

Law Office Searches: A Primer¹

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Introduction

This paper is intended for the lawyer who finds him- or herself in the following unpleasant situation: the police have arrived at the firm's office and are demanding to execute a search warrant. Many questions about the rights and duties of both the police and the lawyer will arise at the moment the officers walk through the office door. Pre-eminent among these questions is the following: "How is it that the solicitor/client privilege associated with the lawyer's file is to be protected in the course of the search of a lawyer's office?" Accordingly, this paper offers a quick summary of the law and deals with the kinds of issues that might arise when the police come calling with a criminal search warrant.²

The Law

For many years, law office searches were governed by the common law. In "a patchwork of cases"³ principles were developed that would allow the competing interests inherent in any law office search to be balanced and dealt with after the fact in the courts. The most important of these cases was the Supreme Court's 1982 judgment in *Déscoteaux v. Mierzwinski*.⁴ Shortly after *Déscoteaux*, in 1985, Parliament enacted as part of the *Criminal Code* a legislative scheme to replace the common law.⁵ In its most recent incarnation, that scheme is found in section 488.1 of the *Code*. Unfortunately, section 488.1 was found severely wanting by several courts of appeal⁶ and ultimately, in 2002, by a majority of the Supreme Court of Canada in *Lavalee, et al v. Canada*.⁷ In *Lavalee*, the Court struck down the legislative scheme and imposed a new common law approach

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² Note that this paper does not deal with summonses or production orders that might also be served on lawyers under a variety of provincial and federal acts.

³ V. Paisley, "Search and Seizure Checklist: What to do When the Police Arrive to Search a Law Office" (1986-87), 20 Law Society Gazette 291 at 291.

⁴ *Déscoteaux, et al. v. Mierzwinski, et al.*, [1982] 1 S.C.R. 860.

⁵ R.S.C. 1985, c.27 (1st Supp.), s.71.

⁶ See, for example, *Regina v. Fink* (2000), 193 D.L.R. (4th) 51 (Ont.C.A.); *Lavalee, et al. v. Canada, et al.* (2000), 184 D.L.R. (4th) 25 (Alta.C.A.); *White, et al. v. Canada* (2000), 187 D.L.R. (4th) 581 (Nfld.C.A.).

⁷ *Lavalee, et al. v. Canada* [2002] 3 S.C.R. 209.

of its own that is to govern until Parliament, if it chooses to do so, amends the *Code*. That new approach was summarized by Justice Arbour in the following ten principles:⁸

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the Justice of the Peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

⁸ *Ibid.*, at para.49.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

It will be obvious that some of these ten principles are directly relevant to the duties and obligations of the lawyer whose office is being searched, and these duties will be examined below. The first order of business, however, is where to turn for help.

Help!

For many lawyers, the arrival of the police will be an unexpected and traumatic thing. Although it is occasionally the case that the police will give plenty of warning about a law office search, it is more often the case that the event will be announced only shortly before the search is to be executed.⁹ The combination of surprise, an exigent situation, and the fact that search and seizure law may well be outside the particular lawyer's sphere of expertise, suggests that the best thing to do first is to call for the assistance of a senior criminal law practitioner who can give advice on all of the matters addressed in this paper. In addition to ensuring that the police do not exceed their powers and that the lawyer's clients' privileges are protected, the lawyer may also be concerned to determine whether he or she or the firm is also involved in the criminal investigation, either as a target of the investigation or as a victim of the offence under investigation. If there is a risk that this may be so, the lawyer will need the advice of criminal counsel for any number of reasons. Two examples will suffice. Where the lawyer is also a target, he or she will want to be careful about statements made to the officers conducting the search (as these statements may be admitted into evidence at the lawyer's subsequent criminal trial). Accordingly, it is better to have an independent lawyer act as the point of contact with the police. Where the lawyer is either target or victim he or she will want to avoid any conflict of interests (real or perceived) between the lawyer and the client who is the subject of the search. The advice of another independent lawyer will be valuable in either case.

The Warrant

It is fundamental to Canadian search and seizure law that a warrantless search is *prima facie* unlawful. Certainly, no law office search should ever be conducted without a warrant. Therefore, the lawyer's first duty when the police arrive is to inspect the search warrant. Usually the lawyer will not have to ask for the opportunity to do so as the police officers will be eager to demonstrate that they have been given judicial authority to conduct the search. Several things should be done with the warrant. First, the lawyer should make and keep a copy of it (if the police do not already have a copy prepared for

⁹ It should be noted that a law office search should generally not be conducted without *any* notice to the lawyer, unless such notice might reasonably be expected to compromise the integrity of the criminal investigation. However, the amount of notice required appears to be only that amount of notice that permits the lawyer to be present for the search. See *Maranda v. Richer*, [2003] 3 S.C.R. 193 at para.20.

the lawyer). He or she should also ensure that the warrant identifies the law office as the place to be searched (it is not unheard of for the police to arrive at the wrong address!) and authorizes the search on the date that the police have attended.¹⁰ The warrant should also sufficiently identify both the offence that is under investigation¹¹ and, in the context of law office searches, the client or clients whose files are sought, so that the lawyer knows why the police are there. The warrant should also be inspected for any deficiency or error that is obvious on its face. For example, it should be signed and dated by a justice of the peace. Finally, the lawyer will want to be aware that the warrant may have attached to it terms for its execution.¹²

Co-operation

Although there are many potential deficiencies to any given warrant, and it may be wise to make objections to the police “for the record”, unless the warrant is obviously and ridiculously deficient, it is good general advice that the lawyer should co-operate with the police during their search and that objections to the warrant or the manner of the search should be made later before the appropriate court. The lawyer who purports to prevent the police from conducting their search on technical grounds runs the risk of being charged with obstruction and making a complicated situation even more difficult. As Justice Lerner wrote:

In addition to conforming with the *Criminal Code* and the case law, one must apply common sense to the factual situation when a peace officer presents himself armed with a search warrant.¹³

In other words, there will be plenty of time later to make whatever objections or challenges need to be made. In the meantime, the lawyer should co-operate with the police and instruct staff of the firm to do likewise. In this way, the search will be less intrusive, more expeditious, and, as will be discussed under the next heading, least likely to violate solicitor/client privilege.

Focusing the Search

There is a voluminous body of law respecting the precise limits of the police powers in the execution of a search warrant. Given the limited scope of this paper however, we will deal only with the special duty imposed on police engaged in the peculiar context of a law office search. Notably, this is a duty that the lawyer can help the police fulfill. In her judgment in *Lavalee*, Justice Arbour was at pains to emphasize that every effort must be made by all relevant players (the issuing justice, the police, the lawyer, the Law Society)

¹⁰ The warrant should have an “expiry date” before which the warrant must be executed in order to be valid.

¹¹ *R. v. Adler* (1977), 37 C.C.C. (2d) 234 (Alta.S.C.); *R. v. PSI Ltd., et al.* (1977), 37 C.C.C. (2d) 263 (Ont.H.C.).

¹² *Maranda, v. Richer, supra*, note 9, at paras.15 and 20; *Déscoteaux, supra*, note 4, at 893.

¹³ *R. v. PSI, ibid.*, at 268.

to ensure that the encroachment on solicitor-client privilege that flows from any law office search must, to the greatest extent possible, be minimized.¹⁴ This principle is reflected in a variety of ways in Justice Arbour's reasoning. Fundamental to this principle, however, is the idea that the police should not seize more documents (or other evidence) than is necessary or authorized by the warrant. In *Maranda v. Richer*, a year after *Lavalee*, the Supreme Court of Canada was highly critical of a police search of a law office where it was apparent that the police had carted away many more documents than were justified by the scope of their warrant.¹⁵ The warrant should identify what it is that the police are looking for and it is the lawyer on the file who is best placed to assist the police in focusing on what it is that they are looking for and no more. In consultation with the officer in charge of the search, the relevant lawyer should be able to establish a protocol for the search that allows the lawyer to gather together the files and other documents (both paper and electronic) of the relevant client, to satisfy the officer that all relevant evidence has been collected, and to allow the police to seal the documents and leave. At least one lawyer at the firm should be present as the documents are being sealed in order (1) to make an inventory and copies of what it is that the police will be taking away in sealed packages, (2) to ensure that the police are not examining the documents before they are sealed (see *Lavalee* guideline #4), and (3) to ensure that the sealed packages are properly marked for future identification.

It should also be remembered that the lawyer has a duty to his or her other clients as well as to the client who is the subject of the search. In other words, care should be taken to ensure that the privilege of the firm's other clients is not inadvertently compromised during the search.

Claiming Privilege

The lawyer's first duty in a law office search is the protection of solicitor/client privilege and client confidentiality.¹⁶ While it used to be important for counsel to claim privilege at the time of the search in order to ensure that privilege was protected, under the *Lavalee* guidelines it is now clear that (with limited exceptions¹⁷) *all* documents in the possession of a lawyer are deemed to be privileged in the limited sense that they are *all* to be sealed *before* they are examined or taken from the lawyer's premises (see guideline #4). The lawyer and client then have a reasonable time following the search in which to examine the documents and make a determination about which documents, if any, should be the subject of a claim of privilege (see guidelines #6 and #7). Nevertheless, it is prudent for the lawyer whose office is being searched to assert privilege on behalf of the client¹⁸ over

¹⁴ *Lavalee*, *supra*, note 7 at para.37. See also *Maranda v. Richer*, *supra*, note 9, at paras.13 to 17.

¹⁵ *Maranda v. Richer*, *supra*, note 9, at paras.5, 18 and 19.

¹⁶ In this respect the law surrounding law office searches is consistent with the lawyer's general duty of confidentiality. See: Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 2.03.

¹⁷ Where the warrant explicitly identifies a specific document or documents that the police may seize examine and copy, there is no requirement that those specifically identified documents be sealed. See *Lavalee* guideline #4.

¹⁸ Although the client on whose behalf privilege is claimed need not necessarily be named. The identity of the client itself may in fact be privileged. See *Lavalee*, *supra*, note 7, at para.28.

everything that the police take away with them. The lawyer should ensure that the police have recorded the assertion of privilege in some way. If necessary, the lawyer can prepare a written claim of privilege while the search is being conducted so that the police can take it away with them.

Notifying the Client

Of course, it is important to remember that it is the client's privilege, not the lawyer's, and that the client has a right to know that his or her privilege is at risk of being breached by a law office search. Accordingly, the *Lavalee* guidelines place a premium on the need to alert the client to the fact of the search (see guideline #5). While it is apparent that Justice Arbour put this duty on the shoulders of the state, it would seem that the lawyer should also take whatever steps are necessary to alert the client that documents that may contain privileged information are going to be seized. In this way, the client can be present, should he or she choose to be so, in order to ensure that privilege is asserted and that the warrant is executed in a manner that minimizes the risks to privilege, and to give whatever instructions the circumstances require, including the instruction to assert privilege.

Notifying the Law Society

Justice Arbour also made it plain that the Law Society may play a role in law office searches (see guideline #5). In particular, where the lawyer or the client cannot be located at the time that the police arrive to execute the warrant, the Law Society may be called in order to act as a surrogate for either or both them and to ensure that the search is carried out in compliance with both the terms of the warrant and the *Lavalee* guidelines. Accordingly, where the relevant lawyer is absent, or where the client is absent or incompetent, the Law Society should be alerted to the fact of the search and invited to attend at the law office to oversee the sealing and seizure of the documents.¹⁹ Again, while *Lavalee* puts this duty to contact the Law Society on the state, it will be in the interests of both the lawyer and the client to see that it is done.

Don'ts

Although it is probably obvious to most readers, it must be said: Do not do anything that could be construed as an obstruction of the police during the course of the search. In particular, do not do anything to prevent the police from finding the documents that they are searching for. For example, do not remove, hide or shred any such documents, and do not instruct your staff to do so. Let the police find what they are looking for.

¹⁹ Although this topic is not broached in *Lavalee*, it may also be the case that the Law Society could act where the lawyer's interests are in conflict with those of the client.

After the Search 1: Litigating Privilege

Following the search there will be time to reflect, to retain or refer the client to criminal counsel, to examine the seized documents, and to determine whether or not privilege should be asserted. It may be that criminal counsel and the Crown can agree on a protocol that will allow the parties to resolve questions of privilege without the necessity of involving the Court, or at least to narrow the band of documents that are in dispute. Failing that, privilege can be asserted and argued in Court pursuant to the *Lavalee* guidelines (see guidelines #6, #7 and #8). Again, should either the lawyer or the client be unavailable to participate in the process, the Law Society may act in their place (see guideline #7).

After the Search 2: Challenging the Search & Seizure

There will also be plenty of opportunity to challenge the search by traditional search and seizure means. Typically, these means fall into two categories: 1. challenge by way of *certiorari* in the Superior Court to have the warrant quashed on jurisdictional grounds; and 2. challenge under section 8 of the *Charter* (the right to be free from unreasonable search and seizure) before the trial judge in any subsequent criminal trial in order to deem the fruits of the search inadmissible pursuant to section 24(2) of the *Charter*. Again, these remedies can be pursued after there has been time for reflection and consultation with criminal counsel.