

**POWERS OF SEARCH, SEIZURE AND FORFEITURE UNDER THE  
CUSTOMS ACT**

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**THE CUSTOMS ACT**

This paper is not intended to be exhaustive but merely to alert practitioners to a few of the more commonly encountered situations regarding powers of search, seizure and forfeiture under the Customs Department.

These powers are critical not only from the standpoint of assuring compliance with the Customs Act to maximize revenue collection, but also to prevent the importation and exportation and release of goods which are restricted, prohibited or uncustomed.

The compliance required goes beyond the Customs Act and relates to Customs Laws as well which term is defined in Section 2 of the Customs Act as:

“Customs Laws” shall mean and include this Act and any other regulations or proclamations made thereunder and all other enactments relating to the customs.

Some of the related enactments include:

1. The Common External Tariff Act. This regulates duties that are chargeable.
2. The General Consumption Tax Act

3. The Revenue Board Act
4. The Statistics Act
5. The Hotel Incentives Act
6. The Revenue Protection Act
7. The Customs Duties (Dumping and subsidies) Act
8. The Export Industry Encouragement Act
9. The Copyright Act
10. The Standards Act
11. The Plants Quarantine Act 1994

Imported plants for example, are subject to inspections by Quarantine Officer pursuant to the Plants Quarantine Act before they can be delivered to the importer and imported commercial goods must meet, to the extent required, the standard specifications under the Standards Act 1969 before Customs can release such items for use within the island, whether or not the requisite import duties have been paid.

### **SEARCH**

By virtue of provisions made under Section 3 of The Customs Act, customs officers have the same powers and privileges accorded to officers of the Constabulary Force. This means that customs officers have the same general power to obtain a search warrant for evidence of a serious arrestable offence as do the Police.

A customs officer therefore may conduct a search of a person without a warrant in accordance with Sections 57, 58 and 59 of the Customs Act and

in accordance with Sections 17 and 19 of the Constabulary Force Act. The above Sections provide a general power of search without warrant in specified circumstances. Section 57 of the Customs Act, for example, is limited to search of any person on an aircraft or ship or any person who has landed therefrom or any person receiving goods from either of the above persons, provided the officer has been informed or has reason to believe that such a person is carrying or has any uncustomed or prohibited goods.

Section 17 of the Constabulary Force Act is not dissimilar in its effect of delimiting the circumstances in which a Constable may search a person without a warrant. Section 17 reads --

**Any Constable may search any person on board any ship or boat within the limits of any port in this Island, or any person who shall have landed from any ship or boat, whether or not such person shall have traveled on such ship or boat, provided he shall have good reason to suppose that such person has any uncustomed or prohibited goods about his person, and if any person shall rescue, destroy or attempt to destroy and goods to prevent seizure or obstruct any Constable in going, remaining or returning from on board, or in searching such shop, boat or person or otherwise in the execution of his duty, every such person shall be liable to a penalty not exceeding two hundred dollars and in default to imprisonment for a period not exceeding twelve months.**

There is however, an apparent distinction in the standard to be met by the Officer (Officer here is used in the sense meant by Section 2 of the Customs Act and not in the restricted sense as under the Constabulary Force Act), before a person searched without a warrant in both Section 57 of the Customs Act and Section 17 of the Constabulary Force Act. The former refers to the search being subject to the Officer first having been informed or having reason why the latter requires the Officer to have good reason.

In other situations the power of search for evidence in the suspect's possession is incidental to arrest. In the absence of statutory powers, an arrest must precede the search of the person if the legality of the search is not to be vitiated. *Dillon vs. O'Brien and Davis (1887) 20 LR Ir 300; Cox CC 245.*

#### CONDITIONS PRECEDENT TO SEARCH

Generally, a customs officer conducting a search of a person without a warrant must have reasonable grounds for suspecting that the person has come within a breach of the Customs Act, unless the contrary is expressly stipulated as in Section 57 of the Customs Act above. It is difficult to formulate the principles governing reasonable grounds with any precision, but a few guidelines are evident from the authorities. For example, nothing in the nature of a prima facie is required; there need not be any evidence

which would be admissible in a court of law. As Lord Devlin said in *Shaaban bin Hussien vs. Chong Fook Kam*:

*“‘Reasonable cause’ is a lower standard than information sufficient to prove a prima facie case. Reasonable cause may take into account matters that could not be put into evidence at all or matters which, although admissible, would not on their own prove the case. The circumstances of the case should be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence”.*  
*[1970] AC 942 at 948 PC.*

The suspects known character and previous convictions may be taken into account in establishing the existence of reasonable grounds for suspicion, particularly where the previous offences were of a similar character to that being investigated. *McArdle vs. Egan (1933) 150 LT 412.*

It is not sufficient merely to observe that the suspects behavior was suspicious. Some basis for the suspicion must be shown of a kind capable of an evaluation by an objective third person. *Mure vs. Kaye 128 ER 239.*

This may be no more than information obtained from a reliable informant provided the person against whom the power is exercised matches the information supplied. *Lister vs. Perryman (1870) LR 4 HL 521.*

### DETENTION

The goods may be detained until the question of their release or seizure can be determined. For example they may be detained pending a test or examination, or pending a decision by another authority such as a quarantine officer under the Plants Quarantine Act. If it is eventually decided that the goods be seized, a Notice of Seizure is usually issued. where the goods are released instead, rent should not be charged unless the detention was the result of some omission on the part of the importer or owner and the Collector or other proper officer considers that rent should be charged.

### SEIZURE

Anything liable to forfeiture under the Customs Laws may be seized by customs officers. This includes restricted, prohibited and uncustomed goods or anything used to convey such goods. No particular definition is provided in the Act for restricted and prohibited goods and these terms therefore bear their ordinary dictionary meaning. Restricted goods may be defined as goods which are subject to some restriction as a precondition to their importation, exportation or use within the Island. The restriction may be the requirement of a license before the particular item is imported.

Uncustomed goods are defined as:

**includes goods liable to duty on which the full duties due have not been paid, and any goods, whether liable to duty or not, which**

**are imported or exported or in any way dealt with contrary to the customs laws.**

Generally, the authority to seize derives from a writ of assistance or special search warrant under the Customs Act. The writ of assistance is a kind of general search warrant issued from the Supreme Court upon the application of the Commissioner. It is valid for the reign in which it is issued and for six months thereafter. By virtue of Section 202 of the Customs Act, an officer holding a writ of assistance has the power to enter any house, shop, cellar, warehouse, room or other place and seize any uncustomed or prohibited goods or any books or documents relating thereto. The main advantage of the writ of assistance is that it gives the officer holding it an almost indefinite entry power thereby allowing for repeated entries.

The special warrant issued under Section 201 of the Customs Act is more commonly used and generates much controversy. Section 203 of the Customs Act reads --

**If any officer shall have reasonable cause to suspect that any uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, are harboured, kept or concealed in any house or other place in the Island, and it shall be made to appear by information on oath before any Resident Magistrate or Justice in the Island, it shall be lawful for such Resident Magistrate or Justice by special warrant under his hand to authorize such officer to enter and search such house or other**



place, by day or by night, and to seize and carry away any such uncustomed or prohibited goods, or any books or documents relating to uncustomed or prohibited goods, as may be found therein; and it shall be lawful for such officer, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search or seizure as aforesaid.

The requirement of reasonable cause to suspect that the items mentioned in the Section are in certain premises is an obligation on both the officer laying the information and the Justice or Magistrate who issues the special warrant. This means that the Justice or Magistrate must make a sufficient inquiry to satisfy himself as to the existence of reasonable cause and in so doing, must instruct himself properly in any matters of law to be decided before reaching his conclusion. This matter was considered by the Privy Council in **The Attorney General vs. Danhai Williams and Danwills Construction Limited**, Privy Council Appeal No. 70 of 1995 (unreported) delivered May 12, 1997, where Lord Hoffman in considering the duty of the Justice or Resident Magistrate in granting a special warrant, approved the principles established in dicta from the House of Lords in **Regina vs. Inland Revenue Commissioners, Ex parte Rossminster Limited** [1980] A.C. 952. In the latter case, Lord Wilberforce said (at page 998) :

“If the Judge does his duty ... he must carefully consider for himself the grounds put forward by the revenue officer and judicially satisfy himself in relation to each of the premises concerned, that these amount to reasonable grounds for suspecting etc. It would be quite

wrong to suppose that he acts simply as a rubber stamp on the revenue's application."

It is not sufficient for the Justice to act on information which is not on oath.

*Mitchell vs. New Plymouth Club, Inc. [1958] NZLR 1070.*

A Magistrate may however, take account of an earlier informal conversation provided the officer later swears in the information on oath that what he already told the Magistrate is true. *Selbeck vs. McDonald [1978] 1 NSWLR 1.*

The jurisdiction of the Justice to issue the warrant may also be questioned where it appears on the face of the warrant that he considered the relevant issues or misdirected himself on the law relevant to the issue of the warrant. For example, in *Seven Seas Publishing Limited vs. Sullivan [1968] NZLR 663* a police officer applied to a Magistrate for a search warrant under the Indecent Publications Act 1963 (NZ), Section 25 (1). The Section authorizes the Magistrate to issue a warrant if satisfied, inter alia, there were reasonable grounds for believing that an indecent document was being kept on any premises for the purpose of being so dealt with as to constitute an offense against the Act. Upon considering the sworn affidavit of the police officer, the Magistrate granted a warrant in which it was set out that the Magistrate was satisfied that there was reasonable ground for suspecting that the offence was being committed. On a application by the owners of the premises, certiorari was granted to quash the warrant, on the grounds that the warrant showed that the Magistrate had directed his mind to the wrong question namely deciding there was reasonable cause for suspecting

rather than believing. However, the jurisdiction of the Magistrate to issue a warrant may not be affected in all cases where he misdirects himself in law. Where the warrant indicates that he considered the question of whether there is a reasonable cause to believe that an offence has been committed when the Section creating the power to search requires reasonable cause to suspect as the question to be considered, jurisdiction to issue the warrant may not be affected since suspicion is a less assured state of mind than belief. See **The Attorney General vs. Danhai Williams and Danwills Construction Limited, Supra.**

The fact that the grounds for belief are not included in the information on oath does not give rise to a presumption that the Magistrate exceeded his authority. The written information is no more than a record of the fact that an information was laid. It provides no opportunity for one to verify the reasons given by an officer who seeks a search warrant. In spite of this there is a presumption that the Magistrate acted with statutory authority provided that the recital on the warrant establishes that the Magistrate had reasonable cause to suspect etc.

#### **FORM OF THE WARRANT**

It is not a requirement that the special warrant be in any particular form. It is however desirable that the special warrant should make reference to the statutory provision creating the power authorizing its issue, but the absence of a specific reference is not fatal to the warrant's validity, particularly

where it is clear from the terms of the warrant that it is issued in accordance with the statutory provision authorizing its issue.

The fact that the warrant confers more power than the authorizing provision allows, does not affect its formal validity, where the recital establishes that the requisite reasonable standard was met prior to its issue.

Consequently, the unlawful seizure of items (i.e. the seizure of items not covered by the authorizing provision) does not vitiate the legality of the search and the taking of items properly authorized by the provision and the warrant.

The power of search granted by the warrant must be exercised reasonably and for the purpose for which it was granted. Only places which might reasonably be suspected of containing articles of the type covered by the warrant may be opened since a power to search for specified items is not a general power to ransack a house. *George vs. Metropolitan Police Commissioner (1984) Times, March 31.*

Where the warrant is used as a fishing expedition to search for other items not covered by the warrant, it may be held that the officer concerned was using the entry and search power for an improper purpose.

#### **FORFEITURE**

Items which have been seized are suspect to forfeiture. Forfeiture may arise either where a claim is not made within the statutory notice period for the item seized or where they are ordered condemned as forfeited as a result of

forfeiture proceedings. Section 215 of the Customs Act deals with the question of the forfeiture of items seized and reads:

**215 (1) Whenever any seizure shall be made, unless in the possession or in the presence of the offender, Master or owner, as forfeited under the customs laws, or under any law by which officers are empowered to make seizure, the seizing officer shall give notice in writing of such seizure and of the grounds thereof to the Master or owner of the aircraft, ship, carriage, goods, animals or things seized, if known, either by delivering the same to him personally, or by letter addressed to him, and transmitted by post to, or delivered at his usual place of abode or business if known; and all seizures made under the customs laws or under any law by which officers are empowered to make seizures shall be deemed and taken to be condemned, and may be sold or otherwise disposed of in such manner as the Minister may direct, unless the person from whom such seizure shall have been made or the Master or owner thereof, or some person authorized by him shall within one calendar month from the day of seizure give notice in writing to the Commissioner that he claims the same, whereupon proceedings shall be taken for the forfeiture and condemnation thereof; providing that if animals or perishable goods are seized, they may by direction of**

**the Commissioner be sold forthwith by public auction, and the process thereof retained to abide the result of any claim that may legally be made in respect thereof.**

Items which are seized and subject to forfeiture may be recovered consequent on the Commissioner exercising her power under Section 219 of the Customs Act to mitigate or remit any penalty imposed by virtue of a breach of the Act. The power also extends to the restoration of any items seized to the owner, provided that the power is exercised prior to the commencement of proceedings in any court against any person committing an offence under the Act or prior to the commencement of proceedings for the condemnation of any items seized.

An interesting question is whether the goods of an innocent third party may be forfeited where the items seized is the subject of a breach of the Act. In *Allgemeine Gold-und Silberscheideanstalt vs. Customs And Excise Commissioners* [1980] QB 390, [1980] 2 ALL ER 137, the Customs and Excise caught people smuggling gold, stolen from the plaintiffs in Germany, into Britain. The Commissioner of Customs and Excise decided to forfeit it, despite the fact that the owners of the gold, the German company, had no part in the smuggling. In an action by the German owners, the Court of Appeal held that the Commissioners had an unreviewable discretion as to whether to forfeit goods liable to forfeiture and this was unaffected by the free movement of goods provisions of the Treaty of Rome and international law obligations and governments not to deprive people of their property

without compensation. (Note: Under the Customs and Excise Management Act 1979, the decision of whether or not to forfeit is vested in the Customs and Excise as against a Court.)

Section 210 of the Customs Act which is tantamount to a catch-all provision for breaches under the Act does not settle the question conclusively. The Section reads --

**Every person who shall import or bring, or be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not, or shall unload, or assist or be otherwise concerned in unloading any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction, or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods, or shall knowingly acquire possession of or be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws**

and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods, shall for each such offence incur a penalty of five thousand dollars, or treble the value of the goods, at the election of the Commissioner; and all goods in respect of which any such offence shall be committed shall be forfeited.

The latter part of the Section is open to the interpretation that a precondition to forfeiture is that an offence be committed by the person whose goods are subject to forfeiture. It is also open to an interpretation that goods are subject to forfeiture once any of the offences under the Section are committed whether or not the goods belong to a person who has in fact committed an offence.

One implication of the first interpretation is that where an offence is committed by an importer and not the innocent third party who has possession of the goods, the only remedy to the Customs Department lies in prosecuting the importer for breach of Section 210 of the Act. In this scenario the full penalty under Section 210 (i.e. including forfeiture of the goods) could not be imposed since there will be no goods against an order for forfeiture could be made. A partial imposition of the penalty would be wrong in Law since the Commissioner is obligated to apply the full penalty under Section 210. *Regina vs. Roy George Wilson Resident Magistrate's Court Criminal Appeal No. 32 of 1994 (unreported) delivered November 23, 1994.* Therefore, any election of a penalty by the Commissioner under



**ONUS OF PROOF**

Where goods are the subject of forfeiture proceedings in that they are restricted, prohibited or uncustomed, the onus of proof is on the defendant to establish that the requisite license was obtained before importation, that the goods are not prohibited, or that the goods were dealt with in accordance with the Customs laws.

**CONCLUSION**

I have attempted to raise some of the points which require consideration by customs officers, practitioners and the public at large. These points are by no means exhaustive of the gamut of issues to which the topic gives rise any may be taken merely as an attempt to probe some of the questions which may make for a just exercise of such powers in the interest of the Customs Department and for the protection of the public.