

## ENF 12 Search, Seizure, Fingerprinting and Photographing

A140(1) authorizes a designated officer to seize and hold any means of transportation, document or other thing if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of the Act . The criteria for seizures under A140 are the same, regardless of the object being seized.

A148(2) provides authority for the detention, seizure or forfeiture of security provided by a transporter and any vehicle or other prescribed good if the transporter fails to comply with an obligation under the Act. For procedures relating to seizures made under the authority of A148(2), refer to ENF 15.

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### 9.2. Limitation period for seizures

R258 provides that no seizure may be made under A140(1) in respect of the fraudulent or improper obtaining or use of a thing more than six years after that obtaining or use.

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### 9.3. Solicitor-client privilege: *Lavallee*<sup>1</sup> Supreme Court Decision

The Supreme Court of Canada ruled in *Lavallee* to protect the confidentiality of communication between a lawyer and their client(s), in the context of search and seizure. On the rare occasion when an officer is faced with a solicitor-client privilege scenario, where the officer is in possession of a document that may give rise to solicitor-client privilege, an officer should refrain from infringing on that right.

In order for the privilege to apply, the following conditions must be met:

1. there must be a communication between a client (or their agent) and a legal advisor;
2. this communication entails the seeking or giving of legal advice; and
3. this communication is intended by the parties to be confidential.

There is an exception to solicitor-client privilege when the client seeks guidance from a lawyer in order to facilitate the commission of fraud or crime. An exception also exists where communication is not intended to be confidential. Nevertheless, caution should be exercised before examining or seizing documents that could be subject to solicitor-client privilege and Legal Services (or another appropriate section of the CBSA to be determined) should be contacted about these issues.

An officer should:

- ensure another officer is available to witness and to sign the appropriate form (IMM 5242B);
- ensure the client understands and observes the process;
- have the client sign the appropriate form;
- ensure that notification is given to the lawful owner of the document;
- limit the contamination factor by sealing the item and not allowing others to view or handle the seized items;
- report procedures on file and/or update FOSS.

In some cases, a client may manifest their intent to waive solicitor-client privilege. In such cases, it is recommended that the client sign a declaration to that effect, and that a credible witness, such as another officer, countersign the declaration.

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<sup>1</sup> *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. V Fink* 2002 SCC 61.

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In any of the above cases, an officer should:

- conduct background checks (FOSS/CPIC/NCIC/Interpol);
- determine admissibility;
- identify if there is a pattern of abuse of solicitor-client privilege;
- determine the rightful holder of the document;
- make every attempt to obtain consent from the privilege holder, i.e., the client, since the privilege belongs to the client;
- if the client manifests their intention to waive solicitor-client privilege, request that the client sign a declaration to that effect;
- seal the documents, if they are not sealed, and appropriately mark them;
- report to the manager/supervisor and update FOSS;
- make every attempt to obtain legal advice from another source (if one is not available, contact CBSA NHQ, Legal Services);

The officer should evaluate whether the examination of the document is necessary for the purposes of the Act. For example, if enough evidence exists to support an inadmissibility allegation or there are sufficient identity and travel documents to effect removal, then search and seizure of the document in question may not be necessary. The most cautious course of action may sometimes be for the CBSA officer to seek a search warrant in relation to the documents, where reasonable grounds exist. A search warrant cannot allow the search and seizure of documents known to be protected by solicitor-client privilege.

CBSA officers will not have to deal with a large volume of documents that could be subject to solicitor-client privilege. Moreover, in the mail examination context, procedures put in place to protect any potential solicitor-client privilege should be invoked as soon as an officer views documents to which solicitor-client privilege is attached and before a seizure is made under the *Customs Act* or IRPA.

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### 9.4. Seizing documents

A140(1) authorizes an officer to seize and hold any means of transportation, document or other thing if the officer believes, on reasonable grounds, one of the following:

- it has been fraudulently or improperly obtained or used;
- the seizure is necessary to prevent its fraudulent or improper use; or
- the seizure is necessary to carry out the purposes of the Act and Regulations.

CIC officers who have reasonable grounds to believe that documents were fraudulently or improperly obtained or used may seize documents and turn them over to the CBSA for further investigation.

This includes seizure of identity, travel and/or other documents as evidence or to effect a removal, should an individual become subject to an enforceable removal order.