



International Business Bulletin

EDITOR:

Anna Shahid
Direct 416.593.2951
ashahid@blaney.com

This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

For more information, feel free to contact any of the lawyers who wrote or are quoted in these articles, or one of the co-chairs of our International Trade and Business Group:

Henry J. Chang, co-chair
Direct 416.597.4883
hchang@blaney.com

Stan Kugelmass, co-chair
Direct 416.593.3943
skugelmass@blaney.com

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AN OVERVIEW OF THE CANADA BORDER SERVICES AGENCY'S ADMINISTRATIVE MONETARY PENALTY SYSTEM

Henry J. Chang

Introduction

Section 109.1 of the *Customs Act*¹ authorizes the imposition of civil penalties by the Canada Border Services Agency (“CBSA”):

- a) According to Subsection 109.1(1), a penalty of up to \$25,000 may be imposed on a person who fails to comply with a provision of any statute or regulation designated in regulations made under the Subsection 109.1(3). Subsection 109.1(3) specifically limits the application of such penalties to violations under the *Customs Act*, the *Customs Tariff*², the *Special Import Measures Act*³, and any regulations made under those statutes. The relevant provisions that are subject to civil penalties appear in the *Designated Provisions (Customs) Regulations*⁴.
- b) According to Subsection 109.1(2), a penalty of up to \$25,000 may also be imposed on a person who fails to comply with any term or condition of a licence issued under the *Customs Act*, the *Customs Tariff*, or an obliga-

tion in an undertaking given pursuant to Section 4.1 of the *Customs Act* (relating to the release of goods prior to accounting).

Pursuant to Section 109.1, CBSA has developed its Administrative Monetary Penalty System (“AMPS”), which is intended to deter non-compliance in the commercial stream. These penalties may be applied to any commercial clients, including: (a) importers, (b) exporters, (c) brokers, (d) warehouse and duty free shop operators, (e) carriers, (f) freight forwarders, and (g) representatives thereof. The stated purpose of AMPS is to create a level playing field for all Canadian businesses by ensuring that there is a cost for non-compliance. As a result, CBSA claims that AMPS is intended to be a remedial rather than punitive program.

CBSA generally prefers to impose AMPS penalties instead of using seizures or ascertained forfeitures as an enforcement tool. However, AMPS penalties may be imposed in addition to any seizure of goods or conveyances under Section 110 or ascertained forfeiture under Section 124 (for goods or conveyances that cannot be found). In appropriate cases, a seizure action may also be initiated; these may include instances where the goods are prohibited or controlled (i.e. alcohol,

¹ R.S.C., 1985, c. 1 (2nd Supp).

² <http://www.cbsa-asfc.gc.ca/trade-commerce/tarif-tarif/menu-eng.html>

³ R.S.C., 1985, c. S-15.

⁴ SOR/2002-336.

“In many cases, the AMPS penalty structure is graduated (first, second, and third levels) and provides higher penalties for repeated violations of the same contravention.”



Henry J. Chang is co-chair of the firm's International Trade and Business Group. A recognized authority in the field of foreign law, Henry is licensed as a Foreign Legal Consultant by the Law Society of Upper Canada, and is the Official Research Partner of the International Bar Association and the Strategic Research Partner of the ABA Section of International Law.

Henry may be reached directly at 416.597.4883 or hchang@blaney.com.

prohibited weapons, firearms, drugs, child pornography, conveyances modified and used for smuggling, and controlled goods whose export could pose a security risk). CBSA may also proceed with criminal prosecution where warranted, due to the seriousness of the offence or potential harm to society.

AMPS Penalty Framework

When CBSA discovers a contravention, it will typically impose an appropriate AMPS penalty on the commercial client. These penalties are described in CBSA's Master Penalty Document (“MPD”); the MPD lists the relevant contraventions and the penalties that result from a failure to comply.⁵

In many cases, the AMPS penalty structure is graduated (first, second, and third levels) and provides higher penalties for repeated violations of the same contravention. However, for a small number of contraventions, the penalty is set at a flat rate.

For the purposes of penalty calculation, the retention period for each individual contravention is either 12 or 36 months. Most contraventions that result from post-release verifications have retention periods of 36 months while border-related contraventions have retention periods of 12 months. Any contraventions that occur during the retention period are used to determine whether the penalties will escalate.

Once the retention period has expired, if the same contravention occurs again, the penalty will be calculated from the first level. However, the

commercial client's overall contravention history will remain on the AMPS system for six years plus the current year; commercial clients with a history of repeated contraventions will be examined more closely during subsequent inspections. Pursuant to Subsection 107(9) of the *Customs Act*, commercial clients may request a copy of their AMPS Client Contravention History and are entitled to submit up to two requests per calendar year.

CBSA has also implemented a 30-day delay to the penalty escalation from the first level to the second level, for low- and medium-risk contraventions. Between the date that a Notice of Penalty Assessment (“NPA”) is issued and the end of the 30-day period, the commercial client has time to take remedial action in order to avoid the second penalty level.

An AMPS penalty becomes payable on the date that the NPA is served. Interest is payable on penalties at the prescribed rate beginning on the date following the date of the NPA. However, if the penalty is paid within 30 days after the date of the NPA, no interest will apply.

An AMPS penalty is issued against the person named in the NPA and is considered a debt owed to the Government of Canada. The Canada Revenue Agency is responsible for recovering AMPS penalties that are in default.

Review and Appeal of AMPS Penalties

When a commercial client does not agree with the findings described in the NPA, there are two types of initial review available, both of which are described below.

⁵ <http://cbsa-asfc.gc.ca/trade-commerce/amps/am-rm-eng.pdf>.

“In certain cases, CBSA will allow a commercial client to reinvest all or a portion of a penalty applied under AMPS, by means of a Penalty Reinvestment Agreement (“PRA”).”

Requesting a Correction

Under Subsection 127.1(1), CBSA may cancel or reduce an AMPS penalty (where the request is made within thirty days after the assessment), if:

- a) It is satisfied that there was no contravention; or
- b) There was a contravention but it finds that there was an error with respect to the amount assessed and the penalty should be reduced.

However, an error must be evident to both parties or this strategy will not be successful. Correction requests are made to the issuing CBSA office.

Requesting a Redress Review

Under Subsection 129(1) of the *Customs Act*, the person named on the NPA may request redress review (i.e. a request for a Minister’s decision) of the AMPS Penalty within ninety days (subject to limited exceptions) after service of the NPA. This is initiated by sending a request in writing to the CBSA officer who served the NPA or to the CBSA office closest to the location from where the NPA was served.

Within thirty days of filing the redress request, the commercial client will receive a letter containing the name and contact details of the adjudicator responsible for the file. The adjudicator will review the request and the reports of the officer who took the original enforcement action. The client will then receive a notice explaining the reasons for the action and the issuing CBSA officer’s reports. At that time, the client will have the opportunity to make further submissions before the decision is made.

The adjudicator will consider the evidence and make a recommendation for decision. A senior CBSA officer, who has the authority to make a decision on behalf of the Minister of Public Safety (the “Minister”), will review the adjudicator’s recommendation and the evidence before making a decision. The decision of the senior CBSA officer is considered final and is not subject to review but is appealable to the Federal Court of Canada.

In certain cases, CBSA will allow a commercial client to reinvest all or a portion of a penalty applied under AMPS, by means of a Penalty Reinvestment Agreement (“PRA”). A PRA is granted through the ministerial review process, which a client may initiate by making a request for redress review under Subsection 129(1) of the *Customs Act*. A commercial client may apply for a PRA if they:

- a) Are the client against whom the penalties were issued, as identified on each NPA;
- b) Have been issued one or more penalties involving numerous and/or repetitive contraventions or instances of non-compliance, caused by a systematic problem in their Commercial Information System;
- c) Have not yet been issued a Minister’s decision in respect of the NPAs at issue;
- d) Have identified the cause of the systematic problem in their Commercial Information System; and
- e) Are prepared to invest in corrective measures to remedy the systematic problem and demonstrate that the corrective measures are effective in achieving compliance.

Appeal of a Redress Review to the Federal Court of Canada

According to Subsection 135(1) of the *Customs Act*, a person who has requested a redress review (i.e. a Minister's decision) may appeal that decision by way of an action to the Federal Court of Canada. However, the appeal must occur within ninety days of being notified of the decision. In addition, the Federal Court of Canada will not vary a Minister's decision unless it is persuaded that:

- a) The Minister, or agents of the Minister, failed to observe principles of natural justice or failed to act within their statutory discretion; or
- b) The decision was based on error in law or finding of fact that is perverse or capricious or without regard to evidence before the Minister.⁶

Conclusion

Commercial clients who receive an NPA from CBSA, ordering them to pay an AMPS penalty that they believe to be inaccurate or unfair, should act quickly to request an initial review of the CBSA decision. In the event of an unfavorable Minister's decision, they can consider commencing a Federal Court action at that time. However, given the limited scope of the Federal Court's review, such clients have the best chance of cancelling or reducing their AMPS penalty if they present persuasive arguments during the initial review stage. ■

⁶ *Mattu v. Minister of National Revenue* (1991), 7 T.T.R. 10, 45 E.T.R. 190 (I.D.)

"DOING BUSINESS IN THE UK" CONFERENCE

Blaney McMurtry LLP is proud to sponsor the conference "Doing Business with the UK" organized by the British Canadian Chamber of Trade and Commerce. The focus of the event will be on promoting trade and investment between Canada and the U.K. Keynote speakers include the Consul General of the U.K. in Toronto, the Head of Ontario Regional Office of Canada's Department of Foreign Affairs and International Trade, the Area Director of the Ontario Ministry of Economic Development and Innovation, the Chair of the Ontario Chamber of Commerce and the Chair of the Canadian Council for Public-Private Partnerships. Lunch keynote speaker will be Andy Byford, CEO of the Toronto Transit Commission.

- When:** Wednesday, September 26th, 2012, 9 am - 5 pm;
Where: Ontario Investment and Trade Centre, 250 Yonge St. Suite 3500
Cost: Members-\$60; Non-Members-\$90, plus HST
Register: www.bcctc.ca
Special Offer: Attendants will receive a 50% discount on BCCTC new memberships

International Business Bulletin is a publication of the International Trade and Business Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Kylie Aramini at 416 593.7221 ext. 3600 or by email to karamini@blaney.com. Legal questions should be addressed to the specified author.

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**Blaney
McMurtry**
BARRISTERS & SOLICITORS - LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com