



NOVA SCOTIA  
BARRISTERS' SOCIETY

## **LAW OFFICE SEARCH AND SEIZURE GUIDELINES FOR MEMBERS**

Revised November 2003

### **A. INTRODUCTION**

The Nova Scotia Barristers' Society has prepared the attached Guidelines to assist you in dealing with what is likely an unexpected and unsettling experience - a law enforcement agency executing a warrant at your law office to search for evidence in relation to one or more of your clients. In cases where a current or former client is the target of the investigation, the lawyer's office may be subject to search if the law enforcement agency believes the lawyer is in possession of information in the form of files or documents relating to a client that will assist the agency in its investigation of the client. These Guidelines are not intended to address circumstances where the lawyer is the target of the law enforcement agency investigation and a search warrant is being executed.

The Nova Scotia Barristers' Society has also established a roster of lawyers with expertise in this area ("contact persons") upon whom you can call for assistance. The role of these contact persons will be explained later in these Guidelines.

Law office search and seizure is a serious exercise of law enforcement agency power with grave implications for solicitor/client privilege and the administration of justice. Such matters are to be treated by members with the utmost priority. You should not delegate your responsibility to anyone else in your firm unless you cannot avoid doing so. These Guidelines have been drafted to assist you in properly discharging all your obligations in these circumstances. Review them immediately and thoroughly.

### **B. LAW OFFICE SEARCHES AND S. 488.1 OF THE *CRIMINAL CODE***

Search warrants may be obtained by law enforcement officials under various sections of the *Criminal Code*, *Controlled Drugs and Substances Act* and other Federal and Provincial legislation. The process for law office searches and seizures pursuant to any Federal Act was codified by section 488.1 of the *Criminal Code*, a section that has now been declared

unconstitutional by the Supreme Court of Canada in **Lavallee, Rackel and Heintz v. Canada (Attorney General); White, Ottenheimer and Baker v. Canada (Attorney General); R. v. Fink** [2002] S.C.C. 61 decided on September 12, 2002. Justice Arbour, writing for the majority, concluded that section 488.1 more than minimally impairs solicitor-client privilege thereby amounting to an unreasonable search and seizure contrary to section 8 of the *Charter*. She accordingly struck the section down pursuant to section 52 of the *Constitution Act, 1982*.

Law office searches and seizures can continue notwithstanding the Supreme Court of Canada's determinations that section 488.1 is unconstitutional. You will therefore need to know how to deal with the law enforcement agency and the warrant, and you may subsequently have to make an assessment of the legality of the actions of the law enforcement agency.

### **C. LAW OFFICE SEARCHES AND SOLICITOR/CLIENT PRIVILEGE**

The Nova Scotia Barristers' Society recognizes that some, if not most of the lawyers who may be subject to search warrants in relation to clients will have little or no experience with search warrants, criminal law, or dealings with police or other law enforcement agencies. For example, in proceeds of crime investigations, family lawyers, real estate lawyers, corporate and commercial lawyers and lawyers practicing in the area of estates and trusts may well be confronted by the law enforcement agency seeking, under warrant, financial information about past or present clients.

It is essential for members to realize that solicitor/client privilege is a client right and must be asserted upon the first contact with the law enforcement agency. While the law enforcement agency must afford "a reasonable opportunity" for a claim of solicitor/client privilege to be made before any documents can be examined, copied or seized, the reasonable opportunity requirement has not been clearly defined and will depend on the circumstances.

The search warrant may also indicate how long the law enforcement agency is required to wait for the arrival of the lawyer named in the warrant or a person with instructions from that lawyer before commencing their search. In the absence of the named lawyer or designated person, the law enforcement agency is permitted to seize documents under seal and remove them from the law office.

## D. LEGAL AND PROFESSIONAL OBLIGATIONS INVOKED BY LAW OFFICE SEARCHES

The Barristers' Society's interest in these matters is: 1) to ensure that clients' rights are rigorously protected, 2) compliance with the law is observed and 3) members obtain the support and assistance they require to discharge their obligations to their clients, past and present, and as officers of the court. A lawyer's obligations include compliance with the terms of the warrant and conduct that does not constitute obstruction of a law enforcement agency officer in the exercise of his or her duty.

## E. SOLICITOR/CLIENT PRIVILEGE - A SUBSTANTIVE RIGHT

The majority of the Supreme Court of Canada in **Lavallee** held that solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. They noted that the privilege favours not only the right of the interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. They stated that solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Constitutional imperatives compel the adoption of stringent norms to ensure the protection of the privilege.

In light of the Supreme Court of Canada's declaration of unconstitutionality, law office searches and seizures are currently governed by the common law. Law office searches and seizures can continue notwithstanding the Supreme Court of Canada's determination that section 488.1 of the *Criminal Code* is unconstitutional. Justice Arbour, noting Parliament's prerogative to legislate in this area of criminal law enforcement, articulated 10 general principles to govern the legality of searches of law offices as a matter of common law until Parliament chooses to act on the issue, if it does. Justice Arbour described the guidelines as reflecting the present day constitutional imperatives for the protection of solicitor-client privilege, and governing the search authorization process and the general manner in which the search must be carried out. Her guidelines are as follows:

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 as 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 the 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.
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.

A lawyer must advise his or her staff of the importance of maintaining solicitor/client confidentiality and privilege. If during a search the lawyer is not available and reachable, a partner, associate or senior member must assert privilege over all documentation.

Following *Lavallee*, the British Columbia Court of Appeal ruled in *Festing v. Canada (A.G.)*, [2003] B.C.J. No. 404 that the *Lavallee* guidelines should apply to searches of any place where privileged documents may reasonably be expected to be located. This was held to include, for example, a lawyer's home, a lawyer's office in multi-disciplinary business premises, the offices of in-house counsel for a business, and storage facilities where lawyers store their files.

On November 14, 2003, the Supreme Court of Canada held in *Maranda v. Richer*, [2003] SCC 67 that lawyers' fees and disbursements must be presumed, as a general rule in the context of the purposes of law office search and seizure, to fall within the category of information protected by solicitor-client privilege.

## **F. THE ROLE OF CONTACT PERSONS**

It is the role of the contact person to provide, *pro bono*, assistance to a member dealing with a law office search and seizure in the context of a law enforcement agency investigation of a client or clients. The contact person may be able to attend at your office to assist you or may have to render assistance to you over the telephone. You should seek this assistance immediately, having obtained a copy of the warrant from the law enforcement agency, and in private. The contact person will assist you with these Guidelines and may be able to help you interpret the provisions of the warrant. It is not the contact person's role or obligation to assert privilege on behalf of your client(s). It is your role and responsibility to assert privilege on behalf of any former or present clients to whom the warrant refers.

Should you decide you want to retain the contact person for assistance beyond that required to deal immediately with the execution of the warrant, you will have to arrange the terms of that retainer privately with that person. The contact person will be obliged to notify the Barristers' Society that he or she has been contacted by you in the context of a warrant being executed but any further information will only be provided to the Society with your consent.

## **G. GUIDELINES TO BE FOLLOWED SHOULD A LAW ENFORCEMENT AGENCY ATTEND AT YOUR OFFICE TO CONDUCT A SEARCH**

1. Advise the law enforcement agency that there may be issues of solicitor/client privilege and ask to see the original of the search warrant and make a copy of it immediately.
2. Retire to a private office and call the Executive Director and/or the Director of Professional Responsibility of the Nova Scotia Barristers' Society (902-422-1491) and report that a law enforcement agency is present to conduct a search of your office.
3. You will be given the name of contact persons listed with the Society in your area who are familiar with the provisions of the *Criminal Code*. You have a responsibility to call one of them. If unable to touch base with one of those contact persons, call the Executive Director or the Director of Professional Responsibility of the Nova Scotia Banisters' Society and so advise.
4. The contact person will assist you in determining what you should do, and may be able to attend at your office to assist if you so request. Time for the contact person to visit your office must be within a reasonable period and under no circumstances shall it be longer than one hour unless a longer time frame is

- negotiated with the law enforcement agency. If you require the attendance of the contact person and before he/she is able to attend within the specific period of time, you should advise the law enforcement agency and request that they suspend the execution of the warrant until that person arrives and you have had an opportunity to seek advice.
5. If the contact person attends your office, the contact person and you should retire to a private office and carefully read every word of the search warrant. If you do not wish the contact person to attend at your office you should read the search warrant to the contact person over the phone and discuss the proper procedure to be followed.
  6. Make reasonable effort to contact your client and notify him or her of the search. Advise the client that you are asserting the client's solicitor/client privilege.
  7. If you are present when the search warrant is executed you should treat the search as top priority and not delegate your responsibility unless absolutely necessary, and then only to a partner or an associate. If neither is available you should then delegate your responsibility to the most senior staff member. If you must delegate to the most senior staff member, a contact person must be contacted and should be present when the warrant is executed.

#### **H. PROCEDURES TO BE FOLLOWED BY EVERY LAWYER WHEN OFFICE IS BEING SEARCHED BY A LAW ENFORCEMENT AGENCY**

1. Read and re-read the search warrant and make specific note of the documents being sought
1. Inform the law enforcement agency that you assert solicitor/client privilege on behalf of your client over the documents sought and financial records relating to the client.
2. You or your designate should locate **only** the documents and financial records sought. You are to ensure that the law enforcement agency does not have access to or review the documents in question, and make very sure that no other clients' documents are included in the seizure.
3. You or your designate should remain in attendance for the duration of the search. At all times you should remain civil and courteous with the law enforcement personnel. You and your staff should refrain from engaging in any conversation beyond that which is absolutely necessary.
4. Once you locate the documents or financial records mentioned in the search warrant, you must take the documents and records and photocopy them. If this is not practical, you should make an inventory of the records being seized. If this

is not practical, because of the number of documents or financial records being seized, assert solicitor/client privilege for all documents. Computer records should be copied and copies retained in your office.

5. Once you have located, copied or inventoried the documents and financial records, place the documents and records in your own envelope. Seal it and initial it where sealed, and place the envelope in the receptacle provided by the law enforcement agency. To make sure that the documents are not exposed to the law enforcement agency personnel, you should personally attend at the sealing of the receptacle in which the documents or financial records are placed.
6. You should attend with the law enforcement agency in transporting the sealed receptacle to the Sheriff of the County in which you reside. This protects you, as well as the law enforcement agency personnel, from any subsequent argument that the documents were examined or otherwise tampered with after leaving the lawyer's office and before being delivered to the Sheriff. It is, therefore, recommended that you request to be present when the documents are actually handed over to the Sheriff. If you are not available you should delegate this responsibility to one of your partners, associates or senior staff members.
7. The lawyer or senior staff member must make notes of what happens throughout the search.

#### **I. PROCEDURE TO BE FOLLOWED AFTER SEARCH IS COMPLETED AND DOCUMENTS SEIZED**

1. Set up an appointment to meet with your client and discuss the issue of solicitor/client privilege and seek instructions. If your client instructs you to proceed and assert solicitor/client privilege then carefully follow the procedure that is required to advance a claim of a privilege.
1. If not familiar with the relevant provisions of the *Criminal Code* dealing with search warrants you should consult, on behalf of your client, a lawyer familiar with this area of the law. This lawyer will examine the validity of the search warrant to see whether or not an application should be made to quash the warrant or other related procedures should be taken to protect solicitor/client privilege.
2. If you are going to represent your client in this matter, completely familiarize yourself with the procedure that applies where a claim of privilege has been asserted.
3. If unable to contact/locate your client, you should assert solicitor/client privilege, and take whatever steps are needed to protect your clients' solicitor/client privilege interests before the Courts.