



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Report to Convocation January 27, 2011

Professional Regulation Committee

Committee Members

Glenn Hainey (Chair)
Carl Fleck (Vice-Chair)
Julian Falconer
Patrick Furlong
Avvy Go
Michelle Haigh
Gavin MacKenzie
Ross Murray
Julian Porter
Judith Potter
Susan A. Richer
Sydney Robins
Baljit Sikand
William Simpson
Roger Yachetti

Purpose of Report: Decision and Information

**Prepared by the Policy Secretariat
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COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on January 13, 2011. In attendance were Glenn Hainey (Chair), Patrick Furlong, Avvy Go, Michelle Haigh, Ross Murray, Judith Potter, Susan A. Richer, Sydney Robins and William Simpson. Staff attending were Naomi Bussin, Terry Knott, Janice LaForme, Katie Rook, Jim Varro, Sheena Weir and Sophie Galipeau.

GUIDELINES FOR LAW OFFICE SEARCHES

Motion

2. That Convocation approve the Guidelines for Law Office Searches, for use by Ontario Lawyers. The Guidelines and Summary will be distributed as a separate document to Convocation.

Introduction and Background

3. In February 2007, Convocation approved in principle the Federation of Law Societies of Canada's Draft "Protocol on Law Office Searches" for purposes of consultation with relevant stakeholders on procedures in respect of such searches. The Federation's Protocol appears at **Appendix 1**.
4. The Federation's Protocol was prepared following the September 2002 decision of the Supreme Court of Canada in *R. v. Lavallee*,¹ in which the Court struck down s. 488.1 of the *Criminal Code* as unconstitutional. This section dealt with the procedures police officers were to follow in the execution of a search warrant on a lawyer's office.
5. The Federation's Protocol was intended for a lawyer's use when faced with a law office search. The Protocol is based on the principles articulated in *R. v. Lavallee* and the practical direction provided in the 2003 decision of the Ontario Superior Court of Justice in *R. v. Rosenfeld*.²

¹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2202] 3 S.C.R. 209.

² *R. v. Law Office of Simon Rosenfeld*, (2003), 108 C.R.R. (2d) 165, which involved the search of the office of an accused lawyer. The Law Society intervened in the case, addressing the issue of its involvement in the process. The Court made an order in respect of the process that follows the seizure in the first instance to notify potential clients regarding the issue of privilege. This involves the appointment by the Court of a referee who will review the seized documents and, in conjunction with the affidavit to be produced by the respondent lawyer, identify the clients who are to receive notice of a hearing to establish the process for determining the issue of solicitor-client privilege respecting the documents.

6. The other Canadian law societies rely on the Protocol as the document that governs law office searches. The Protocol has been generally accepted by the respective Ministries of the Attorney General and law enforcement officials in these provinces and territories. Judicial notice of the Federation's Protocol appeared in an Alberta Queen's Bench decision, where the judge addressed the issue relating to a search of a lawyer's office and commented on the process that included the Federation's Protocol.³
7. In 2007, the experience in Ontario was different. The processes outlined in *R. v. Lavallee* and reflected in the Federation's Protocol were applied unevenly. Since the Supreme Court of Canada decision in *R. v. Lavallee* the Law Society has been involved in several proceedings to protect solicitor-client privilege. The Law Society needed to challenge, in Court, the positions sought to be taken by law enforcement officials that varied from the appropriate application of the principles set out by the Supreme Court of Canada for law office searches.
8. Because of these issues and with a view to ensuring a consistent approach that is in keeping with the common law, the Committee determined that the Law Society needed to address with the Ministry of the Attorney General and any other relevant stakeholder issues relating to the application and observance of the Federation's Protocol.
9. The Committee reviewed the Federation's Protocol in 2007 and recommended to Convocation that it be approved in principle for the purpose of consultation. In February 2007, Convocation approved the Federation's Protocol in principle as the working document for the purposes of its consultation with the Ministry of the Attorney General and other legal and law enforcement organizations.

³ *R. v. Tarrabain, O'Byrne & Company*, 2006 ABQB 14. The Court said:
In furtherance of this object, Mr. Lepp, the Director of Special Prosecutions for the Province of Alberta, contacted the Law Society of Alberta to seek advice. He did so because this was the first time in his experience that a member of the Law Society was a potential target of the investigation being undertaken. In the past, Mr. Lepp had been involved in many searches of law offices where a client of the firm was the target of the investigation. *A protocol with the Law Society covered this situation*. Because this was a unique occurrence, he felt that the Law Society should be consulted. He wanted to ensure compliance with *Lavallee*. Any advice that the Law Society could provide, because of the important role it plays in the regulation of the profession in the Province, was welcome. (emphasis added)

The Consultation Process

10. Following the approval by Convocation in February 2007, a new document, the Guidelines for Law Office Searches, was prepared. The Guidelines incorporated much of the content of the Federation's Protocol in a more accessible document for lawyers and law enforcement personnel. The document was prepared in anticipation of the consultation that Convocation authorized.
11. In the spring of 2008, prior to completion of the draft, Law Society staff discussed the Federation's Protocol with representatives of the Ministry of the Attorney General and received their comments.
12. A draft of the Guidelines for the purpose of the more formal consultation was completed by the summer of 2008.
13. The first phase of consultation occurred in the late summer and fall of 2008. Forty-one legal and law enforcement organizations were invited to review and offer comment on the draft 2008 Guidelines. Twenty of these organizations participated and provided comment and feedback, either in writing or through meetings at the Law Society. The legal and law enforcement organizations invited to participate and those that participated appear at **Appendix 2**.
14. The majority of the phase one participants saw value in having law office search guidelines. However, it became apparent during the consultation that there was a need to reconsider the content of the draft 2008 Guidelines, based on consistent feedback from the participants about the nature of the document. The consultation was interrupted at this point to revise the document based on the information received to that point.
15. David W. Stratas, now Justice David W. Stratas, contributed to this revision prior to his appointment to the Federal Court of Appeal. Lindsay MacDonald, a Vancouver lawyer and former counsel to the Law Society of Alberta, also contributed to the development of the Guidelines. Mr. MacDonald was a member of the Federation committee that drafted

the Federation's Protocol and appeared as counsel for the Law Society of Alberta in *R. v. Lavallee*.

16. The revision of the Guidelines was completed in April 2010. As directed by the Committee, on May 10, 2010, the redrafted Guidelines were circulated to the twenty legal and law enforcement organizations who had participated in the first phase of consultation with an invitation to provide comment.
17. As part of this second phase of consultation, the redrafted Guidelines were sent, with an invitation to provide comment, to the Ministry of the Attorney General, the Department of Justice, the Public Prosecutions Services Canada, the Ontario Crown Attorneys' Association, the Federal/Provincial/ Territorial Heads of Prosecution and the Federation of Law Societies. These legal organizations were not part of the first phase of consultation. This second phase of consultation took place in the late spring and summer of 2010.
18. Eighteen legal and law enforcement organizations of those invited to participate in the second phase of consultation provided written comment and feedback to the Law Society. The legal and law enforcement organizations invited to participate in the second phase of consultation and those that participated appear at **Appendix 3**.

Overview of the Guidelines

19. The Guidelines for Law Office Searches and Summary are the product of the consultation process undertaken by the Law Society and consideration by the Committee of the feedback received from respondents.
20. The Guidelines begin with a summary setting out the various steps, in a checklist format, that a lawyer should take when facing a search warrant for a law office search. The substance of the Guidelines follows this summary and in some detail addressed electronic and paper searches. The document ends with an appendix setting out the guidelines expressed by Justice Arbour in *R. v. Lavallee*.

21. The section of the Guidelines on their purpose and scope includes a statement that members of the public and law enforcement personnel are invited to read and use the Guidelines. In time, an online version will be available on the Law Society's website.
22. The Guidelines cover the matters that require attention when a law office is the subject of a search warrant, including:
 - a. Determining the validity of the warrant;
 - b. Asserting solicitor-client privilege;
 - c. Determining the need for a referee;
 - d. Determining the need for a forensic computer examiner; and
 - e. Post-search procedures.

Comment and Feedback Received from Phase Two Participants

23. The majority of the legal and law enforcement organizations that participated in the consultation process continue to see value in having law office search guidelines available to assist lawyers.
24. The comment and feedback about the redrafted Guidelines from the legal and law enforcement organizations that participated in the second phase of consultation are included in a separate document that is available to Convocation.⁴

Recent Case Involving a Law Office Search

25. As a recent example of the Court's treatment of solicitor-client privilege arising from the search of a lawyer's office, attached at **Appendix 4** is the decision of the Superior Court of Justice in *Attorney General v. Law Society*, 2010 ONSC 2150 (April 20, 2010). In this case, the Law society responded in an application to unseal and access seized computers and computer devices pursuant to a search warrant on the law office of Bradley Sloan, who was charged with possession of child pornography.

⁴ Based on permission of the respondents.

26. In following the guidelines based on the *R. v. Lavallee* decision, the Court appointed an independent Referee (for the purposes outlined in the Guidelines in this report), and an independent Computer Forensic Examiner to oversee the extraction, secure storage, examination and organization of computer files/images that related to the charges against Mr. Sloan.



Protocol on Law Office Searches

A Proposed Draft Protocol to address searches and seizures of documents from law offices

As at October 15, 2004

Scope

This protocol applies to all searches and seizures and statutory demands for the production of documents or materials of, at or from a law office, whether by way of search warrant or production order or letter of demand or notice of requirement to produce from the Canadian Revenue Agency, or other agency.

This protocol applies to cases where:

1. the lawyer whose office will be searched is a target of the investigation or
2. the documents are not precisely named in the Warrant to Search or
3. the lawyer is not present at the time the Warrant to Search is executed to produce the documents.

For the purpose of this Protocol,

“document” means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade marks or articles of commerce or inscriptions on stone or metal or other like materials;

“law office” means any place where privileged materials may reasonably be expected to be located;

“referee” means a lawyer, independent of the Crown and the lawyer whose law office is the target of the search, who has been appointed by the Court or, in Quebec, by the Barreau du Québec or the Chambre des notaires du Québec as directed by the judge authorizing the Warrant, to perform the obligations listed in this protocol.

Preamble

1. Since the decision in *Lavallee, Rackel & Heintz v. Canada (Attorney General)* (2002) 216 D.L.R. (4th) 257 (S.C.C.)⁵, there has been no section of the *Criminal Code* governing the activities of persons executing warrants to search a law office and what happens to documents that are seized under the authority of the warrant to search. The *Lavallee* decision points out that client names' may be privileged and the *Maranda v. Richer* 2003 SCC 67 decision says that lawyers' statements of account and payment details may be privileged.
2. It is desirable in the public interest for the Federation of Law Societies (“Federation”) and the Federal Department of Justice to agree on a protocol relating to searches and seizures of lawyers' files which will put in place sufficient protection for solicitor-client privilege.
3. In *R. v. Law Office of Simon Rosenfeld* [2003] O.J. No. 834 (Ont. Sup. Ct. Justice)⁶, Nordheimer J. stated that it was the Court's responsibility to protect solicitor-client privilege and not that of the Law Society and that the Crown should bear any costs associated with searches and seizures. He concluded that the way to protect the privilege was to appoint a referee to review the seized documents.

Procedure

4. Where a Warrant to Search authorizes the search of a law office, the following procedure shall be observed:
 - a. In each Province and Territory, the local law society and the Federal and Provincial or Territorial Attorneys General will jointly develop a roster of lawyers who have agreed to act as referees in that jurisdiction. If agreement on the roster in a jurisdiction cannot be reached, the law society shall, at the request of

⁵ The *Lavallee* decision is available at : <http://www.canlii.org/ca/cas/scc/2002/2002scc61.html>

⁶ The *Rosenfeld* decision is available at : <http://www.canlii.org/on/cas/onsc/2003/2003onsc10974.html>

the Court, propose the names of at least three appropriate individuals for the court's consideration.

- b. Before executing a Warrant to Search a law office, the prosecuting authority shall apply to the superior court for the appointment of an independent referee to
 - i. search for and seize the documents as required by the Warrant,
 - ii. maintain the continuity and the confidentiality of the documents,
 - iii. examine the documents in accordance with the procedures established in the Protocol.
- c. Before attending at the law office named in the Warrant to Search, the Peace Officer in charge of executing the Warrant shall advise the local law society of the existence of the Warrant to Search a law office and the time and date of the search, in order that the (local law society) may designate a representative to be available to attend at the search on its behalf, if it sees fit to do so.
- d. The Peace Officer in charge of executing the Warrant to Search shall make every effort to contact the lawyer whose law office is named in the Warrant to Search at the time of the execution of the warrant, and shall advise the lawyer that he or she may immediately contact the local law society for guidance regarding the lawyer's obligations resulting from the execution of the Warrant to Search.
- e. No acts authorized by the Warrant to Search shall take place until procedures 4(a) through 4(d) are followed and until the referee has had an opportunity to attend the law office, save and except that the Peace Officer in charge of executing the warrant may, with reasonable notice to a representative of the (local law society) of the intention to do so, enter the law office only in order to permit the Peace Officer to secure the premises of the search to prevent the removal of any articles from those premises.
- f. All documents seized pursuant to the Warrant to Search shall be placed by the referee in packages, sealed, initialed, and marked for identification.
- g. Upon completion of the execution of the Warrant to Search, the Peace Officer executing the Warrant and the referee shall deliver the seized documents into the custody of the Court.
- h. Every effort must be made to contact all clients of the lawyer whose solicitor-client privilege may be affected by the Warrant to Search at the time of the execution of the Warrant. Where such notification cannot be made, the referee will recommend to the court the proper process for notifying all clients whose solicitor-client privilege may be affected by the Warrant to Search, which may

include a recommendation that advertisements be placed in the relevant media if the referee is of the view that such a step is necessary.

- i. The referee shall notify all clients who can be identified of the process that will be followed respecting the documents so that those clients may participate in that process for the purpose of protecting their privilege over the documents.
- j. The referee shall report to a judge of the superior court the efforts made to contact all potential privilege holders, who will then be given a reasonable opportunity to assert a claim of privilege over the seized documents and, if that claim is contested, to have the issue decided by a judge of the court in an expeditious manner.
- k. If notification of potential privilege holders is not possible, the referee shall examine the seized documents to determine whether a claim of privilege should be asserted, and will be given a reasonable opportunity to do so.
- l. All fees and disbursements of the referee shall be borne by the Attorney General.
- m. The Attorney General may make submissions to a judge of the court on the issue of privilege, but shall not be permitted to inspect the seized documents.
- n. Where the sealed documents are determined by the Court not to be privileged, they shall be released to the peace officer(s) and used in the normal course of the investigation, subject to any direction by the court.
- o. Where the seized documents are determined by the Court to be privileged, they shall be returned to a person designated by the Court.

Phase One Participants

1. Advocates' Society
2. County and District Law Presidents' Association
3. Criminal Lawyers Association
4. Di Luca, Joe
5. Durham Regional Police Service
6. Halton Regional Police Service
7. LawPRO
8. Law Society of Alberta
9. Law Society of British Columbia
10. London Police Service
11. Metropolitan Toronto Police Service
12. Niagara Regional Police Service
13. Ontario Bar Association
14. Ontario Provincial Police
15. Peel Regional Police Service
16. Royal Canadian Mounted Police
17. Toronto Lawyers Association
18. Treaty Three Tribal Police Service
19. Windsor Police Service
20. York Regional Police Service

Organizations Invited but did not Participate

1. Akwesane Mohawk Police
2. Anishinabek Police Service
3. Barrie Police Service
4. First Nations Chiefs of Police Association
5. Greater Sudbury Police Service
6. Hamilton Police Service
7. Kingston Police Force
8. Lac Seul Police Service
9. Mnijikaning Police Service
10. Nishnawbe-Aski Police Service
11. Ontario Association of Chiefs of Police
12. Ottawa Police Service
13. Sarnia Police Service
14. Sault Ste. Marie Police Service
15. Six Nations Police Service
16. Thunder Bay Police Service
17. United Chiefs & Council of Manitoulin Anishnaabe Police Service
18. Walpole Island Police Service
19. Waterloo Regional Police Service
20. Wikwemikong Tribal Police Service
21. Tyendinaga Mohawk Police

PHASE TWO CONSULTATION

Phase Two Participants

1. Advocates' Society
2. County and District Law Presidents' Association
3. Criminal Lawyers Association
4. Department of Justice
5. Federal/Provincial/ Territorial Heads of Prosecution*
6. Halton Regional Police Service
7. LawPRO
8. London Police Service
9. Ministry of the Attorney General
10. New Brunswick Office of Public Prosecutions
11. Niagara Regional Police Service
12. Ontario Bar Association
13. Public Prosecution Service of Canada*
14. Royal Canadian Mounted Police – Headquarters - Ottawa
15. Royal Canadian Mounted Police – The Province of Ontario
16. Toronto Lawyers Association
17. Treaty Three Tribal Police Service
18. Windsor Police Service

Organizations Invited but did not Participate

1. Durham Regional Police Service **
2. Federation of Law Societies
3. Law Society of Alberta **
4. Law Society of British Columbia **
5. Metropolitan Toronto Police Service **
6. Ontario Crown Attorneys' Association
7. Ontario Provincial Police **
8. Peel Regional Police Service **
9. York Regional Police Service **

* Mr. Brian Saunders prepared a joint response in his capacity as Director of Public Prosecution Services of Canada and as permanent Co-Chair of the Federal/Provincial/Territorial Heads of Prosecution

**These organizations participated in the first phase of the consultation process

Background

[2] Bradley Sloan is a lawyer with an active practice in criminal defense work in Timmins and the coastal communities of James Bay. He was arrested for possession of child pornography on November 21, 2009. On the same day, warrants to search his law office and residence for computers and computer devices were executed within the presence of a member of the Law Society of Upper Canada (Law Society). Eight computers were seized, sealed and placed in the custody of the police, “until ordered opened by a judge of the Superior Court of Justice”. The search warrants have not been challenged.

[3] A protocol to continue the investigation of the seized devices was negotiated between counsel for the Attorney General and the defendant and the Law Society. The parties jointly recommend this negotiated protocol for the Court’s consideration. All terms for the continued search have been agreed upon but for two important aspects which they bring to this court for a determination. The defendant did not appear before the court. Counsel for the defendant advised the court through counsel and by letter that he is content with either of the proposed protocols for continuing the investigation.

[4] The protocol as agreed provides for:

- the appointment of an Examiner; a forensic computer specialist to conduct forensic procedures on the seized devices to enable the Timmins Police Service and the Crown to obtain relevant evidence (the non-privileged graphic images of alleged child pornography);
- the appointment of a Referee; a lawyer whose role is to assist the Court in ensuring that the procedure followed for the searching of seized devices maximally protects the solicitor-client privileges of the solicitor’s clients. It is the intention to return copies of those privileged files through the Court, to the defendant;
- the Examiner to create an EnCase forensic image of the physical drive from each original computer;
- the Examiner to conduct further forensic searching of the EnCase images instead of working directly with the contents of the actual seized devices, in order to preserve the integrity of the contents on the seized devices;
- The forensic investigation to take place with the use of certain programs which ‘tease out’ child pornography without the need to view privileged files. The offensive material would be stored on an external storage device to be sealed pending a Crown application to unseal;
- The Examiner to file with the court a report chronicling his work.

[5] The Law Society was of the view that the participation of the Examiner could establish a demonstrably independent process for the imaging of the seized devices and thereby remove any suggestion, perception or possibility that any member of law enforcement could obtain access to any of the privileged files on the seized devices.

[6] The narrow issue in dispute is where the imaging of the computers will take place and where the seized devices (primarily computers) will be stored pending trial. The Attorney General proposes that the imaging and the storing of the seized devices take place at the Timmins Police Service in Timmins. The Law Society proposes that the imaging and storing take place at either the Superior Court in Timmins or at the Examiner's National Discovery Centre in Toronto. With respect to storage at the Superior Court, the Law Society submits that the seized devices should be placed in secure storage in accordance with the accepted practices of the Superior Court of Justice for the filing of court documents and exhibits. In this decision, I will focus more on the issue of the storage of the seized devices inasmuch as the arguments of the Law Society were primarily directed to on this issue. I will deal peripherally with the issue of where the imaging should take place.

The Law

[7] In *R. v. Lavallée, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, the Supreme Court of Canada confirmed that solicitor-client privilege is a fundamental civil and human right. From the moment when the police learned of the possibility of the offensive material on the subject computers in November 2009, they have demonstrated their keen appreciation of this privilege. The police application for the search warrant recommended terms for the execution of the warrant which included the presence of an independent member of the Law Society and the immediate sealing of the computers seized from the law office and subjecting this matter to a further Superior Court order before any unsealing.

[8] While the Court in *Lavallée* struck down s. 488.1 of the *Criminal Code* for constitutional reasons, Justice Arbour set out 'principles that govern the legality of searches of law offices as a matter of common law'. The guidelines require that the documents seized (or in this case the computers), should be sealed and that every effort must be made to contact a representative of the Bar to oversee the sealing. There is no dispute that the police complied with these guidelines.

[9] A methodology or protocol for the continued investigation is necessarily complex inasmuch as it is not technically feasible to extract the privileged files from the computers and return the computers to the police without affecting the integrity of the underlying data. Nor is it feasible for the police to search for relevant evidence of child pornography without simultaneously observing the privileged and non-relevant privileged files, which, as a matter of law, are "out of reach of the state": *Lavallée* at para. 24.

[10] As the Attorney General submitted, there is no reference in *Lavallée* guidelines, to the place where the seized items shall be placed. The decision does not require that the sealed material be deposited with the court or indeed any non-police entity.

[11] The Law Society founded its argument in the following statement from *Lavallée*: "Unjustified or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences." (para. 49)

The Evidence

[12] The Attorney General called Detective Constable Darren Dinel to describe how evidence is stored within the police facility. He also explained the photographs of the secure storage facility at the Timmins Police Service and the system whereby lockers are sealed. Currently the seized devices are stored in an evidence locker. The locker is sealed on one side. On the other side it is accessible to the one individual who is responsible for the property room. No evidence from the evidence locker can be accessed except through her. The seized devices remain sealed in the sealed locker pending an order of this court. Once the EnCase images are made, the Timmins Police Service is proposing a separate and distinct storage locker within this property room for the seized devices pending trial or other resolution of these offences.

[13] The Law Society filed an affidavit from the proposed Examiner, who asserted that he was prepared to arrange secure storage of the seized devices in the National Discovery Centre of Deloitte Touche. This storage would be in a locked cabinet accessible only to the Examiner pending further order of the court.

[14] There was no evidence with respect to the facilities or the personnel responsible for the storage of exhibits at the Timmins courthouse.

Analysis

[15] The parties here have both demonstrated their acute appreciation for the constitutional status of the protection of the solicitor-client privilege of the clients of this defendant by coming to agreements on the appointments and terms of appointments of the Referee and the Examiner. The Attorney General submits that the terms of the protocol which have been agreed to date, far over reach the legal requirements set out in *Lavallée*. They say that they have taken this position in order to advance the prosecution, protect the constitutional rights of the defendant, crystallize the search and with it the identification and protection of child victims.

[16] The parties acknowledge that this is not a case where the police are seeking to examine the client files of a lawyer on the basis that such materials may afford evidence of a crime. Similarly, it is not a situation where counsel is alleged to have conspired to commit a crime with the client, in which circumstance the warrant may actually seek to search and seize client files. It is agreed that the allegation is simply that the lawyer has stored, on his office and home computers, illegal images that are unrelated to his clients or any of their files. The goal of the search and the protocol is to isolate any evidence of child pornography that is, by definition agreed to by the parties, unrelated to any privileged client files.

[17] The Law Society argues that this case raises the question as to whether the public confidence in the fairness of the criminal justice system can be maintained when the computers containing client files and information of criminal charges are stored in the premises of the police pending the resolution of these matters. From the information which came to the police and which formed the basis of the warrant application, the police are almost certain that there exists on at least one of the seized devices both child pornography and material that must be protected by solicitor-client privilege. While the Law Society states that it is satisfied that the

methodology set out in the agreed protocol adequately protects the solicitor-client privilege with respect to the actual examination of the content of the seized devices, they steadfastly maintain that having the seized devices, with all original material, including privileged items, remain under the care and control of the police, pending trial, will erode the public confidence in the administration of justice.

[18] The Law Society submits that this case is distinguishable from past law office search cases because the police are not interested in any of the defendant's files of the privilege-holding clients. All solicitor-client privilege files are irrelevant to the police for this investigation.

[19] I am satisfied that the agreement reached so far, dealing with the appointments of an Examiner and a Referee, the process to extract the offensive material from the computers, and the actual investigation of the seized devices will minimally impair, if at all, solicitor-client privilege. By agreement, there will be no involvement of law enforcement personnel in the creation of images from the seized devices nor in reviewing those images to remove any potential solicitor-client privilege material. So far as can be guaranteed, the proposed process will put into police hands, for the purpose of investigation, only the images of child pornography and child nudity graphics and related material (e.g. chat lines, etc.) which the Examiner has, through the operation of sophisticated computer technology, classified and extracted from the images taken from the seized devices. Before this material is passed on to the police, it will have been reviewed by a Referee, a member of the Law Society, to ensure that it does not include any material protected by solicitor-client privilege. This entire protocol has been designed to and will provide maximum protection to the privilege holders.

[20] The guidelines set out in *Lavallée* have been rigorously applied and the process provides for robust protection of solicitor-client privilege. From the outset, beginning with the initial involvement of the Timmins Police Service, the issuance and execution of the warrant and the discussions leading up to the draft agreement dealing with the unsealing of the seized devices, the Crown has complied with their duty to minimize any impairments of the solicitor-client privilege that might have arisen out of this search and seizure. (*Miranda v Richer*, [2003] 3 S.C.R. 193, at para. 10)

[21] In *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 232 [*Goodis*], the court dealt with a disclosure request that would have forced the interference with solicitor-client privilege. In that case the Supreme Court of Canada firmly said that there shall be no disclosure of material subject to solicitor-client privilege unless absolutely necessary. Interference with that privilege is limited to what is absolutely necessary. In this case, unlike in *Goodis*, the police have no interest in obtaining or viewing the irrelevant electronic files of privilege holding clients of the defendant.

[22] Where the parties disagree is on a point which was not contemplated by any of the courts so far in the jurisprudence on the privilege issue. The Law Society takes the position that the natural evolution of the law on the protection of solicitor-client privilege in the context of a law office search, particularly in a situation where the lawyer practices criminal defence law, is that the original evidence, the physical computers containing privileged material, should not be stored

in the care and control of the police while the investigation continues on the non-privileged material. This investigation will involve only the items extracted and stored on a separate electronic storage device taken from the EnCase images.

[23] The argument underscores the unique situation where the seizing body, the police, are adverse in interest to many of the privilege holders. The seized devices will likely contain active files of criminal defendants who remain before the courts, including some who may be the subject of charges laid by the Timmins Police Service.

[24] The Law Society points to references in *R. v. The Toronto Humane Society*, [December 22, 2009] and *R. v. Tarrabain, O'Byrne & Company*, [2006] A.J. No. 12 [*Tarrabain*] in support of their first proposal that the seized devices be deposited with the court for safe keeping.

[25] In *Tarrabain* the Alberta court of Queen's Bench differentiated between searches of law offices where the lawyer is, or is not, a target of the criminal investigation. Where the lawyer is the target of the investigation, Sanderman J. set out the role of the Referee in sealing the seized packages. He went on to say: "They (the packages) are marked by the Referee for the purposes of identification and then delivered into the custody of the Court." (para. 22)

[26] More recently in *Toronto Humane Society*, Justice Nordheimer dealt with the images of the seized computer hard drives which were still in the hands of the O.S.P.C.A., the seizing authority. He said: "It (the sealed material) ought to be in the hands of a neutral third party who can maintain the material securely without any suggestion of inadvertent disclosure to the searching authority."

[27] In my view these cases stand for two propositions, firstly, that the court retains control over the entire process of the unsealing of material seized from a law office or subject to solicitor-client privilege. Secondly and more particularly, at the stage where the material must be reviewed to determine whether it contains solicitor-client privilege, the court controls this process. The review may be done by the presiding judge or by a person appointed by the court. In *Tarrabain* (para. 22), the reference made to depositing the material with the court appears to be made in contemplation of the review by the Referee to determine what material, if any, is privileged. There is no comment by Sanderman J. on the question of storage of the original evidence on which no investigatory process is underway.

[28] In *Toronto Humane Society*, the court was dealing with an urgent, short notice motion where the seizing authority had been in place for approximately one month with no express terms on how to deal with material protected by solicitor-client privilege and no end date to the search. As a term of adjournment, the court ordered that the sealed images of the computers containing privileged material be "deposited with a neutral third party who can maintain the material securely without any suggestion of inadvertent disclosure to the searching authority". It is not clear whether the order included any provision dealing with the physical computers, separate and apart from the images taken from the hard drives. Again, what we have is a statement that the court controls the material and the court will ultimately determine how the seizing authority can conduct its investigation.

[29] The court in *Toronto Humane Society* alluded to the principle underlying the order that the material be stored securely with at neutral third party. The court specifically sought to avoid ‘any suggestion of inadvertent disclosure to the searching authority’. In that case, the O.S.P.C.A., which had obtained and executed the warrant, was adverse in interest to the *Toronto Humane Society*. They are not a body which has any known infrastructure for securely storing privileged information. While they had sealed the images of the computers, they had been on site with the computers for over a month. There is no suggestion that they had any appreciation or need to appreciate the technical issues which inform the protocol in this case, i.e. the need to ensure that the underlying evidentiary material is not contaminated by any inadvertent use or manipulation of the computers. The *Toronto Humane Society* is not a law office and as the privilege holders, they could assert any solicitor-client privilege to material on their computers. In *Toronto Humane Society*, the court could take no comfort from the evidence that O.P.S.C.A., as seizing authority, had put into place a rigorous, robust and secure system to prevent inadvertent disclosure of the privileged material.

Is there a risk of Inadvertent or Intentional Disclosure?

[30] The evidence lead by the Attorney General in this case was very specific. The Detective Constable in charge of the investigation described in evidence the facility in and the protocols under which these seized devices would be stored at the Police Services; essentially three levels of seals or locks in a room which is the sole responsibility of a civilian employee whose only task is to ensure the integrity and continuity of the stored evidence. The Law Society argues that there exists a risk of inadvertent disclosure of privilege or the appearance that there could be a risk of such an inadvertent disclosure. Counsel for the Attorney General says that an inadvertent breach of the privilege is unimaginable under this protocol. I am satisfied that the risk of inadvertent disclosure in this storage situation is minimal.

[31] The Attorney General posits that the Law Society position is founded on an unacceptable hypothesis that the police will intentionally interfere with the solicitor-client privilege. This hypothesis, says the Attorney General, requires the court to accept that a member of the Timmins Police Service would commit a serious criminal offence, essentially obstructing justice to break through the lock and the seal of the storage locker and break the seal on the computers to breach the solicitor-client privilege of the defendant’s clients. The Attorney General asserts that the administration of justice demands that we approach this litigation from the presumption that police will follow court orders.

[32] The Law Society specifically disavows that they are making any suggestion of intentional police misconduct or any other objectionable hypothesis. They say that their proposal is not based on a fear of any intentional infringements of the sealing order, but rather on the risk of an inadvertent breach of the privilege. They submit that even the risk of an inadvertent breach should be avoided to maintain the appearance of justice. The Law Society position is founded on the principle that public confidence in the administration of justice will be compromised if privilege holders learn that their criminal defence material is held in the care and control of the police.

The Storage Alternatives

[33] Before considering that submission, I will examine the proposed alternatives to storing the seized devices. The Law Society first proposes that the seized devices be stored at the Superior Court of Justice in Timmins. There was no evidence with respect to either the physical facility for storage of the seized computers, nor was there evidence with respect to any system or protocol for security or continuity in place at the Timmins Courthouse. The Law Society argued that the court “must possess the appropriate resources, facilities and internal security to safely store sealed records and or devices”. However, they admit that it is common for the court to order that exhibits of weapons, drugs, noxious substances and cash be kept in the custody of the police during trials. In my experience, Crown counsel frequently, if not always, make such requests. I can only presume that this practice exists throughout the province because the court has inferior facilities and systems to safeguard the integrity and continuity of sensitive and dangerous exhibits, when compared to the facilities and protocols in place in local police stations. There is no single employee in charge of a secure room with exhibits and no system of sealing or locking of individual distinct lockers of which I am aware. In any event, in the absence of evidence, I am of the view that storage of the seized devices in the court facilities would not afford appropriate security. This is not saying it is impossible to order that such facility be provided. However no attempt was made by either party to explore the actual feasibility of this option, in a courthouse in which neither counsel have any personal knowledge or experience.

[34] The alternative proposal was that the seized devices be stored in the premises of the Deloitte National Discovery Centre. Mr. Fotheringham, the agreed upon Examiner, made the following comment in his affidavit: “I would be prepared to undertake that, at all material times, any seized devices and any EnCase images of those devices would remain in safe and secure storage in the National Discovery Centre. Upon concluding any work on any computer devices or EnCase images of those devices, I would ensure that all such equipment was stored in a locked cabinet accessible only to me until such time as the seized devices and/or EnCase images were ordered by the Court to be moved to a different location.”

[35] As I have said earlier, the protocol proposed by the Attorney General includes a minimal risk. A minimal risk is not a guarantee that there could never be either inadvertent or intentional breach of the solicitor-client privilege. Perhaps when dealing with human beings there is never a guarantee that a system of locks and seals is fail-safe; perfection in this area is no more likely than any other area of human endeavour. While the risk is minimal, the consequences of any failure of this system would be monumental. Any number of ongoing prosecutions would be at risk if there was any finding whatsoever of the slightest breach of the solicitor-client privilege no matter how inadvertent.

[36] Courts must always consider, as the highest priority, the public interest and the need for public confidence in the administration of criminal justice. (*R. v. Robillard* (1987) 28 C.C.C. (3d) 22 at p. 27 and 28) At this point, four months since the seized devices were placed with the Timmins Police Service there are no allegations of any breaches of the solicitor-client privilege. I agree that this fact and the proposed system should provide some confidence to a reasonable

person. But the criminal investigation and trial process is lengthy. The seized devices will be unsealed, moved, worked upon, moved, sealed and stored. The seized devices could be stored for another 6 – 12 months before this case is completed.

[37] This Court has a duty to ensure that all safeguards are put in place to avoid completely or reduce as completely as possible, any risk of a breach of the solicitor-client privilege. This duty is particularly onerous in this situation, where any breach of the privilege would put the privileged material in the hands of the police who are adverse in interest to the privilege holders. This is not the case of a generic protection of the privilege against any disclosure to an uninterested person. The consequences of a breach of the solicitor-client privilege in this case go to fundamental principles. At this early stage of the proceedings, the Law Society does not have to show that there is a probability of a breach of the privilege if the seized devices are stored with the Timmins Police. We are in a preventative situation now. Fortunately, we are not dealing reactively to an allegation of an inadvertent breach.

[38] Any protocol for the storage of the seized devices must be as reliable and trustworthy as possible. The public confidence in the administration of the criminal justice system relies on the respect for the solicitor-client privilege which must be “as close to absolute as possible.” *R v. McClure* [2001] 1 S.C.R. 445.

[39] Would the reasonable person, reasonably informed, perceive that the storage of the law office computers in the care and control of the Timmins police was fair to the criminal clients of the defendant? Or, would these reasonable people perceive that the integrity of the trial process had been compromised, particularly if there was an alternate storage site proposed that avoided the risk that any inadvertent breach of the prior would land the privileged material into the hands of the police?

[40] Counsel agreed that this fact situation was novel in the evolution of solicitor-client privilege cases arising from law office searches. They did not argue that there was a legal presumption in favour of storage of evidence with the police or outside of police control, they did not submit that either party had an onus to bear in this regard.

[41] The Attorney General does not identify any specific concerns with the Law Society’s alternate proposal to store the seized devices in the Examiner’s National Discovery Centre in a secured system, available only to him. The Examiner will have already applied programs to the seized devices and captured all of their images. He is not a member of a law enforcement agency and no member of a law enforcement agency has access to the storage of the seized devices. This is the preferable option for the storage site. While there is no system that is perfectly secure, this proposal goes a long way to reducing the consequences of any inadvertent breach of the privilege. Consequently, it will go a long way to ensuring that reasonable members of the public, including clients of this defendant, do not lose confidence in the administration of the criminal justice system. Although this proposal would be unnecessary in many other law office searches, the particular circumstances of this case and the admonition from *Lavallée* to use “all efforts to protect” the privilege persuade me to accept the Law Society proposal.

[42] I have dealt only with the question of the storage of the sealed devices because the Law Society conceded that their arguments about public confidence in the administration of justice were not engaged by the question of where the actual imaging took place. It is agreed that there are appropriate facilities at the Timmins Police Service where the Examiner can image the seized devices. Therefore, the proposal by the Attorney General with respect to the imaging shall form part of this Order. However, should counsel wish to address me further on this issue, they may make arrangements through the Trial Coordinator for a teleconference.

[43] The attached Order reflects the agreed protocol in sections A, C, D, E, and F. Section B has been drafted in accordance with these reasons.

[44] There shall be an order in the form attached as Appendix A to this decision.

P.C. Hennessy
Superior Court Justice

Released: April 20, 2010

CITATION: Attorney General v. Law Society 2010 ONSC 2150
DATE: 20100420

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MINISTRY OF THE ATTORNEY
GENERAL

Applicant

- and -

LAW SOCIETY OF UPPER CANADA

Respondents

RULING ON MOTION

P.C. Hennessy
S.C.J.

Released: April 20, 2010

APPENDIX A

**ONTARIO
SUPERIOR COURT OF JUSTICE
(North East Region)**

**THE HONOURABLE MADAM) THIS 20TH DAY OF
JUSTICE PATRICIA C. HENNESSY) APRIL, 2010**

IN THE MATTER OF two search warrants issued by Justice of the Peace Lancaster on November 21, 2009;

AND IN THE MATTER OF an application to unseal and access seized computers and computer devices for examination subject to certain conditions.

ORDER

THIS APPLICATION was brought by the Attorney General of Ontario (“Crown”) this day, at the Superior Court of Justice, at 155 Elm Street. Sudbury, Ontario, on Notice to the Law Society of Upper Canada (“LSUC”) and Bradley David Sloan.

UPON READING the Application Records filed by the Crown and the LSUC and upon hearing evidence presented on the Application and upon hearing the submissions of counsel for the Crown and the LSUC;

AND UPON READING the Order of Justice of the Peace Stephen Lancaster dated November 21, 2009 respecting two search warrants and an assistance order issued respecting the home and law office of Mr. Sloan whereby several computers, described more specifically below, were seized and taken into the custody of the Timmins Police Service where they remain under lock and seal,

THIS COURT ORDERS AS FOLLOWS:**A. Appointment of Independent Referee and Computer Examiner**

1. The Court appoints Mr. Joseph DiLuca, Barrister and Solicitor, as independent referee (the “Referee”).
2. The Court appoints Mr. Corey Fotheringham, Associate Partner Deloitte & Touche (“Deloitte”), as independent computer forensic expert (the “Examiner”).

B. Imaging of the Computers

3. The Examiner will attend at the Timmins Police Service and be permitted access to the sealed evidence locker currently housing the following original computers and computer devices seized from the home and law office of Mr. Sloan (the “Seized Devices”):
 - a. Nextar Two external hard drive
 - b. Nextar Three external hard drive
 - c. Seagate hard drive
 - d. HP Compaq computer tower
 - e. IBM Net Vista computer tower
 - f. Creative computer tower
 - g. HP Compaq Micro computer tower
 - h. Dell laptop
4. In the presence of the Examiner, the Seized Devices will be taken to a secure and private room at the Timmins Police Service, where the Examiner shall make EnCase images of the Seized Devices (the “EnCase Images”). A member of the Timmins Police Service may be present to monitor the continuity of the Seized Devices and EnCase Images, but at no time shall any member of the Timmins Police Service be permitted to view the contents of the Seized Devices or EnCase Images.
5. At all times, the Examiner shall maintain secure custody of the Seized Devices, until such time as he completes the process of making the EnCase Images of the Seized Devices.
6. After the Examiner completes making the EnCase Images, the Seized Devices shall be re-sealed, and securely transported to the offices of Deloitte National Discovery Centre in Toronto, Ontario, where they shall be placed in a locked cabinet accessible only by the Examiner. A member of the Timmins Police Service may escort the Examiner to monitor the continuity of the Seized Devices, The Examiner will observe the re-sealing

of the Seized Devices and ensure that the cabinet containing the Seized Devices is secured. The Seized Devices will remain sealed in the locked cabinet, subject to any further court order.

7. The Examiner will securely transport the EnCase Images to his office at Deloitte in Toronto at 33 Yonge Street, Suite 210.

C. Independent Examination of EnCase Images

8. At all times, the Examiner will maintain exclusive control over the EnCase Images. Subject to paragraph 15 below, the Examiner will be the only person who has access to the EnCase Images. When he is not working on the EnCase Images further to this Order, the Examiner shall ensure that they are locked in a sealed area to which no person other than the Examiner has access. The Examiner will only work on them in a private area.
9. The EnCase Images shall not be copied, digitized, downloaded and no data contained on them shall be copied, distributed or transmitted by anyone, in any way, for any purpose, subject to the conditions below.
10. The Examiner will utilize current Ontario Provincial Police (“O.P.P.”) E-Crimes protocol in all of his work on the EnCase Images.
11. The Examiner will use “C4P” and “C4M” enscripts (most recent versions) to extract all of the digital images contained on the EnCase Images.
12. After the application of C4P and C4M, the Examiner will classify all of the extracted images. The categories of interest to the Crown are “Child Pornography” and “Child Nudity”. If the Examiner is uncertain of the correct classification, he will place such images in a folder entitled “May Contain Child Pornography or Child Nudity” (collectively, all such categories shall be referred to as the “Offensive Materials”).
13. In addition to extracting and classifying all digital files from each EnCase Image using C4P and C4M, the Examiner will examine the EnCase Images to determine whether any Peer to Peer (“P2P”) file sharing programs are found. Where such programs are found, the Examiner will seek to recover:
 - i. Evidence relevant to the installation, access and control of such programs;
 - ii. Any available search terms associated with the use of such programs;
 - iii. All Internet history, temporary Internet files, browsing history and typed URLs for evidence relevant to the consent, knowledge, possession, sharing or distribution of Internet child exploitation images;

- iv. Evidence of subscription to news groups, bulletin boards or Internet sites associated with Internet child exploitation;
 - v. Evidence of chat rooms, instant messaging or other web-based communication programs used to facilitate the discussion of Internet child exploitation; and
 - vi. Where such programs are found, the Examiner will seek to recover the relevant program communication logs.
14. In the event that any Offensive Materials or information described in paragraphs 11 to 13 above are found on the EnCase Images, the Examiner shall place them on an external storage device (“External Storage Device”). At all times, the Examiner shall keep the External Storage Device in secure storage with the EnCase Images. The Referee will be available to the Examiner should any issues relating to solicitor/client privilege arise during the course of the Examiner’s work.
15. After the Examiner completes the examination of the EnCase Images as set out in paragraphs 11-13 above, for any EnCase Image upon which any Offensive Materials are located, the Examiner shall review the EnCase Image, with the assistance of the Referee if required, to determine whether there are any privileged client files on the EnCase Images. If such privileged files are located, after the Examiner conducts such checks necessary to determine that no Offensive Materials are commingled among the privileged files the Examiner shall copy such files to a separate external storage device (the “Privileged Files”) and seal the Privileged Files.

D. Report to the Court

16. The Examiner will prepare a report for the Court with respect to his findings pertaining to paragraphs 11 to 13 above (the “Examiner’s Report”). The Examiner’s Report must be completed within three weeks of receiving the EnCase Images. If further time is required, the Examiner will notify the Referee, who will seek guidance from this Court, on notice to the Crown.
17. The Examiner’s Report and the External Storage Device will be placed in a sealed packet and filed in this Court by the Referee. Upon filing the Examiner’s Report and External Storage device with the Court, the Referee shall notify the Crown. The Crown may bring an application to unseal the sealed packet containing the Examiner’s Report and External Storage Device, on notice to the Referee.
18. The Examiner will also file with the Court the sealed packet containing the Privileged Files so that the Court, with the assistance of the Referee, and on notice to the Crown, can determine whether the Privileged Files should be returned to counsel for Mr. Sloan. Neither the Crown nor the Timmins Police Service shall be permitted to view the contents of the Privileged Files.

19. At the hearing to address the Crown's application to unseal the sealed packet containing the Examiner's Report and the External Storage Device, and the return of any Privileged Files to Mr. Sloan, the Referee may raise any issues with the Court that concern solicitor/client privilege or notification of privilege holders.
20. For each EnCase Image, the Examiner shall make clear in the Examiner's Report whether it contains any Offensive Materials. Any EnCase Image that contains none of the Offensive Materials shall be reformatted by the Examiner and returned to the Crown. Each corresponding Seized Device that contains none of the Offensive Materials shall be returned to the law office of Mr. Sloan pursuant to the provisions of s. 490 of the *Criminal Code*.

E. Additional Analysis of EnCase Images

21. In the event that ensuing discussions between counsel to Mr. Sloan and Crown Counsel do not resolve the criminal charges, a further forensic examination may be required, in which case the Court will be consulted for further direction, on notice to the Referee.

F. Costs

22. All of the costs of the work performed by the Referee and the Examiner described in this Order shall be borne by Her Majesty the Queen in right of Ontario.

G. Destruction of Seized Devices and EnCase Images

23. Following the conclusion of any criminal proceedings against Mr. Sloan, any Seized Devices not previously returned to Mr. Sloan that contain Offensive Materials, together with any EnCase Images of such Seized Devices, shall be subject to a forfeiture application under s. 164(4) of the *Criminal Code*, on notice to Mr. Sloan and the Referee.

H. No Waiver of Privilege

24. None of the work conducted by the Referee or the Examiner pursuant to this Order shall constitute a waiver of solicitor/client privilege of any privileged material on the Seized Devices or EnCase Images.

DATED at the City of SUDBURY, ONTARIO this 20th day of April, 2010.

The Honourable Madam Justice Patricia C. Hennessy
Superior Court of Justice