or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in §1956(c)(5) of this title) by, through, or to a financial institution (as defined in §1956 of this title), including any transaction that would be a financial transaction under §1956(c)(4)(B) of this title, *but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution*.[31]

This amendment means, basically, that any transaction involving legal fees attendant upon upholding the right to legal representation is not a monetary transaction, and hence is exempted from criminalisation. It represents a quite significant victory for the US legal profession, especially for the criminal bar. Lawyers no longer risk prosecution should they accept tainted fees,[32] even if they become aware of the unlawful provenance of said fees in their dealings with or on behalf of their clients.[33]

Obviously, criminals or lawyers should not be allowed to abuse this exemption by using the payment of unnecessarily high fees as a laundering technique.[34] In such cases, both lawyer and client deserve to be prosecuted to the full extent of the law.[35] However, in all cases of *bona fide* legal representation upholding the right to counsel, the 1988 amendment means that a US lawyer ought not to be prosecuted merely for being paid with tainted funds.

Regrettably, even the express exemption in §1957 is no guarantee against prosecution. That the sword of Damocles continues to hang over the heads of lawyers was illustrated amply in the case of *United States v Velez*,[36] which came before the US courts two decades after the 1988 amendment. It concerned the 2008 indictment of attorney Ben Kuehne on money laundering charges.[37]

A former Medellin drug lord, Fabio Ochoa-Vasquez, had been extradited to the US in 2001 to stand trial for conspiring to smuggle to the US about thirty tons of cocaine per month between 1997 and 1999.[38] He was convicted in 2003. Kuehne was engaged in 2001 by Roy Black, Ochoa-Vasquez's American lawyer, to determine whether the money Black was receiving from his client as fees was clean.[39] Kuehne had two co-accused: Gloria Florez Velez, Ochoa-Vasquez's former accountant; and Oscar Saldarriaga Ochoa, his Colombian attorney. Together they drafted six opinions, each of which pronounced untainted the fee source to which it related.[40] Between January 2002 and April 2003,

[31] Emphasis added. See also Gaetke & Welling (1992) at 1168; Nelson (2009) at 51.
[32] See Jacobs (1989) at 314.
[33] See Gaetke & Welling (1992) at 1172; Nelson (2009) at 51.
[34] See Nelson (2009) at 51; Weinstein AK (1998) "Prosecuting Attorneys for Money Laundering: a New and Questionable Weapon in the War on Crime" 51(1) *Law and Contemporary Problems* 369-386 at 374.
[35] §1956 of the MLCA, 1986 allows for the prosecution of lawyers who receive a tarnished fee payment, knowing that it derives from a crime, and who conceal its criminal origin.
[36] *United States v Velez* Case No 05-20770-Cr-Cook (2008) and *United States v Velez* F 3d 875 (11th Cir 2009).
[37] See Healy NM *et al* (2009) "US and International Anti-Money Laundering Developments" *The International Lawyer* 795-809 at 807; Slater D (20 November 2008) "Scales of Justice: The Right to Counsel vs the Need to Bar Tainted Legal Fees" *The Wall Street Journal* at 1.
[38] See Healy *et* al (2009) at 807; Nelson (2009) at 56; Podgor ES (2010) "Regulating Lawyers: Same Theme, New Context" *Journal of the Professional Lawyer* 191-220 at 196.
[39] See Nelson (2009) at 57; Healy *et a*l (2009) at 807.
[40] See Podgor (2010) at 195; Healy *et a*l (2009) at 807.

Ochoa-Vasquez's relatives deposited a total of $5 289 762-67 into Kuehne's trust account. Kuehne disbursed all the funds (except some $50 000 withheld as a retainer) to Ochoa-Vasquez's lawyers. He was paid $197 300 for his work in vetting the fees.

Kuehne was charged, *inter alia*, with conspiracy to violate §1957 of the MLCA. It was alleged that Kuehne and his co-accused falsified documents and facilitated a series of wire transfers to the US via the Black Market Peso Exchange, whilst knowing that the funds were the proceeds of drug trafficking. They argued that they were protected by the Sixth Amendment exemption and applied for the charge under §1957 to be dismissed. District Judge Cooke granted Kuehne's motion of dismissal. The state appealed,[41] arguing that the exemption in §1957(f)(1) had been nullified by a Supreme Court ruling[42] that the Sixth Amendment does not protect the right to counsel where an accused used criminal proceeds for legal fees. Kuehne and his co-accused insisted that they were protected by this exemption and that the charge under §1957 could not stand. Kuehne argued further that he did not know that the funds in question were tainted.

The Court of Appeal ruled in favour of Kuehne and his co-accused,[43] agreeing with Judge Cooke that Kuehne could not be prosecuted because the funds were for legitimate legal services.[44] It held that the plain language of §1957(f)(1) exempts criminal proceeds used to secure Sixth Amendment legal representation.[45] The state then dismissed the case against Kuehne.[46]

This was the first indictment under the federal AML statutes of an attorney for performing due diligence on another lawyer's legal fees. The indictment of Kuehne, a renowned lawyer respected by his colleagues, shocked the US legal community. Although cleared, Kuehne had been under indictment for two years and had to cope with the stresses and expense of defending himself. He had been charged even though Ochoa-Vasquez was not his client. He had been hired by Ochoa-Vasquez's lawyers only to ascertain whether they were being paid with dirty money, and he was indicted even though he had verified that the money was clean. He had been charged under §1957 even though it exempts attorneys from prosecution who are paid with tainted money when upholding a client's constitutional right to legal representation. The point is that, like Kuehne, all attorneys face a plurality of perils in exercising their professional responsibilities. They become ready targets of zealous prosecution if they allow a suspicion to arise that, in order to secure their fees, they are prepared to open the gate to the money laundering process.

5.2 The Canadian position

Canada criminalised money laundering in 1989 in section 462.31(1) of the Criminal Code. The provision stipulates that:

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[41] *United States v Velez* F 3d 875 (11th Cir 2009) at 5.
[42] *Caplin & Drysdale v United States* 491 US 617 (1989) at 617 & 626.
[43] See Podgor (2010) at 196. See also *United States v Velez* F 3d 875 (11th Cir 2009) at 9.
[44] *United States v Velez* F 3d 875 (11th Cir 2009) at 9.
[45] *United States v Velez* F 3d 875 (11th Cir 2009) at 9.
[46] See Government Motion to Dismiss Third Superseding Indictment with Prejudice, *United States v Kuehne and Ochoa* Case No 05-20770-Cr-Cook (2009).

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.[47]

Money laundering is committed in respect of a "designated offence", which is defined 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.[48]

The definition of money laundering contained in the Criminal Code has been incorporated by express reference into the Proceeds of Crime (Money Laundering) and Terrorist Financing Act of 2000 (PCMLTFA). Thus, section 2 of the PCMLTFA provides that a "money laundering offence means an offence under subsection 462.31(1) of the Criminal Code".

In Canada, then, a person commits money laundering by dealing with tainted property or its proceeds, in any way and by any means, with the intention of concealing or converting said property or proceeds, and in the knowledge or belief that it derives from an illegal source.[49] The maximum punishment for a person convicted of money laundering is imprisonment for ten years.[50]

Theoretically, Canadian lawyers who accept dirty money as legal fees may fall foul of the Criminal Code or the PCMLTFA.[51] They risk prosecution if they knowingly accept, use or otherwise transact with tainted fees, "with intent to conceal or convert" them, thereby to mask their criminal derivation. This last point is pivotal when it comes to tainted fees. Section 462.31(1) of the Criminal Code requires an intention to launder on the part of the person dealing with the property or proceeds in question. Thus, a lawyer not only should know or believe that his fees are being paid with dirty money, but also should accept the dirty money with the intention of laundering it by concealment or conversion. In other

[47] See also Murphy D (2000) "Canada's Anti-Money Laundering Regime" 58 *Resource Material Series 117th International Seminar Visiting Experts' Papers* 286-302 at 286; Murphy D (2004) "Canada's Laws on Money Laundering Proceeds of Crime: The International Context" *Asper Review* 63-84 at 65; Kroeker R (1995) "The Legal and Ethical Propriety of Allowing Accused to Use the Proceeds of Crime to Retain Counsel" 53(6) *The Advocate* 865-878 at 865.
[48] Sec 462.3(1) of the Criminal Code, 1985.
[49] See Brucker TM (1997) "Money Laundering and the client: How can I be retained without becoming a party to an offence?" 55(5) *The Advocate* 679-692 at 680; Wilbern C (2008) *Assessing the Opinion of Lawyers of Canadian Money Laundering legislation* Unpublished PhD thesis: North Central University at 18.
[50] Sec 462.31(2)(a) of the Criminal Code, 1985. See also Wilbern (2008) at 18.
[51] See Schneider (2006) at 65; Wilbern (2008) at 18 & 24-28.

words, the acceptance by a Canadian lawyer of tainted fees likely will amount to a crime only if the lawyer is part of a joint criminal enterprise with the client to use the payment of legal fees as a means of washing the client's dirty money. If the lawyer is not party to such a scheme, then his receiving dirty money as legal fees and transacting with it does not contravene section 462.31(1) of the Criminal Code, even if he knew or suspected that the money was dirty.

Canadian AML law thus does not criminalise tainted fees, except when the lawyer is motivated by an intention to launder. Absent such intention, it appears that Canadian lawyers may accept tainted fees with impunity. Their knowing or believing that the fees are proceeds of crime does not render their dealings unlawful. What is more, it is apparent that section 462.31(1) of the Criminal Code cannot be contravened negligently. In a word, to be guilty of money laundering, the lawyer who is paid with dirty money must intend to camouflage its criminal origins in some way. To be sure, the lawyer who is party to a fee laundering scam is a money launderer and needs to be prosecuted as such. However, the lawyer who is paid with dirty money while providing *bona fide* legal services in the course of practising his profession is not a money launderer and thus beyond the reach of section 462.31(1) of the Criminal Code, even if he is certain that the money is dirty.

This understanding of the position in Canada may be extrapolated from the response of the organised legal profession to the enactment of the PCMLTFA in 2000 and its accompanying Regulations in November 2001.[52] The profession was decidedly unhappy and launched litigation with a view to exempting lawyers from the force of the PCMLTFA and its Regulations.[53] Significantly, the court challenges did not mention the question of tainted fees as a crime. The primary issues were whether the AML legislation threatened the independence of the bar and attorney-client confidentiality, and whether it created a conflict between lawyers' duties to their clients and their obligation to report confidential information to the government.[54] The litigation offensive by the legal profession spanned 15 years and was eminently successful, but in none of the series of cases brought before the Canadian courts was the criminalisation of tainted fees in dispute.[55] It may be concluded that both the profession and the government understand and accept that in Canada it is not a crime for a lawyer to be paid with dirty money.

Further, not only does Canadian AML law not criminalise tainted fees, but it also allows for the payment of reasonable legal expenses from property which allegedly is proceeds of crime. This is possible in terms of section 462.34(4)(c)(ii) of the Criminal Code, which empowers a judge, upon application, to return seized property or to release restrained property to the applicant for the purpose of meeting his reasonable legal expenses. The

[52] See Macdonald R (2010) "Money Laundering Regulation—What can be learned from the Canadian Experience?" *Journal of the Professional Lawyer* 143-150 at 144; Gallant M (2009) "Uncertainties Collide: Lawyers and Money Laundering, Terrorist Finance Regulations" 16(3) *Journal of Economic Crimes* 210-219 at 211.
[53] See Terry LS (2010) "An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance" *Journal of the Professional Lawyer* 3-67 at 3 & 34.
[54] See Gallant (2009) at 211; Macdonald (2010) at 144.
[55] See *Law Society of British Columbia v Canada* 2001 BCSC 1593; *Federation of Law Societies of Canada v Canada* 2011 (BCSC) 1270; *Federation of Law Societies of Canada v Canada* 2013 (BCCA) 147; *Canada (Attorney General) v Federation of Law Societies of Canada* 2015 SCC 7.

application under section 462.34(4)(c)(ii) entails a two-stage enquiry: firstly, is the accused entitled to the release of a portion of the seized or restrained property as legal fees; and, secondly, are said legal expenses reasonable?[56]

If the enquiry establishes that the applicant qualifies for assistance and that the quantum being sought is reasonable, the court will order the return or release of property under seizure or restraint so that he is able to pay for legal counsel. The property in question well may be proceeds of crime. However, it would seem that the applicant's right to legal representation trumps any recovery proceedings to which the property may be subject. In Canada, then, lawyers may be paid freely with dirty money which is in the hands of their clients and they may be paid at the behest of the court with dirty money which is under seizure or restraint. In sum, the fact that money is dirty is no bar to its being used by a client to settle his lawyer's fee account.

At this juncture, reference to the case of *Gagnon* is apposite.[57] The accused was charged with trafficking in cocaine and possession of stolen property. The property in question was a log skidder, which Gagnon needed for a logging contract. He earned $1 500 from the contract which he used to pay his bail on the possession charge. Later, he signed over the bail bond of $1 500 as fees to his lawyer. Gagnon was convicted on both the trafficking and possession counts, for which he received prison sentences of five years and nine months respectively. He had agreed that assets worth $130 000 be forfeited on the trafficking charge. The state then sought to seize the $1 500 as proceeds of crime on the possession charge or for a fine of $1 500 be imposed *in lieu* of forfeiture.[58]

The Court denied the seizure motion, holding that the $1 500 already had been assigned irrevocably to Gagnon's lawyer, and that even if the state had seized it before its assignment, Gagnon could have applied under Section 462.34(4)(c)(ii) of the Criminal Code for its release as legal expenses. The court found that Gagnon could have been fined instead but decided not to do so, noting that he probably would have succeeded with a section 462.34(4)(c)(ii) application and that the fees of lawyers who act as defence counsel ought not to be at risk of forfeiture.[59]

Gagnon drew conceptual connections between legal fees, the right to legal representation and the right of lawyers to practise their profession. Thus, the court characterised lawyers' fees as a "special type of expenditure linked to a constitutionally protected right".[60] Entrained in the right to counsel is counsel's right to be remunerated. The spectre of fee forfeiture prompted the court to ask:

What lawyer would undertake the defence of an accused person if fees paid by the accused could eventually be recovered by the state?[61]

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[56] See *R v Lortie* (1985) 21 CCC (3d) 436; *R v Clymore* (1992) 74 CCC (3d) 217 (BCSC); Brucker (1997) at 680-681.
[57] *R v Gagnon* 10 (1993) 80 CCC (3d) 508.
[58] This is possible under section 462.37(3) of the Criminal Code, 1985. See *R v Gagnon* 10 (1993) 80 CCC (3d) 508 para 8.
[59] *R v Gagnon* 10 (1993) 80 CCC (3d) 508 para 19.
[60] *R v Gagnon* 10 (1993) 80 CCC (3d) 508 para 19.
[61] *R v Gagnon* 10 (1993) 80 CCC (3d) 508 para 22.

However, the court noted also that reluctance or refusal by lawyers to represent accused who pay with dirty money, although understandable, jeopardises the right of such an accused to competent representation:

What accused would then have the benefit of the constitutional right to a full defence, given the dual problems of finding a lawyer who will act under those conditions and of serving time in addition to the sentence imposed for the substantive crime if the lawyers' fees are repaid to the state as proceeds of crime?[62]

Clearly, the implementation of the right to legal representation is contingent upon lawyers being paid to practise their profession. This is an interdependent configuration which implodes if the lawyer is not paid for the work he performs in defending the accused. The court in *Gagnon* understood that the "constitutional right to a full defence" remains at risk unless and until legal fees are free from the risk of forfeiture for being dirty money.

All in all, Canada has no especial truck with dirty money being used by an accused to pay for *bona fide* and reasonable legal expenses. Canadian jurisprudence in this area is concerned primarily with securing and preserving the right to counsel. Hence, it is not a crime for a lawyer to accept tainted fees, unless the payment is part of a money laundering scheme between client and lawyer. What is more, provision has been made in the Criminal Code for legal expenses to be paid from dirty money which has been impounded. In Canada, the interests of the state and of society in prosecuting and punishing economic crime are superseded by the constitutional rights of the accused and his lawyer.

5.3 Comparative summation

South Africa, the US and Canada all introduced AML legislation as part of their international obligations. The key South African statutes, POCA and FICA, both criminalise tainted legal fees. A South African lawyer who knows or reasonably ought to have known that a client is paying him with dirty money stands to be prosecuted as a money launderer. The only relief lies in the POCA provisions empowering the High Court to order payment of reasonable legal expenses from property under restraint or preservation as proceeds of crime. South African AML legislation does not countenance lawyers being paid with dirty money in any other circumstances.

Initially, the US also criminalised tainted legal fees. The prohibition in the MLCA on monetary transactions involving proceeds of crime meant that lawyers whose fees exceeded $10 000 would incur criminal liability if they were paid with dirty money. However, the US legal profession secured an amendment to the MLCA which excluded from the meaning of a monetary transaction all dealings necessary to uphold the right to legal representation. Effectively, the amendment decriminalised tainted fees. Thus, it is quite legal for US lawyers to be paid with dirty money in giving effect to a client's right to counsel.

Canada, it appears, never did criminalise tainted fees. An intention to launder is an

[62] *R v Gagnon* 10 (1993) 80 CCC (3d) 508 para 22.

element of the money laundering offence in the Criminal Code and the PCMLTFA. The lawyer who accepts dirty money as legal fees must do so, *inter alia*, with intent to conceal or convert the criminal provenance of said money. This requirement means that tainted fees are problematic only if they form part of a money laundering stratagem. Certainly, lawyers who entertain no such intent may accept tainted fees without fear of prosecution. As in South Africa, the Canadian Criminal Code allows for the payment of reasonable legal expenses from seized or restrained proceeds of crime.

Comparatively, South African lawyers are worst off. Unlike their US and Canadian counterparts, they run the real risk of being branded money launderers by representing clients who pay with dirty money. In South Africa, there is no exemption for legal fees as there is in the US. And the South African lawyer who is paid with tainted fees does not need an intention to launder, as in Canada. It is possible even for a South African lawyer to become a money launderer negligently!

The lot of South African lawyers is illustrated well by the case of *Wei*, concerning an abalone poaching syndicate.[63] It involves 30 accused and 590 charges. One of the accused is Anthony Broadway, a defence attorney, who had represented a number of his co-accused in the past. It is alleged that he received various sums of cash as fees from them, while being aware that they did not have legal income to pay his fees.[64] He is the first attorney in South Africa to be indicted for receiving tainted fees.

> 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. His wife, Helena, who lives in Kent in the UK, has been cited as a respondent, as was close corporation Royal Albatross Investments.[65]

Broadway has been charged with contravening section 2 of POCA for receiving or retaining property which he knew to be derived from racketeering.[66] He has been charged also with money laundering and offences relating to proceeds of unlawful activity under sections 4, 5 and 6 of POCA, as well as with failing to comply with the provisions of FICA and to register with the FIC.[67] Other money laundering charges relate to the retrieval of money invested on behalf of one Frank Barends with a financial broker; R1 500 000 paid into Broadway's trust account for the benefit of Barends;[68] R425 058 paid from his trust account into the business account of Royal Albatross Investment 142 CC;[69] a cheque of R90 000 payable to and cashed by him;[70] and R600 474-76 paid directly into his personal savings account.[71] It is not clear from the indictment, but all these amounts presumably

[63] *S v Wei & Others*, pending case, Western Cape High Court.
[64] *S v Wei* Summary of facts Para E 27.
[65] Schroeder F (2103) "Abalone syndicate set to lose millions", available at http://www.iol.co.za (visited 27 April 2017).
[66] *S v Wei* Para F3.
[67] *S v Wei* Summary of Facts Para G 51, Count 566.
[68] *S v Wei* Para G 52, Count 567.
[69] *S v Wei* Counts 519 & 425.
[70] *S v Wei* Para G 53, Count 573.
[71] *S v Wei* Para G 53, Count 574.

are criminal proceeds which supposedly were laundered by Broadway.

He has been charged also with failure to submit STRs and CTRs to the FIC.[72] One of the counts alleges that Barends lent more than R1 000 000 to one Johan Van der Berg and that Broadway, after he had requested the money via a letter of demand, facilitated the sale of a house, owned by Van der Berg's wife, to Barends at a reduced price.[73] This allegedly was a property scam to launder the R1 000 000.

The facts of *Wei* are messy and the issues are difficult to disentangle. And there does not appear to have been any real progress in the case since Broadway was indicted in 2013. However, the case removes all doubt about the criminalisation of tainted fees under POCA and FICA. It stands as an exemplar of the precarious position of South African lawyers representing clients who profit from criminal conduct. Like Broadway, they hazard being thrust onto the wrong side of the law if they are paid with dirty money. Of course, any offensive against dirty money ought to be welcomed. However, given the constitution of South African AML legislation, there is the real possibility that a crackdown on dirty money could result in a crackdown also on lawyers who represent the purveyors of dirty money.[74] Anthony Broadway could be the first of many defence attorneys who find themselves in the dock, accused of laundering money for accepting tainted fees.

6 Tainted fees and the right to legal representation

Like all accused, the person charged with money laundering is entitled to be defended by a lawyer. The right to legal representation is guaranteed universally, more or less. In South Africa, it is entrenched in section 35(3)(f) of the Constitution, as part of the fair trial rights of every accused person.

The question of tainted legal fees is linked intimately to the right to legal representation. In the US, §1957 of the MLCA was amended to secure this right, leading to the decriminalisation of tainted fees. Indeed, the case against Ben Kuehne collapsed because of this amendment. In Canada, tainted fees never have been criminalised and hence never have obstructed the right to counsel. In *Gagnon*, the court expressly linked legal fees to the protection of the "constitutional right to a full defence". Certainly, Canadian lawyers do not face the peril of prosecution if they are paid with dirty money for effectuating a client's right to legal representation.

By contrast, South African defence lawyers are saddled with an intractable situation. They have an ethical and constitutional duty to represent accused persons, including those charged with money laundering. Yet, if they are paid with money which they know or suspect to be dirty, they themselves face the prospect of being charged with money laundering. And the prospect is not a theoretical one, as the prosecution of Anthony Broadway attests.

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[72] *S v Wei* Para G 54 and G 58.
[73] *S v Wei* Para G 55.
[74] Hawkey K (2011) "FICA and jurisdiction over acting judges on the agenda at FSLS AGM" *De Rebus* at 9.

Lawyers are essential to ensuring that the fair trial rights of an accused person are respected by the police, the prosecution and the courts. By criminalising tainted fees, South Africa's AML statutes have endangered the constitutional right to legal representation. Preventing lawyers from accepting tainted fees could prompt them to refuse to defend persons indicted for money laundering, thereby violating the right to counsel.[75] What is more, even if a lawyer declines a brief for fear of being paid with dirty money, he is required to report the matter to the FIU.[76]

Defence attorneys are in the singular, if not unique, position of securing a crucial constitutional right simply by practising their chosen profession. Thus, South Africa's criminalisation of tainted fees well may decried as unconstitutional for being an unreasonable and unjustifiable limitation upon the fundamental right to legal representation.[77] Be that as it may, such unconstitutionality is unquestionably immanent in the offending sections of POCA and FICA. The menace of their nullifying the right to legal representation by menacing defence attorneys with prosecution is serious. Furthermore, it is arguable that the right of South African criminal lawyers to practise their profession has been compromised by the AML legislation. Relative to their US and Canadian colleagues, then, South African lawyers are in a no-win position as regards tainted fees.

A key consideration here is the response of the organised profession to the AML legislation. The US and Canadian legal professions reacted vigorously, by voicing their opposition to the repugnant aspects. This campaign of discontent ensured that US and Canadian attorneys would not risk prosecution for representing clients who paid their fees with contaminated funds. Regrettably, South Africa's legal profession did not register any serious or sustained concern about the sections of POCA and FICA which exposed its members to prosecution for accepting tainted fees. Certainly, the Law Societies of South Africa (LSSA) did not spearhead a campaign to lobby for appropriate amendments to the AML legislation. In particular, no efforts were made by the organised profession to challenge the objectionable provisions in court.

The apparent lassitude of the LSSA notwithstanding, it is evident that the South African legislature hardly spared a thought for the issue of tainted fees when it enacted the AML statutes. Whilst legislative attempts to curb economic crime are necessary, FICA and POCA entail potentially ruinous consequences for lawyers by their criminalisation of tainted fees. The current asymmetry between the statutory AML imperatives and the constitutional right to legal representation victimises lawyers whose fees are paid with dirty money. This is a situation which the organised profession ought not to tolerate indefinitely. Indeed, it cries out to be righted. In a word, South African AML law needs to be amended in order to balance the state's interest in combating money laundering, including the lawyer-facilitated version, with the lawyer's right to practise his profession and the accused's right to legal representation.

[75] See Bussenius (2004) at 30.
[76] Sec 29(2) of FICA, 2001.
[77] A full discussion of this possibility is beyond the scope of this essay.

Of course, if lawyers assist their clients in money laundering schemes, they must be prosecuted. However, it should not be a crime for a lawyer merely to accept tainted 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 ought to be granted. The point is that combating crime ought not to infringe fundamental rights. And in unthinkingly criminalising tainted fees, the South African legislature showed but little regard for the basic right to legal representation and the right of legal professionals to practise law.

7 Conclusion

US and Canadian law does not support South Africa's criminalisation of tainted fees. It is submitted, therefore, that tainted fees be decriminalised and that POCA and FICA be amended accordingly. An exemption similar to that contained in §1957 of the MLCA should be incorporated into the South African AML legislation. If no such exemption is allowed, lawyers could begin treating certain accused persons as untouchables, thereby violating their fundamental right to legal representation. Why the South African organised legal profession failed to defend its members against the assault implicit in the culpable provisions of POCA and FICA remains a mystery. However, now is the time for the LSSA to become activist and campaign for the decriminalisation of tainted fees. Certainly, there is no policy or moral justification for the *status quo* and it ought to be reversed sooner rather than later.

Regrettably, lawyers cannot rely upon the perspicacity or goodwill of the legislature to look after their interests. They need to take responsibility for their own professional well-being and lobby for amendment of the AML statutes. Perhaps the LSSA ought to test the constitutionality of the legislation in court. Perhaps it should consider intervening in the *Wei* case to stop the prosecution of Anthony Broadway on the charge(s) related to tainted fees. Criminal lawyers in the US and Canada are not as assailable as their South African counterparts precisely because their professional organisations responded robustly to the threats inscribed in their AML legislation. The South African profession needs to follow suit. If nothing is done, the surreal situation could arise where a South African lawyer who provided legal representation to money launderers finds himself in the dock on money laundering charges without legal representation!