LAW REFORM COMMISSION

MANITOBA

COMMISSION DE RÉFORME DU DROIT

REPORT

ON

ENFORCEMENT OF REVENUE STATUTES

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The Reference

In 1974 in the Legislature of Manitoba the government proposed, as part of an omnibus Bill amending various taxation statutes, a uniform provision in regard to powers of entry, search and seizure, without warrant, by peace officers or other officers authorized for the purposes by the Minister of Finance. Although the provision had been in effect for ten years as section 17(1) of *"The Revenue Tax Act"*[1] (now *"The Retail Sales Tax Act"*), its proposed extension to other revenue statutes aroused considerable opposition in the Legislature. The concern expressed by a number of prominent members was that the provision would increase the power of the tax enforcement officials to the point where the civil rights of taxpayers would be threatened. Although a uniform provision was passed into law, this concern caused the Minister of Finance to propose, and the Attorney-General to agree, that the whole question of revenue law enforcement be referred to the Manitoba Law Reform Commission for more extensive study and comment.

The Issue

To achieve an adequate understanding of the provincial tax enforcement provisions, it is necessary to understand the scheme of the taxation statutes. The most prominent taxation statute in Canada is the *Income Tax Act*[2], and while a consideration of its enforcement provisions is beneficial to this study, the Act itself is outside the purview of the Manitoba Law Reform Commission. Consequently the provincial *"Income Tax Act"*[3], which is essentially a duplicate of the federal legislation, will not be considered in the examination

of Manitoba's revenue statutes.

The five remaining provincial revenue statutes[4] all operate in the same manner: they impose a tax on the consumer of specified goods and the tax is paid to the dealer of the taxed article. The dealer is designated an agent of the Crown for the purposes of collection and remission of the monies and is required to be registered and licensed by the Minister of Finance. Because the tax is assessed on the basis of quantity of trade, it is an essential statutory requirement of the system that the dealers maintain books and records. Herein lies the inevitable problem: because the system depends on this form of self-management, if the records are inaccurately maintained, either as a result of carelessness, misinterpretation of the regulatory statute, or fraud, the correct amount of tax will not be collected and/or remitted.

This situation results in an inequitable distribution of the tax remittance burden among the dealers and a loss of revenue to the province. In order to combat this the statutes confer certain powers upon the Department of Finance, the most important of which is the right to audit the books and records of all dealers. Through an audit the Minister can determine whether or not a dealer has complied with the statute and remitted the correct amount of tax. If it appears that the provisions of the statute have been violated, whether intentionally or not, the Minister can then estimate the dealer's true tax liability and re-assess him for that amount. This causes the onus of disproving the liability to fall on the dealer should he wish to appeal.

The combined powers of audit and re-assessment

serve to enforce the statute in almost every instance. For those very rare cases where the dealer refuses to cooperate with the Department, however, there exist the so-called snooper clauses: those provisions which confer the powers of entry, search and seizure, with and without warrant, upon the Minister. Despite the fact that these provisions are rarely implemented, and usually only serve as threats to discourage tax evasion, the sweeping powers they grant are potentially capable of abuse. For this reason it is our view that the snooper clauses must be reviewed to determine whether or not their positive aspects justify their existence in light of the threat they pose to the civil rights of individuals.

The Legislation

It is useful at this point to examine the revenue statutes from the various Canadian jurisdictions to determine the incidence of the three snooper powers:

1. The power to enter and search premises without a warrant;
2. The power to seize without a warrant; and
3. The power to enter, search and seize with a warrant.

It can be stated immediately that the first power, that of entry and search without a warrant, is present in all of the statutes examined. Without it the Minister's authority to audit would be ineffectual, as he would have no legal right of access to business establishments and their records. There are some problems with the Manitoba provision granting

this power and they will be examined below.

The other two powers, those of seizure with and without a warrant, are granted less frequently and often inconsistently within each province. It can be noted at this point that the only distinction between the two powers on the face of the legislation is that the provision to seize with a warrant makes allowance for the use of force. Unless it is otherwise noted, the power to seize applies to documents, records, and books.

The revenue statutes of Manitoba, Ontario and Quebec, in company with the federal *Income Tax Act*, are the only statutes that consistently grant both the power to seize without a warrant and the power to search and seize with a warrant.

In Newfoundland *"The Gasoline Tax Act"*[5] grants the power to seize without a warrant; *"The Retail Sales Act"*[6] grants the power to seize with a warrant; *"The Tobacco Tax Act"*[7] grants the power to search with a warrant but does not allow seizures.

In Nova Scotia *"The Gasoline and Diesel Oil Tax Act"*[8] allows for seizure without a warrant while *"The Health Services Tax Act"*[9] provides for seizure with a warrant.

New Brunswick has no power of seizure in either its *"Social Services and Education Tax Act"*[10] or its *"Tobacco Tax Act"*[11]; in *"The Gasoline Tax Act"*[12] seizure of gasoline samples is allowed without a warrant but no authority exists

to seize documents.

In Prince Edward Island *"The Gasoline Tax Act"*[13] and *"The Revenue Tax Act"*[14] provide for seizure without a warrant while *"The Health Tax Act"*[15] has no provision for seizure.

Saskatchewan allows seizure without a warrant in *"The Education and Health Tax Act"*[16] and *"The Fuel Petroleum Products Act"*[17]; in *"The Tobacco Tax Act"*[18] there is no provision for seizure.

In Alberta both *"The Fuel Oil Tax Act"*[19] and *"The Tobacco Tax Act"*[20] allow seizure without a warrant and the latter also provides for seizure with a warrant.

In British Columbia neither *"The Cigarette and Tobacco Tax Act"*[21] nor *"The Fuel Oil Tax Act"*[22] provide for seizure; *"The Social Services Tax Act"* [23] contains the power to obtain a warrant but does not allow for seizure under the warrant.

The question of whether or not any conclusions can be gleaned from these facts is a difficult one. In each jurisdiction the treatment accorded by the Legislature to the provisions of its revenue statutes varies. And, the fact that seizure without a warrant is provided for more often than seizure with a warrant is perhaps the only generalization to be drawn. In the face of these apparently inconsistent and irreconciliable approaches to tax enforcement in Canada, it would seem that, with the exception of the need for uniformity, little can be learned from the other provinces.

However, it is our view that consistency within the province is to be encouraged, especially because all the Manitoba revenue statutes are enforced by the same administrative body: the Department of Finance. Thus it would appear that the Manitoba legislation compares favourably with that of the other provinces. To better view those areas of the Manitoba legislation that invite criticism, the three types of snooper powers will be examined separately. (See Appendix A for relevant legislation.)

Entry and Search Without Warrant

The first power conferred in the snooper clauses is that of entry and search without warrant, found in subsection (1) of the enforcement sections in the Manitoba statutes. As mentioned above this power is common to all the Canadian revenue statutes and is a necessary accessory to the right to audit. The provision is essentially the same in all five Manitoba statutes and in our view no objection need be taken to it except as it relates to private dwellings.

The inviolability of a person's home has long been a fundamental principle of the common law:

> . . . the house of everyone is to him as his castle and fortress. . . .[24]

Mr. Justice Chisholm, of the Nova Scotia Supreme Court, said:

> At common law the dwelling of the subject is held to be immune from intrusion, unless there is express authority to justify the intrusion, and the person of the subject is held equally sacred.[25]

One frequently quoted statement is that of an American judge, Mr. Justice Weaver of the Iowa Supreme Court:

> The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every Court in the English speaking world from Magna Charta down to the present, and is embodied in every Bill of Rights defining the limits of governmental power in our own republic. The mere fact that the man is an officer, whether of high or low degree, gives him no more right than is possessed by an ordinary private citizen tb break in on the privacy of a home and subject its occupants to the indignity of a search for the evidences of a crime, without a legal warrant procured for that purpose. No amount of incriminating evidence whatever its source, will supply the place of such a warrant.[26]

A brief examination of various Canadian statutes on this subject again demonstrates inconsistency. The federal *Income Tax Act* allows entry into any place where business is carried on or anything is done or kept in connection with a business; similar or identical words are used by all of Ontario's revenue statutes and by Quebec's *"Revenue Department Act"*,[27] as well as by *"The Tobacco Tax Act"* of Alberta. On the other hand, *"The Fuel Oil Tax Act"* of Alberta specifies entry into any premises other than a private dwelling house. Saskatchewan's legislation does the same. Nova Scotia provides for entry into business premises or any premises where records are kept, as do Newfoundland and British Columbia; however, these latter two also have other revenue statutes permitting entry into any premises.

Only Manitoba specifies entry ". . . upon the business premises of any person, or any premises where business records of any person are kept, other than a private dwelling house that is not used for business purposes and that is not a place in which business records are purported to be kept. . . ." In our view the underlined words are obscure and pose a potential threat to civil rights. Without these words enforcement officers would have the right to enter any business premises or any dwelling where business records are kept; presumably, a private dwelling which serves a business purpose would be a "business premise" and liable to entry and search, as would a private dwelling containing business records. The additional words, in an attempt to delineate when a private dwelling may be entered, manage only to confuse the issue by allowing entry and search when some unnamed person (the Minister? the taxpayer?) purports that business records are kept there. The question as to what grounds must exist before the unnamed person may purport the existence of records is left unanswered by the section.

It is our view that entry into a private dwelling house ought not to be lightly effected. On the other hand, to deny taxation enforcement officials the right to enter private dwellings would be to constitute the house a haven for tax evaders. Therefore, it is suggested that officials of the Department of Finance should be granted entry to the business premises of any person, or any premises where the Minister has reasonable and probable grounds to believe that business records of any person are kept.

Seizure Without Warrant

The second power, that of seizure without the authority of a warrant, would appear to be the epitome of unbridled government power and the most capable of abuse.

As we have seen, however, many revenue statutes have incorporated it, as have a number of other statutes: the *Criminal Code*[28], the *Food and Drugs Act*[29], the *Narcotic Control Act*[30], the *Excise Act*[31], and the *Customs Act*[32]. Considering the obviously high level of legislative acceptance of this power, and its potential for abuse, it is our view that the conditions under which it may be exercised should be precisely stated in the legislation.

Officials of the Department of Finance inform us that the right of seizure without warrant was originally requested by them after a search without a warrant restricted to a taxpayer's dwelling house, was foiled when the taxpayer calmly drove away in his car, where, they quickly realized, the records they were seeking were kept. Since its enactment the revenue officials indicate that they have had no need of the power; its use is contemplated for situations in which there is a real danger of a taxpayer destroying records if they are not immediately taken out of his control. Despite the infrequency with which it is used, the Department maintains, and we agree, that such a power is essential to effective tax enforcement.

However, while it is conceded that a power of seizure without warrant is necessary, it should not be capable of becoming a substitute for the power of entry and seizure by search warrant. The distinguishing factor is illustrated by James A. Fontana:

> Section 181(2) [of the *Criminal Code*] for example, contemplates the discovery by the officer of someone "keeping a common gaming house"; the test here is an active one and some degree of emphasis must be placed on the word "finds". It would seem inappropriate for an officer to leave his station house fully expecting to see a gaming house operation in progress at the address to which he is directed, and not take a search warrant with him. The section contemplates a "discovery"

without advance knowledge or suspicion that an offence is going on.[33]

While the Department of Finance obviously understands and respects this distinction between the two powers of seizure, it is our view that, in an effort to safeguard civil rights, the legislation should specifically restrict the use of seizures without warrant to those situations in which there are reasonable and probable grounds to believe that immediate seizure is necessary to prevent the suppression or destruction of evidence.

It should be noted that Manitoba already has a safeguard against abuse of the power of seizure that does not exist in any other Canadian jurisdiction. In other jurisdictions the decision to seize evidence may be made by the field officer conducting an audit. In Manitoba this decision may only be made by ". . . the Minister . . . the Deputy Minister of Finance, . . . and Assistant Deputy Minister of Finance, . . . a director or assistant director of the Taxation Division of the Department of Finance, or . . . any other officer of the Department of Finance of a similar class and designated by the Lieutenant-Governor-in-Council. . . ". Since there are neither assistant directors nor other officers of a similar class designated by the Cabinet, the number of persons empowered to authorize a seizure is less than 10. This situation ensures that the decision to seize can be made promptly but will not be made hastily. If a field officer were to take such action on his own initiative, the Department of Finance reports that he

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Memorandum of Dissent and Separate Opinion of Val Werier

In my view, seizure without the authority of a warrant should not be allowed unless there is overwhelming evidence that it is absolutely necessary for the welfare of the state, of which I see no evidence in respect of revenue statutes. Furthermore seizure without warrant has never been employed in the revenue statutes, except in The Gasoline Tax Act. I would therefore recommend the removal of this authority from all the revenue statutes.

would face suspension.

While these provisions would seem adequate to serve the demands of caution, some form of external scrutiny would still need to be introduced. In our view, the Minister should be required to report the circumstances of every case of seizure either to a Committee of the Legislature or to a judicial inquiry board within 90 days. Considering the infrequency with which the power is implemented, this would put a negligible strain on the system. The question of confidentiality would have to be considered, of course, because of the negative implication that would attach to a taxpayer as a result of the public disclosure of a seizure. It must be recalled, however, that the purpose of such a hearing would be to investigate the activities of the Department, not the taxpayer; therefore this should not be a major stumbling block.

In our view these suggestions for internal and external scrutiny would ensure responsible use of the power of seizure without warrant without derogating from its effectiveness.

Entry by Search Warrant

Entry, search and seizure under the authority of a search warrant is almost certainly the enforcement mechanism with the greatest safeguards, since it involves supervision by the courts. The effectiveness of this supervision depends largely upon the standards that must be met before a court will approve a request for a search warrant.

The relevant part of section 443 of the *Criminal Code* states that a justice must be "satisfied by information

upon oath . . . that there is in a building . . . anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence". Martin's Criminal Code, 1978 states that:

> A search warrant should not authorize a fishing expedition; the description of the evidence should be so specific that the searchers can identify the thing to be seized. It is the justice, not the informant, who must be satisfied that there is a reasonable ground for believing the facts required to be established before issuing the warrant.

Under the revenue statutes, however, the requirements for approval of a search warrant are less demanding. The federal *Income Tax Act* allows a judge to approve a search authorization where "the Minister has reasonable and probable grounds to believe that a violation of this Act . . . has been committed or is likely to be committed". Similar wording is used in Manitoba's *"Retail Sales Tax Act"*. While these words were examined in *Granby Construction and Equipment Ltd., et al v. Vernon Robert Milley et al*[35] they were not specifically interpreted. Mr. Justice McFarland stated that in that case a sworn affidavit of the investigating official satisfied the requirements.

The other four Manitoba revenue statutes demand only that the Minister be acting "for any purpose relating to the administration or enforcement of this Act". A similarly

broad provision is found in all the Ontario and Quebec statutes and was present in the federal *Income Tax Act* until 1972. This provision was interpreted in *Bathville Corporation Ltd. et al v. Atkinson et al*[36], where the defendants, on behalf of the Minister, seized books and documents belonging to the plaintiff under the authority of section 126(3) of the federal *Income Tax Act*. The plaintiff applied for an order of replevin, alleging that the warrant was irregular because it had not been directed at a specific person nor had it specified the documents to be seized. The application was denied despite the fact that the warrant lacked these components. Mr. Justice Moorehouse said at first instance:

> The Act is not ambiguous and in many instances grants unusual and extensive powers to the Minister for the purposes of the Act. It is not limited to those cases where the Minister believes there may have been a violation. The power here granted is general and it is extensive . . . .[37]

On appeal, Mr. Justice Porter, Chief Justice of the Ontario Court of Appeal, said:

> This issuance of authorization in the first instance, depends upon the view of the Minister that a purpose related to the administration or enforcement of the Act will or may be served by the exercise of powers . . . .[38]

It is obvious, then, that the broadly interpreted provisions of the statutes allow a judge to approve the authorization of a fishing expedition and it can be argued that such expeditions are the only effective means of enforcing the statute. The argument is well illustrated by a comparison between criminal and taxation legislation.

> Among the many differences two important ones are: (a) the primary purpose of the *Income Tax Act* is not the punishment of wrongdoers but the collection of the cost of government from the citizen, and (b) the violation of the tax statute . . . does not necessarily result in a visible act or observable circumstances. For example, the commission of a crime of violence or theft, or even a commercial crime such as wash trading, leaves a noticeable mark on property, or person, or on tangible records. In contrast to this, a failure to disclose under the *Income Tax Act* does not by itself create a fact or situation which may be observed by the administrators of the statute. . . .
>
> Furthermore, the taxpayer is in full possession of all the information related to the alleged breach of the taxing Act in a much more secure way than the accused, fugitive, or suspect under the criminal statutes. A taxpayer by non-disclosure will be fully aware of the facts and the possible violation of the statute . . . . In these circumstances, the taxpayer, unlike the criminal, has left no tracks and may have damaged no other person, so there would be no complainant or circumstance observable by the administrators of the statute. For these reasons an extensive power of search may be justified. . . .[39]

It would be an impossible situation if the Minister were obliged to specify the documents he sought.

> Most schemes are like jigsaw puzzles and the search and seizure procedure allows the Department to get the pieces. It is only after this that it really begins to put the puzzle together. If you had never seen a puzzle, it would be difficult to ask for the particular pieces.[40]

Despite this compelling argument, it is submitted that the Minister's power to seek a warrant "for any purpose related to the administration and enforcement of this Act" is too loosely worded. The wording found in the *Income*

Tax Act", demanding that the Minister show reasonable and probable grounds for believing a violation has occurred or is likely to occur, is preferable because it is expressly directed at offences. As mentioned above, the authority to audit and re-assess gives the Minister ample power to administer and enforce the statute in those instances where no violations have taken place. Therefore, the power to search and seize, which in fact is used only in cases where violations are suspected, should be expressly limited to those cases.

In order to ensure further that civil rights are safeguarded it is our view that a section similar to 231(5) of the federal *Income Tax Act* should be incorporated into the Manitoba statutes. That section provides that an application to a judge for a search warrant must be supported by sworn evidence establishing the facts upon which the application is based. The incorporation of a similar section would ensure that the production of affidavits by the investigating officials, which is a common practice, would become a statutory rule.

It should be pointed out that a judge designated to approve an authorization for a warrant is not functioning in a judicial capacity and, therefore,his decision to approve or not is not open to review. This principle was established in *Biggs v. M.N.R.*[41] and definitely applies to four of Manitoba's revenue statutes whose warrant provisions are the same as the federal one under consideration in that case. The equivalent provision of *"The Retail Sales Tax Act"* has not been interpreted but there is little doubt that the same result would occur. For reasons of better tax enforcement it is submitted that this situation is for the best.

If a right of review were introduced one result would be that documents seized under the authority of a

warrant would have to be sealed pending the determination of the appeal. This would create a problem because evidence acquired in a search often leads to further sources of documentation; if Department officials were denied access to the records after seizure while the validity of the warrant was reviewed, other taxpayers involved in the same fraudulent scheme would have time to destroy or hide their records. This was a major concern expressed to the Law Reform Commission by officials of the Manitoba Department of Finance.

In our view the task of approving requests for search warrants should fall to the same courts under all of the Manitoba taxation statutes. At present *"The Retail Sales Tax Act"* grants this power to magistrates while the rest of the statutes designate judges of the Court of Queen's Bench or the County Court. The need for uniformity requires that *"The Retail Sales Tax Act"* be amended in this regard.

A final submission relating to the warrant provisions in the Manitoba statutes concerns the right to use force. *"The Retail Sales Tax Act"* makes no mention of force while the other statutes allow for its use where necessary. Officials of the Department of Finance report that they do not require force when searches are conducted but they express a desire to retain the right. It serves as a useful threat to dissuade potential tax evaders and to encourage cooperation. For this reason, then, *"The Retail Sales Tax Act"* should be amended to include the right to employ force; again, the desire for uniformity is a major factor to be considered.

Hours of Entry

Quebec's *"Revenue Department Act"* provides that a

search with warrant may be made only between the hours of 7:00 a.m. and 8:00 p.m. on juridical days, unless otherwise authorized by a judge.[42] It is the only taxation statute in Canada with such a restriction.

Manitoba's Department of Finance informs us that it prefers to search private dwellings when the taxpayer is at home, which is more likely to be in the evening. As a result, great reluctance was expressed to the enactment of this provision in Manitoba. At present, a judge is quite free to impose any time constraints on the execution of a search warrant that he considers necessary.

In our opinion the legislation should provide that searches and seizures without warrant be conducted at reasonable hours considering, however, the circumstances of each case. This would preclude the possibility of harassment but would not restrict the essential power and requirements of seizure. A restriction limiting seizures to certain hours would not be appropriate as this would clearly destroy the utility of a power premised on swift and immediate action.

Solicitor-Client Privilege

A final topic which falls within the ambit of this study is the solicitor-client privilege as it relates to taxation enforcement.

In general, privilege functions to exclude certain communications, although relevant, probative and trustworthy as evidence, from the judicial process. Wigmore outlined four criteria which must be satisfied before privilege can be invoked:

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 disclosure of the communication must be greater then the benefit thereby gained for the correct disposal of litigation.[43]

Mr. Justice Munroe, of the British Columbia Supreme Court, summarized the rule as it relates to the solicitor-client relationship as follows:

> That rule as to the non-production of communications between solicitor and client says that where . . . there has been no waiver by the client and no suggestions made of fraud, crime, evasion, or civil wrong on his part, the client cannot be compelled and the lawyer will not be allowed without the consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending.[44]

The rule exists because, in the words of Lord Justice Jessel, Master of the Rolls:

> As, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults . . . ; that he should

> be able to place unrestricted and unbounded confidence in the professional agent, and the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent) that he should be enabled properly to conduct his litigation.[45]

The nature and scope of the protection thus afforded the client is often misunderstood, especially in the context of the enforcement of taxation statutes. Taxpayers and their solicitors righteously oppose real or imagined attempts by revenue officials to restrict the ambit of the protection afforded by the doctrine of privilege - the scope of which they often tend to over-estimate. At the same time, government personnel charged with the task of administering taxation statutes regard the doctrine as a significant impediment to the effective enforcement of revenue laws; the device, the main purpose of which is not to protect the privacy of the innocent taxpayer, but rather to shield from sight the tax evader.

It is useful, then, to outline briefly the bounds of the solicitor-client privilege as it relates to taxation enforcement. There is widespread belief that only communications made with a view to actual or contemplated litigation are privileged, but this is not the case. Oral and written communications made with no consideration of possible court action still fall within the ambit of the doctrine, providing they were made ". . . within the periphery of the usual and ordinary scope of professional employment. . . [ie. 'for the purpose of giving or receiving professional advice']".[46] Whether or not the doctrine applies depends on the nature of the particular communication in question, and the relationship between the corresponding parties with regard to that

communication. Information exchanged between parties in their capacity as friends is not privileged, although one of the parties happens to be a lawyer. As well, it is essential to recall in the context of taxation enforcement that the doctrine exists to protect communications. Thus, a client who merely deposits receipts, business ledgers, and other documents in his lawyer's office, will not be allowed to invoke the doctrine.

Not only must there be genuine communication but such communication must be expressly or implicitly confidential in character. The mere fact that the communication was made between a lawyer and his client is not sufficient to invoke the doctrine. Even the presence of an unnecessary third party at the time of communication could vitiate the privilege.

The doctrine of privilege also extends to certain communications made by third parties acting as agents of either the solicitor or his client. Here, however, the courts have somewhat narrowed the scope of the privilege. Unlike direct communications between lawyer and client, for privilege to attach to third party communications ". . . the requirement still persists that such communications must have been made in relation to existing or contemplated litigation".[47] Thus, in *Re Sokolov* Mr. Justice Matas, then of the Manitoba Court of Queen's Bench, ruled that material prepared by an accountant as agent of the client, for submission to the lawyer, was privileged.[48] Shortly thereafter, in *Re Goodman and Carr*, certain accountant's reports were ordered turned over to revenue officials because the records in question had been prepared some time prior to litigation, and not with a view to litigation.[49]

Communications intended to facilitiate the commission of a fraud or crime are not and cannot be

privileged. Privilege is denied such communication, even where the solicitor is totally unaware that his client is seeking advice for illicit purposes. As Mr. Justice Stephen noted in the case of *R. v. Cox and Railton*[50] "a communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment'." While this should placate tax department officials, it should be noted that merely to allege fraudulent conduct is insufficient to overcome the solicitor-client privilege. As was pointed out in *Missiaen v. M.N.R.*[51] there must be evidence in support of the charge.

Finally, the privilege exists for the benefit of the client and consequently can be waived by him either expressly or impliedly.

With these factors in mind, then, it is possible to examine the application of the doctrine in the context of a demand for production of documents pursuant to a seizure provision and unrelated to a judicial proceeding. According to the *obiter dictum* of Mr. Justice Osler of the Ontario High Court:

> . . . it must be remembered that the rule is a rule of evidence, not a rule of property. I would not be prepared, therefore, to quash a warrant respecting material which there were reasonable grounds to believe might afford evidence with respect to the commission of an offence simply because the possibility existed that such material might be covered by the solicitor-client privilege. The only way, as I see it, in which the privilege can be asserted is by way of objection to the introduction of any allegedly privileged material in evidence at the appropriate time.[52]

The problem with this is that an objection at trial is too late. In *Rolka v. M.N.R.*[53] a lawyer voluntarily turned over to officers, acting under the seizure provisions of the federal *Income Tax Act*, documents that would have been subject to solicitor-client privilege; an attempt was then made at trial to claim benefit of privilege. Mr. Justice Cameron of the Exchequer Court said:

> In my view, these documents are admissible . . . . The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed in regard thereto has been lost.[54]

Despite the aforementioned opinion of Mr. Justice Osler, the weight of judicial opinion favours the proposition that the solicitor-client privilege may be invoked to prevent the seizure of documents during a pre-prosecution investigation. Two cases have been decided under the seizure provisions of the *Combines Investigation Act*.[55] In *Re Director of Investigation and Research and Canada Safeway Limited*, privilege was claimed at the time of the attempted seizure; Mr. Justice Monroe said there:

> . . . I have reached the conclusion that since illegally obtained evidence is not for that reason inadmissible, the respondent is right in claiming the privilege at this time, and further that section 10 of the Combines Investigation Act does not either in express terms or by reasonable implication exclude the doctrine of solicitor-client privilege. That doctrine is not to be infringed, much less destroyed, unless the clear wording and intent of section 10 requires such construction. In the result, while the Director and his authorized representatives may enter the premises of the respondent to perform their duties under section 10 of the Act, they may not have access to the documents upon which a solicitor-client privilege exists.[56]

The same conclusion was arrived at by Mr. Justice Jackett, Chief Justice of the Federal Court in *Re Director of Investigation and Research and Shell Canada Limited*:

> I fully realize that the protection of the confidentiality of the solicitor-client relationship has, heretofore, manifested itself mainly, if not entirely, in the privilege afforded to the client against the compulsory revelation of communications between solicitor and client in the giving of evidence in court or in the judicial process of discovery. In my view, however, this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judicial system, by the a compulsory form of pre-prosecution discovery envisaged by the *Combines Investigation Act* as it would be by evidence in court or by judicial discovery.[57]

These decisions indicate, then, that seizure can be prevented by the mere invocation of the solicitor-client privilege. The obvious drawback of such a state of affairs is that in order to obtain possession of the desired documents enforcement officials would be obliged to seek a judicial determination of the issue. The potential for the disappearance of incriminating evidence during this delay is quite considerable. It is our view that in the interest of better tax enforcement it would be advisable to restrict the privilege to some degree.

At present, such a restriction exists in the federal *Income Tax Act* and in Quebec's *"Revenue Department Act"*. The former statute provides that an officer wishing to examine or seize a document in the possession of a lawyer must give the lawyer a reasonable opportunity to claim the privilege for each document in the name of his client. Those documents for

which privilege is claimed are sealed in a packet and delivered to a custodian (generally, the sheriff). The client or the lawyer then has 14 days to apply to a judge for a determination of the issue. The judge decides the matter summarily, examining the documents if he wishes; those subject to the privilege are returned to the lawyer; those not subject are delivered to the officer or some other person designated by the deputy minister.[58] W.Z. Estey, now Mr. Justice Estey of the Supreme Court of Canada, once referred to this procedure as a "kind of cross-breeding of the Rules of Court in civil cases relating to the production of documents, and the rules of seizure under . . . the *Criminal Code*. This may be more than fortuitous and perhaps is a silent acknowledgment of the hybrid nature of a tax proceeding."[59]

It is our view that a similar provision should be introduced into the Manitoba statutes. It must be recognized, however, that the provision has certain shortcomings. The most glaring inadequacy of the section in the *Income Tax Act* is that it applies only to documents in the possession of a lawyer. As is often the case, however, documents in the possession of the client, his accountant, or some other party may also be subject to solicitor-client privilege. According to Mr. Justice Wilson, Chief Justice of the Supreme Court of British Columbia, "the statute does not do away with or narrow the common law definition for the purposes of the *Income Tax Act* insofar as privilege accorded to the client of a solicitor is concerned"[60]; Mr. Justice Milvain, Chief Justice of the Trial Division of the Alberta Supreme Court, says that the section in question is ". . . procedural in its effect, rather than substantive".[61] Presumably then, while privileged documents in a lawyer's

possession could be removed from his control, the same documents in the hands of the client could be withheld from department officials by virtue of the common law doctrine of privilege. This interpretation of the law clearly points out that if a statutory mechanism for the invocation of solicitor-client privilege is to be employed, it must be comprehensive and apply to all documents, regardless of their location.

A further problem that must be avoided is that a procedure for claiming privilege could become a mechanism whereby taxpayers and their solicitors could harass officials and delay investigation. The nature of the claim of privilege demands that a reasonable time be allowed the taxpayer for the inspection of documents to determine if the doctrine applies. In the words of Martin Freedman, "the astute and careful solicitor might well require a great deal of time, and it is unlikely that department officials would be agreeable to lengthy delay . . .".[62] On the opposite side of the scale, some provision must be made to deter solicitors from simply claiming privilege for every scrap of paper in their possession. Mr. Justice Dryer, of the British Columbia Supreme Court, has complained that, "it should not be necessary for the court to go through hundreds of documents in respect of which no claim of privilege could possibly succeed."[63]

Therefore, a statutory procedure regulating claims of solicitor-client privilege should include some provision to allow taxpayers a reasonable time to make the claim, and at the same time should allow for the imposition of penalties in cases where the doctrine has been invoked unnecessarily.

In our view there are numerous advantages to be gained from a comprehensive provision regulating solicitor-client privilege. Such a provision would statutorily recognize the existence of the privilege in tax investigations, serving as a further reminder to revenue department officials that the investigating powers granted them are subject to some constraints. It would also provide a clear, precise procedure for determining the claim of privilege, and create a statutory defence for the lawyer who refuses to turn over privileged material.

Return of Seized Documents

The seizure and retention of documents by the Minister for extended periods of time can be extremely damaging to a business, even where the taxpayer is permitted to view the documents seized. Neither of the seizure subsections in the Manitoba statutes makes provision for the return of documents; the provision permitting seizure under warrant allows that the documents may be retained by the Minister for production in court proceedings but does not indicate a maximum period for retention. It is our view that such a restriction is necessary to protect the taxpayer from bureaucratic harassment.

The federal *Income Tax Act* has a provision which restricts the retention period to 120 days unless a judge orders that the documents be retained as evidence for a court proceeding. This applies only to documents seized without warrant, however. Thus,in *Granby Construction and Equipment Ltd. et al v. Milley et al*, a seizure of documents was made under warrant and a full year was allowed to pass without any proceedings being instituted. An application for an order

of replevin of the documents was made but it failed because there was no limitation on the retention of documents. Mr. Justice McIntyre,of the British Columbia Court of Appeal, reached this decision reluctantly because he found the exercise of the Department's power had been oppressive and high-handed.

While there is no record of Manitoba's Department of Finance acting in such a manner, it is our view that a provision similar to that found in the *Income Tax Act*, but applicable to all seizures, whether under warrant or not, should be enacted. Such a provision, requiring the return of documents within a definite period unless an extension is granted by a judge, would ensure rapid processing by the Department.

The only alternative to such a provision would be to require the Department to make copies of all seized documents and thereupon to return the originals. All five of the Manitoba statutes contain a provision allowing seized documents to be copied by the Department but it is not a requirement, therefore the potential for bureaucratic harassment exists. The problem of increased costs would be an obvious consideration affecting this second alternative. This alternate provision should require that the Department turn over the copies to the taxpayer immediately after they have served the purpose for which they were seized.

For ease of reference our Recommendations may be summarized as follows:

SUMMARY OF RECOMMENDATIONS

Entry and Search Without Warrant

1. The present provision for entry into private dwelling houses should be removed and replaced with one allowing entry into any premises where the minister has reasonable and probable grounds to believe that business records are kept. (p.8)

Seizure Without Warrant

2. The use of seizures without warrant should be restricted to those situations in which there are reasonable and probable grounds to believe that immediate seizure is necessary to prevent the suppression or destruction of evidence, and furthermore, should be limited to being carried out at reasonable hours considering,however,the circumstances of each case. (pp. 10-17)

3. The minister should be required to report the circumstances of every case of such seizure either to a committee of the Legislature or to a judicial inquiry board within 90 days.(p. 11)

Entry by Search Warrant

4. The power to search and seize under the authority of a warrant should be expressly limited to those situations where the minister has reasonable and probable ground to believe that a violation has occurred or is likely to occur. (p. 15)

5. An application to a judge for approval of a search warrant should be supported by sworn evidence establishing the facts upon which the application is based. (p. 15)

6. *"The Retail Sales Tax Act"* should be amended to change the power of warrant approval from magistrates to the judges of the County Court and the Court of Queen's Bench, as is the case in the other taxation statutes. (p. 16)

7. *"The Retail Sales Tax Act"* should be amended to include, in the warrant provisions, the right to use force where necessary. (p. 16)

Solicitor-Client Privilege

8. A provision setting out the procedure for claiming solicitor-client privilege, similar to s. 232(3), (4) and (5) of the *Income Tax Act*, should be enacted. It

should apply to all privileged documents, regardless of location. It should include a provision to allow taxpayers a reasonable time to make a claim, and at the same time should allow for the imposition of penalties in cases where the doctrine has been invoked unnecessarily. (pp. 24 and 25)

Return of Seized Documents

9. (a) The seizure sections should provide for a maximum period for retention of documents unless a judge orders otherwise. (p. 27)

alternatively

(b) The legislation should provide for the duplication of all documents seized and the immediate return of the originals. The duplicates also should be turned over to the taxpayer immediately after they have served the purpose for which they were seized. (p. 27)

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"* signed this 13th day of August 1979.

Clifford H.C. Edwards, Chairman

R. G. Smethurst, Commissioner

V. Werier, Commissioner

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A.Burton Bass, Commissioner

Evan H.L. Littler, Commissioner

FOOTNOTES

1. *"The Revenue Tax Act"*, C.C.S.M. c. R150.
2. R.S.C. 1952, c. I-48 as amended
3. *"The Income Tax Act"* (Manitoba) C.C.S.M., c. I10.
4. *"The Retail Sales Tax Act"*, C.C.S.M., c. R150; *"The Gasoline Tax Act"*, C.C.S.M., c. G40; *"The Motive Fuel Tax Act"*, C.C.S.M. c. M220; *"The Tobacco Tax Act"*, C.C.S.M., c. T80; *"The Revenue Act, 1964"*, C.C.S.M., c. R140.
5. R.S.N. 1970, c. 147.
6. S.N. 1972, No. 56.
7. R.S.N. 1970, c. 374.
8. R.S.N.S. 1967, c. 116.
9. R.S.N.S. 1967, c. 126.
10. R.S.N.B. 1973, c. S-10.
11. R.S.N.B. 1973, c. T-7.
12. R.S.N.B. 1973, c. G-3.
13. R.S.P.E.I. 1974, c. G-3.
14. R.S.P.E.I. 1974, c. R-14.
15. R.S.P.E.I. 1974, c. H-3.
16. R.S.S. 1965, c. 66.
17. R.S.S. 1965, c. 67.
18. R.S.S. 1965, c. 68.
19. R.S.A. 1970, c. 153.
20. R.S.A. 1970, c. 364.
21. S.B.C. 1971, c. 7.
22. R.S.B.C. 1960, c. 158.
23. R.S.B.C. 1960, c. 361.

24. *Semayne's Case* (1604), 5 Coke 91a, at 91b; 77 E.R. 194 (K.B.), at 195.

25. *R. v. Ella Paint* (1917), 28 C.C.C. 171 (N.S.S.C.), at 174.

26. *McClurg v. Brenton* (1904), 123 Iowa 368, 98 N.W. 881 (Iowa S.C.), at 882.

27. S.Q. 1972, c. 22.

28. R.S.C. 1970, c. C-34, s. 181(2).

29. R.S.C. 1970, c. F-27, s. 37(1).

30. R.S.C. 1970, c. N-1, s. 10(1).

31. R.S.C. 1970, c. E-12, s. 70.

32. R.S.C. 1970, c. C-40, s. 133.

33. James A. Fontana, *The Law of Search Warrants in Canada* (1974), 166.

34. *Martin's Criminal Code*, 1978 (Edward L. Greenspan) 348.

35. [1974] C.T.C. 701, 74 D.T.C., 6543 (B.C.C.A.).

36. [1965] 1 O.R. 340, (C.A.).

37. *Bathville Corp. v. Atkinson*, [1964] 2 O.R. 17 (H.C.), at 19.

38. *Supra* n. 36, at 341.

39. W.Z. Estey, "Tax Offences - Liability of Taxpayers and their Professional Advisers" (1968), *Report of Canadian Tax Foundation*, 21st Conference 25 at 30-31.

40. Eugene J. Mockler, "Tax Administration and Civil Liberties" (1964), Can. B. Papers 54, at 74.

41. [1954] Ex. C.R. 702.

42. S.Q. 1972, c. 22, s. 40(2).

43. Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974) at 156-157.

44. *Re Director of Investigation and Research and Canada Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 (B.C.S.C., at 746.

45. *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.) at 649.

46. *Supra* n. 43, at 159, quoting Lord Atkin in *Minter v. Priest* [1930] A.C. 558 (H.L.), at 585.

47. *Supra* n. 43, at 169.

48. [1968] D.T.C. 5266.

49. [1968] 2 O.R. 814.

50. (1884), 14 Q.B.D. 153 at 167.

51. (1967), 61 W.W.R. 375 at 379.

52. *R. v. Colvin*, ex parte Merrick, [1970] 3 O.R. 612 (H.C.), at 617.

53. [1963] Ex. C.R. 138.

54. *Ibid.*, at 154-155.

55. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

56. *Supra* n. 44, at 748.

57. [1975] F.C. 184 (C.A.), at 193-194.

58. Section 232(3), (4) and (5).

59. *Supra* n. 39, at 36-37.

60. *Re Kask*, [1966] C.T.C. 659.

61. *Re Helman et al and M.N.R.* (1970), 15 D.L.R. (3d) 753 (Alta. S.C.), at 761.

62. Martin H. Freedman, "Solicitor-Client Privilege under the Income Tax Act" (1969), 12 *Can. Bar J.* 93, at 95.

63. *In re Modern Film Distributors et al*, [1968] C.T.C. 549 (B.C.S.C.), at 552.

APPENDIX A

Relevant legislation

The snooper clauses of *"The Gasoline Tax Act"*, *"The Motive Fuel Tax Act"*, and *"The Revenue Tax Act"* are virtually identical to section 17(1) to (3) of *"The Tobacco Tax Act"*:

Right to examine records, documents, etc.

17 (1) The minister, or if duly authorized for the purpose, any officer appointed by the minister under this Act, or any peace officer, may, from time to time and at all reasonable times, and without warrant, enter upon the business premises of any person, or any premises where business records of any person are kept, other than a private dwelling house that is not used for business purposes and that is not a place in which business records are purported to be kept,

(a) for the purpose of ascertaining whether the tax has been, or is being paid, collected or remitted by any person, or the amount of the tax payable by any person;

(b) to inspect or examine books, records, documents, and premises of any person, for the purpose of ascertaining the quantities of tobacco that are bought, used or sold by him during any period in respect of which a return is required to be made under this Act or the regulations, or are at that time being bought, used or sold by him;

(c) to ascertain whether the person has, or has had, in his possession tobacco in respect of which tax is payable; and

(d) to make such enquiries and such searches of the premises as he deems necessary for the purposes of this Act;

or to do one or more of the things mentioned in clauses (a) to (d); and the person shall, at that time, answer all questions put to him relating to any of the matters concerning which authority to enter is given in this section, and shall produce for inspection by the minister, officer, or peace officer, such books, records or documents, as are required of him, and any tobacco in his possession.

En. S.M. 1974, c. 57, s. 53.

Seizure of books, etc.

17(2) Where it appears to the satisfaction of the minister, or of the Deputy Minister of Finance, or of an Assistant Deputy Minister of Finance or of a director or assistant director of the Taxation Division of The Department of Finance, or of any other officer of The Department of Finance of a similar class and designated by the Lieutenant Governor in Council, that any provision of this Act or the regulations has not been, or is not being complied with, he may seize or cause to be seized any books of account, records, or documents, for evidence.

En. S.M., 1965, c. 84, s. 5; R. & S., S.M. , 1966-67, c. 66, s. 3.

Court approval of authority to enter and seize.

17(3) The minister may, for any purpose related to the administration or enforcement of this Act, with the approval of a judge of the Court of Queen's Bench or of a County Court, which approval the judge may give upon ex parte application, authorize in writing any officer of The Department of Finance,

together with any peace officer whom he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle, motor vehicle, or place, in the province for books, records, documents, tobacco, or things, that may afford evidence as to the violation of any provision of this Act or the regulations, and to seize and remove any such books, records, documents, tobacco, or things, and retain them for production in any court proceedings or, in the case of books, records, or documents, for production in any court proceedings or until copies thereof have been made and certified under subsection (4).

En. S.M., 1965, c. 84, s. 5.

The equivalent provisions in "*The Retail Sales Tax Act*" have some material differences:

Right of entry, etc.

17(1) An officer appointed by the minister for the purpose of enforcing this Act may, from time to time and at all reasonable times, and without warrant, enter upon the business premises of any person or any premises where business records are kept other than a private dwelling house that is not used for business purposes and that is not a place in which business records are purported to be kept

(a) to determine whether this Act and the regulations are being or have been complied with; or

(b) to inspect, audit, and examine, books of account, records, and documents; or

(c) to ascertain the quantities of tangible personal property purchased, on hand, sold, or consumed, by any person, or the amounts of service purchased, sold, or consumed, by any person, and whether the tax collected or payable by any person has been remitted or paid to the minister;

or to do any one or more of these things; and the person occupying, or in charge of, the premises shall at that time answer all questions pertaining to any of the matters concerning which authority to enter is given under this section, and shall produce for inspection by the officer such books of account, records, and documents, and such tangible personal property in his possession, as are required of him.

Am. S.M. 1974, c. 57, s. 9.1.

Books and records to be made available.

17(1.1) The minister may, in writing, order a holder of a registration certificate who is resident and carrying on business in the province to keep and maintain within Manitoba and make available within Manitoba for inspection, examination and audit under this Act the books of account, records and documents specified in the regulations or to make such other arrangements as may be satisfactory to the minister for making them available for inspection, examination and audit under this Act, and the holder of the registration certificate shall comply with the order.

En. S.M. 1978, c. 16, s. 25.

Seizure of books of account, etc.

17(2) Where it appears to the satisfaction of the minister, or to the Deputy Minister of Finance, or to an Assistant Deputy Minister of Finance, or to a director or assistant director of the Taxation Division of The Department of Finance, or to any other officer of The Department of Finance of similar class and designated by the Lieutenant Governor in Council, that any provision of this Act or the regulations has not been, or is not being, complied with, he may seize or cause to be seized any books of account, records, or documents for evidence.

Assessment of tax.

17(3) Where, upon the inspection, audit, or examination, of books of account, records, or documents, of any person, it appears to the satisfaction of the minister that any tax collected by the vendor has not been remitted in accordance with this Act or the regulations, or any tax payable by a purchaser has not been paid in accordance with this Act and the regulations, the minister may make an assessment of the amount of tax collected by the vendor or payable by the purchaser, and the amount so assessed shall be presumed to be the amount of the tax collected by the vendor or payable by the purchaser; and subsections (3) and (4) of section 16 apply to the assessment mutatis mutandis.

Search warrant.

17(4) A magistrate, upon being satisfied by information under oath that there is reasonable ground for believing that any person has in his possession any tangible personal property in respect of the retail sale of which the tax payable has not been paid, may at any time issue a warrant under his hand authorizing an officer appointed by the minister and named therein to enter and search any building, receptacle, or place, where the tangible personal property is believed to be situated, and to inspect, audit, examine and seize, tangible personal property, books of account, records and documents, and to make such inquiries as are deemed necessary; and the person shall produce for inspection by the officer named in the warrant any tangible personal property, books of account, records and documents, in his possession and answer any questions relating thereto.

Am.

The snooper clauses of the federal *Income Tax Act* have no direct application to the provincial legislation but they have been discussed and are worth reproducing here:

INVESTIGATIONS

231. (1) Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of this Act, may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept, and

(a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,

(b) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,

(c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, and

(d) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation.

Origin of subsec. 231(1)–
Derived from subsec. 126(1) of the *Income Tax Act*, R.S.C. 1952, c. 148.
Formerly subsec. 115(1) of *The 1948 Income Tax Act*.
Derived from ss. 41-45 of the *Income War Tax Act*.

RETURN OF DOCUMENTS, BOOKS, ETC.

(2) The Minister shall,

(a) within 120 days from the date of seizure of any documents, books, records, papers or things pursuant to paragraph (1)(d), or

(b) if within that time an application is made under this subsection that is, after the expiration of that time, rejected, then forthwith upon the disposition of the application,

return the documents, books, records, papers or things to the person from whom they were seized unless a judge of a superior court or county court, on application made by or on behalf of the Minister, supported by evidence on oath establishing that the Minister has reasonable and probable grounds to believe that there has been a violation of this Act or a regulation and that the seized documents, books, records, papers or things are or may be required as evidence in relation thereto, orders that they be retained by the Minister until they are produced in any court proceedings, which order the judge is hereby empowered to give on *ex parte* application.

IDEM

(3) The Minister may, for any purposes related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person

(a) any information or additional information, including a return of income or a supplementary return, or

(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,

within such reasonable time as may be stipulated therein.

Origin of subsec. 231(3)–

Formerly subsec. 126(2) of the *Income Tax Act*, R.S.C. 1952, c. 148.
Formerly subsec. 115(2) of *The 1948 Income Tax Act*.
Der ed from ss. 41-45 of the *Income War Tax Act*.

SEARCH

(4) Where the Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

Origin of subsec. 231(4)–

Derived from subsec. 126(3) of the *Income Tax Act*, R.S.C. 1952, c. 148.
Formerly subsec. 115(3) of *The 1948 Income Tax Act*.
Derived from ss. 41-45 of the *Income War Tax Act*.

EVIDENCE IN SUPPORT OF APPLICATION

(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.

ACCESS AND COPIES

(6) The person from whom any documents, books, records, papers or things are seized pursuant to paragraph (1)(d) or subsection (4) is, at all reasonable times and subject to such reasonable conditions as may be determined by the Minister, entitled to inspect the seized documents, books, records, papers or things and to obtain copies thereof at his own expense.

DEFINITIONS

232. (1) In this section, . . .

"SOLICITOR-CLIENT PRIVILEGE"

(e) "solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

SOLICITOR-CLIENT PRIVILEGE DEFENCE

(2) Where a lawyer is prosecuted for failure to comply with a requirement under section 231 to give information or to produce a document, he shall be acquitted if he establishes to the satisfaction of the court

(a) that he, on reasonable grounds, believed that a client of his has a solicitor-client privilege in respect of the information or document; and

(b) that the lawyer communicated to the Minister, or some person duly authorized to act for the Minister, his refusal to comply with the requirement together with a claim that a named client of the lawyer has a solicitor-client privilege in respect of the information or document.

EXAMINATION OR SEIZURE OF CERTAIN DOCUMENTS WHERE PRIVILEGE CLAIMED

(3) Where an officer is about to examine or seize a document in the possession of a lawyer and the lawyer 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, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, 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 the officer and the lawyer agree in writing upon a person to act as custodian, in the custody of such person.

APPLICATION TO JUDGE

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

(a) within 14 days from the day the document was so placed in custody, apply, upon 3 days' notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day (not later than 21 days after the date of the order) and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, 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 the Deputy Attorney General of Canada and the custodian within 6 days of the day on which it was made, and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and

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

DISPOSITION OF APPLICATION

(5) An application under paragraph (4)(c) shall be heard in camera, and on the application

(a) the judge may, if he considers it necessary to determine the question, inspect the document and, if he does so, he shall ensure that it is repackaged and resealed; and

(b) the judge shall decide the matter summarily and,

(i) if he is of opinion that the client has a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the lawyer, and

(ii) if he is of opinion that the client does not have a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the officer or some other person designated by the Deputy Minister of National Revenue for Taxation,

and he shall, at the same time, deliver concise reasons in which he shall describe the nature of the document without divulging the details thereof.