The goods are to be shipped by various modes of transport including:

(a) vessel

(b) rail

(c) aircraft

(d) highway

The goods have not begun their continuous journey out of Canada.

The goods are destined for Mexico.

Questions

2. Do the goods have to be reported?

3. If so, when do they have to be reported?

4. Are the goods subject to detention and/or civil penalties?

5. If the goods are subject to detention and/or civil penalties then who is responsible for such penalties?

6. What remedies are available if a penalty assessment is imposed?

Answers

1. Yes, the goods have to be reported.

2. The time frames are:

   (a) vessel – within 3 business days after the departure of the vessel from the place where it is loaded

   (b) rail – within one business day after the day on which the railcar or which the goods are loaded is assembled to form part of the train for export

   (c) aircraft – within one day after the day on which the aircraft departs from the place in Canada where it is loaded

   (d) highway – where an officer suspects the goods are being exported in contravention of the *Customs Act*.

3. AMPS penalties may be imposed. Air, highway, marine and rail carriers should refer to Memorandum D3-1-8, Cargo-Export Movements for the policy and procedures respecting the report and control of exports from Canada.

4. Carriers may be liable to an AMPS penalty.

5. The carrier can request a ministerial decision (seek redress) pursuant to the *Customs Act*.

Program #2: BN Number

Facts

Export Co. does not have a BN number and has asked to use Freight Forwarder Co.'s BN number for purpose of reporting the export of the goods to CBSA.

Questions

3. Can Export Co. to use Freight Forwarder Co.'s BN number?

4. Is so, what are the legal consequences of allowing Export Co. to use Freight Forwarder Co.'s BN number?

Answers

5. Yes.

6. Freight Forwarder Co. is responsible for export compliance (e.g., that all appropriate documents have been submitted to the CBSA) (see Memorandum D20-1-1, Export Reporting, paragraphs 13, 33, 34, 35 and 117 – 121.

Program #3: FAST

Facts

Carrier Co. has contracted with Export Co. to provide expeditious export shipment services. To that end, it has become a FAST program participant and has hired drivers who are FAST approved. One of its FAST approved drivers, John Q. Public, was recently charged with impaired driving.

Questions

7. What impact will the charge have on John Q. Public's FAST eligibility?

8. What remedies are available to John Q. Public?

Answers

9. Suspension.

10. Request for a review of the cancellation decision.

APPENDIX "C"

DRAFT

	CURRENT WORDING		PROPOSED
Number	**C366**		**C366**
Contravention	Person failed to report imported goods valued at $1,600 or greater, to customs forthwith at the nearest designated customs office open for business.		Person failed to report imported goods to customs forthwith at the nearest designated customs office open for business.
Penalty	• 1st: $2,000 or 20% of the value for duty, whichever is greater • 2nd: $4,000 or 40% of the value for duty, whichever is greater • 3rd and Subsequent: $6,000 or 60% of the value for duty, whichever is greater		1st- $2,000 2nd- $4,000 3rd and subsequent- $8,000
Penalty Basis	Value for Duty		Per Shipment
Legislation	*Customs Act*, section 12, sub-sections 12(1) and (3)		*Customs Act*, section 12, sub-sections 12(1) and (3)
D Memo	D3-1-1, Regulations Respecting the Importation, Transportation and Exportation of Goods		D3-1-1, Policy Respecting the Importation and Transportation of Goods *Reporting of Exported Goods Regulations* *Reporting of Imported Goods Regulations* *Transportation of Goods Regulations* The regulations listed above are on the Justice Canada website www.justice.gc.ca
Guidelines	Applied by an officer. Applied against the person (other than a carrier) who failed to report goods when obligated to do so.		**Non-compliance occurs when** a person fails to report imported goods to customs forthwith at the nearest designated customs office open for business. It is normally applied against the person (other than a carrier) who failed to report goods when obligated to do so. This penalty will apply to a carrier for non report of importations which are COMAT (company material) goods. In these cases the carrier is in fact the importer and carrier. A list of designated commercial offices open seven days a week for the reporting and clearing of commercial goods can be found at

			http://www.cbsa-asfc.gc.ca/contact/listing/indexpages/indextype27-e.html The goods must be brought in the person's own vehicle or in hand baggage. Examples of C366: At a land border, a BSO examines a vehicle that had been sent for secondary examination. During the examination, the BSO discovers undeclared commercial goods in the passenger vehicle. An examination of hand baggage at an international airport locates undeclared jewelry for resale which was not declared by the importer.
	Do not apply against the importer in cases where the importer has used a carrier. Occurs when unreported commercial goods are found. For failure to report imported goods valued at less than $1,600, see C367. For failure by a carrier to report imported goods, see C021/C022. For failure to declare all goods at time of interim accounting, see C360/C361. Apply a penalty on the total VFD of the unreported goods. Although a penalty may be applied under this contravention, all OGD admissibility requirements must be met prior to release. It is also possible that the OGDs may have their own administrative monetary penalties.		Do not apply against the importer in cases where the importer has contracted a commercial carrier to import the goods. For failure by a carrier to report imported goods on behalf of commercial clients, see C021. For failure to report exported goods, see C170.
Retention Period	12 months		12 months

APPENDIX "D"

DRAFT GUIDELINE – RELEASE
(UNAUTHORIZED MOVEMENT OF GOODS)

	CURRENT WORDING		PROPOSED
Number	C358		C358
Contravention	Person removed goods from a customs office or sufferance warehouse prior to release or authorization by an officer.		Person removed goods from a customs office or sufferance warehouse prior to release or authorization by an officer.
Penalty	1st: $1,000 or 5% of the value for duty, whichever is greater. 2nd: $2,000 or 10% of the value for duty, whichever is greater. 3rd and Subsequent: $3,000 or 20% of the value for duty, whichever is greater.		1st: $1,000 2nd: $2,000 3rd and subsequent: $4,000
Penalty Basis	Value for duty		Per shipment
Legislation	*Customs Act*, section 31		*Customs Act*, section 31
D Memo	D4-1-4, Customs Sufferance Warehouses		
Other Reference	*Customs Act*, Section 19		D4-1-4, Customs Sufferance Warehouses *Customs Act*, section 19
Guidelines	Applied by an officer.		Non- compliance occurs when a person removes goods from a customs office or sufferance warehouse prior to release or authorization by Customs. . Examples of C358: ➢ A commercial carrier has been directed by Border Services Officer (BSO) at the Primary Inspection Line (PIL) to report to the customs warehouse on the form Y28 and the carrier fails to report to the warehouse. The goods have been moved from a customs office without authorization. ➢ During a warehouse audit, goods documented as being in the warehouse could not be located nor accounted for. ➢ Customs attempts to examine goods at a warehouse and discovers goods have been moved out of the warehouse without Customs authority. Applied against a carrier for removing goods from a customs office