

# *Carpe Pecuniam*: Criminal forfeiture of tainted legal fees

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## SUMMARY

A person charged with money laundering has a right to legal representation and a lawyer is entitled to defend such person. What if the lawyer is paid with dirty money? This paper explores the legal status of tainted fees, to determine whether such moneys should be forfeitable and, if so, what forfeiture means for the client's right to legal representation and the lawyer's right to practise his/her profession. This is an issue of international import and the paper considers criminal forfeiture of tainted legal fees in South Africa, the USA and Canada. All three jurisdictions provide for the criminalisation of tainted fees. However, South African lawyers are most in peril both of prosecution and conviction for accepting tainted fees and of having such fees confiscated. Whereas the USA and Canada uphold the right of lawyers to practise their profession, South Africa appears to negate it. The South African position requires reform.

## 1 Introduction

Nowadays, money laundering is a prominent feature of the international criminal justice landscape, including South Africa's, and most states are keen to arrest, prosecute and punish money launderers. Needless to say, those accused of money laundering have as much right to legal representation as do all other accused. Indeed, such accused persons likely can afford to pay for legal representation of their choice – more so than many accused charged with non-economic crimes – because they have access to the proceeds of their crimes.

Of course, lawyers all over the world are entitled to defend persons accused of money laundering and to be paid for the services rendered in the course of such defence. If the legal fees are paid with clean money, untainted by criminality, then there is no cause for apprehension, at least as far as the lawyer is concerned. However, if the fees are settled with money which derives from the criminal conduct of his/her client, then the lawyer may be in an unenviable position. Here a number of questions arise. Is a lawyer entitled to accept dirty money as legal fees? Is the client

entitled to use part of his/her criminal proceeds to defray his/her legal costs? Is the lawyer who is paid with dirty money vulnerable to criminal prosecution? Can the state seek to confiscate such legal fees because they are proceeds of crime?

This paper focuses on the last question and makes an attempt to unpack its ramifications with a view to understanding the legal status of tainted fees paid to a lawyer by a client accused of money laundering. Should such moneys be forfeitable and, if so, what does forfeiture mean for the client's right to legal representation and the lawyer's right to practise his/her profession? This is an issue of international range, given that money laundering schemes often cross national borders, and much is to be learnt from the experiences of foreign jurisdictions. Against this backdrop, the paper studies the approaches taken by South Africa, the USA and Canada to the forfeiture of tainted legal fees.

## 2 The South African approach

In South Africa, economic crimes in general and money laundering in particular are regulated primarily by the Prevention of Organised Crimes Act 121 of 1998 (POCA) and by the Financial Intelligence Centre Act 38 of 2001 (FICA). Both these statutes criminalise the acceptance by lawyers of fees with a criminal provenance. The criminalisation provisions of POCA and FICA operate as a primary prohibition against a South African lawyer receiving tainted fees for services rendered.<sup>1</sup> The lawyer who flouts this prohibition risks criminal prosecution and punishment.<sup>2</sup>

In addition to the threat of personal criminal liability for the lawyer who is paid with dirty money, South African law allows for the forfeiture of the dirty money itself. Criminal forfeiture, which is *in personam* and conviction based, is possible in terms of the various sections of Chapter 5 of POCA.<sup>3</sup> It is structured formally in terms of restraint orders and confiscation orders. Restraint orders operate to prohibit temporarily any transactions with the property or asset to which they pertain, in order that said property or asset may be preserved for eventual forfeiture. Confiscation orders concern the permanent appropriation by the state of criminal assets held by their targets. Once confiscated, these are deposited into the Criminal Assets Recovery Account, which is subsumed within South Africa's National Revenue Fund.<sup>4</sup> The disposition of funds

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1 See ss 2, 4, 5 and 6 of the Prevention of Organised Crime Act 121 of 1998 and ss 1 and 28 of the Financial Intelligence Centre Act 38 of 2001.

2 For a full discussion of this aspect see Hamman & Koen "Pecunia non olet: Dirty money as legal fees" 2017 *JACL* 108-114.

3 Chapter 6 of POCA sets out a correlative civil forfeiture regime, which is *in rem* and non-conviction based, and which reproduces, for the most part, the structure of criminal forfeiture. However, it is accessory to criminal forfeiture which, as in most countries, is the default forfeiture regime in South Africa.

4 See s 64(a) of the Prevention of Organised Crime Act.

in the Criminal Assets Recovery Account is decided by the Cabinet on the recommendation of the Criminal Assets Recovery Committee.<sup>5</sup>

The criminal forfeiture provisions of POCA are of general application and hence could be deployed by the state to confiscate fees paid to a lawyer by a client who has been charged with or convicted of money laundering, provided that the fees have a criminal derivation. This form of forfeiture hinges upon a criminal prosecution and conviction of the lawyer, probably for receipt of criminal proceeds as fees. The forfeiture process normally would commence with a restraint order and conclude with a confiscation order. The former usually is a pre-conviction step, issued with a view to preventing dispersal or concealment of the tainted fees; the latter occurs post-conviction, at the sentencing stage of the criminal trial.

The key provision in respect of the restraint order in conviction based forfeiture proceedings is section 25(1) of POCA, which reads:

“A High Court may exercise the powers conferred on it by section 26(1)–

- (a) when –
  - (i) a prosecution for an offence has been instituted against the defendant concerned;
  - (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
  - (iii) the proceedings against that defendant have not been concluded; or
- (b) when –
  - (i) that court is satisfied that a person is to be charged with an offence; and
  - (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against such person.”

Section 25(1) thus allows a South African High Court,<sup>6</sup> to grant a restraint order against a lawyer in two instances. The first is during an ongoing prosecution, when a confiscation order already has been made against the defendant-lawyer or when there is a reasonable expectation that such an order will be made. The second is prior to the institution a prosecution, when the court is satisfied that prosecution will ensue and that there are reasonable grounds to expect that a confiscation order will be made against the defendant-lawyer.

The restraint takes place in terms of section 26(1) of POCA, which empowers the High Court to issue the restraint order by way of an *ex parte* application by the state. If the restraint order is granted, the defendant-lawyer and any other person are prohibited from “dealing in any manner with any property to which the order relates”. The idea is to ensure that the property, in this case the tainted legal fees, is preserved for possible forfeiture under a future confiscation order. Further, section

<sup>5</sup> See s 69 of the Prevention of Organised Crime Act.

<sup>6</sup> Evidently, lower courts are not empowered to make restraint orders under the POCA forfeiture regime.

26(2) of POCA provides, essentially, that the restraint order applies to all realisable property.<sup>7</sup> The notion of realisable property is capacious, and would encompass not only the actual tainted fees but also any other assets into which part or all of the tainted fees have been converted, whether in the hands of the lawyer-defendant or in those of a third party to which they have been gifted – presumably in an effort to place them beyond the reach of the law.

The restraint order is primarily a mechanism of preservation. Its core purpose is to secure the tainted legal fees or their commuted equivalent. However, it is a temporary measure, designed to prevent dissipation of the restrained property pending the outcome of the criminal proceedings. The actual forfeiture of the tainted fees (or their converted reciprocal) to the state is accomplished by way of a confiscation order. Confiscation in conviction based forfeiture is governed by section 18(1) of POCA, which stipulates that:

“Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; and
- (c) any criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.”

A confiscation order follows conviction of the defendant and upon application by the state to the convicting court. The granting of a confiscation order does not appear to be dependent upon the existence of a restraint order issued prior to conviction. Indeed, it is possible that a restraint order could be applied for after the granting of the confiscation order. Assume, for example, that a court issues a confiscation order against a convicted lawyer in respect of tainted fees and/or the asset(s) into which said fees have been converted, in whole or in part. The aim of the confiscation order is to deprive the lawyer of access to and enjoyment of his/her-debased currency. According to section 18(1), the confiscation order constitutes a judgment which sounds in money,<sup>8</sup> and if the state is concerned that the convicted lawyer’s assets have to be

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7 S 14(1) of the Prevention of Organised Crime Act identifies realisable property as:

- (a) any property held by the defendant concerned; and
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.

8 See Basdeo “The law and practice of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma” 2014 *PELJ* 1054.

preserved in order for the confiscation order to be realised, it well may apply for a restraint order after the confiscation order already has been made. This possibility is envisaged, somewhat counter-intuitively, by section 25(1)(a)(ii) of POCA as cited above. As a rule, though, the restraint order would precede the confiscation order.

The crimes for which the court may issue a confiscation order against the convicted lawyer include any and all offences of which the lawyer has been convicted during the same criminal proceedings.<sup>9</sup> In addition, the confiscation order may encompass any other criminal conduct considered by the court to be “sufficiently related” to these offences.<sup>10</sup> As a money judgment, the confiscation order seeks to divest the convicted lawyer of the proceeds of his\her crime(s) and any related criminal behaviour. The quantum of the confiscation order may be any amount which the court considers appropriate, provided it does not exceed the value of the proceeds gained from the criminal conduct in question.<sup>11</sup> For example, the confiscation order could require the lawyer to pay to the state the full amount which he\she has received as fees from his\her client. This is the fee forfeiture. Further, the court may supplement the primary confiscation order with any secondary order which it considers necessary to implement the confiscation order fairly. The confiscation order and any cognate order do not constitute criminal sanctions, and stand separate from any punishment imposed by the court for the offence(s) committed by the lawyer.

Interestingly, whereas a restraint order may be made only by a High Court, a confiscation order may be granted by the court which has tried and convicted the defendant, be it a High Court or a lower court. This jurisdictional difference likely derives from the fact that the restraint order application is *ex parte* and is granted without reference to the defendant, whereas the confiscation order forms part of a trial in which all the conventional notice requirements would have been met. This means that the tainted legal fees or their proprietary counterpart may be restrained by one (high) court while another (lower) court – which has tried and convicted the errant lawyer – may order their forfeiture, as money, to the state.

Hitherto, South African law has seen only one case in which the state sought the criminal forfeiture of dirty money paid as legal fees.<sup>12</sup> It concerns an abalone poaching syndicate and involves some 30 accused and close to 600 charges. The case has been running in the Western Cape High Court for several years already, but information about it is sparse and has had to be gleaned from newspaper reports and online sources. One of the accused was Anthony Broadway, an attorney, who had been

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9 S 18(1)(a) and s 18(1)(b) of the Prevention of Organised Crime Act.

10 S 18(1)(c) of the Prevention of Organised Crime Act.

11 S 18(1) and s 18(2)(a) of the Prevention of Organised Crime Act.

12 The case commenced life as *State v Ran Wei & Others* in the Western Cape High Court. It appears to have been re-named since as *State v Frank Barends and Others*, case no SS 47/2012.

defence counsel for a number of his co-accused before he himself was charged under POCA with the receipt of tainted fees and became an object of forfeiture proceedings by the state. As one report had it:

“Bellville attorney Anthony Broadway ... who represented several syndicate members since 2001, was also a defendant in the restraint proceedings. His assets, listed on an annexure to the order, include properties in Kenridge and Bellville, a Mercedes-Benz, a Hyundai i20, a trailer, two motorcycles and the contents of nine bank accounts in his name”.<sup>13</sup>

Mr Broadway now has been saddled with the dubious distinction of being the first South African lawyer ever to become embroiled as a target in the forfeiture regime of POCA. Although the case has not been finalised yet,<sup>14</sup> it has been reported in the media that Anthony Broadway himself is no longer an accused and has been cleared of all charges.<sup>15</sup> It would appear, then, that South Africa’s first and only attempt to deploy the provisions of POCA against an attorney in criminal proceedings relating to tainted legal fees has come to nought. However, the attempt does confirm that South African lawyers have to appreciate not only that the receipt of tainted legal fees is an offence but also that such fees are forfeitable to the state.

However, there is a silver lining to the POCA cloud engulfing tainted legal fees in that allowance is made for a lawyer’s fees to be paid by a client (accused of money laundering) from funds which well may be proceeds of crime. It is a concession which applies to assets which are subject to a restraint order. In such a case, it is possible for a court to order that the reasonable legal expenses of the accused be settled from the frozen assets. This possibility stands as an exception to the rule that lawyers cannot be paid with dirty money and that said money is subject to confiscation.

This is the so-called legal expenses exception. It is governed by section 26(6)(b) of POCA, which specifies that:

“Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the High Court may think fit –

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13 Schroeder (2013-11-02) “Abalone syndicate set to lose millions” *IOL* <https://www.iol.co.za/news/abalone-syndicate-set-to-lose-millions-1601120> (last accessed 2018-09-09).

14 See *S v Miller and Others* 2018 (2) SACR 75 (WCC) para 87 in which the court noted: “While this matter has been running, another lengthy POCA trial involving the poaching and export of abalone (*The State v Frank Barends and others*, case no SS 47/2012) has been running in this Division before Mr Justice Erasmus. Judgment in that matter has not been delivered yet.”

15 See Menges (2017-06-27) “Perlie lawyer vry” *Die Son*, <https://www.son.co.za/Nuus/Kaapsenuus/perlie-lawyer-vry-20170626> (last accessed 2018-09-09); Breytenbach (2017-06-27) “Prokureur vry oor twee rekenaars” *Die Burger*; <https://www.pressreader.com/south-africa/die-burger/20170627/281694024789041> (last accessed 2018-09-18).

for the reasonable legal expenses of ... a person [against whom the restraint order is being made] in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which such proceedings may relate, if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.”

It must be emphasised here that this section constitutes an exemption from the general tenor of South African law that tainted legal fees are forfeitable, first and foremost. Criminal proceeds or otherwise dodgy funds may be used to defray legal expenses only if they are subject to formal restraint and the court authorises that they may be defrayed. The point is that South African law tolerates the payment of legal fees from criminal funds grudgingly, and then only with the imprimatur of the court. The granting of that imprimatur depends upon the court's being convinced that the subject of the restraint order has declared his/her full interest in the restrained property under oath and that he/she does not own sufficient unrestrained property with which to settle his/her lawyer's account. Honesty and impecuniosity on the part of the client, then, are prerequisites for persuading the court to authorise payment of his/her lawyer's fees from restrained funds. The lawyer, who accepts tainted fees outside of the statutory legal expenses exception, breaks the law and stands to be prosecuted and to have the fees confiscated by the state.

### 3 The USA approach

The forfeiture of tainted legal fees long has been allowed in the USA. The main forfeiture statute is to be found in Title 21 of the United States Code, specifically 21 USC §853(a)-(q), known otherwise as the Comprehensive Forfeiture Act (CFA) of 1984. The CFA was preceded by the Racketeer Influenced and Corrupt Organisations Act (RICO),<sup>16</sup> and the Continuing Criminal Enterprise Act (CCE Act),<sup>17</sup> both of 1970. None of these statutes contains any express provisions that exempt attorneys' fees from forfeiture.<sup>18</sup>

Significantly, the US Money Laundering Control Act (MLCA) of 1986,<sup>19</sup> contains a so-called safe harbour provision which effectively decriminalises the receipt by an attorney of tainted fees, provided such fees relate to upholding the Sixth Amendment right of accused persons

16 18 USC §§1961-1968.

17 21 USC §848.

18 See Brickley “Forfeiture of attorneys' fees: The impact of Rico and CCE forfeitures on the right to counsel” 1986 *Virginia Law Review* 495; Winick “Forfeiture of attorneys' fees under RICO and CCE and the right to counsel: The constitutional dilemma and how to avoid it” 1989 *University of Miami Law Review* 770.

19 18 USC §§1956-1957.

to legal representation.<sup>20</sup> However, it appears that this provision does not indemnify tainted legal fees against forfeiture. Whereas the lawyer who is paid with dirty money in terms of the safe harbour clause does not risk criminal prosecution, the dirty money in question remains fair game for court-ordered confiscation. In other words, the safe harbour clause of the MLCA does not operate to protect tainted legal fees against the reach of the CFA, RICO and the CCE Act.<sup>21</sup>

In 1989, the vulnerability of tainted legal fees to criminal forfeiture was considered in two cases, which have become paradigmatic in this area, namely, *United States v Monsanto*,<sup>22</sup> and *Caplin & Drysdale v United States*.<sup>23</sup> They are discussed below.

### 3 1 *United States v Monsanto*

In this matter, one Peter Monsanto allegedly was involved in a large-scale heroin distribution enterprise,<sup>24</sup> and was indicted for violations of the racketeering laws, the creation of a continuing criminal enterprise, and tax and firearm offences.<sup>25</sup> It was averred further that he had accumulated assets, a home, an apartment and \$35 000 in cash, because of his narcotics trafficking. The state argued that these assets were liable to forfeiture under section 853(e)(1)(A) of the CFA, which provides that, when a person is indicted:

“the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property ... for forfeiture.”<sup>26</sup>

The District Court granted the *ex parte* motion for an order freezing the designated assets pending trial. Monsanto claimed, *inter alia*, that the order interfered with his Sixth Amendment right to counsel of his choice.<sup>27</sup> He sought a declaratory order to the effect that if the frozen assets were used to pay attorneys’ fees, the state would not invoke section 853(c) of the CFA, which could render a transfer from a client to an attorney forfeitable, to confiscate such payments in the event of his

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20 18 USC §1957(f)(1). See also Gaetke & Welling “Money laundering and lawyers” 1992 *Syracuse Law Review* 1168; Nelson “Federal forfeiture and money laundering: Undue deference to legal fictions and the Canadian crossroads” 2009 *Miami Inter American Law Review* 51.

21 For the sake of good order, it should be noted here that in the USA tainted legal fees are liable to be confiscated also by way of civil forfeiture, as provided for in 18 USC §981. However, it appears that US jurisprudence has been pre-occupied with the criminal forfeiture of tainted legal fees, suggesting that the state has not opted to rely upon civil forfeiture in any sustained way.

22 *United States v Monsanto* 491 US 600 (1989).

23 *Caplin & Drysdale v United States* 491 US 617 (1989).

24 See Winick 1989 *University of Miami Law Review* 772; and Nelson 2009 *Miami Inter American Law Review* 53.

25 *United States v Monsanto supra* 603. See also Nelson 2009 *Miami Inter American Law Review* 53.

26 See also Nelson 2009 *Miami Inter American Law Review* 53.

27 *United States v Monsanto supra* 604.

being convicted and the assets forfeited.<sup>28</sup> This motion was denied by the District Court, but the Court of Appeals ordered that the restraining order be amended to allow him to pay attorneys' fees.<sup>29</sup> The matter then went to the United States Supreme Court.

The Supreme Court relied upon section 853(a), which is the primary forfeiture provision of the CFA. It provides, *inter alia*, that:

“Any person convicted of a violation of this subchapter or subchapter II punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.”

It then proceeds to specify that:

“The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II, that the person forfeit to the United States all property described in this subsection.”

The Supreme Court found that section 853(a) of the CFA did not exempt from criminal forfeiture those assets, which a defendant wishes to use to retain an attorney. The Court held that the language of section 853(a) was plain and unambiguous,<sup>30</sup> and that Congress had selected strong words to make mandatory the forfeiture of criminal proceeds. Hence section 853(a) provides that an offender “shall forfeit” any property constituting the proceeds of his/her offence and that the sentencing court “shall order” the forfeiture of such property, in addition to any other criminal sanction it may impose upon the offender.<sup>31</sup> What is more, the Supreme Court found that the definition of property in the CFA could not be taken to exclude attorneys' fees.<sup>32</sup> In other words, tainted legal fees were subject to criminal forfeiture under section 853(a) of the CFA.

The Supreme Court decided further that the restraining order against the contested property did not violate Monsanto's right to counsel of choice as protected by the Sixth Amendment or the due process clause of the Fifth Amendment.<sup>33</sup> It held that it was constitutionally in order for a district court to make a pre-trial freezing order against assets in a defendant's possession, even where those assets are earmarked as legal

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28 *United States v Monsanto supra* 604. The relevant portion of section 853(c) provides that: “All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States.”

29 *United States v Monsanto supra* 604.

30 *United States v Monsanto supra* 607.

31 *United States v Monsanto supra* 607.

32 *United States v Monsanto supra* 607.

33 *United States v Monsanto supra* 614.

fees.<sup>34</sup> Here the Court relied upon section 853(c) of the CFA, which provides, as intimated above, that criminal property subject to forfeiture vests in the state “upon the commission of the act giving rise to forfeiture”, and that any such property transferred to a third party too is forfeitable in the hands of the recipient.<sup>35</sup> The Court went so far as to equate attorneys’ fees with stock-brokers’ fees, laundry bills and country club memberships, which also were not exempted from forfeiture.<sup>36</sup> In a word, *United States v Monsanto* confirmed that tainted legal fees enjoy no special status in the USA and, like all criminal proceeds, stand to be forfeited to the state.

### 3.2 *Caplin & Drysdale v United States*

In *Caplin & Drysdale*, a law firm sought payment for representing a client indicted under the CCE Act. Christopher Reckmeyer was charged with running a massive drug importation and distribution scheme alleged to be a continuing criminal enterprise.<sup>37</sup> The state applied for an order to forfeit to it designated property that had been acquired by Reckmeyer via drug law violations. The indictment sought forfeiture, in terms of §853(a) of the CFA, of the designated assets that were in Reckmeyer’s possession. A restraint order was granted by the District Court, which prohibited him from transferring any of the potentially forfeitable assets.<sup>38</sup> Despite the court order, Reckmeyer transferred \$25 000 to his lawyers, Caplin & Drysdale.<sup>39</sup> He was represented by Caplin & Drysdale until after his indictment. He then applied to the District Court to amend the restraint order to enable him to use some of the restrained assets to pay his lawyers’ fees and he requested the Court to exempt such assets from post-conviction forfeiture.<sup>40</sup> However, before the Court could deliver its judgment, Reckmeyer entered into a plea bargain with the state in terms of which he agreed to forfeit all of the designated assets.<sup>41</sup>

As a result of the plea bargain, the Court rejected Reckmeyer’s application, and thereafter ordered that virtually all of his assets be forfeited to the state.<sup>42</sup> The law firm of Caplin & Drysdale then argued that assets used to pay an attorney are exempt from forfeiture under section 853 of the CFA and, if they are not, that the statute’s failure to provide an exemption renders the section unconstitutional.<sup>43</sup> It applied in terms of section 853(n) of the CFA for an order to declare that it has a valid third-party interest in the forfeited assets. The District Court granted

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34 *United States v Monsanto supra* 614.

35 *United States v Monsanto supra* 613.

36 *United States v Monsanto supra* 609. See also Nelson 2009 *Miami Inter American Law Review* 53.

37 *Caplin & Drysdale v United States supra* 619.

38 This was done in terms of §853(e)(1)(A) of the Comprehensive Forfeiture Act.

39 *Caplin & Drysdale v United States supra* 620.

40 *Caplin & Drysdale v United States supra* 621.

41 *Caplin & Drysdale v United States supra* 621.

42 *Caplin & Drysdale v United States supra* 621.

43 *Caplin & Drysdale v United States supra* 621.

the order to *Caplin & Drysdale*.<sup>44</sup> However, the decision was overturned in the Court of Appeals, on the basis that there was no exception to the forfeiture requirement and that, the statutory scheme was constitutional.<sup>45</sup>

On a further appeal, the US Supreme Court confirmed, with reference to its own earlier decision in *Monsanto*,<sup>46</sup> that whereas section 853(e) of the CFA endows the court with discretion not to authorise pre-trial restraining orders on potentially forfeitable assets, such discretion does not extend to allowing otherwise forfeitable assets to be available to pay *bona fide* attorneys' fees.<sup>47</sup> It also held that the exercise by the court of the discretion contained in section 853(e) does not prevent non-restrained assets used for attorneys' fees being forfeited subsequently under section 853(c) of the CFA, which allows for the confiscation of forfeitable assets transferred to third parties.<sup>48</sup>

The Supreme Court held also that the CFA does not encroach upon the Sixth Amendment right to legal representation.<sup>49</sup> In this regard, it pronounced that:

“A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.”<sup>50</sup>

Hence the claim by *Caplin & Drysdale*, that it is a Sixth Amendment right of a criminal defendant to pay attorneys' fees with assets which were forfeited to the state, was without merit.<sup>51</sup>

*Caplin & Drysdale* argued also that the forfeiture provisions disordered the balance of power between the state and the accused and that it did so in a manner that offended against the due process clause of the Fifth Amendment.<sup>52</sup> Here, too, the Court was unconvinced. It responded in the following terms:

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44 *Caplin & Drysdale v United States supra* 621.

45 *Caplin & Drysdale v United States supra* 622.

46 *United States v Monsanto supra* 611-614.

47 *Caplin & Drysdale v United States supra* 623.

48 *Caplin & Drysdale v United States supra* 623. See also Gaetke & Welling 1992 *Syracuse Law Review* 1177; Nelson 2009 *Miami Inter American Law Review* 54.

49 *Caplin & Drysdale v United States supra* 626.

50 *Caplin & Drysdale v United States supra* 626. See also Nelson 2009 *Miami Inter American Law Review* 55.

51 See Gaetke & Welling 1992 *Syracuse Law Review* 1176.

52 *Caplin & Drysdale v United States supra* 624. See also Nelson 2009 *Miami Inter American Law Review* 54 & 76.

“Forfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly. But due process claims alleging such abuses are cognizable only in specific cases of prosecutorial misconduct (and petitioner has made no such allegation here) or when directed to a rule that is inherently unconstitutional .... Petitioner's claim – that the power available to prosecutors under the statute *could* be abused – proves too much, for many tools available to prosecutors can be misused in a way that violates the rights of innocent persons ... The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them, *e.g.*, by attempting to impose them on persons who should not be subjected to that punishment ... Cases involving particular abuses can be dealt with individually by the lower courts, when (and if) any such cases arise.”<sup>53</sup>

In rejecting the Fifth Amendment argument, the Court relied essentially on the distinction between the specific and the general. It found that the danger or possibility of abuses of due process rights in specific forfeiture matters could not be used to nullify the idea of forfeiture as a weapon in the anti-crime arsenal of the state. Violation of the Fifth Amendment during forfeiture proceedings was unconstitutional and had to be dealt with as and when they occurred. But forfeiture itself passed constitutional muster. *Caplin & Drysdale* had challenged the constitutionality of the criminal forfeiture regime in the USA on two counts, and lost on both.

The decisions in *Monsanto* and *Caplin & Drysdale* set the tone for the USA approach to the forfeiture of tainted legal fees. The former dealt with forfeitable assets subject to a pre-trial restraining order, the latter with criminal forfeiture post-conviction. In both cases, the US Supreme Court upheld the forfeiture orders granted by the lower courts as constitutional and not in violation of the Sixth Amendment right to counsel. In the USA, then, dirty money paid to a lawyer as legal fees is susceptible to confiscation by the state, in the same way as are all other assets which constitute criminal proceeds. As regards their fees, US lawyers do not enjoy any special dispensation, in that neither the legislature nor the courts have seen fit to declare them non-forfeitable.

Reference to the United States Attorneys' Manual (USAM) is in order here. USAM 9-120.000 sets out Attorney Fee Forfeiture Guidelines. These confirm that legal fees paid to a lawyer for legitimate representation in both civil matters (USAM 9-120.103) and criminal matters (USAM 9-120.104) may be the target of forfeiture proceedings. It would appear, then, that attorneys' fees indeed are no different from stock-brokers' fees, laundry bills and country club memberships.

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53 *Caplin & Drysdale v United States supra* 634-635.

## 4 The Canadian approach

The position of the Canadian lawyer who acts as defence counsel for a money launderer and who accepts tainted funds as a fee payment is regulated by the definition of money laundering in section 462.31(1) of the Canadian Criminal Code. It reads:

“Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.”<sup>54</sup>

According to this section, then, a person commits money laundering if he/she transacts, in any way and by any means, with criminal property or proceeds, and does so with the intention of concealing or converting said property or proceeds, whilst knowing or suspecting its provenance.<sup>55</sup>

Furthermore, the person convicted of money laundering stands to be subjected to the Canadian assets forfeiture regime. In this connection, section 462.37(1) of the Criminal Code provides that if the trial court:

“is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law”.<sup>56</sup>

The forfeiture order made by the court under section 462.37(1) is a post-conviction order. Prior to conviction, the court may grant, on application

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54 S 462.3(1) of the Criminal Code defines a designated offence as:

- (a) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or
- (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a).

55 See McBride 1995 “Proceeds of crime” [library.lawsociety.sk.ca/inmagicgenie/documentfolder/AC1182.pdf](http://library.lawsociety.sk.ca/inmagicgenie/documentfolder/AC1182.pdf) (last accessed 2018-09-18); Brucker “Money laundering and the client: How can I be retained without becoming a party to an offence?” 1997 *The Advocate* 680; Wilbern *Assessing the opinion of lawyers of Canadian money laundering legislation* (PhD dissertation 2008 North Central University) 18.

56 It is noteworthy here that Canadian law enjoins the court to confiscate proceeds of the designated crime according to the civil standard of proof and not the usual criminal standard of proof beyond a reasonable doubt. However, discussion of the constitutional issues which this matter entails is beyond the scope of this paper.

of the Attorney General, an order or orders aimed at protecting and preserving the criminal proceeds in question. Thus, under section 462.32 the court is empowered, on reasonable grounds, to issue a warrant to a competent person to search for and seize the forfeitable property. And in terms of section 462.33 the court could make a restraint order, *ex parte* and on reasonable grounds, forbidding all and sundry from transacting in any way with the forfeitable property. An application by the Attorney General for a search warrant under section 462.32 usually is accompanied by a request for a restraint order under section 462.33.<sup>57</sup>

Interestingly, the Canadian forfeiture regime reaches beyond the designated crime, to criminal proceeds of any other crime. Thus, section 462.37(2) provides that:

“If the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) was obtained through the commission of the designated offence of which the offender is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.”<sup>58</sup>

All in all, Canadian law not only criminalises any and all dealings with criminal proceeds, but also requires their forfeiture to the state if they derive from the designated offence and allows their forfeiture if they derive from any other offence.<sup>59</sup>

The discussion thus far suggests that the Canadian lawyer who receives dirty money as legal fees well may see himself condemned as a money launderer and have his/her fees confiscated by the state. This is the worst-case scenario, but it is unlikely to be the norm in cases involving tainted fees. The position of the lawyer in such cases is mitigated significantly by the fact that knowledge and intention are key elements of the definition of money laundering provided in section 462.31(1) of the Criminal Code. In order to fall foul of the relevant criminalisation and forfeiture provisions, the lawyer who accepts tainted funds from a client for professional services rendered must do so, firstly, “knowing or believing” that they are tainted and, secondly, “with intent to conceal or convert” them. In other words, he/she must know or suspect that the funds are criminal proceeds and he/she must accept them with an intention to launder them. The lawyer who accepts the

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57 See McBride 1995 “Proceeds of crime” 5.

58 Unlike section 462.37(1), here the forfeiture is not mandatory and the standard of proof is the conventional criminal standard.

59 See McBride 1995 “Proceeds of crime” 3; Rose *Forfeiture of legal fees with proceeds of crime: The ability of accused persons to pay “reasonable legal fees” out of the alleged proceeds of crime* (LLM dissertation 1995 University of British Columbia) 50; Tapley “Canada’s law on money laundering and proceeds of crime” 2004 *Asper Review of International Business and Trade Law* 40; Wilbern 2008 *Assessing the opinion of lawyers of Canadian money laundering legislation* 18.

funds “innocently”, without the required *mens rea*, will escape the reach of these provisions, even if he/she was aware or surmised that the funds were proceeds of crime. It is only really the lawyer who is conspiring with his/her launderer-client – say, to use the lawyer’s trust account as a money laundering conduit – who stands to be convicted and to forfeit his/her fees. The rest, those who are not animated by the money-laundering *zeitgeist*, may accept tainted legal fees; it appears, with impunity and without fear of forfeiture. There currently is no indication that Canada is pursuing or intends to pursue the prosecution of lawyers who are paid with dirty money for *bona fide* professional services. For all intents and practical purposes, then, tainted legal fees have not been criminalised and are not forfeitable from the perspective of the conscientious and scrupulous Canadian lawyer.

What is more, there are times when the court, in effect, may order that a lawyer be paid with dirty money or, at least, with money which is suspected to be dirty. This is possible in terms of section 462.34 of the Canadian Criminal Code.<sup>60</sup> To begin with, section 462(1)(a) entitles:

“Any person who has an interest in property that was seized under a warrant issued pursuant to section 462.32 or in respect of which a restraint order was made under subsection 462.33(3) may, at any time, apply to a judge for an order under subsection (4).”

Section 462.34(4)(c)(ii) then on goes on to stipulate that:

“On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given ... the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit, for the purpose of meeting the reasonable ... legal expenses of a person referred to in subparagraph (i).”<sup>61</sup>

In the context of this paper, section 462.34(4)(c)(ii) constitutes a legal fees exemption from the Canadian forfeiture regime. It allows for the release of seized or restrained money to defray reasonable legal expenses before forfeiture is granted.<sup>62</sup> It appears, then, that Canadian law places more store by having the lawyer who defends an alleged

60 See Beare “Efforts to combat money laundering in Canada” 1992 *Commonwealth Law Bulletin* 1444; Brucker 1997 *The Advocate* 680; Murphy “Canada’s anti-money laundering regime” 2000 *Resource Material Series 117th International Seminar Visiting Experts’ Papers* 289.

61 Subparagraph (i) of section 462.34(4)(c) applies to “the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person”.

62 The application for the release of the money for legal expenses is regarded as a two-stage process. Firstly, it must be determined whether the accused is entitled to the release of the fees by virtue of impecuniosity. Secondly, it must be established whether the legal expenses are reasonable in the

money launderer paid rather than by prosecuting the lawyer for accepting dirty money in settlement of his\her fees. The accused person's right to legal representation seems to trump the state's interest in confiscating criminal proceeds, which have been transferred to his\her lawyer as legal fees.<sup>63</sup>

In sum, the Canadian definition of money laundering implies that the receipt of dirty money as legal fees by a lawyer is not a crime, except in the rare case when the lawyer himself\herself is a money launderer of sorts. Further, it does not seek to forfeit such fees accepted by a lawyer, except where the lawyer has been convicted as a money launderer. The protection of the lawyer's right gainfully to practise his\her profession and the client's right to engage defence counsel seems to enjoy priority over the state's right to prosecute money launderers and deprive them of the nefarious assets. It is an approach which is expressed, somewhat ironically, in a conspicuous dearth of Canadian case law on lawyers as launderers and on criminal forfeiture of tainted legal fees.

## 5 Conclusion

In comparing the South African approach to the forfeiture of tainted legal fees with that of the USA and Canada, a number of trends may be observed. The USA, Canada and South Africa all allow for the criminal forfeiture of tainted legal fees. In other words, all three jurisdictions have enacted statutes designed to deprive of his\her criminal profits a lawyer who has been convicted of money laundering. However, this commonality tends to fracture in the face of rather significant differences across the three countries.

South Africa and Canada both criminalise the acceptance of tainted legal fees by lawyers. However, the USA has the safe harbour clause allowing a lawyer to be paid with dirty money in order to uphold the client's Sixth Amendment right to legal representation. Further, Canada has defined money laundering in such a way as to exclude the receipt by a lawyer of dirty money in payment of *bona fide* legal services rendered, even if the lawyer knows or suspects the money to be dirty. It appears,

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circumstances of the case. See Beare 1992 *Commonwealth Law Bulletin* 1444; Kroeker "The legal and ethical propriety of allowing accused to use the proceeds of crime to retain counsel" 1995 *The Advocate* 868; Brucker 1997 *The Advocate* 679.

63 Sections 462.37(3) & (4) represent somewhat of a cautionary tale for the accused. The former allows the court impose a fine *in lieu* of forfeiture where the forfeitable assets have been transferred, in whole or in part, by the accused to his lawyer as fees. The latter requires the court to impose a prison term in default of payment of the fine. In other words, the accused who invokes the legal fees exemption in section 462.34(4)(c)(ii) in order to pay his lawyer and who thereby renders himself unable to pay the fine imposed *in lieu* of forfeiture, well might end up in jail. This situation arose in *R v Pawlyk* (1991) 72 Man R (2d) 1. See also Beare 1992 *Commonwealth Law Bulletin* 1442; McBride 1995 "Proceeds of crime" 8; Brucker 1997 *The Advocate* 683.

then, that it is South African lawyers who stand most in hazard of being prosecuted and convicted for accepting tainted legal fees.

All three countries allow for the pre-conviction restraint and post-conviction forfeiture of tainted legal fees. In this regard, it is important to note that the safe harbour clause in the USA does not shield the tainted fees themselves from forfeiture.<sup>64</sup> Unlike the USA, both South Africa and Canada have legal fees exemption clauses, in terms of which a court may order that a lawyer be paid from a client's assets which are under restraint. The Canadian exemption provision tallies with that country's overall hospitable approach to tainted legal fees. A determinate South African policy approach to tainted legal fees is not discernible yet, so the country's exemption clause has to be comprehended in exceptional terms, as a court-sanctioned departure from its generally inhospitable criminal forfeiture regime.

A lawyer's right to practise law gainfully hardly is contentious. What is more, this right entails the freedom to provide legal services to whosoever is in need of them. In other words, the repute (or otherwise) of his\her clientele ought not to count as a prohibitory factor in relation to a lawyer's right to practise his\her profession. The lawyer who is a scoundrel deserves to be at the receiving end of legal constraints and sanctions. The conscionable lawyer who has a scoundrel for a client does not.

It seems that the USA and Canada have factored the lawyer's right to earn a living into their approaches to and interpretation of the law pertaining to tainted legal fees. By contrast, South Africa's anti-money laundering legislation appears to ride roughshod over the right of a lawyer to practise his\her profession (as well as the client's right to counsel) and may not survive constitutional scrutiny.<sup>65</sup> The fact that the South African forfeiture regime includes a legal fees exemption is cold comfort to the criminal defence lawyer who, *per definitionem*, will have many a scoundrel for clients. Such a lawyer has to contend with the proverbial "double whammy", that is, he\she faces not only the prospect of prosecution, conviction and punishment simply for accepting tainted fees, but also the prospect of losing those fees to the coffers of the state. He\she would be protected and his\her fees would be unassailable only under the legal fee exemption. However, the idea of a criminal defence lawyer having to invoke the exemption and all its procedural accoutrements in order to avoid prosecution and secure his\her fees ought to be a cause for serious concern – if not to the South African legislature then, at least, to the organised legal profession, as represented by the South African Legal Practice Council.

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64 This could be accomplished, for example, in terms of the civil forfeiture regime in the USA.

65 For an examination of the constitutional questions embedded in South Africa's criminal forfeiture regime, see generally Basdeo 2014 *PELJ*.