



The police have arrived at your firm's office and are demanding to execute a search warrant. As your heart rate increases and the officers march through the office door, many questions about the rights and duties of both the police and you, the lawyer, will run through your head.

when the police come calling: the law office search

The law

Fortunately, the law governing law office searches has recently been simplified so that most of the decisions that need to be made do not have to be made in the hectic period while the police are present. Now, most decisions can be deferred to a point after there has been time for reflection.

For many years, law office searches were governed by the common law. Then, in 1985, Parliament enacted a legislative scheme to replace the common law. In its most recent incarnation, that scheme is found in section 488.1 of the *Criminal Code*. Unfortunately, section 488.1 was found constitutionally wanting by the Supreme Court of Canada in *Lavallee, et al v. Canada*.¹ The Court struck down s.488.1 and imposed a new common law approach that was summarized in ten principles, numbers 4 to 8 of which follow:

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.

For present purposes, the most important of these principles is #4, which requires that all material taken from a law office be sealed *before* it is either examined or seized by the police, thereby relieving you from the need to assert privilege on the spot, and moving the resolution of that issue to a later date.

Help!

However, there are still things to think about when the police arrive. For many lawyers, the search will be unexpected and traumatic. The combination of surprise, an exigent situation, and the fact that search and seizure law may be outside your

sphere of expertise, suggests that the thing to do first is to call for the assistance of a senior criminal law practitioner who can give advice about your rights and obligations.

In addition to ensuring that the police do not exceed their powers and that your clients' privileges are protected, you may also be concerned to determine whether you or your firm are otherwise involved in the criminal investigation, either as a target or as a victim of the alleged offence. If you are a target, better to have an independent lawyer act as the point of contact with the police. If you are a victim, an independent lawyer will allow you to avoid any conflict of interests with the client who is the subject of the search.

Moreover, as a practical matter, an independent criminal lawyer will be detached from the anxiety that may accompany the search of your office, will not be fazed by the presence of police officers, and may actually know the officers personally. His or her presence



Ian Smith

will be a welcome buffer between you and the search and should assist in making the event go as smoothly as possible.

The warrant

No law office search should be conducted without a warrant. Therefore, your first duty is to inspect the warrant. Make a copy of it. Ensure that it identifies your 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. The warrant should also sufficiently identify both the offence under investigation and the client whose files are sought. Inspect the warrant for any deficiency that is obvious on its face. Finally, look for terms attached to the warrant for its execution.

Co-operation

Although there are many potential deficiencies to any given warrant, and it may be wise to have the police note your objections “for the record,” unless the warrant is obviously and ridiculously deficient, it is generally good advice that you should co-operate with the police during their search. The lawyer who purports to stop the search on technical grounds runs the risk of being charged with obstruction and making a complicated situation even more difficult. There will be plenty of time later to make objections to the warrant or the manner of the search. In the meantime, co-operate and instruct your staff to do likewise. In this way, the search will be faster and less intrusive.

Focusing the search

In *Lavalee*, the Court emphasized that every effort must be made to ensure that the encroachment on privilege that flows from a law office search be minimized. Fundamental to this principle is the idea that the police should seize no more evidence than is necessary or authorized by the warrant. You can ensure that this principle is honoured.

The warrant should identify what the police are looking for. It is the lawyer on the file who is best placed to assist them in finding that and no more. In consultation with the officer in charge, you and (if you’ve accepted my earlier advice) independent criminal counsel should be able to establish a protocol for the search that allows the relevant lawyer to gather the documents (both paper and electronic), to satisfy the officer that all relevant evidence has been collected, and to allow the police to seal the documents and leave. You or independent counsel should be present as the documents are being sealed in order to make an inventory and copies of what is seized, to ensure that the police are not examining the documents before they are sealed, and to ensure that the sealed packages are marked for future identification.

While there is no *duty* to assist the police, practically speaking, your assistance will minimize both encroachments on privilege and the disruption of your practice.

Claiming privilege

While it is no longer strictly necessary to claim privilege during the search, it is still prudent to do so over everything seized. Ensure that the police have recorded that claim. If necessary, prepare it in writing while the search is ongoing so that the police can take it with them.

Notifying the client

It is the client’s privilege, not yours, and the client has a right to know that his or her privilege is at risk due to the search. While *Lavalee* put the duty to notify on the state, you should also take steps to alert your client so that he or she can decide whether to be present to assert privilege.

Notifying the Law Society

Where the lawyer or client cannot be located, the Law Society may act as a surrogate for either or both them, and ensure that the search is carried out in compliance with the warrant’s terms and the *Lavalee* principles. In these circumstances, if the police have not already done so, the Law Society should be alerted to the fact of the search and invited to attend.

Don’ts

To state the obvious: Do *not* do anything that could be construed as an obstruction of the police. Do not remove, hide or shred documents, and do not instruct your staff to do so. Let the police find what they are looking for. Otherwise, you will *really* need criminal counsel.

After the search

The most difficult steps can be left for later, when there has been time to reflect, to retain or refer the client to criminal counsel, to examine the seized documents, and to determine whether privilege should be asserted. It may be that counsel and the Crown can resolve questions of privilege. Failing that, privilege can be asserted and litigated.

There will also be opportunities to challenge the search. This is done either by way of *certiorari* to have the warrant quashed on jurisdictional grounds; or at trial under section 8 of the *Charter* (the right to be free from unreasonable search and seizure) in order to deem the fruits of the search inadmissible pursuant to section 24(2) of the *Charter*.

Ian Smith is a partner with Fenton, Smith Barristers in Toronto.

This is an abbreviated version of Mr Smith’s paper. The full version is available at www.lawpro.ca/news.

¹ *Lavalee, et al. v. Canada*, [2002] 3 S.C.R. 209.