

services.¹⁶³ This addition to the legislation was a response to the Law Societies' adoption of the No-Cash Rule.¹⁶⁴

It was acknowledged by the British Columbia Court of Appeal in 2013 that the FLSC, by adopting the No-Cash Rule, had put sufficient measures in place to combat lawyer-facilitated money laundering and terrorist financing.¹⁶⁵ The Court stated that compliance with these rules is ensured by the FLSC conducting annual audits and requesting reports.¹⁶⁶ It noted that a significant difference between the PCMLTFA and information disclosed to Law Societies is that the latter is subject to an obligation that it will not be disclosed to others. This at least ensures that attorney-client confidentiality will be protected.

The No-Cash Rule was a clear indication that the Canadian Law Societies were taking their responsibility to combat lawyer-facilitated money laundering seriously.¹⁶⁷ Although Canadian lawyers are exempted from submitting CTRs to FINTRAC, they must heed the no-cash requirement of the FLSC, or face disciplinary sanctions.

5.3.3 The South African Position

In South Africa, lawyers are required to submit to the FIC a CTR in respect of all cash transactions, which include payments to and receipts from a client, that exceed R24 999-99.¹⁶⁸ The obligation includes single as well as multiple transactions.¹⁶⁹ The

163 Section 10(1) of the PCMLTFA reads:
“Sections 7 and 9 do not apply to persons or entities referred to in paragraph 5(i) or (j) who are, as the case may be, legal counsel or legal firms, when they are providing legal services.”

164 No-Cash Rule of the FLSC (2004).

165 *Federation of Law Societies of Canada v Canada* 2013 BCCA 147 Para 148. See also Lawrence & van Houten (2013: 1).

166 *Federation of Law Societies of Canada v Canada* 2013 BCCA 147 Para 23.

167 See Gallant (2013: 11), Paton (2010: 181), McDonald (2010: 145), Woolley (2013: 2).

168 Regulation 22B of the Regulations to FICA. See also Hamman & Koen (2012: 73), Henning & Ebersohn (2001: 124) and Millard & Vergano (2013: 399).

169 This amounts to an attempt to prevent smurfing or structuring. See also Hamman & Koen (2012: 73).

failure to file such a report is criminalised and could result in the imposition of a fine of up to R10 million or a term of imprisonment of up to 15 years.¹⁷⁰ There is currently no indication that the CTR requirement will be amended by the legislature in the near future.

Although it can be appreciated that the government intended CTRs as a weapon to prevent the cleaning of cash from illegal origins, the FICA requirement seems harsh. If someone pays a lawyer with cash of R25 000 or more, it does not matter that the client can provide an explanation for having the cash, a report must be filed with the FIC and if it is not filed the lawyer is committing a crime. However, there could be a logical explanation for a person paying with cash. South Africa has a vibrant informal economy in which vendors sell their goods at various stalls outside the formal shopping centres and in informal trading areas. Their only means of transacting is cash, both for accepting and making payments, especially if they do not have banking accounts. Also, a client could withdraw the money from a financial institution and come to the lawyer with a legitimate cash payment. What if such a client is oblivious of the fact that he could have asked his bank to make an electronic fee transfer or that he could have done so himself?

It seems that the legislature regards the mere payment of R25 000 or more in cash as being suspicious and therefore a CTR must be filed. The LSSA does not prescribe to lawyers anything about cash payments by clients and there is no prohibition when lawyers are paid in cash. Disturbing for lawyers is the fact that the failure to file a CTR is criminalised.

5.3.4 Comparative Commentary

The CTR regime in South Africa has more stringent requirements than in the US and Canada. In the US, in terms of the BSA, it is required that domestic currency transactions that exceed \$10 000 be reported to the Treasury Department. However, it must be noted that this requirement applies to financial institutions

170 Sections 51 and 68 of FICA.

and not to lawyers. Under Section 6050-I of the IRC, any cash payments in excess of \$10 000 should be reported to the IRS, with the details of the payer to be included in such report. It is submitted that should the disclosure of client information have the effect of furnishing information that warrants protection under attorney-client confidentiality or legal professional privilege, attorneys probably will not be compelled to furnish the information.

In Canada, the FLSC was successful in securing exemption for attorneys from the obligation to submit CTRs to FINTRAC for transactions involving cash in excess of \$10 000. However, the FLSC has introduced the so called no-cash rule to prevent their lawyers from receiving cash payments in excess of \$7 500.

South African lawyers are the worst off, because the failure to file a CTR is a crime and they could face prosecution for such failure. By contrast, in the US the Treasury Department or the IRS will subpoena lawyers to court to explain why a CTR was not made that included all the details of the payer, but lawyers will not be prosecuted for a failure to comply with the provisions of the BSA or the IRC. It is not regarded as a crime for lawyers not to file a CTR. The requirement in Section 6050-I of the IRC is that lawyers provide the details of the payer to the IRS. If the details are not provided, the IRS will conduct its own investigation against the client. The purpose of the IRS summons is not to accuse a person, but to commence an inquiry. In South Africa, the mere failure to report a transaction, and not the omission to furnish the particulars of the payer, is criminalised.

As mentioned previously, the LSSA does not prescribe to lawyers that they should not accept cash payment from clients, as Canada's FLSC does. The magnitude of South Africa's informal economy does not make it viable to put a prohibition on clients paying cash to lawyers. The LSSA should be requested to draft a rule to guide South African lawyers not to accept cash payment above a certain amount. The prohibition on accepting cash in excess of R24 999,99 can stand, as long as the non-submission of a CTR ceases to be a crime. Instead, a rule could be drafted to make it

a disciplinary offence if cash above the agreed threshold is received by a practitioner in either his business or trust account. Such a payment could be verified by the chartered accountant who performs the annual audit on the trust account of an attorney. The transgression of such a rule could result in a fine or other administrative penalty for a lawyer, but it should not be a crime.

It seems that the drafters of the South African legislation were over-zealous, confronting lawyers with the threat of prosecution for not filing CTRs and STRs.

5.4 Third Party Access to Client Records

5.4.1 The US Position

The US position regarding third party access to confidential attorney-client is structured by Model Rule 1.6 of the ABA and the Fourth Amendment to the US Constitution. Model Rule 1.6 covers the confidentiality of information specifically in relation to the attorney-client relationship. All such information is privileged and a lawyer may not reveal any of it if it pertains to the representation of a client. Waiver of such privilege can occur only with the client's informed consent.¹⁷¹

Lawyers are always in possession of client details and are expected not to divulge the information to third parties. The information may be revealed only where the lawyer reasonably believes that it is necessary to prevent death or substantial bodily harm,¹⁷² to prevent the client from committing a crime or fraud that could cause injury to someone else's finances or property,¹⁷³ or to mitigate or rectify injury to someone else's finances or property whilst the client is utilising a lawyer's services.¹⁷⁴ The information could be revealed also to provide advice about compliance with Model Rule 1.6, to establish a defence for a lawyer in the case of a dispute between lawyer and client,¹⁷⁵ to defend a criminal charge or a civil claim,¹⁷⁶

171 Model Rule 1.6(a).

172 Model Rule 1.6(b)(1).

173 Model Rule 1.6(b)(2).

174 Model Rule 1.6(b)(3).

175 Model Rule 1.6(b)(4).

176 Model Rule 1.6(b)(5).

or to comply with a court order.¹⁷⁷ In addition, information could be revealed if it will resolve a conflict of interest when a lawyer leaves his employment or changes occur in the composition of a legal firm, as long as the revealed information does not compromise the attorney-client privilege.¹⁷⁸ In terms of Model Rule 1.6(c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

The Fourth Amendment provides protection to law offices against warrantless searches and seizures. It reads:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Information contained in lawyers’ files about confidential attorney-client discussions falls within the ambit of the Fourth Amendment. A duly authorised warrant, issued by a judicial officer, is required before a search of lawyers’ office and a seizure of confidential information will be justified.

The Fourth Amendment seeks to prevent “unreasonable searches and seizures”. In *Katz v US*, the Supreme Court established that a search and seizure is unreasonable if it violates the target’s reasonable expectation of privacy in the object of the search and seizure.¹⁷⁹ The test for the existence of a reasonable expectation of privacy is two-fold: firstly, the target of the search or seizure must have a subjective expectation of privacy; secondly, society must recognise that expectation as objectively reasonable.¹⁸⁰

177 Model Rule 1.6(b)(6).

178 Model Rule 1.6(b)(7).

179 In *Katz v United States* 389 US 347(1967).

180 This two-requirement test was confirmed in *Kyllo v US* 533 US 27 (2001)190 f3D 1041.

It is submitted that lawyers necessarily have a reasonable expectation of privacy in respect of confidential client information and that this expectation meets the requirements of the two-legged test. In other words, the offices of US lawyers cannot be raided by a state agency without prior judicial authorisation in the form of a valid warrant based on probable cause. Certainly, warrantless searches and seizures to obtain client information that could help the prosecution are anathema in terms of the Fourth Amendment.

5.4.2 The Canadian Position

The question of access to attorneys' files and offices was probably the main reason for the constitutional litigation pursued by the FLSC from 2001 to 2015. Various issues had lawyers up in arms. They had to verify the identity of clients by way of very stringent customer due diligence exercises. They had to keep detailed client records. And they had to grant access to FINTRAC to inspect their files, which inspection could be warrantless. What is more, Section 74 of the PCMLTFA included a penalty clause which stated that every person who or entity that knowingly contravenes a number of Sections or the Regulations is guilty of an offence.¹⁸¹ The punishment prescribed for a contravention and a summary conviction was a fine of not more than \$50 000 or imprisonment of not more than six months or both.¹⁸² The sentence for a conviction on an indictment was a fine of not more than \$500 000 or imprisonment of not more than five years or both.¹⁸³ These threats to their lawyers formed the basis of the FLSC's bid to have Sections 62 to 65 of the PCMLTFA declared unconstitutional.

In June 2005, the Department of Finance issued a consultation paper which included proposals about amendments to the provisions of the PCMLTFA regarding FINTRAC's authority to examine the records of a client in possession of his lawyer.

181 Sections 6, 6.1, 9.1 to 9.3, 9.4(2), 9.5 to 9.7 or 11.1, 12(1) or (4) or 36(1), 37, 55(1) or (2), 57 or 62(2), 63.1(2) or 64(3) or the Regulations to the PCMLTFA.

182 Section 74(a) of the PCMLTFA.

183 Section 74(b) of the PCMLTFA. See also *Federation of Law Societies of Canada v Canada* 2011 BCSC 1270 Para 90.

The recommendations in the consultation paper included a reference to the case of *Lavallee, Rackel & Heintz* wherein the Supreme Court of Canada had set out stringent requirements that should be followed to protect attorney-client privilege when the police seize documents from law offices under search warrants.¹⁸⁴

According to the consultation paper: “The proposed amendments would ensure that the compliance provisions under the PCMLTFA allowing FINTRAC to examine documents are consistent with these principles.”¹⁸⁵

The FLSC, in responding to the consultation paper in September 2005, confirmed the need to address this issue and supported the Department of Finance’s proposal to amend Sections 62 to 65 of the PCMLTFA in such a manner that they conform to the principles established by the *Lavallee* decision. The FLSC urged the government to ensure that attorney-client privilege is protected in the amendments to the PCMLTFA.¹⁸⁶

However, the Regulations which came into operation on 30 December 2008 effectively authorised warrantless searches of law offices and did not include the recommendations of the Department of Finance and the FLSC.¹⁸⁷

Section 62 of the PCMLTFA dealt with the contentious issues of third party access to client records,¹⁸⁸ the entering of premises,¹⁸⁹ the use of computers to examine data,¹⁹⁰ the reproducing of records,¹⁹¹ and the use of any copying equipment.¹⁹² It was required that records should be made available to FINTRAC within 30 days after a request was made to examine them.¹⁹³ This meant that lawyers should grant

184 *Lavallee, Rackel & Heintz v Canada* [2002] 3 SCR 209.

185 Department of Finance’s June 2005 Consultation Paper Enhancing Canada’s Anti-Money Laundering and Anti-Terrorist Financing Regime Consultation Paper June 2005, Para 6.17 at 44.

186 The FLSC Submission in response to the Department of Finances’ Consultation Paper: 30 September 2005.

187 See Priestley (2009: 23).

188 Section 62(1) of the PCMLTFA.

189 Section 62(1)(a) of the PCMLTFA.

190 Section 62(1)(b) of the PCMLTFA.

191 Section 62(1)(c) of the PCMLTFA.

192 Section 62(1) of the PCMLTFA.

193 Section 62 of the PCMLTFA.

access to a third party to enter their offices and allow them to examine confidential, private client records. The PCMLTFA authorised FINTRAC to examine the client records of lawyers.¹⁹⁴

On 27 September 2011, the British Columbia Supreme Court held that Sections 62 to 64 of the PCMLTFA were unconstitutional.¹⁹⁵ This was endorsed on appeal in 2013,¹⁹⁶ and the Supreme Court of Canada confirmed the invalidity of the sections in February 2015.¹⁹⁷ The Supreme Court stated that warrantless searches, such as those permitted under the PCMLTFA, were unreasonable.¹⁹⁸ It found that the search powers in Sections 62, 63 and 63.1, when applied to lawyers, coupled with the insufficient safeguard of attorney-client privilege in Section 64, constitute a very substantial limitation of the right to be free of unreasonable searches and seizures guaranteed by Section 8 of the *Charter*.¹⁹⁹ The Court read Sections 63 and 63.1 down to exclude lawyers from the scope of their operation.²⁰⁰ It declared that Section 64 was of no force or effect and that Sections 62 and 63.1 should be read down so that they exclude documents in the possession of lawyers or their offices.²⁰¹ It was held that the duties that were imposed on lawyers by the state were in conflict with the interest of their clients and that compliance with such duties would turn lawyers into state instruments.²⁰²

194 Section 62 of the PCMLTFA.

195 *Law Society of British Columbia v Canada* 2001 BCSC 1593. See also Chong (2013: 1) and Priestley (2009: 11).

196 *Federation of Law Societies of Canada v Canada* 2013 BCCA 147.

197 *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7. See also Marrocco & Furniss (2013: 1).

198 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7 Para 56.

199 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7 Para 57.

200 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7 Para 63. This confirms the judgments of the courts a quo in *Federation of Law Societies of Canada v Canada* 2011 BCSC 1270 Para 229. Confirmed in *Federation of Law Societies of Canada v Canada v Canada* 2013. See also Chong (2013: 1).

201 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7 Para 67.

202 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC Para 77.

The Supreme Court of Canada's sentiment echoes that expressed in the 2011 judgment of Gerow J, who referred with approval to the following statement by Lebel J in *Maranda*:²⁰³

“[I]t is important that lawyers, who are bound by stringent ethical codes not have their offices turned into archives for the use of the prosecution.”²⁰⁴

Gerow J considered that to impose the recording and related obligations contained in PCMLTFA on legal counsel and legal firms would achieve precisely the result that Lebel J warned against.²⁰⁵

The Supreme Court stated that “the lawyer’s duty of commitment to the client’s cause” requires constitutional protection against governmental intrusion,²⁰⁶ and that “the lawyer’s duty of commitment to the client’s cause” should be regarded as a principle of fundamental justice.²⁰⁷ The decision of the Court in February 2015 brings to an end a fifteen-year period of litigation between the FLSC and the Attorney General of Canada. It is a victory that must be savoured by Canadian lawyers. It has been settled definitively that the premises of lawyers will be not be entered,²⁰⁸ their records not examined,²⁰⁹ data on their computers not accessed,²¹⁰ their records not reproduced,²¹¹ and their copying equipment not used by third parties such as FINTRAC,²¹² without a warrant duly authorised by a competent court. This brings certainty to the position in Canada regarding third party access to client records in lawyers’ offices.

203 *Federation of Law Societies of Canada v Canada* 2011 BCSC 1270 Para 143. *Maranda v Richer*, 2003 SCC 67 (CanLII), [2003] 3 S.C.R. 193 Para 37.

204 *Maranda v Richer*, 2003 SCC 67 (CanLII), [2003] 3 S.C.R. 193 Para 37.

205 *Federation of Law Societies of Canada v Canada* 2011 BCSC 1270 Para 144. See also Chong (2013: 1).

206 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC Para 83.

207 *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC Para 84.

208 Section 62(1)(a) of the PCMLTFA.

209 Section 62(1) of the PCMLTFA.

210 Section 62(1)(b) of the PCMLTFA.

211 Section 62(1)(c) of the PCMLTFA.

212 Section 62(1) of the PCMLTFA.

5.4.3 The South African Position²¹³

The object of FICA was to complement POCA by introducing mechanisms and measures aimed at preventing and combating money laundering activities. The legislation places the responsibility for detecting potentially illegal activities on accountable institutions, such as lawyers.²¹⁴ The FIC was established to receive and analyse CTRs and STRs and to implement the mechanisms set out in FICA and POCA.²¹⁵ FICA required lawyers to report confidential client information²¹⁶ and it authorised the FIC and the LSSA to examine a lawyer's client records by way of a warrantless search.²¹⁷

However, in *Estate Agency Affairs Board v Auction Alliance*,²¹⁸ the authority of members of the FIC and the LSSA to enter the premises of accountable institutions and seize computer documents without a warrant was declared unconstitutional. Fortunately, the Constitutional Court's decision in *Estate Agency Affairs Board* brings relief also to lawyers.²¹⁹ Before this case, the FIC and the LSSA were authorised to use any computer system when searching a lawyer's office for data.²²⁰ Also the lawyer and other persons employed in the law practice were required to assist the FIC's search agents and to furnish them with "any information ... that they may reasonably require".²²¹ The FIC had the power to disclose this information to the police.²²² At least South African lawyers now receive the same protection against warrantless searches of their law offices as their Canadian counterparts.

213 The South African position regarding third party access to client records was fully discussed in Section 3.3.4 of this study above.

214 See Goredema (2005: 27), Van der Westhuizen (2003: 33) and Henning & Ebersohn (2001: 123). See also Schedule 1 in which FICA lists all the accountable institutions which includes attorneys as defined in the Attorneys Act 53 of 1979.

215 See Van Jaarsveld (2011: 490).

216 Section 28 and 29 of FICA.

217 Section 45B of FICA.

218 *Estate Agency Affairs Board v Auction Alliance* 2014 (4) BCLR 373 (CC).

219 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC.

220 Section 45B(2)(d) of FICA.

221 Section 45B(3) of FICA.

222 Section 45B(5) of FICA.

5.4.4 Comparative Commentary

It is incomprehensible that lawyers' offices could be raided by third parties to acquire evidence against the clients of lawyers, without a duly authorised warrant. Unfortunately, this was precisely the effect that the Canadian and South African statutes envisaged before the offending sections of the statutes were invalidated. Attorney-client confidentiality and legal professional privilege are two of the major pillars of the legal profession. Lawyers are in a unique position of trust, precisely because of the nature of their professions. Lawyers on a daily basis have to deal with information that possibly could incriminate their clients and they are not supposed to divulge it to anyone.

Third party access to client records is not dealt with in a specific statute in the US, as it was in the PCMLTFA in Canada and FICA in South Africa. In the US, attorney-client confidentiality is covered in the ABA Model Rule 1.6 and in the Fourth Amendment which prohibits warrantless searches. In Canada, this was the crux of the constitutional challenge against the provisions of the PCMLTFA. The question was: why lawyers' offices should be used as archives for the prosecution? The Canadian Supreme Court correctly declared Sections 62 to 64 of the PCMLTFA unconstitutional and the Constitutional Court in South Africa likewise declared Section 45B of FICA unconstitutional. In South Africa, lawyers were quiet on this issue and it was left to an estate agent to bring an application to have Section 45B of FICA declared unconstitutional. Ironically, Section 45B has been in operation since the amendment of FICA in 2008. So, for a period of seven years, warrantless searches of the offices of accountable institutions, including the offices of lawyers, were authorised by legislation. The South African legal profession is fortunate that the FIC and members of the LSSA did not act in accordance with Section 45B during this period.

It will be a sad day when lawyers provide evidence and testify against their clients for the prosecution. At least there is some solace for South African attorneys in that

the declaration of unconstitutionality of warrantless searches of law offices is one area where they do not come off worse than their US and Canadian counterparts.



CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

Lawyers in South Africa are more or less in the same position as their US and Canadian counterparts as far as third party access to client records goes. However, they are in a much more precarious position as regards STRs, CTRs and tainted fees. Whilst it is understandable that the South African legislature had to attempt to curb crime and ensure that lawyers do not facilitate money laundering, FICA and POCA entail near catastrophic consequences for lawyers in the criminalisation of the receipt of tainted fees, and of the failure to submit STRs and CTRs.¹

No justification for such criminalisation emerges from the jurisprudence in the US and in Canada. Hence, this chapter investigates the provisions of UN Conventions, EU Directives and FATF Standards in a final attempt to search for authority for the provisions of POCA and FICA.

6.2 The Criminalisation of Tainted Fees

It will be recalled that in both the US and Canada the payment of legal fees with suspected tainted funds is not regarded as a crime. The US has inserted an exemption from prosecution clause in the MLCA for lawyers should they be paid with tainted money. The purpose of this insertion was to guarantee an accused person's right to legal representation. Canada's Criminal Code allows for the release of funds for legal expenses when an application for forfeiture is made. The topic of tainted fees, however, did not receive the same amount of attention in Canada as it did in the US.

1 In terms of Sections 3 and 8 of POCA and Sections 1, 52 and 53 of FICA.

The United Nations Conventions and the EU Directives are silent as to whether the acceptance of tainted fees is to be regarded as a crime. Under the CoE Money Laundering Convention of 1990, it was adjudged incorrect to assume that lawyers should be prosecuted for accepting tainted fees, while the notion that lawyers should be prosecuted for being paid with tainted fees was deemed a misinterpretation.² The international consensus was that it should never be a crime to hire a lawyer or for a lawyer to accept such fees. It was never the intention to criminalise the representation of an accused charged with one of the money laundering predicate crimes. The Explanatory Report to the Convention confirms that certain interpretations which might have raised human rights and civil liberties concerns were invalid.

It was envisaged that an exemption from prosecution would be granted to lawyers who defend clients accused of money laundering. The EU ML Directives were aimed at rooting out corruption in the financial sectors and extend to lawyers when they participate in such corruption by assisting clients in the preparation and execution of financial transactions and in real estate deals.³ The Directives never were intended to cover all criminal matters and, according to Gilmore, never were intended as blanket coverage of all activities conducted by lawyers.⁴

Furthermore, Article 14 of the Charter of the African Union does not contain anything relating to tainted fees and refers only to the right to a fair trial. The FATF is also quiet regarding the tainted fees issue. There is thus no authority in the UN Conventions, the EU ML Directives, the Charter of the African Union, or in the FATF Standards to justify that the receipt of tainted fees for legal representation should be regarded as a crime.

2 The Convention on Laundering, Search and Seizure and Confiscation of the Proceeds of Crime. See also the 1990 Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime Para 33. See § 2.3.1 for a detailed discussion of this issue.

3 Article 2a(5) of the 2001 EU ML Directive. See discussion in §2.3.2.2 of this study.

4 Gilmore (2011: 231). Recital 16 of the 2001 EU ML Directive. See discussion in §2.3.2.2 of this study.

Unfortunately for South African lawyers, there is no exemption from prosecution for attorneys as there is in the US.⁵ In South Africa, attorneys could face exemplary prosecution at the behest of the National Prosecuting Authority.⁶ It is, in fact, only a person charged with a money laundering or related offence under POCA and FICA whose right to legal representation is affected, and not that of any other accused person. Lawyers who represent an accused person charged with a money laundering or related offence thus are being treated differently from those who represent other accused persons.

Consider, for example, that X intentionally and unlawfully kills Y, with no one witnessing the incident. Although X does not dispute having committed the offence and admits as much to his lawyer, he instructs his lawyer that he wants to plead not guilty. X's view is that there are no witnesses who observed the killing and the state will be unable to link him to the murder. X is presumed innocent and is entitled to his fair trial rights under Section 35(3) of the South African Constitution. While counsel may not argue that X did not commit the offence, he may argue that the state has not proved that X is guilty beyond a reasonable doubt and that there are not sufficient guarantees in the evidence of the state to warrant a conviction.⁷ In this hypothetical, X is entitled to legal representation, and a lawyer will assist him to enforce his right to silence, his right to be presumed innocent and the privilege against self-incrimination. There is no penalty for X's lawyer, although he was at all times aware of X's factual guilt. If a defence lawyer, however, suspects that money paid as fees is tainted, he commits a crime. Why then is it permissible for a lawyer to represent an accused person who has admitted guilt to a very serious crime, but not for a lawyer to represent an accused person charged with money laundering and be paid money which allegedly stems from the money laundering offence in issue? This contradiction amounts to a persecution of lawyers who represent money launderers.

5 Gaetke & Welling (1992: 1168).

6 See Hawkey (2011: 9).

7 Freedman (1966: 1471).

The argument is not that lawyers should be exempted from prosecution because they are a special breed. If they transgress the law they should be punished and if they are launderers themselves they should be prosecuted to the full extent of the law.⁸ If they allow their trust accounts to be used as a vehicle to clean money they must face the consequences of their conduct.⁹ Similarly, if they assist their clients in schemes aimed at defrauding the tax authorities or to launder dirty money, they must be prosecuted.¹⁰ However, it should not be a crime merely to accept tainted funds as legal fees, if the payment is to give effect to an accused person's right to legal representation. In such a case, an exemption from prosecution for lawyers should be granted.

A lawyer should be allowed to charge a fee which is compatible with his expertise and with the complexity of the case. The Law Societies have broad guidelines on fees that lawyers may charge, and a client who is aggrieved by too high a fee charged by his lawyer, may have the bill of costs taxed by the Law Society or by the courts. Similarly, if the prosecution alleges that a higher than normal fee was charged by lawyer perhaps as a means to launder money, such an account can be taxed. If it is found that a lawyer has overcharged the client, the lawyer could be ordered to refund the excess and he will be penalised also. If it is found that an excessive fee was asked with the sole intention of cleaning the money, then the lawyer should be charged. However, a lawyer should not face criminal charges merely for accepting tainted fees. It is submitted that South Africa should adopt the American approach and exempt lawyers from prosecution for the receipt of tainted fees where the right to legal representation is affected. Such an exemption undoubtedly will vindicate the right to legal representation.¹¹

8 *S v Hattingh*—unreported, Bloemfontein Regional Court and *Pillay & Others v S* 2004 (1) All SA 61 (SCA).

9 *United States v Foster* 835 F.Supp. 360 (1993).

10 *United States v Mcquire* 79 F 3d 1396 (5th Cir.1996) and *United States v Foster* 835 F. Supp.360 (1993).

11 The right to legal representation is entrenched in Section 35(2) and 35(3) of the Constitution of 1996.

The criminalisation of tainted fees also may infringe a lawyer's right to exercise his profession.¹² It may prompt young law graduates not to become criminal lawyers. Established and experienced lawyers could be forced also to look for alternative spheres of legal practice to earn a living. If no exemption from prosecution is allowed for criminal defence lawyers, it is quite possible that they could treat a certain category of accused persons as untouchables. However, while trying to avoid prosecution, criminal defence practitioners still must earn a living and fulfil their constitutional duty to provide legal representation to clients. It is the possibility of prosecution and conviction for accepting tainted fees that constitutes the most dangerous predicament for lawyers.

It is submitted that both POCA and FICA should be amended to exempt lawyers from prosecution if they are paid with contaminated funds. An exemption clause similar to that contained in the MLCA should be inserted into FICA and POCA. Surely, combating crime ought not to have the effect of infringing rights. It is submitted that in declaring tainted fees a crime, the South African legislature failed to find the balance between combating lawyer-facilitated money laundering, on the one hand, and the right to legal representation and the right to exercise a profession, on the other hand.

6.3 Transaction Reporting: STRs and CTRs

The South African legislature, in its wisdom, used FICA to make it compulsory for lawyers to submit STRs and CTRs in respect of client activities and to criminalise non-submission. If a lawyer, in his dealings with a client, suspects that the client is busy with suspicious and unusual transactions and he fails to report such suspicions, he commits a crime. This goes against the established objective of legal professional privilege and attorney-client confidentiality to keep certain client information confidential.

12 See detailed discussion of this issue in §4.4 of this study.

Clients tend to expect that what they tell a lawyer in confidence will stay with him and will not be broadcast anywhere and to anyone else. In the comparative study of the US and Canada, no helpful lessons were learnt and no justification could be found for making the filing of STRs compulsory for lawyers and for criminalising non-compliance. US lawyers formed part of the FATF's construction of the RBA and always were opposed to compulsory STRs for lawyers. The ABA resolutions do not make it compulsory for lawyers to file STRs and the Good Practices Guidance provides assistance to attorneys on how to deal with this issue.

In Canada, the FLSC had no problem approaching the courts to obtain an interdict against STRs being required from their lawyers. It not only succeeded in court, but also convinced the legislature to amend the PCMLTFA so that STRs are not compulsory for lawyers.

The United Nations Conventions and the EU Directives likewise do not make it compulsory to submit STRs. The EU Directives require the filing of STRs only when there is no link to judicial proceedings,¹³ in three specific instances: when legal advice provided has the effect that the lawyer is taking part in money laundering; when the lawyer is providing advice for money laundering; and when the lawyer knows that the client is seeking advice for money laundering purposes. The submission of an STR to a FIU is not compulsory but can be made to a Law Society, as a self-regulating body.¹⁴ There is, however, no indication that a failure to submit an STR should be regarded as a crime. Article 14 of Charter of the African Union confirms that an accused person has a right to a fair trial, but, as with the FATF Standards it is silent regarding an STR requirement for lawyers and the criminalisation of non-submission. No authority can be extracted from the UN Conventions, the EU ML Directives, the Charter of the African Union or the FATF Standards to justify compulsory STRs for lawyers and to criminalise non-compliance.

13 Recital 17 of the 2001 EU ML Directive.

14 Article 34(2) of the 2015 EU ML Directive.

Sadly, South African lawyers are saddled with the possibility of being prosecuted for failure to file an STR with the FIC. It is recommended that FICA be amended to remove the compulsion for lawyers to submit STRs and to decriminalise non-submission.

The non-submission of CTRs is not regarded as a crime anywhere else except in South Africa. The argument that lawyers should be alert not to accept large amounts of cash has merit. However, the failure to submit a report for accepting cash above a designated threshold should not be a crime. It is suggested that South Africa follow the FLSC's No-Cash Rule.¹⁵ This rule requires each Law Society to implement regulations which preclude lawyers from receiving cash amounts of more than \$7 500.¹⁶ The adoption of the No-Cash Rule effectively rendered it unnecessary for lawyers in Canada to report cash transactions involving \$10 000 or more to any government institution.¹⁷ In Canada, a transgression of this No-Cash Rule will result in disciplinary sanction from the appropriate Law Society.

A No-Cash Rule for South Africa, sponsored by the LSSA, will circumvent the obligation to report a client in terms of Section 28 of FICA. It is suggested that such a rule will be easy for the LSSA to monitor. Every legal practice must undergo an annual audit by an independent chartered accountant. The report template of the auditor can be amended slightly to require him to report whether any cash payments in excess of, say, R20 000 were made in respect of a single matter. A transgression of this rule should result in disciplinary sanction from the LSSA. Such a rule will decriminalise the receipt of cash payments less than R20 000 in respect of a single matter.

15 See Paton (2010: 181), Priestley (2009: 17) and Terry (2010: 42).

16 See Gallant (2013: 11), Woolley (2013: 2), Paton (2010: 181), Terry (2010: 42), McDonald (2010: 145), Priestley (2009: 17) and Lawrence & van Houten (2013: 1).

17 See Gallant (2009: 215), Gallant (2013: 11), Paton (2010: 181), McDonald (2010: 145), Woolley (2013: 2) and Priestley (2009: 17).

6.4 Third Party Access to Client Records

Before the case of *Estate Agency Affairs Board v Auction Alliance*, the FIC had virtually unrestrained access to client records in the possession of lawyers. In both Canada and South Africa this intrusion was sorted out with constitutional challenges. However, whereas the Canadian lawyers challenged the constitutionality of the PCMLTFA, in South Africa it was left to an estate agent. The effect of the judgment is that lawyers' offices should not be used as archives for the prosecution. For a period of seven years (from 2008 to 2015) warrantless searches of law offices were possible in South Africa. The South African legal profession was just fortunate that the FIC and the LSSA did not exploit this possibility.

6.5 Concluding Remarks

Why the South African legal profession failed to defend itself against the assault represented by the provisions of POCA and FICA remains a mystery. Perhaps it was lulled into complacency because no one as yet has been prosecuted for the non-submission of STRs and CTRs and for accepting tainted fees.¹⁸ However, if the proposed amendments to POCA and FICA are not made, it could come to pass that a lawyer finds himself as an accused person in court without legal representation.

¹⁸ This position will change with the prosecution of attorney Anthony Broadway in *S v Wei & Others*, pending case before the Western Cape High Court.

6.6 Recommendations

6.6.1 Amendment to POCA: Tainted Fees

It is recommended that Sections 2, 4, 5 and 6 of POCA be amended to exempt attorneys from prosecution in the event of their fees being paid with tarnished funds.

A new Section 2 of POCA could read as follows (with the proposed amendment indicated in bold and underlined):

Any person who

- (a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and
- (ii) knows or ought reasonably to have known that such property is so derived; and
- (iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;
- (b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and
- (ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;
- (c) (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and
- (ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;
- (d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;
- (e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;
- (f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or
- (g) conspires or attempts to violate any of the provisions of

paragraphs (a), (b), (c), (d), (e) or (f), within the Republic or elsewhere,
shall be guilty of an offence, **but the term “person” does not include members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

A new Section 4 of POCA could read as follows (with the proposed amendment indicated in bold and underlined):

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect
 - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof;
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—
 - (aa) to avoid prosecution; or
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence, **but the term “person” does not include members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

A new Section 5 of POCA could read as follows (with the proposed amendment indicated in bold and underlined):

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby

- (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence, **but the term “person” does not include members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

A new Section 6 of POCA could read as follows (with the proposed amendment indicated in bold and underlined):

Any person who

- (a) acquires;
- (b) uses; or
- (c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence, **but the term “person” does not include members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

6.6.2 Amendment to FICA: Tainted Fees

It is recommended that the definition of “money laundering” in Section 1(1) of FICA be amended to exempt members of the legal profession from prosecution in the event of their being paid tainted fees for legal representation.

A new definition of “money laundering” in Section 1(1) of FICA could read as follows (with the proposed amendment indicated in bold and underlined):

an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, **but the term “activity” does not include the conduct of members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

6.6.3 Amendment to FICA: CTRs

Currently, Section 51 of FICA criminalises the failure by lawyers to submit CTRs to the FIC, in the following terms:

An accountable institution or reporting institution that fails, within the prescribed period, to report to the Centre the prescribed information in respect of a cash transaction in accordance with section 28, is guilty of an offence.

It is recommended that Section 51 of FICA be deleted in order to decriminalise the non-submission of CTRs.

6.6.4 Amendment to FICA re STRs

It is recommended that Section 29 be amended to exempt attorneys from submitting STRs. A new Section 29 of FICA could read as follows (with the proposed amendment indicated in bold and underlined):

- (1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that-
 - (a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
 - (b) a transaction or series of transactions to which the business is a party
 - (i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
 - (ii) has no apparent business or lawful purpose;
 - (iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;
 - (iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;
 - or
 - (v) relates to an offence relating to the financing of terrorist

- and related activities; or
- (c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities, must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.]
- (2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.
- (3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than-
- (a) within the scope of the powers and duties of that person in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.
- (4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than
- (a) within the scope of that person's powers and duties in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.
- (5) **The term “person” referred to in this Section does not include members of the legal profession acting to fulfil their responsibilities to give effect to the right to legal representation as guaranteed by the Constitution of the Republic of South Africa, 1996.**

6.6.5 No-Cash Rule for LSSA

It is recommended that the LSSA adopt wholesale the Canadian No-Cash Rule, suitably modified for South African conditions. The transgression of this rule should result in disciplinary sanction from the LSSA.

A South African No-Cash Rule, annexed verbatim from the Canadian No-Cash Rule, should read as follows:

1. A lawyer shall not receive or accept from a person, cash in an aggregate amount of R20 000 or more South Africa Rand (R) in respect of any one client matter or transaction.
2. For the purposes of this rule, when a lawyer receives or accepts cash in a foreign currency from a person the lawyer shall be deemed to have received or accepted the cash converted into South Africa Rand (R) at
 - (a) the official conversion rate of the Reserve Bank of South Africa for the foreign currency as published in the Reserve Bank of South Africa daily noon rates that is in effect at the time the lawyer receives or accepts the cash, or
 - (b) If the day on which the lawyer receives or accepts cash is a holiday, the official conversion rate of the reserve bank of South Africa in effect on the most recent business day preceding the day on which the lawyer receives or accepts the cash.
3. Paragraph 1 applies when a lawyer engages on behalf of a client or gives instructions on behalf of a client in respect of the following activities:
 - (a) receiving or paying funds;
 - (b) purchasing or selling securities, real properties or business assets or entities;
 - (c) transferring funds by any means.
4. Despite paragraph 3, paragraph 1 does not apply when the lawyer receives cash
 - (a) from a financial institution or public body,

- (b) from a peace officer, law enforcement agency or other agent of the State acting in his or her official capacity,
- (c) pursuant to a court order, or to pay a fine or penalty.



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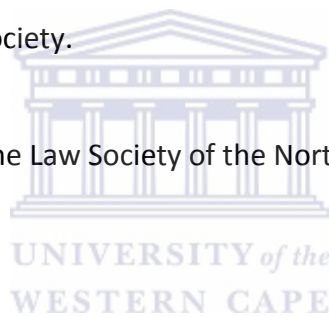
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