

The Adviser



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SEARCH & SEIZURE

The Practice Advisory Service receives requests from the profession from time to time regarding advice as to what to do when the Police or Revenue Canada representatives arrive to search the law office. Members should read carefully the relevant sections of the Statute pursuant to which the search is being conducted. Victor Paisley, Q.C., prepared a paper on the subject for the Professional Services Committee of the Canadian Bar Association. Checklists from that paper regarding searches pursuant to the Criminal Code, the Income Tax Act and the Provincial Offences Act are published here with the kind permission of Mr. Paisley and the CBA. The article should be in every law office. The full text of the paper may be purchased from the Canadian Bar Association, Suite 1700, 130 Albert St., Ottawa, Ontario, K1P 5G4.

PROCEDURE TO FOLLOW WHEN A LAW OFFICE IS TO BE SEARCHED PURSUANT TO A CRIMINAL CODE WARRANT

1. Ask to see and copy the warrant.
2. Determine whether the warrant contains an express provision affording a definite period of time for a claim of solicitor-client privilege to be made.
3. In the absence of such a provision request a reasonable opportunity to reveal the relevant documents specified in the warrant: suggest seven days. Reference: Criminal Code, Section 444.1(8); Re Joseph and Minister of National Revenue, (1985) 51 O.R.(2d) 658; Descoteaux v. Mierzwinski and Attorney General of Quebec et al, (1982) 70 C.C.C.(2d) 385.
4. Failing agreement with the officer in charge, confer with senior crown counsel in your jurisdiction to attempt to come to an agreement as to the time to be allowed.
5. Make copies of the documents about to be seized or record and identify the nature of documents that were seized.
6. Failing any agreement claim privilege for all documents that the officer wishes to seize.
7. Name the client on whose behalf the privilege is claimed. Criminal Code, Section 444.1(2)

8. The officer is not permitted to examine or copy the documents which he intends to seize but must place the documents in a package and seal and identify the package. Criminal Code, Section 444.1(2)(a)

9. Suggest that the Registrar of the Supreme Court act as custodian in lieu of the Sheriff of the District in which the seizure is made. Criminal Code, Section 444.1(2)(b)

10. Notify the client of the seizure and request his instructions.

11. Provided that the client instructs you to proceed, within 14 days from the date of seizure apply on two days notice to the Attorney General of the Province (in Criminal Code matters) or the Department of Justice (in Combines, Narcotics matters etc.), and to the client, apply to a judge of the Supreme Court for an order appointing a day within 21 days of the date of the order for the determination of the question whether the documents should be disclosed and for an order requiring the custodian to produce the document to the judge at that time and place. Criminal Code, Section 444.1(3)(a)

12. In the event that the documents were not copied or adequately recorded prior to seizure apply to the judge before whom the application to appoint the date of hearing is made for an order permitting the documents to be examined or copies to be made. Criminal Code, Section 444.1(9)

13. Serve a copy of the order appointing the hearing date on the appropriate Attorney General, the custodian, and the client within six days of the date of the order. Criminal Code, Section 444.1(3)(b)

14. Consider the appropriate affidavit to be filed in support of the motion - file a solicitor's affidavit rather than the client's in circumstances where it might not be appropriate to expose the client to cross-examination. For an illustration of procedure on the motion see R. v. Zaharia & Church of Scientology of Toronto (1985) 21 C.C.C. (3d) 118.

SEARCH AND SEIZURE
OF A LAW OFFICE UNDER
INCOME TAX ACT
(BILL C-84)

In general, the same procedure applies as set out in the Criminal Code Checklist with the following exceptions:

1. Where the seizure is pursuant to Section 231.1 and 231.2 of the Income Tax Act the seizing officer retains the documents which have been seized until they are produced to a judge as required by Section 232(4)(a)(2). An application to a judge for an order fixing a date for the determination of the question of privilege is brought within 14 days after the date of seizure on three clear days notice of motion to the Deputy Attorney General of Canada. Income Tax Act, Section 232(4)(a)(1) (Bill C-84).

2. A copy of the order of the judge fixing the hearing date is served upon the Deputy Attorney General of Canada and where applicable on the custodian within six days of the date on which it was made and the custodian is paid the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it. Income Tax Act, Section 232(4)(b) (Bill C-84).

3. Where a claim of privilege has been made in respect of a named client the lawyer making the claim for privilege shall at the same time communicate to the Minister the address of the client last known to the lawyer so that the Minister may endeavour to advise the client of the claim of privilege that has been made on his behalf and thereby afford him an opportunity of waiving the claim of privilege before the matter is to be decided. Income Tax Act, Section 232(14) (Bill C-84).

4. Section 232(15) of Bill C-84 provides:

"No person shall hinder, molest or interfere with any person doing anything that he is authorized to do by or pursuant to this section or prevent or attempt to prevent any person doing any such thing and, notwithstanding any other Act or law, every person shall, unless he is unable to do so do everything he is required to do by or pursuant to this Section."

PROCEDURES TO PROTECT SOLICITOR-CLIENT
PRIVILEGE PURSUANT TO THE
PROVINCIAL OFFENCES ACT,
R.S.O. 1980, c. 400, SECTION 144

The following are the significant differences between the procedure set out in the Criminal Code, Section 444.1 and the Provincial Offences Act, Ontario, Section 144.

1. The seizing officer places the seized documents in the custody of the clerk of the court in the jurisdiction of which the seizure was made. Provincial Offences Act, Section 144.1(b)
2. The application for an order to determine the question of privilege is made not later than thirty days after the date of which the document was placed in custody. Provincial Offences Act, Section 144(5)
3. The application is made to a provincial court judge or a district court judge. Provincial Offences Act, Section 92(1)(c)
4. The person who seized the document and the Attorney General of the province are parties to the application and are entitled to at least three days notice thereof. Provincial Offences Act, Section 144(6)