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A Privileged Profession: Searches of Lawyers' Offices

Festing v. Canada (Attorney General), 2001 BCCA 612,
159 C.C.C. (3d) 97, 2001 CarswellBC 2457

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Every criminal lawyer knows that section 487 of the *Criminal Code* authorizes warranted searches (see sidebar). Most criminal lawyers know that section 488.1 provides for claims of solicitor/client privilege to be made during such a search, and lays out a procedure for what follows. What no-one knows, at this point, is whether, and to what extent, those statutory provisions will eventually be held to be constitutionally valid.



In *Festing*, the real issue was whether section 488.1 provides enough protection against seizure of privileged documents. The section allows for privilege claims to be asserted during the course of a warranted search, but sets out a number of restrictions on this. For example, the section appears to require that the claim be made by the responsible lawyer while the search is in progress and before the documents in question have been seized, and the lawyer must name the client. The client or lawyer then has just fourteen days to set in motion the court procedure for evaluating the claim of privilege.

A procedure has generally been followed in British Columbia, whereby the Law Society is first notified by the officer seeking to execute a warrant at law offices. The idea is that the Law Society can then, if it chooses, have a representative attend at the time of the search. Further, the lawyer whose office is to be searched is generally advised to call the Law Society for guidance. Time is then allowed for consultation before the search proceeds.

If, though, the lawyer is not at the office when the

continued on page 50...

INSIDE THIS ISSUE

49 *A Privileged Profession: Searches of
Lawyers' Offices*

50 Statutory Provisions

54 Cases Cited

55 Cumulative Index

56 Focus YOUR Criminal Appeal

continued from page 49...

officers attend, all they have to do is contact the Law Society to let them know what is happening, and they are then entitled to enter by force.

The Majority

Prowse J.A. wrote for the majority, Donald J.A. concurring. She found that section 488.1 violates *Charter* section 8 for the following reasons:

- the lack of any provision for notice to affected clients, so that a client can lose or be deemed to have waived privilege by default;
- exacerbation of this problem by the strict time limits contained in subsection 488.1(3) (see sidebar), particularly where a lawyer is trying to deal with the seizure of multiple files belonging to more than one client;
- the provision in paragraph 488.1(4)(b) by which the Crown may be allowed to view a document during the proceeding held to determine whether or not the document is indeed privileged; and
- the requirements to name clients.

Having found a section 8 breach, Prowse J.A. felt that it was not necessary to go on and consider whether the provisions also breach section 7.

“Rather than preserving or extending the protection of solicitor-client privilege available at common law, the impugned subsections of s. 488.1 had the opposite effect. Amongst other deficiencies, these provisions permitted solicitor-client privilege to be lost by default, or deemed waived, within an unduly-restricted time frame and without provision for notice to clients.”

Prowse J.A. went on to undertake a section 1 analysis, and concluded that the impugned components of section 488.1 failed on the second branch of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The provisions were not shown to be rationally connected to the overall objectives of the section, and more than minimally impaired clients’ rights to privacy. She agreed with Romilly J.’s comment at trial that the section “goes too far in insuring expediency and efficiency and not far enough in protecting the privacy rights of clients whose files are seized” ([2000] 5 W.W.R. 413 (B.C. S.C.)).

STATUTORY PROVISIONS

Criminal Code s. 487:

- (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
- (c.1) any offence-related property,
- may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.
- (2.1) A person authorized under this section to search a computer system in a building or place for data may
- (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
- (b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;
- (c) seize the print-out or other output for examination or copying; and
- (d) use or cause to be used any copying equipment at the

continued on page 51...

place to make copies of the data.

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(b) to obtain a hard copy of the data and to seize it; and

(c) to use or cause to be used any copying equipment at the place to make copies of the data.

Criminal Code s. 488.1:

(1) In this section,

“custodian” means a person in whose custody a package is placed pursuant to subsection (2);

“document”, for the purposes of this section, has the same meaning as in section 321;

“judge” means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

“lawyer” means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor;

“officer” means a peace officer or public officer.

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(a) seize the document and place it in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(a) within fourteen days from the day the document was

Prowse J.A. also noted concerns raised by counsel regarding the general computerization of law office records and files. Where a computer hard drive is seized, of course, private information belonging to large numbers of clients may be taken along with the file sought. This potential complexity was cited as just one of the reasons for the Court to strike down the legislation, rather than attempt the legislative exercise of reading down or reading in.

The Court declared section 488.1 to be of no force and effect, but suspended implementation of that remedy pending the decision of the Supreme Court of Canada in a number of other cases currently under consideration by that body.

The cases awaiting judgment from the highest court are *R. v. Lavallee, Rackel & Heintz* (2000), 143 C.C.C. (3d) 187 (Alta. C.A.); *R. v. Claus* (2000), 149 C.C.C. (3d) 336 (Ont. C.A.); *Canada (Attorney General) v. Several Clients*, [2000] N.S.J. No. 384 (C.A.) and *White, Ottenheimer & Baker v. Canada (Attorney General)* (2000), 146 C.C.C. (3d) 28 (Nfld. C.A.) (“*White*”). Only in *White* did the court seek to avoid striking down the impugned section by an exercise of severance and reading in.

“Section 488.1 contains several deficiencies of a fundamental nature. There may well be other deficiencies which have not yet been identified. In that regard, counsel referred to emerging problems relating to solicitor-client confidentiality arising from advances in technology and changes in the way in which lawyers practise law which may require more refined approaches to the protection of solicitor-client privilege.”

Having provisionally struck down section 488.1, Prowse J.A. next turned her attention to section 487, and the question of whether that provision could be said to be unconstitutional, there now being nothing in the statute to protect privileged documents from seizure.

She first noted Romilly J.’s confidence that the common law (*Descoteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) (“*Descoteaux*”)) adequately protected privileged material via the discretion of the authorizing

justice to place restrictions on search warrants, or via constitutional remedies where such restrictions were inadequate. The Ontario Court of Appeal had come to the same conclusion in *R. v. Piersanti & Co.*, [2000] O.J. No. 4842 (C.A.).

Prowse J.A. drew a critical distinction: justices of the peace do not have jurisdiction to issue warrants for the seizure of documents protected by solicitor-client privilege, yet section 487 purports to authorize warrants for the seizure of other documents in circumstances where it is almost inevitable that privileged documents will also be inspected or seized. Is this constitutionally acceptable?

In *Descoteaux*, Lamer J. had held that a justice in such a situation must include conditions in the warrant that would limit, as far as possible, breaches of privilege. He had suggested that Parliament might craft provisions that would, in effect, formalize such protective conditions. What Parliament had crafted was section 488.1. Having struck down that section as deficient, the majority of the B.C. Court found that section 487, to the extent it purported to authorize searches of law offices, was a violation of section 8 of the *Charter*. The remedy was to read in the words “other than a law office” (earlier in her reasons, Prowse J.A. had acknowledged that a “law office” would logically encompass any place that a lawyer might be expected to keep client files and documents, including his or her home. Implementation of this remedy too was suspended pending the outcome of the related appeals to the Supreme Court of Canada. .

The Dissent

Newbury J.A. disagreed with the majority in all respects. In respect of section 488.1, she would have had the Court engage in the sort of legislative exercise shunned by Prowse J.A., and in respect of section 487, she would have left its shortcomings for the common law to remedy. In the course of her reasons, she also gave a useful overview of the history and significance of solicitor/client privilege in Canada.

As noted by Lamer J. (as he then was) in *Descoteaux*, *supra*, the modern justification for the substantive principle reflects the 18th Century origins of what was at the time a rule of evidence. That was a time when the professional immunity of the lawyer was being challenged in the search for truth, but was being replaced

so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.

(4) On an application under paragraph (3)(c), the judge

(a) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(b) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;

(c) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(d) shall determine the question summarily and,

(i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor-client privilege or to the client, or

(ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(d) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(b), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(a), or that following such an application no further application has been made under paragraph (3)(c), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

(7) Where the judge to whom an application has been made under paragraph (3)(c) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and that the package is resealed without alteration or damage.

(10) An application under paragraph (3)(c) shall be heard in private.

(11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*.

by a protection for the client and his confidences, without which, it was felt, an adversarial legal system could not function effectively. In Canada and in modern times, the privilege has developed into a “fundamental civil and legal right” (*Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 at 839; *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 at 383 (S.C.C.)).

Newbury J.A. went on to remind the reader of the apparent conflict between this fundamental—and fundamentally justified—right and the desire to get at the truth, and the distinction, often overlooked, between matters that are privileged and those that are merely confidential.

“Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created, nor expansively construed, for they are in derogation of the search for the truth.”

Newbury J.A. noted that a Special Committee of the Ontario Branch of the Canadian Bar Association had delineated the following list of elements that must be present before any privilege will be held to exist:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosing of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Regarding lawyers in particular, those four requirements are amended or augmented by four others, as follows:

1. There must be a communication, whether oral or written.
2. The communication must be of a confidential nature.
3. The communication must be between a client (or his agent) and a legal advisor.
4. The communication must be directly related to the seeking, formulating, or giving of legal advice.

In Newbury J.A.’s view, this expression of the definition

of solicitor/client privilege—and a history of judicial expressions of trust and hope—should be sufficient, via informal and variable mechanisms such as British Columbia’s “Special Procedures” (alluded to above, and the authorship of which seems to be a mystery), to guide justices authorizing searches and seizures of confidential materials from law offices. She also noted that there does appear to be a further safeguard in the common law allowing invocation of a privilege to prevent seizure under a search warrant and as a ground for quashing that search warrant, though it was not explained how the magic of such an invocation might overcome the momentum of officers acting under the impetus of the procedures currently set out in section 488.1.

Finally, Newbury J.A., dismissing the concerns of the majority about the several impediments placed by the section in the way of a lawyer intent on protecting his clients’ documents, cited the well-established duty of such a lawyer not to divulge confidential communications as providing a sufficient safeguard: after all, as the trial judge in *R. v. Fink* (2000), 143 C.C.C. (3d) 566 (Ont. S.C.J.), rev’d (2000), 149 C.C.C. (3d) 321 (Ont. C.A.) had asserted, that is what the client retains the lawyer to do...

At the time of writing, the Supreme Court of Canada had heard, but not ruled on, the collection of cases from other provinces referred to above. Time will tell whether the steely security of this particular “fundamental civil and legal right” can withstand the notorious and determined safe-crackers of the Law-and-Order Gang.



CASES CITED

<i>Canada (Attorney General) v. Several Clients</i> , [2000] N.S.J. No. 384 (C.A.)	51
<i>Descoteaux c. Mierzwinski</i> , [1982] 1 S.C.R. 860 (S.C.C.).....	51
<i>Festing v. Canada (Attorney General)</i> , [2000] 5 W.W.R. 413 (B.C. S.C.)	50
<i>Goodman Estate v. Geffen</i> , [1991] 2 S.C.R. 353 (S.C.C.).....	53
<i>R. v. Claus</i> (2000), 149 C.C.C. (3d) 336 (Ont. C.A.).....	51
<i>R. v. Fink</i> (2000), 143 C.C.C. (3d) 566 (Ont. S.C.J.), rev’d (2000), 149 C.C.C. (3d) 321 (Ont. C.A.).....	54
<i>R. v. Lavallee, Rackel & Heintz</i> (2000), 143 C.C.C. (3d) 187 (Alta. C.A.)	51
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103 (S.C.C.)	50
<i>R. v. Piersanti & Co.</i> , [2000] O.J. No. 4842 (C.A.).....	52
<i>Solosky v. Canada</i> (1979), [1980] 1 S.C.R. 821	53
<i>White, Ottenheimer & Baker v. Canada (Attorney General)</i> (2000), 146 C.C.C. (3d) 28 (Nfld. C.A.)	51

Cumulative Index

	page
Abetting.....	25
Break and enter.....	33
<i>Festing v. Canada (Attorney General)</i> , 2001 BCCA 612, 159 C.C.C. (3d) 97, 2001 CarswellBC 2457.....	49
Firearms, imitation.....	1
Marijuana, criminalization.....	9
Party liability.....	25
Privilege, Solicitor-Client.....	49
Probation, stale.....	17
<i>R. v. Barnhardt</i> , 2001 BCCA 191.....	25
<i>R. v. Ivan</i> (2000), 148 C.C.C. (3d) 295, 2000 BCCA 452.....	17
<i>R. v. Malmo-Levine</i> ; <i>R. v. Caine</i> (2000), 145 C.C.C. (3d) 225, 2000 BCCA 225.....	9
<i>R. v. Scott</i> , (2000), 145 C.C.C. (3d) 52, 2000 BCCA 220.....	1
<i>R. v. Schizgal</i> , 2001 BCCA 238.....	33
Solicitor-Client Privilege.....	49

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