

**PROCEEDINGS AT HEARING
OF
NOVEMBER 18, 2020**

COMMISSIONER AUSTIN F. CULLEN

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November 18, 2020

(Via Videoconference)

(PROCEEDINGS COMMENCED AT 9:30 A.M.)

THE REGISTRAR: Good morning. The hearing is now resumed. Mr. Commissioner.

THE COMMISSIONER: Thank you. Thank you, Madam Registrar.

Yes, Mr. McGowan.

MR. MCGOWAN: Good morning, Mr. Commissioner.

Mr. Isaac has conduct of the panel this morning.

THE COMMISSIONER: Thank you. Yes, Mr. Isaac.

MR. ISAAC: Good morning, Mr. Commissioner. The next set of witnesses, who will be called together as a panel, are representative from the Law Society of British Columbia. Craig Ferris, QC, Don Avison, QC, Jeanette McPhee and Gurprit Bains.

Madam Registrar, I'd ask that you please swear in Mr. Ferris and Mr. Avison and affirm Ms. McPhee and Ms. Bains.

THE REGISTRAR: Witnesses, would you please unmute yourself. Would each of you please state your full name and spell your first name and last name for the record. I'll start with Mr. Ferris.

THE WITNESS: Craig Andrew Boyd Ferris. My first

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)

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1 name is Craig, C-r-a-i-g, and my last name is
2 Ferris, F-e-r-r-i-s.

3 THE REGISTRAR: Thank you. And Mr. Avison.

4 THE WITNESS: Donald John Avison. My first name is
5 Don and my last name is Avison, A-v-i-s-o-n.

6 THE REGISTRAR: And Ms. McPhee.

7 THE WITNESS: Jeanette Ann McPhee. First name
8 Jeanette, J-e-a-n-e-t-t-e, McPhee, M-c-P-h-e-e.

9 THE REGISTRAR: And Ms. Bains.

10 THE WITNESS: Gurprit Bains. First name Gurprit,
11 last name Bains, B-a-i-n-s.

12 THE REGISTRAR: Thank you.

13 **CRAIG FERRIS, a witness**
14 **called for the**
15 **commission, sworn.**

16 **DONALD AVISON, a witness**
17 **called for the**
18 **commission, sworn.**

19 **JEANETTE MCPHEE, a**
20 **witness called for the**
21 **commission, affirmed.**

22 **GURPRIT BAINS, a witness**
23 **called for the**
24 **commission, affirmed.**

25 THE REGISTRAR: Counsel.

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)
Exam by Mr. Isaac

1 **EXAMINATION BY MR. ISAAC:**

2 Q Thank you. If I could ask, please, for each of
3 the panel members to introduce yourselves and
4 briefly explain your role and responsibilities
5 within the law society for the commissioner,
6 briefly identifying any of the key AML-related
7 areas that you are responsible for. Perhaps I
8 could ask to Mr. Avison to begin.

9 A (DA) Certainly. Thank you, Mr. Isaac. My
10 responsibility at the law society is as the
11 executive director and as the chief executive
12 officer, and as a result of have responsibility
13 of the overall supervision of the undertakings
14 of the law society as that relates specifically
15 to any of the matters that under consideration
16 by the commission. That would involve direct
17 engagement with the professional conduct group
18 of the law society, responsibility in relation
19 to the superintendents of the trust assurance
20 program and the audit program, responsibility
21 for oversight with respect to essentially all
22 other matters in the law society including the
23 lawyers indemnity fund and the operation of the
24 professional legal training program and all
25 other areas that are part of the law society

1 operations.

2 Q Thank you. And, Mr. Ferris, if you'd please do
3 the same.

4 A (CF) Thank you. So I'm the president of the law
5 society for 2020. I was elected as a bencher in
6 late 2013 and assumed a role as a bencher on
7 January 1st, 2014. As president this year I am
8 the top elected official of the law society. I,
9 as chair of the benchers meetings, will have a
10 lead role in policy that the benchers develop
11 and chairing in our meetings and speaking on
12 behalf of the law society.

13 During my time as a bencher I have been a
14 member on the ladder as president, so I was
15 first vice president and second vice president,
16 and before that I was a member of the executive
17 committee. And the executive committee acts as
18 policy and planning committee. And so with
19 respect to AML, all of the policies that have
20 been brought forward from bencher committees and
21 staff would have run through our executive
22 committee.

23 Prior to that I was also chair of our ethics
24 committee which is the committee that looks at
25 our Professional Conduct Handbook for two years

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1 and also I was chair of our discipline committee
2 which is the charging body at the law society.

3 Finally, I am -- for the last three years I
4 have been chair of the law society tribunal,
5 which is the independent body which adjudicates
6 disciplinary violations against our members.

7 Q Thank you, Mr. Ferris. And, Ms. McPhee, if
8 you'd likely -- similarly introduce yourself,
9 please.

10 A (JM) Thank you. I am the chief financial
11 officer and the director of trust regulation, so
12 I have responsibility for oversight over the
13 trust assurance and forensic accounting
14 functions. Also corporate services which would
15 include finance, HR, operations and other
16 administrative areas and also member services.

17 Q Thank you. And finally, Ms. Bains.

18 A (GP) Thank you. I'm the deputy chief legal
19 officer at the law society. I oversee the
20 investigations monitoring and enforcement group.
21 That's the group that investigates allegations
22 of serious misconduct that have proven were
23 likely to result in a referral to the discipline
24 committee for a disciplinary response.

25 The monitoring and enforcement part of it is

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1 overseeing the disciplinary hearing panel
2 sanctions and any voluntary undertakings or
3 interim conditions that have been imposed on
4 lawyers during the course of investigation.
5 Part of my role as it relates to AML issues
6 includes collaboration with other agencies, with
7 law enforcement, with other regulators with a
8 view to explaining the powers that the law
9 society has, our regulatory functions,
10 encouraging those bodies to refer lawyer
11 misconduct to us and obtaining information from
12 those bodies as required for our investigations.

13 I'm also a part of the federation AML
14 working group. I'm on the education subgroup
15 part of that group and I'm also a participating
16 member of the joint federation finance AML
17 working group as well.

18 Q Thank you.

19 A (CF) Mr. Isaac, I just -- I forgot too mention
20 that I'm also chair of the law society AML
21 working group.

22 Q Thank you, Mr. Ferris. Before we turn to some
23 of the more substantive questions, obviously
24 with four panel members it would be helpful just
25 to identify how we might proceed in the most

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1 effective, efficient way so that we're drawing
2 upon all of the combined experience of the
3 panel. There may be questions where I direct a
4 particular question to a particular panel
5 member, but there likely will be many others
6 where the questions are directed to the panel,
7 generally. What I would ask is that the panel
8 member who feels best position to respond to
9 that question do so, and then if there are other
10 panel members that feel that they have
11 additional insights to provide with respect to
12 the question, that they do so as well.

13 MR. ISAAC: So with that, there's one other area I'd
14 like to just address at the outset. The law
15 society has prepared and produced to the
16 commission five summaries that provide
17 background information on the law society itself
18 as well as areas relevant to its key AML
19 activities, and I anticipate referring to those
20 during the testimony. But if we could begin by
21 entering those as exhibits.

22 Madam Registrar, if we could bring up,
23 please, the Law Society of BC introduction to
24 the law society summary first. And we may as
25 well bring each up in turn. The second is the

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1 Law Society of BC investigations and discipline
2 summary. The third is the Law Society of BC
3 regulation summary. The fourth is the Law
4 Society of BC trust assurance program summary.
5 And finally, the fifth one is the Law Society of
6 BC education summary.

7 Now, as I said, we will return to these over
8 the course of the panel's testimony, but if I
9 could ask, please, that these be marked as the
10 next five exhibits.

11 THE COMMISSIONER: So, Madam Registrar, I think those
12 would be exhibits 222, 223, 224, 225 and 226.

13 THE REGISTRAR: Yes, exhibits 222 to 226.

14 **EXHIBIT 222: Law Society of BC - Introduction**
15 **to the Law Society**

16 **EXHIBIT 223: Law Society of BC - Investigations**
17 **and Discipline Programs Summary**

18 **EXHIBIT 224: Law Society of BC - Regulation of**
19 **the Practice of Law**

20 **EXHIBIT 225: Law Society of BC - Trust**
21 **Assurance Program Summary**

22 **EXHIBIT 226: Law Society of BC - Education of**
23 **the Profession**

24 MR. ISAAC: Thank you, Madam Registrar. If you could
25 close all of those except for the first one,

1 please. The introduction to law society
2 summary.

3 Q Before we begin, there are obviously a number of
4 areas that we anticipate covering and I thought
5 it would be helpful just to identify those at
6 the outset. I expect we'll begin by looking at
7 some introductory questions regarding the law
8 society, looking at some of the key AML
9 initiatives that we develop over time, then
10 we'll proceed to look at some of the specific
11 AML rules in more detail. I expect we'll also
12 address questions of education, the law
13 society's trust audit program, investigations as
14 well as, finally, specific issues and areas of
15 future initiatives.

16 So beginning first with that sort of
17 overview of the law society itself, the
18 introduction to law society summary here that's
19 shown does provide a significant amount of
20 background information about the law society's
21 mandate, governance, staffing and funding. I
22 don't intend to duplicate all of that with you
23 today in your testimony. I just want to focus
24 on an few key areas.

25 Mr. Avison, there are approximately 13,000

1 practising lawyers in the province currently; is
2 that right?

3 A (DA) That's correct.

4 Q Does the law society maintain -- sorry. I'd
5 asked -- I think you confirmed there are
6 approximately 13,000 practising lawyers in BC.
7 Does the law society maintain a breakdown of
8 what lawyers in the province practice in what
9 areas and in particular areas that may raise an
10 elevated money laundering risk?

11 A (DA) Well, there is information that is
12 available based on the practice of individuals,
13 and that's primarily through the annual practice
14 declarations that identify the areas of practice
15 that lawyers are involved with. So yes, I would
16 say we do have quite a reasonable sense of areas
17 of practice with members of the profession
18 across the province.

19 Q Okay. And the law society also maintains
20 visibility on what lawyers in the province have
21 trust accounts; is that right?

22 A (DA) Yes.

23 Q At paragraph 3 of the introduction summary here,
24 it states that the law society does not receive
25 government funding. How is the law society

1 funded?

2 A (DA) The law society is funded by the members.
3 Those who are members of the profession through
4 annual levies in relation to the practice fee
5 and the operations of the lawyers indemnity fund
6 through the levies associated with that program.
7 But there is no government funding at all.

8 Q And the summary also notes at paragraphs 12 and
9 13, at least, that the revenue in 2019 was
10 approximately \$34 million and with expenses in
11 that same year of about \$32.5 million. And down
12 at paragraph 14, again of the same summary, it
13 states that the regulation of profession, so
14 including professional conduct, trust assurance,
15 discipline, that accounts for roughly 43 percent
16 of the law society's expenses. And several of
17 the other summaries that we may look at note
18 that there have been significant increases in
19 those areas particularly in the last few -- more
20 recent years.

21 To what extent have those recent increases
22 in staffing and expenses been driven by expanded
23 or otherwise AML initiatives taken on by the law
24 society?

25 A (DA) Well, certainly some of the increases over

1 the course of recent years have been associated
2 with some of those activities, so there have
3 been increases in the budget in relation to the
4 investigations program and with the discipline
5 group, and increases to the budget also with
6 respect to the operation of the trust assurance
7 program. So some of it directly related and
8 some indirectly in the sense that they relate to
9 the overall examination of trust accounts which
10 is done on a regular basis, and we'll say more
11 about that later on. But as you've noted, there
12 have been significant increases over the course
13 of the last several years in each of those
14 areas.

15 Q Okay. And we will look at the question of
16 budget and staffing in connection with some of
17 those specific areas later on in the testimony.

18 MR. ISAAC: But perhaps, Madam Hearing Registrar, if
19 you could bring up LSBC document 390. And I
20 believe this is the law society 2020 fees and
21 budgets report.

22 Q Mr. Avison, could you just briefly explain what
23 this document is, please.

24 A (DA) Well, it's a report that deals with the
25 development and the ultimate conclusion in

1 relation to the budget of the law society. So
2 the budget development process takes place over
3 an extended period of time, taking information
4 from each of the responsibility areas in the law
5 society. That's dealt with primarily by the
6 finance and audit committee and a budget that's
7 ultimately approved by the benchers.

8 Q Okay. And this a document I expect we'll return
9 to, but for now if you could please turn to
10 page 4 of the document. There is a comment
11 here: "continuing to address the increased
12 number of citations and serious files." Can you
13 just explain, please, what the significance of
14 that is and particularly in the context of this
15 budget report.

16 A (DA) Well, part of it was relevant to an
17 increase in the number of citations and hearings
18 that were being dealt with by the law society.
19 So over the course of recent years we had seen
20 an increase in the number of hearings that the
21 law society was dealing with. Historically, the
22 average of hearings was in the order of 24 to
23 26, but for the last number of years there were
24 a greater number that were going to hearing. I
25 think some of those matters are actually

1 addressed within the body of the paragraph that
2 you pulled up on the screen, so there was an
3 increase in relation to the number of hearings
4 but also some increase with respect to the
5 complexity of some of the investigation matters
6 that we were dealing with.

7 Q This in terms of the complexity, and that's
8 something I think again we'll likely address
9 further. Would it be fair to say that the
10 investigations in discipline proceedings
11 regarding the AML-related rules are on the more
12 complex side, those are the ones that would put
13 more pressure on the resources and capacity of
14 the law society?

15 A (DA) Well, it's not only those, but I think the
16 AML-related matters are inherently more complex
17 given the amount of work that is required in
18 relation to the financial components.

19 Q Okay. And if we move forward on the same
20 document, please, to page 6. And there's a
21 heading on this page beside the number 3 that
22 says "Continued Focus on Anti-Money Laundering
23 Initiatives." And this is a portion of this
24 document that's highlighted as well in the
25 summary that I referred to. Can you just

1 explain, please, briefly for the commissioner
2 what the significance of this is and the context
3 of this document and more broadly?

4 A (DA) Well, I think it's an indication in
5 relation to the extent of it which this has
6 become an increasingly important area of
7 activity for law societies across the country.
8 So I think it provides some sense in relation to
9 the kind of work that's taking place in relation
10 to the additional resources that we require in
11 investigations, forensic accounting and the
12 trust assurance and the discipline program.

13 I think, Mr. Isaac, you're aware of the fact
14 that there are fairly extensive resources in
15 each of those areas, so publicly I think it in
16 many ways has not been well understood that we
17 have a very robust trust assurance program and a
18 forensic accounting group and a dedicated group
19 in relation to investigations and discipline.
20 We've been adding more resources to each of
21 those areas over the course of the last
22 several years.

23 Q And I think there's reference there in this
24 paragraph referring to the efforts have led to
25 the implementation of revised rules and an

1 elevated focus on these matters. Correct?

2 A (DA) That's correct. I think there's been a
3 focus on those matters for quite some period of
4 time but certainly it has been a core area of
5 focus certainly in the period of time that I've
6 been with the law society, which commenced at
7 the 1st of January 2018. It has been very much
8 an important issue that has received a great
9 deal of attention and that was taking place well
10 before my arrival.

11 MR. ISAAC: Okay. If we could please mark this as
12 the next exhibit.

13 THE COMMISSIONER: Very well. That will be 227.

14 THE REGISTRAR: Exhibit 227.

15 **EXHIBIT 227: Law Society of British Columbia**
16 **2020 Fees and Budgets Report**

17 MR. ISAAC:

18 Q And just stepping back, I'd asked about -- the
19 question about how the law society was funded.
20 As we potentially look forward and consider
21 capacity and potential future recommendations,
22 is the absence of government funding an
23 intrinsic and sort of viable component of the
24 law society's independence for government?

25 A (DA) Well, that's an interesting question.

1 We've never looked at any request for any kind
2 of funding from government. The law society is
3 an independent entity and so our budgets have
4 been developed accordingly. I think in engaging
5 with government there are a number of other
6 areas around making sure that we're involved in
7 some of the conversations and discussions with
8 government and investigative entities where we
9 have talked about there being some utility on
10 that front, but there has not been any
11 discussion in relation to seeking any level of
12 resource from government.

13 The profession operates independently. The
14 independence of the profession is considered a
15 core area of importance and budgets are
16 developed accordingly.

17 Q Okay. Many of the issues that I expect we will
18 address over the course of the panel's testimony
19 relate to the rules that the law society has
20 implemented over time to mitigate the risks of
21 money laundering to the profession. Can you
22 explain just briefly how the rule development
23 process, implementation process works at the law
24 society, how that happens, please.

25 A (DA) Well, certainly. And it happens in a

1 couple of different ways. So -- and one of the
2 documents that you had up a while ago talked
3 about a number of the different committees of
4 the law society, so there are areas where
5 committees would develop recommendations for
6 changes to the rules. So some of it, if I can
7 describe it this way, are domestic. Matters
8 that deal with the operation of the Law Society
9 of British Columbia that relate to rules that
10 are developed to deal with matters that are
11 specific to the profession here in the province
12 of British Columbia.

13 There are a number of other areas where
14 there is common interest with law societies
15 across the country and you heard about -- quite
16 a bit about this in the testimony yesterday from
17 Frederica Wilson from the Federation for the
18 Canadian Law Societies. So there are some areas
19 where the work around the development of rules
20 is done with respect to the model rules at the
21 federation level. So it's a combination of
22 rules that are dealt with here at the law
23 society that move up through the committees,
24 then ultimately to the benchers, and then that
25 other area where there's a much greater degree

1 of engagement with the federation in the
2 development of model rules, and then the
3 consideration of those proposals by the benchers
4 at each of the law societies across the country.

5 Q You did touch on this a little bit which was how
6 the law society determines when to move forward
7 to implement rules or initiatives on its own as
8 opposed to through the federation, a more sort
9 of consensus-based rule development process.
10 You know, and I -- if you can answer that
11 question as well as whether or not there's
12 sometimes attention between the need to move
13 forward quickly, particularly with respect to
14 AML-related initiatives, and the desire perhaps
15 for a -- particularly at the federation level
16 for a consistent pan-Canadian approach?

17 A (DA) Well, maybe I can illustrate this with a
18 couple of examples. So with the law society I
19 think the example that I would utilize is that
20 we've been doing some work for a period of time
21 now in relation to a process review in respect
22 of how we deal with our discipline matters. And
23 so benchers have considered recently a number of
24 proposals that address some things that we would
25 like to put in place to deal more effectively

1 and efficiently with some of the matters coming
2 through the discipline process and ultimately
3 through the hearing process.

4 The work that we do with the Federation is
5 much more focused in relation to those areas
6 where we would look to have consistency across
7 the country. AML is a perfect example of that.
8 So that's an area where there has been the
9 dedication of significant resources not only by
10 our society but many others to the work of the
11 Federation to develop the model rules. I'm sure
12 we'll talk in some detail in relation to the
13 recent amendments to the model code that have
14 resulted in changes that have now been approved
15 by the benchers in this jurisdiction.

16 The attention that exists -- actually I
17 think there is a high degree of collaboration
18 and cooperation across the country, and the
19 benefit that we get from that is the pooling of
20 the intellectual resources, if I can put it that
21 way, from all of the law societies to ensure
22 that those resources are harnessed as
23 effectively as possible in developing the most
24 appropriate rules to deal with current and
25 emerging situations.

1 benefit with respect to collaboration of the
2 Federation.

3 But that being said, I just want to make
4 sure that you understand that we don't just sort
5 of take what the Federation gives us and rubber
6 stamp it. And so if I could use for an example
7 the Professional Conduct Handbook. There will
8 be -- the Federation will take a look at rules,
9 will send them to our ethics committee, we'll
10 send comments back and ultimately there's a
11 recommendation that comes from the Federation
12 which we may take to the benchers as is or we
13 may revise or the benchers may revise. So it's
14 a very iterative process, and so even where
15 we're adopting Federation common rules, it's
16 hard to say that those are Federation rules
17 because there's been an independent review of
18 those by the benchers in BC.

19 Q Thank you. And I think the combined evidence of
20 both of you, I hear you describing the benefits
21 that can be derived from working on a
22 Pan-Canadian approach, the collective
23 intellectual horsepower that could be marshalled
24 through the Federation and also areas where
25 consistency is important. But, Mr. Ferris, I

1 also hear you saying that it's not a blind
2 adoption of model rules, that there is an
3 independent analysis.

4 And that takes me, I suppose, to the
5 question ultimately it is the law society, not
6 the Federation, that has the regulatory
7 authority and responsibility to implement rules
8 and other measures to govern the practice here;
9 is that correct?

10 A (DA) Well, that is correct. The Federation
11 develops model rules, but they have no force and
12 effect until they've been considered by and
13 passed by the benchers in the province of
14 British Columbia.

15 Q And there is nothing requiring the law
16 society -- leaving aside the question of the
17 [indiscernible] the cases, but nothing requiring
18 the law society to move in lock step with the
19 Federation or any other law society? It can
20 move ahead of or go beyond any rule or
21 initiative that -- of the Federation or any
22 other law society; is that correct?

23 A (DA) Well, I think the answer to that question
24 is yes, but there's something I'd like to add to
25 this. I've had the benefit of working on a

1 number of pan-Canadian initiatives in other
2 contexts in education and healthcare. I have
3 not seen them operating as effectively as the
4 pan-Canadian approach that's utilized by the
5 Federation. So I think it's important for the
6 commission to understand that the effectiveness
7 of the relationship that operates between law
8 societies and the Federation is very high. In
9 fact they are us. The Federation -- the council
10 members -- the 14 council members are selected
11 from each of the law societies from across the
12 country.

13 Q And taking all of that together, then, the
14 question of sort of looking forward, if there
15 are best practices, rules or initiatives,
16 whether they're from other domestic or
17 international jurisdictions or just sensible
18 reforms, those may be under consideration by the
19 Federation, they may have been implemented by
20 another Canadian law society, but whether they
21 are or not is ultimately -- it's not a bar to
22 the Law Society of British Columbia from
23 implementing those reforms if they make sense
24 here. Is that a fair statement?

25 A (DA) I think it's a fair statement.

1 Q Okay. And --

2 A (CF) And, Mr. Isaac, if I can just add this.

3 You can be assured that the benchers are always

4 considering what they think is best. And if it

5 came to us that there was a better rule than

6 what the Federation was considering, there's no

7 reason why there would be any bar whatsoever to

8 us adopting that. I think always remembering in

9 mind that the issue that this commission is

10 taking a look at is a pan-Canadian issue, it's

11 not solely a BC issue, and so sometimes you also

12 have to add in the mix whether moving ahead

13 where other jurisdictions have lesser

14 requirements, whether that makes sense or

15 whether you're just shifting the problem. So it

16 is a bit of a complex analysis.

17 Q Thank you. And I would like to just identify --

18 we'll go into the details likely of this

19 document and refer to it further, but on the

20 AML -- sorry, on the Law Society of British

21 Columbia regulation summary.

22 MR. ISAAC: If we could please pull that up. And I

23 believe that is the -- exhibit 224, Madam

24 Registrar. And if we could go to appendix B,

25 which is at page 58, please.

1 THE REGISTRAR: Sorry, Mr. Isaac. Did you say ...

2 MR. ISAAC: No, I apologize. I've given you the
3 wrong summary. I think the -- the appendix here
4 has moved. It's actually the introduction to
5 law society summary. My apologies. If you
6 could take down the regulation summary and go
7 back to that. And then it is page 58 of that
8 summary.

9 Q And appendix B to this is the anti-money
10 laundering strategy plan, and then following
11 that on the next appendix, appendix C, is the
12 AML operational plan. And we'll go into the
13 substance of this in a little bit more detail,
14 but if I could ask you to please explain, what
15 are these documents?

16 A (DA) Well, both the operational plan and the
17 strategic plan have been developed over the
18 course of the last year or so. Some of it picks
19 up in relation to work that has been underway
20 for some period of time, but it brings together
21 some of the key elements in relation to the
22 overall strategic approach and then the
23 operational elements that are currently
24 underway.

25 Q Thank you. And I think you said that this was

1 implemented recently. I believe the strategic
2 plan was implemented in April 2020. Was there
3 something that preceded this? Was there a
4 similar strategic plan or was it a compilation
5 of other things, or is this a new development,
6 having one sort of focal point document that
7 pulls together all of the different threads that
8 relate to AML?

9 A (DA) There was an overall law society strategic
10 plan that was passed in December of 2017 in
11 relation to really all the matters, the key
12 strategic matters that the law society had under
13 consideration. Anti-money laundering was one of
14 the elements that was referenced in relation to
15 the existing strategic plan, and this is a more
16 granular document in relation to AML activities
17 more specifically.

18 Q Okay. And when we look at the actual table in
19 appendix C, there's a number of columns. And I
20 take it that this is essentially a breakdown of
21 all of the AML-related activities and projects,
22 what they're -- who was in charge of them within
23 the law society, what the status is and what
24 could be expected in terms of timeline and next
25 steps; is that correct?

1 A (DA) Correct.

2 MR. ISAAC: Okay. So we can take this document down
3 now, please.

4 Q And I'd like to begin just by -- on the next
5 stage just we're going to look at sort of a bit
6 of an overview and just identify some of the key
7 AML rules and initiatives that have been
8 implemented over time at quite a high level, and
9 we'll go into the details on some of the rules
10 afterwards. And I believe that 2004 was when
11 the law society introduced the cash restriction
12 rule. And that's the -- that was the first
13 AML-specific rule that was implemented by the
14 law society; is that correct?

15 A (DA) Well, yeah, it is correct in that that rule
16 was passed in 2004. Some of the work that was
17 underway to address that had been ongoing for
18 quite sometime prior to that. And there are
19 elements of the responsibility of members of the
20 profession that had been part of the rules and
21 part of the code for quite some period of time
22 prior to the rule change that was made in 2004,
23 but the 2004 rule was one of the more specific
24 ones, yes.

25 Q Okay. When you refer to the rules that existed

1 previously, I take it you're referring to the
2 long-standing professional obligations, I think
3 dating back to the 1920s, that require lawyers
4 not to facilitate illegal conduct. Is that
5 correct?

6 A (DA) Yeah, that's correct. But I'd expand on
7 it. So 2004 and 2001 weren't the first periods
8 of time when the law society was turning its
9 mind more specifically to money laundering and
10 anti-money laundering and initiatives. Some of
11 that work goes back to the period of time when
12 parliament was first passing the proceeds of
13 crime legislation back in, I believe, 1989 with
14 a number of communications in the profession
15 relation of what their obligations were, what
16 the changes in the law were and some of the
17 vulnerabilities that they needed to be mindful
18 of in the conduct of their practice.

19 So there was a considerable amount of work
20 that was ongoing with the law society prior to
21 those developments in 2004.

22 Q And that -- am I correct that the Law Society of
23 British Columbia was the first of the Canadian
24 law societies to implement a cash restriction
25 rule?

- 1 A (DA) That is my understanding, yes.
- 2 Q Would it be fair to say that, at least in that
- 3 early period, that the understanding or the
- 4 focus of the law society and perhaps law
- 5 societies generally was on cash in particular as
- 6 the primary threat of money laundering?
- 7 A (DA) Well, I think for society generally that
- 8 cash was a much more -- it was more visible in
- 9 relation to the conduct of the economy at that
- 10 point in time. Things have evolved considerably
- 11 in the intervening period of time, but yes.
- 12 Q Okay. And the next step is 2008 and that was
- 13 the implementation of the law society's customer
- 14 identification and verification or the CIV
- 15 rules. Is that right?
- 16 A (DA) The client identification rules, yes.
- 17 Q Yes. And those were based on the model rules
- 18 developed by the Federation; is that right?
- 19 A (DA) Yes.
- 20 Q And I think we heard from Ms. Wilson that those
- 21 model rules themselves track very closely the
- 22 federal regulations under the PCMLTFA that had
- 23 been put in place at around the same time.
- 24 A (DA) They did.
- 25 Q And just advancing forward in our timeline, we

1 understand from Ms. Wilson that the period of
2 renewed litigation between 2009 and 2015 was a
3 period where there was no engagement between the
4 Federation and the federal government on AML.
5 And I take it the same applies to the Law
6 Society of British Columbia; right? There was
7 no separate engagement between the law society
8 and the federal government on AML-related issues
9 during that time?

10 A (DA) I believe it was essentially the same
11 situation, yes.

12 Q Is it fair to say that all of the engagement
13 that the law society has with the federal
14 government would occur through the auspices of
15 the Federation?

16 A (DA) Well, that's substantially the case, so
17 certainly in relation to the work that's been
18 done in relation to the AML area that has been
19 done essentially through the Federation. But I
20 think it's important to point out that the
21 Federation and its working groups are populated
22 by the provincial and territorial law societies.
23 So British Columbia has been a very -- had a
24 very significant degree of engagement with the
25 work of the Federation on that front. Primary

1 engagement -- and I think you heard some of this
2 from Frederica Wilson -- is with the Federation
3 through a number of the federal departments,
4 most significantly with finance and with the
5 Department of Justice, but more recently with a
6 number of other entities as well.

7 (CF) Mr. Isaac, if I can just add, the
8 question you ask is the reason we have the
9 Federation. The Federation is based in Ottawa,
10 and so when we need federal government
11 engagement, we try to do that as part of that
12 organization. But the Federation is really our
13 branch office in Ottawa. It's -- the Federation
14 is just a grouping of law societies and it's
15 their office in Ottawa, and so we actually see
16 that Federation engagement as our engagement as
17 part of this process.

18 Q Thank you. And during that period of 2009 to
19 2015, so after the implementation of the CIV
20 rules and the conclusion of the litigation, we
21 understand from Ms. Wilson that there was no
22 sorts of systemic examination of the model rules
23 that had been implemented at that time. And I
24 take it there were no new AML-specific
25 initiatives implemented by the Law Society of

1 British Columbia during that same time period
2 either.

3 A (DA) Sorry, Mr. Isaac, I lost part of the
4 audible when you were asking your question.

5 Q Sorry. Let me repeat. I said we understood
6 from Ms. Wilson that during this period, you
7 know, after 2008 and before the conclusion of
8 the Federation litigation, that during that time
9 there were no new AML rules or initiatives that
10 were implemented and there was no review of
11 those existing model rules. And I just asked
12 whether or not the -- that was -- the same is
13 true for the law society, that during that same
14 time period there were no substantive changes to
15 the rules -- the two rules that had been
16 implemented and no other significant AML
17 initiatives that were implemented during that
18 time.

19 A (DA) Well, I would say yes in relation to the
20 first part and no in relation to the second. So
21 the work of the law society and initiatives
22 associated with engaging the profession in
23 knowing their obligations, bulletins that were
24 issued to the profession, the educational
25 initiatives, all of that work continued to take

1 place. So in relation to whether there was
2 significant engagement between the parties to
3 the litigation through that period of time,
4 there wasn't, either initiated by the law
5 societies or by the federal government.

6 If I may make the observation, I think it
7 was a lost time when the parties could have been
8 working effectively together to develop
9 collectively approaches around how they could
10 engage the issues more directly and more
11 effectively. But you're right, there wasn't a
12 lot of discussion that was taking place while
13 the matter was before the courts.

14 (CF) And, Mr. Isaac, I just want to add
15 because I was in a unique spot at that point in
16 time. I was a representative party in the
17 Federation case before the Supreme Court of
18 Canada and I also had just become a bencher in
19 that time. And I just would highlight what
20 Mr. Avison just said is that it's -- the real
21 risk of ongoing litigation or threats of
22 litigation is that it really freezes people in
23 the positions that they're in because of
24 litigation. And so I would just emphasize that,
25 the need to move beyond that concept of how

1 we're going to develop these rules.

2 Q Well, then I -- that leads into the -- 2015
3 obviously there was an unfreezing, at least,
4 that the litigation concluded. And I don't
5 intend to take the panel through the details of
6 that decision, but fair to say that the
7 Federation's challenge was upheld by the court.

8 There were several other developments that
9 occurred shortly after the conclusion of the
10 Federation case that the Federation indicated
11 were of significance to it and that combined,
12 those developments led to a period of renewed
13 examination of some of the AML model rules both
14 by the Federation and through the Federation,
15 its member law societies. And those -- some of
16 those developments were the July 2015 Department
17 of Finance inherent risk assessment, the mutual
18 evaluation process itself and the mutual
19 evaluation report as well as new federal
20 regulations and other factors. And I just want
21 to briefly take the panel to a couple of those,
22 please.

23 Beginning with the -- before we do that, can
24 I ask the -- well, I will ask. The mutual
25 evaluation process in 2015, did the law society

1 participate in that evaluation process or was it
2 only The Federation that did so?

3 A (DA) Ultimately it was the Federation. I
4 believe you had evidence yesterday on this from
5 Ms. Wilson that the meetings that took place
6 with FATF representatives took place with
7 Jonathan Herman, the CEO of the Federation; and
8 with Ms. Wilson as the deputy director.

9 Certainly there were discussions that took
10 place with member law societies in the lead-up
11 to those discussions with the FATF review group.

12 Q Okay. And there was a document that I did put
13 to Ms. Wilson, and in fairness I'd like to do
14 the same as well.

15 MR. ISAAC: Madam Hearing Registrar, if you could
16 bring up LSB9258-1. And I know that that is
17 also exhibit -- it's already an exhibit. It's
18 exhibit 202.

19 Q And this is an email. It's between Michael
20 Lucas and Frederica Wilson, copying Ms. Armour
21 and Barbara Buchanan. Just who is Mr. Lucas?

22 A (DA) Michael Lucas is the director of the law
23 society's policy area.

24 Q Okay. The Law Society of British Columbia's
25 policy area

- 1 A (DA) Yes.
- 2 Q Okay. And Ms. Buchanan?
- 3 A (DA) Barbara Buchanan, QC, is with our practice
4 advice group and very much involved as one of
5 the key people that deals with the education of
6 the profession in relation to AML matters. And
7 Ms. Buchanan probably has played one of the most
8 significant roles in relation to the work of the
9 Federation and the development of the guidance
10 to the profession documents and guidance to law
11 societies.
- 12 Q Okay. And the --
- 13 A (DA) So --
- 14 Q Sorry.
- 15 A (DA) And I should probably add that in the
16 context of practice advice, Barbara Buchanan
17 would be one of the individuals who would be
18 receiving and providing advice to members of the
19 profession if they had AML-related questions.
- 20 Q Okay. And if we look at the top portion of this
21 email, and its date is November 2015. And just
22 for context, I understand that's just on the eve
23 of the mutual evaluation process actually
24 kicking off, at least in terms of the
25 evaluators' assessment with the legal

1 profession.

2 And Ms. Armour writes to Mr. Lucas and
3 Ms. Wilson copying Ms. Buchanan:

4 "I think the plan was to find out where
5 LSUC --"

6 Which is the Law Society of Upper Canada.

7 "-- is in monitoring and enforcement of ID
8 and verification. If they are in better
9 shape than LSBC (likely) we were going to
10 try to substitute them."

11 It would just help if you could -- if you know,
12 about what the context of this email was and
13 what the reference to substitution and also why
14 Ms. Armour appears to be suggesting that the Law
15 Society of Upper Canada would have been in
16 better shape on monitoring and enforcement in
17 those areas in 2015.

18 A (DA) Yeah, I think, Mr. Isaac, I probably have
19 to acknowledge the fact that I wasn't with the
20 law society at that point in time, but I think I
21 do have some understanding in relation of what
22 was taking place through the course of that
23 exchange with the FATF monitors. I think what
24 the correspondence tells you is that even on the
25 eve of the review by the FATF group, as you

1 described it, that there was still a
2 considerable degree of uncertainty about what
3 engagement was actually taking place. So the
4 Federation and law societies were doing work to
5 make sure that they were in a position to
6 respond. The Law Society of Upper Canada, as it
7 was at that point in time, I think was further
8 along in relation to the referral of some
9 matters to investigations.

10 The Law Society of British Columbia
11 consistently does that now, but I think what we
12 were trying to do and what others were trying to
13 do at that point in time was to identify the
14 kind of engagement that would provide
15 information on what was happening with different
16 law societies across the country. Ultimately it
17 ended up that the engagement was with Mr. Herman
18 and with Ms. Wilson and the FATF reviewers.

19 Q Thank you. And you referred to the question of
20 referrals, that perhaps at that time in 2015 for
21 the enforcement of ID and verification that the
22 practice around -- of the Law Society of British
23 Columbia, at least, has since changed. But can
24 you just explain that a little bit more in terms
25 of what would have been the practice in an

1 around 2015 and how that has changed since.

2 A (DA) Well, I might invite Ms. McPhee to join in
3 on this as well. But there was by that point in
4 time a significant program in relation to trust
5 audit and insurance. So the trust accounts of
6 lawyers were being regularly reviewed and
7 audited. There was engagement, often corrective
8 in nature, in relation to those areas where
9 there might be more modest errors.

10 We've adopted an approach over the course of
11 the last number of years that is much more
12 strict, if I can put it that way, in relation to
13 the referral of matters where there is a defect
14 from the audit group through to the
15 investigations group.

16 (JM) And I can just add a few comments. So
17 the CIV rules were looked at and discussed with
18 firms through the audit process, but it was more
19 of a remedial -- at an operational level, and so
20 they were certainly discussed with the firms and
21 talked about their processes and what they did
22 around those rules. And then in 2016 we set a
23 referral standard to -- at a certain level of
24 breach of the rule, it would be referred to
25 investigations for further review.

1 MR. ISAAC: Thank you. And we can put down this
2 particular document, please, Madam Registrar.

3 I would like to turn now just to the
4 inherent risk assessment itself. And I will
5 pull up -- ask Madam Registrar to please bring
6 up LSB010790. That is a copy of the inherent
7 risk assessment. I would note there is a
8 already a copy of this in evidence. It's an
9 overview report, exhibit 3, appendix B. That is
10 a multi-thousand page document, so this is
11 probably easier, but we may not need to actually
12 mark this.

13 So looking at this, I don't intend to take
14 the panel through every part of this but just
15 focus on a couple of the key areas of this
16 report that spoke to the risks posed to the
17 legal profession. And I recognize that this
18 is -- it's an assessment of inherent risk, so
19 it's not something that takes into account any
20 mitigating measures or their effects.

21 But if we could turn, please, to, first,
22 page 32 of the report. And you'll see here
23 there is a table that lists the overall inherent
24 money laundering and terrorist financing
25 vulnerability ratings, and legal professionals

1 are listed here as having a high vulnerability
2 rating in the table.

3 And if we go forward to page 52 of the
4 document. So there's a discussion here towards
5 the bottom of the page under the heading "Legal
6 Professionals and BC Notaries." It says:

7 "Given the nature of the products and
8 services (e.g., formation and management
9 of corporations and trusts) offered by
10 legal professionals to their clients, they
11 are exposed to high to very high inherent
12 ML risk scenarios. Although BC notaries
13 offer similar services, their activities
14 are mainly limited to British Columbia and
15 therefore money laundering opportunities
16 are more limited and they are exposed to
17 lower risks ...

18 Legal professionals and BC notaries
19 may be used as intermediaries to put
20 distance between criminal activities and
21 the proceeds generated by those
22 activities, and therefore to hide the
23 source and true beneficial owners of such
24 funds, often through complex corporate or
25 trust structures formed with the

1 assistance of legal professionals. This
2 assistance also adds a veil of legitimacy
3 to the movement of funds and other
4 business operations."

5 Just pausing there, does the law society agree,
6 at least generally, with the Department of
7 Finance's assessment in the report here that as
8 a matter of inherent risk -- leaving aside the
9 question of mitigation, but as a matter of
10 inherent risk that lawyers are exposed to a high
11 risk of money laundering, including by those
12 that may seek to use them as intermediaries?

13 A (DA) Well, I don't think that 2015 in this
14 report was a threshold point in relation to the
15 identification of inherent risks. If you go
16 back over publications from the law society for
17 a number of years, you will see that many of
18 those identify for members of the profession the
19 things that they have to be aware of in relation
20 to the potential of risk and the kinds of red
21 flags that might indicate the kind of conduct
22 that they need to be particularly careful about
23 and guard against, and the importance of their
24 role as gatekeepers.

25 So I think you would find a number of these

1 kinds of elements consistently communicated in
2 law society communications to the profession for
3 a number of years well in advance of the
4 publication of this document.

5 (CF) If I could just add, you know, this
6 document I think was -- in my respectful view,
7 was a bit late to the issue. You know, we had
8 been dealing with this issue for years
9 beforehand, and in fact I have another unique
10 perspective that when these -- when the cash
11 rules or the CIV rules -- I can't remember which
12 ones -- were we implemented, my partner was the
13 president of the law society, Bill Everett, QC.
14 And I remember sitting and discussing these
15 issues with him. And so there's been a long
16 history of the Law Society of BC recognizing the
17 risk, and you can debate the level of risk, but
18 it's a material, important, significant risk
19 which we have been involved in educating the
20 profession well before 2015.

21 Q Okay. And I take from that that the -- there is
22 an acknowledgement, a recognition that may have
23 long predated this report. So separating the
24 timeline out for it, and just looking at the
25 question of the risk that's actually described

1 here, though. I -- correct, I hear you both
2 saying that the law society does recognize and
3 has recognized prior to this report the risk
4 that lawyers are exposed to inherently for those
5 that may seek to use them for elicited purposes.
6 Is that fair? If we take the timeline out of
7 it, that this wasn't the catalyst for that
8 recognition but that the recognition itself is
9 something that the law society does have.

10 A (CF) I think that's fair. We've spent a lot of
11 time and effort over decades on this issue and
12 we wouldn't be doing that unless we recognized
13 that there was a material risk here.

14 Q Thank you. One of the concluding portions of
15 this refers to adding a veil of legitimacy to
16 the movement of funds and other business
17 operations. And again separating out the
18 timing, let's remove 2015 from the occasion, but
19 is that something that is also something the law
20 society recognizes is a component and source of
21 inherent risk for the legal profession and
22 indeed maybe part of the potential attraction to
23 criminal wrongdoers, the veil of legitimacy that
24 may -- that those who seek to do criminal acts
25 through lawyers may seek to benefit from.

1 A (DA) Well, I think I'd answer the question in a
2 similar way. That if you go back over the
3 communications for a number of years, you will
4 see that that issue that has been identified,
5 that this is something that lawyers as
6 gatekeepers need to be mindful in the conduct of
7 their practices.

8 Q Thank you. And I think it's important -- just a
9 couple of threshold points. Solicitor/client
10 privilege does not apply if lawyers are engaged
11 in illegal conduct; is that right?

12 A (DA) Absolutely.

13 Q And solicitor/client privilege also does not
14 apply if lawyers are engaged in activities
15 unrelated to the giving or receiving of legal
16 advice; correct?

17 A (DA) Correct.

18 Q As a matter of at least the inherent risk,
19 however, you'd agree that to the outside world,
20 at least, the involvement of a lawyer can carry
21 this presumption or veil of legitimacy and
22 privilege and that that might have and can have
23 the effect of limiting to some extent, at least,
24 the due diligence and oversight by other
25 gatekeepers in the AML system, whether that's

1 financial institutions or law enforcement.

2 Would you agree with that, Mr. Avison?

3 A (DA) Well, I think I come back and I emphasize
4 why that's been a pretty common feature in
5 relations to the communications with the
6 profession over the years about that potential
7 risk and the responsibility of the lawyer as a
8 gatekeeper.

9 Q And I suppose, again leaving aside the timeline
10 or the mitigating, we're only speaking at this
11 point with respect to the question of inherent
12 risk, what exists in the absence of measures.
13 But would you agree that this potential, that
14 the effect of this veil or presumption, that it
15 heightens the need for regulators of the legal
16 profession such as the law society to ensure
17 that their regulatory oversight, that it extends
18 as far and as effectively as possible to cover
19 all instances where those with criminal intent
20 may seek to exploit and wrongfully benefit from
21 those presumptions?

22 A (DA) Yes.

23 Q So within this same report there are a couple of
24 specific areas not under the heading of legal
25 and professionals, but where the legal

1 profession is mentioned in relation to certain
2 services that they may engage in, and the first
3 of those is regarding express trusts. If we
4 could go to page 39, please, of the document.

5 The top of the page here there is a
6 reference to money laundering/terrorist
7 financing vulnerability of express trusts. And
8 this portion says that lawyers' roles in
9 establishing express trusts can present a risk.
10 It says that:

11 "The critical vulnerability of the express
12 trust is that it can be structured to make
13 it difficult to ascertain the identity of
14 the parties to the trust and it can be
15 difficult to freeze and seize assets held
16 in the trust [give that] the trust
17 separates legal ownership ... from
18 beneficial ownership."

19 And Canadian -- it goes on to say that:

20 "Canadian express trusts are predominantly
21 established through trust companies,
22 lawyers and accountants."

23 The other portion that mentions lawyers in the
24 practice of law is if we go to page 53 of the
25 report. This is a section on the real estate

1 sector. And the portion speaks to the ways in
2 which transactions through real estates can be
3 attractive or used by money launderers. And it
4 mentions here that real estate transactions can
5 involve accessing financial institutions through
6 gatekeepers such as lawyers, and that it can
7 also -- real estate transactions usually involve
8 lawyers and their trust accounts. And it goes
9 on to say that:

10 "These lawyers can knowingly or
11 unknowingly provide legitimacy and/or
12 obscure the source of illegally sourced
13 funds."

14 And again, just pausing there. These are the
15 last portions of -- at least of this inherent
16 risk assessment that I want to take you to.

17 But does the law society agree that these
18 are specific areas of potentially elevated
19 inherent risk faced by the legal professional,
20 including in British Columbia?

21 A (DA) Yes, and that's been evident for some
22 period of time in the communications from the
23 law society to members of the profession in
24 British Columbia about areas where they may be
25 at risk in relation to improper conduct by

1 others, and so significant communications over
2 the years in relation to the kinds of red flags
3 that might be encountered in those kind of
4 transactions.

5 And I suspect at some point we'll get into
6 some discussion in relation to some of the
7 opportunities to address some of this into the
8 future through things like the implementation of
9 the Land Owner Transparency Act. That scenario
10 where the law society engaged with government at
11 an early point to indicate that we were of the
12 view that the development of that kind of
13 mechanism would be very useful.

14 (CF) I'd just like to add, Mr. Isaac, that
15 of course we all recognize that the overwhelming
16 number of trust and real estate transactions are
17 completely legitimate, and so the real task here
18 is educating lawyers to make sure that they
19 understand the risks and the red flags of
20 separating, you know, that great overwhelming
21 majority of transactions that are legitimate
22 from the ones that may be problematic. And so
23 that's really where the law society's efforts
24 have been focused. And doing things like
25 encouraging the government to bring in the Real

1 Estate Transparency Act and educating people
2 with respect to risk and red flags.

3 Q Thank you. And I appreciate this is a 2015
4 report, and I take it from your evidence that
5 this doesn't mark the beginning nor likely the
6 end of the focus on these areas and potentially
7 others. And I know that there are other
8 emerging and areas of elevated risk that the law
9 society has focused on since this as well.

10 Are there other -- leaving aside the real
11 estate sector and the issue of trust, are there
12 other areas of potentially elevated risk,
13 inherent risk, that the law society believes
14 lawyers in the province may be exposed to? And,
15 you know, if there are some that you could
16 identify, we will get into the -- perhaps the
17 specific measures that have been taken in
18 respect of addressing those risks, but, you
19 know, are there other specific areas that you
20 think are exposed to elevated levels of inherent
21 risk?

22 A (DA) I think you've identified some of the main
23 ones in relation to the real estate transactions
24 and some corporate structures, but I would
25 emphasize the point that was made by Mr. Ferris

1 in relation to the vast majority of the
2 legitimate transactions. But those are
3 certainly some of the key areas where the focus
4 has been concentrated.

5 Q And I suppose one of the underlying questions as
6 well identified by this is that the -- obviously
7 the practice of law encompasses a very broad
8 range of different services. And not all of
9 those services -- even if the vast majority of
10 what occurs within each of those services may be
11 entirely legitimate, that not all of those
12 services are exposed to the same level of
13 inherent risk or attraction to money launderers;
14 is that -- that's fair?

15 A (DA) Yes.

16 Q You'd agree that sort of underscores the
17 importance of adopting a risk-based approach to
18 the effective regulation of the profession when
19 it comes to addressing those money-laundering
20 risks?

21 A (DA) And that's been relevant to the decisions
22 around how we operate the trust assurance
23 program, where some areas considered to be at
24 higher risk receive a greater degree of
25 attention.

1 Q All right. And I --

2 A (GP) Mr. Isaac, can I add that -- with respect
3 to your questions about risk that we might see
4 beyond these ones. When we do see a practice
5 area or a legal service that represents a
6 concern or a heightened risk, we have then
7 published materials -- educational materials to
8 the profession in response to that either
9 through discipline advisories in the Benchers'
10 Bulletin or, you know, through our work with the
11 Federation in producing risk advisories, case
12 studies and guidance.

13 So I think the process is very dynamic as we
14 -- and I think that's a part of this --
15 typologies, understanding the typologies,
16 continually responding to new information and
17 putting out educational materials. So it's
18 certainly not a static, 2015, this report is the
19 parameters of what we'd be looking at. It's a
20 dynamic process.

21 Q Thank you. And I think that's consistent with
22 other evidence that we have heard in terms of
23 the -- I mean, the whack-a-mole or the ever
24 evolving threat that can be posed by money
25 laundering.

1 You know, your question really highlights why
2 the rule, and I know you said it's an old rule,
3 about lawyers not participating in dishonest
4 transactions with their client, but why that
5 rule is so important and why it's so fundamental
6 is because of exactly this issue which is the
7 typologies change. And if you create
8 prescriptive rules which are sort of checklists,
9 you don't really get lawyers engaged as well
10 with respect to ensuring that what they're doing
11 is correct. And as soon as you create a rule,
12 there's something new and some new other area.

13 So that's why that overarching rule about
14 lawyers not participating in something that's
15 dishonest with their clients, it really focuses
16 the lawyer's mind on identifying risks,
17 identifying how -- whether they should be taking
18 on this transaction and making sure they're
19 complying with their ethical duties.

20 Q Thank you. I think we can put this document
21 down. It is already an exhibit, so I don't
22 propose to mark it as another exhibit now.

23 This inherent risk assessment obviously was
24 part of the broader FATF mutual evaluation
25 process, and it was in September of 2016 that

1 the FATF published its mutual evaluation report.
2 And I don't propose to take the panel through
3 that mutual evaluation report now. I think it's
4 fair to say that the report was highly critical
5 of the regulation of the legal professional in
6 Canada.

7 And I did ask Ms. Wilson earlier this week
8 the Federation's view of that evaluation, and
9 she expressed the view that the mutual
10 evaluation report got a lot wrong and did not
11 give sufficient weight to the -- either the
12 existence or effectiveness of the law society's
13 own AML measures.

14 And I would like to ask, did the law society
15 or any of you have any perspective on that
16 mutual evaluation report and its comments
17 regarding the regulation of the legal
18 profession? Were they fair? And if not, what
19 did the evaluators get wrong or not put
20 sufficient weight to?

21 A (CF) Well, let me just address this from a
22 bencher's perspective because that report came
23 do me as soon as it was published. And I think
24 they both got the facts wrong about how lawyers
25 are regulated in Canada and I also think that

1 they approached the question with a particular
2 perspective, which was there was one way to
3 regulate this and that was the only way.

4 And I think -- and I know we don't want to
5 discuss it right now -- what the Federation case
6 has told us is that we have a different
7 constitutional structure in Canada, and so we
8 have a duty to figure out how to regulate
9 this -- a Canadian -- a sort of made-in-Canada
10 perspective, and it's not going to fit the
11 perspective of FATF. And I thought it was a
12 pretty -- I'm going to say a pretty thin
13 analysis of what we do in Canada and was -- you
14 know, law societies can be open to criticism,
15 and we're happy to take it and to think about
16 it, but that report didn't really provide much
17 of it. It was -- I thought it came from a
18 singular perspective and wasn't all that useful.

19 Q Do any of the other panel members have anything
20 to add to that with respect to the mutual
21 evaluation report?

22 A (DA) Well, I have a similar view. I think it
23 was profoundly unmindful of the constitutional
24 reality in this country and adopted an approach
25 that was focused on a single outcome and single

1 area of particular focus, so I don't think it
2 adequately took into account the realities of
3 the Canadian environment and as a result failed
4 to adequately identify what I would consider to
5 be a more constructive approach looking forward
6 to how we could work more effectively, more
7 collaboratively into the future.

8 (GB) Can I add -- sorry, Mr. Isaac. Can I
9 just add that one of the things that struck me
10 is that the report is critical of the lawyer
11 regulation regime for relying on the two rules,
12 the cash rule -- cash transaction rule and the
13 CIV client identification and verification rule,
14 but the reviewers completely ignore the code of
15 professional conduct which sets out very
16 important obligations as it relates to
17 anti-money laundering, anti-fraud and lawyers
18 not being involved in any illegal activity.

19 And those ethical obligations, in my view,
20 from my investigative experience on these files,
21 those are key to lawyers protecting themselves
22 from vulnerabilities and there's no mention of
23 any of those obligations or those very important
24 duties in that report, and I do think that's a
25 problem with how they evaluated the

1 effectiveness of lawyer regulation.

2 Q Thank you. Shortly after the mutual evaluation
3 report, we understand that the Federation and
4 the law society as part of that began -- there
5 was a new national working group that was
6 created at the Federation level which the Law
7 Society of British Columbia joined. And that
8 would have been, I believe, in late 2016, early
9 2017.

10 Who were the representatives of the Law
11 Society of British Columbia that joined on that
12 Federation working group?

13 A (DA) Well, there were a number of different
14 groups, but around the development of the model
15 rules significant engagement by Deb Armour, who
16 was the chief legal officer at that point in
17 time. Jeanette McPhee has been involved in a
18 number of the working groups as well, including
19 that one. Gurprit Bains has taken on a number
20 of those responsibilities in a subsequent period
21 of time. There are associated committees. So
22 Frederica Wilson indicated yesterday the
23 importance of education, and Barbara Buchanan,
24 QC, has been very much involved in that work and
25 the Federation committees also.

1 Q Thank you. And that work and that participation
2 is something that is ongoing now; is that right?

3 A (DA) Correct. I think the next meeting of that
4 working group happens in early December.

5 Q And just going back, the work of -- the initial
6 work, or the phase 1 work of the working group
7 at the Federation level, resulted in a review of
8 the model rules and new model rules being
9 developed, and we went through that with
10 Ms. Wilson earlier this week.

11 Returning to the Law Society of British
12 Columbia, the law society implemented and
13 adopted all of those rules in July of 2019.
14 There was a new model cash rule as well as an
15 updated CIV rule; is that correct?

16 A (DA) Correct. And those came into force on the
17 1st of January 2020.

18 Q And other primary new rule that emanated out of
19 that working group was a rule 3-58.1?

20 A (DA) Correct.

21 Q Which was an explicit requirement that lawyers
22 only use their trust accounts in connection with
23 legal services; is that right?

24 A (DA) Yes.

25 Q And that was July 2019 that that came into

1 effect?

2 A (JM) That's correct.

3 Q Okay. And that will lead into the next -- I
4 promised a deep, perhaps -- hopefully not too
5 painful dive into some of these rules in a
6 little bit more detail. And the rules in their
7 current stage -- and I'll say as a bit of an
8 explanation at the outset that I expect that our
9 examination of these rules will follow a similar
10 format, touching on what the -- sort of the
11 impetus and the underlying AML rationale for the
12 rule, what its scope is, what's covered and what
13 isn't and why that might matter. How breaches
14 are detected and monitored. We may touch on
15 some enforcement-related issues as well. And
16 then also addressing some areas where those
17 rules may warrant further strengthening or
18 reform, some of which I understand the law
19 society or the Federation had identified and
20 others that we have identified through our
21 process as well.

22 So I should say the background -- the law
23 society regulation summary provides quite a bit
24 of helpful background on some of the rules and
25 reproduces a number of those. And, again, I

1 don't propose to take the panel through in their
2 evidence today the details that are set out in
3 those summaries. But we begin perhaps with the
4 cash transaction rule, which I think is
5 sometimes rather inaccurately referred to as the
6 no-cash rule. What is the underlying rationale
7 of that rule?

8 A (DA) Well, the rule, as I think you heard from
9 Frederica Wilson yesterday, is designed to be
10 compatible with the limitations that are in
11 place federally where the amount was \$10,000.
12 The decision was made by the Federation and
13 ultimately by the law societies in relation to
14 the conduct of legal practices that the amount
15 will be confined to \$7,500.

16 Like you, Mr. Isaac, I'm not particularly
17 fond of the reference to it as a no-cash rule.
18 It's a cash limitation rule, but I think the
19 characterization of it is a no-cash rule helps
20 to make it very clear the extent of which
21 members of the profession need to be mindful of
22 the responsibilities that they have with respect
23 to transactions that are conducted in relation
24 to matters where cash is provided.

25 Q Thank you. And in terms of the scope of the

1 rule, you indicated it's a \$7,500 limit, above
2 that not permitted, in respect of any one client
3 matter when engaged to receive or pay funds,
4 purchase or sell securities, real property or
5 business assets, entities or transfer funds or
6 securities. There are certain exceptions to the
7 rule. I know that one of the those was removed
8 recently in the -- through the Federation model
9 rule process. But the rule does not apply if
10 the cash is received from a number of entities:
11 a peace officer to pay a fine, penalty or bail
12 or financial institution or public body.

13 But I think one of the exceptions that
14 attracts some attention is the -- there are
15 presently no limits for a lawyer accepting cash
16 for professionals, fees, disbursements or
17 expenses. Is that correct?

18 A (DA) Well, I frame it a little bit differently.
19 That the cash that may be received in relation
20 to the provision of legal services by way of a
21 retainer has to be commensurate in relation to
22 the legal services that are performed. So
23 that's an area that's evolving and it's an area
24 where I anticipate there will be further
25 discussion at the level of the Federation

1 working group. It may result in some further
2 consideration by the Federation council and
3 ultimately by law societies across the country.

4 (CF) And, Mr. Isaac, if I can just add
5 because I think this sort of works into the
6 analysis that you're undergoing is that a lot of
7 these rules -- the focus of this commission is
8 strictly on anti-money laundering, but a lot of
9 these rules, they also have other factors at
10 play within them. And so the right to a fair
11 answer and defence in a criminal matter in
12 Canada is fundamental, and while that rule is --
13 that exemption to the rule is obviously governed
14 by the, you know, failure to not engage in
15 fraudulent or criminal conduct by the lawyer, so
16 you've got to be mindful in that circumstance of
17 the cash that's coming into your trust account
18 and making sure you have views that it's
19 legitimate.

20 But beyond that you do have to balance any
21 limitation on that rule with whether or not
22 we're restricting people from defending
23 themselves in criminal proceedings. And that's
24 a larger debate than just anti-money laundering,
25 and so I just ask that you be mindful of those

1 types of issues.

2 Q Thank you. And I would like to -- perhaps we
3 can drill down on a little bit of those because
4 they are important areas of consideration.

5 First, Mr. Avison, you mentioned a
6 requirement -- or I'm not entirely sure if
7 you -- perhaps you could elaborate on it -- that
8 the legal fees or cash received be commensurate
9 to the legal services. And I had understood
10 that that was something which had been raised as
11 a potential area of reform and to be addressed.
12 What is the -- if you could please explain that
13 a little bit more and identify what are the
14 current sources of that and where that might be
15 strengthened going forward.

16 A (DA) Well, I think it is an area that will
17 receive some additional consideration. It might
18 be useful, I think, for Ms. McPhee to provide
19 you with a bit of background in relation to what
20 we do in the trust audit reviews that we do. So
21 it's an area that we begin to look at a little
22 bit more closely.

23 (JM) Just in regards to receiving cash, if
24 cash is received for legal services and if the
25 amount of cash ends up exceeding the amount that

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1 has been charged in legal services, any -- all
2 that cash must be returned, and the refund must
3 be made in cash. So I think that effectively
4 makes sure that it's only -- the cash that's
5 received is effectively commensurate with the
6 fees received. There has been some discussion
7 of having an explicit rule on that but
8 effectively -- because any refund must be made
9 in cash, it effectively ends up being
10 commensurate with fees.

11 (GB) Can I add just two comments. One, if a
12 lawyer asks a client for a \$5,000 retainer, and
13 the client brings the lawyer \$50,000 in cash, in
14 my view, that's a clear red flag and that is a
15 suspicious circumstance and that lawyer ought to
16 be stopping, making inquiries and satisfying
17 themselves of the appropriateness of continuing.
18 And so I would make that point.

19 And the second point, with respect to the
20 fees being commensurate with -- the cash being
21 commensurate with the amount required for the
22 retainer or fees, there have been a number of
23 law society publications where that is the
24 guidance we've given the profession.
25 Ms. Buchanan in particular has written Benchers'

1 Bulletin articles and put out FAQs particularly
2 providing that guidance. Even though it's not
3 explicitly in the rule, that certainly is our
4 expectation.

5 (JM) And so in regards to the rule, it is a
6 major focus of the compliance program and the
7 trust assurance program, so I can speak to that
8 if you wish me to talk about that.

9 Q I think we will get to that both briefly in
10 relation to this rule but also a generally.

11 MR. ISAAC: And I should note for both the witnesses
12 and the Commissioner, I hope to address a few
13 more points under this topic and then perhaps if
14 we would like to take a brief break,
15 Mr. Commissioner, that might be helpful.

16 THE COMMISSIONER: Okay. That's fine.

17 MR. ISAAC:

18 Q Mr. Ferris, you had commented that we ought to
19 bear in mind, I think, access to justice
20 considerations particularly with respect to
21 criminal matters when looking at this exception
22 for professional fees and disbursements, and can
23 you briefly explain that. And perhaps also
24 explain -- you know, perhaps a question that may
25 occur to -- rather obvious is if one has \$7,500,

1 what would prevent that person from simply
2 opening a bank account and providing the money
3 through that bank account? If you could perhaps
4 explain a little bit more what you meant about
5 your previous comment as well as addressing that
6 question, please.

7 A (CF) Right. So just from an overall perspective
8 when we're looking at rules, while we do have a
9 very high anti-money laundering focus, we also
10 have to balance in other factors as well, which
11 is access to justice, and in this particular
12 concern most of the cash retainers, as I
13 understand, are received by criminal lawyers.
14 And so the right to a full answer and defence of
15 people is a fundamental right in the country.

16 And so if you were to restrict that
17 exemption or to force somebody to go open a bank
18 account before they can retain a lawyer, you're
19 starting to put impediments in the way of people
20 getting that defence and retaining that lawyer.
21 And so there's many circumstances where people
22 don't have proper ID, where they -- you know,
23 they're disadvantaged people, homeless people,
24 don't have ID, may have some cash, and other
25 circumstances.

1 And so it's -- it is a balancing factor and
2 I -- you know, personally to date, and I'm
3 always open to be persuaded, I've been of the
4 view that the best way to ensure that that
5 exemption is not abused in any which way is in
6 exactly the way that Ms. McPhee and Ms. Bains
7 have talked about. By making sure that lawyers
8 are aware of red flags and, secondly, making
9 sure that there's no conversion of the money in
10 the trust account. It goes in to pay for a
11 lawyer to do the lawyer's job and any excess
12 goes back to the person in the same form, the
13 cash, and so that that person is no -- can't be
14 said to be any further ahead with respect to the
15 form of the money that they have in.

16 And so when we look at these rules and
17 people suggest well, maybe there should be more
18 checklists or there should be more requirements,
19 you always have to remember that there are other
20 factors that come into play in the consideration
21 of looking at it.

22 Q And I think the -- thank you, Mr. Ferris. I
23 think that Ms. Wilson explained that
24 [indiscernible] to the 2004 rule that access to
25 justice was one of the considerations for

1 setting the limit, a threshold under which
2 lawyers [sic] could still pay in cash. And
3 understanding that, you know, in 2004 we did
4 live in a more cashless society, has the law
5 society -- either itself, has it conducted, or
6 is it aware of any studies or analyses looking
7 at whether or not the \$7,500 limit remains
8 necessary to serve access to justice needs or
9 whether or not a lower limit would still allow
10 that to be accomplished?

11 A (CF) I'm not aware of any studies, but I will
12 pass it to Ms. McPhee as to the extent that we
13 track those amounts. One of the aspects that we
14 have committed ourselves to as a law society
15 over the past few years is to -- is the data
16 driven decision-making. And we do have access
17 and the ability to track data better than we
18 have been. And this is certainly an area that
19 as president I certainly would ask us to track
20 in a number of ways to ensure that we have that
21 data set to be able to make those decisions
22 going forward.

23 But maybe I'll just ask Ms. McPhee to
24 suggest how they do track this.

25 (JM) Sure. So the -- as I mentioned, it is

1 a major focus of the trust assurance program.
2 We look at it through the compliance audits in
3 detail. We look at it through the trust reports
4 where a lawyer must report any cash received
5 over 7,500 for any client matter and we also
6 have self-reporting by lawyers if they
7 inadvertently breach a rule, which includes a
8 cash rule, is reported to the law society. And
9 all of those activities are looked at in detail
10 by the trust assurance department to ensure that
11 it was not a breach of the rule. And if it was
12 a breach, it's an automatic referral to
13 investigations for further review.

14 Q Thank you. And I -- appreciating that -- I
15 think you mentioned several different forms of
16 potential detection for the rule, Ms. McPhee.
17 One of them was the trust compliance audit
18 program. And I think you'd indicated -- is
19 that -- that's something that would be conducted
20 by way of a -- if a breach of the cash rule were
21 defected through potentially a spot audit, or
22 how would detection of -- a breach of the cash
23 rule be detected through the audit function?

24 A (JM) When an audit is -- it's not only if
25 there's been a breach reported but through our

1 normal compliance audit process we will look at
2 all the books, records and accounts of a law
3 firm, which will include all the lawyers who
4 also use trust accounts at that law firm and we
5 will look in detail at all of those records,
6 cash receipts, trust ledgers, anything related
7 to cash and that will be reviewed in detail to
8 ensure that it meets the rule -- the main rules,
9 and if there is a breach, it does get referred.

10 But also the annual trust report is another
11 way, which is an annual report that is followed
12 up on.

13 Q And just to focus on that annual report for a
14 moment. A law firm in British Columbia is
15 required to answer a question on that report.

16 A (JM) Correct.

17 Q Whether or not they received into trust an
18 aggregate of more than \$7,500 or more on any one
19 client matter. Is that what you are referring
20 to?

21 A (JM) That's correct.

22 Q Okay. And then if the lawyer answers yes to
23 that question, then an auditor will -- may
24 follow up; is that correct?

25 A (JM) They will contact the firm, ask for any

1 records associated with that. Those will be
2 sent to the law society. It will be reviewed by
3 an auditor to determine whether it was an
4 exception that was acceptable, whether it fit
5 into the exceptions under the rule, and if not,
6 it will be referred to investigations.

7 Q And that process you described about following
8 up on annual trust reports, is that a
9 long-standing policy or is that something that
10 has been implemented more recently?

11 A (JM) The trust report, as far as I can recall,
12 has always had that question in it in the
13 followup.

14 Q And specifically the question of the followup,
15 you know, if there was -- the question may have
16 existed, but in terms of the practice you
17 described about following up on, I take it,
18 every one of those reports -- is that correct
19 that every one of those is followed up on?

20 A (JM) Yes, every one of them is followed up on.

21 Q Okay. And --

22 A (JM) And it is also looked at -- if we go out to
23 do a compliance audit, the trust report is
24 referred to, the most recent trust report, to
25 ensure that it's been reported. So we do check

1 to make sure the trust reports are accurate.

2 Q Okay. And that process of following up on the
3 annual trust report, the answer to that
4 question, is that something that has always been
5 a component since that requirement or is that a
6 more recent policy change?

7 A (JM) I will have to check to see if we have
8 always done that since 2005 when the program
9 started, but I think I will have to follow up on
10 that and confirm that it didn't happen sometime
11 during that period.

12 Q Yeah. And if a lawyer -- obviously what we're
13 describing here is a self-report that would
14 trigger this. What if a lawyer falsely answers
15 no on the self-report? Would that be left to
16 fall back to the trust audit program to effect?

17 A (JM) Yeah, just to clarify. The self-report is
18 separate from the trust report. So the trust
19 report is received each year and those are
20 followed up on. If we go out and do a
21 compliance audit and the trust report is
22 inaccurate, then that breach would be referred
23 to investigations. And if it was inaccurate or
24 not, dishonest or not, would be determined by
25 the investigation --

1 Q And is that something --

2 A (JM) -- area. Sorry. I'm sorry, just to --

3 Q Go ahead.

4 A (JM) The self-report is separate, where lawyers
5 self-report at any time. If they breach
6 specific rules, and specifically the cash rule,
7 they are required to report to the law society
8 at any time in a year.

9 Q And the -- is that something that you have
10 observed? Not asking you to speak about
11 specific lawyers or specific instances, but
12 lawyers incorrectly filling out the trust
13 report, is that something that you have observed
14 through your work on the audit program?

15 A (JM) It can be observed, but I wouldn't say it
16 was very frequent.

17 Q Okay. And I have one more -- it's a connected
18 line of questioning about this. I understand
19 that there are some other jurisdictions that
20 have -- and in Quebec in particular, where there
21 is a requirement to report the use of one of the
22 exceptions. So if a lawyer is to rely on, for
23 example, the professional fees exception in
24 Quebec, there is a requirement under
25 Regulation 71 of the Barreau du Quebec's rules

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1 to report that within 30 days to the Barreau
2 along with the notation indicating the exception
3 on which they are received. And I have seen
4 reference to that in some of the discussions
5 around potential rule reform. And is that
6 something that the law society has considered
7 implementing either in coordination with the
8 Federation or otherwise?

9 A (DA) It's one of the elements that I think we're
10 going to want to discuss as part of the working
11 group with the Federation, and I think a number
12 of items were enumerated by Ms. Wilson
13 yesterday, but certainly that's one that I think
14 we'll get taken into consideration at some
15 future discussions.

16 Q Right. And perhaps I'd invite -- I mean, I
17 think one of the benefits or at least the
18 potential benefits of that sort of requirement
19 is twofold. One is it requires the lawyer to
20 very clearly turn their mind to the exception
21 and its application and also obviously it gives
22 potentially a more realtime notification to the
23 law society as well. Are those benefits, at
24 least the -- I appreciate that the -- you
25 indicated, Mr. Avison, that the Federation may

1 be considering this, but is this something that
2 the law society is looking at independently or
3 separately from the Federation's process?

4 A (DA) I wouldn't rule it out, but I think our
5 preferred option is to have that discussion with
6 the Federation to begin with. And one of the
7 few benefits of COVID-19 is that we have had in
8 many ways an increased level of engagement
9 across the law society, so we have discussions
10 that take place with the CEOs pretty well every
11 two weeks now by Zoom. So we've had some
12 changes with the Barreau du Quebec, but there's
13 an opportunity for some discussion across
14 jurisdictions in relation to some of the
15 initiatives that each of them have either
16 implemented or are thinking about. So that
17 level of dialogue around those kinds of
18 initiatives and opportunities has increased,
19 oddly enough, in this interesting environment
20 that we find ourselves in.

21 (CF) And, Mr. Isaac, if I could just add
22 this because your question does raise the issue
23 of the risk approach, and so you highlight the
24 potential benefits of this reporting
25 requirement. One of the questions is, you know,

1 based on the data or the experience in Quebec or
2 the experience that Ms. McPhee's been seeing in
3 the trust assurance audit process, is there
4 enough of a problem with lawyers claiming
5 exemptions here to implement another requirement
6 on lawyers to report. And lots of things could
7 have potential benefits. But if you went back
8 through the audit requirements and there really
9 hasn't been a problem with a lawyer using an
10 exemption improperly in all of those audits for
11 the last three or four years, well, you'd ask
12 yourself whether the potential benefits that
13 you've outlined is really worth making a rule
14 change.

15 And so that's the type of thing that we look
16 at when we're looking at these types of issues,
17 and we would look at the Quebec experience as to
18 whether or not it has made any difference there
19 and whether or not they have seen any higher
20 compliance than we have with that reporting
21 requirement.

22 MR. ISAAC: Mr. Commissioner, I think this would be a
23 convenient time for a brief break.

24 THE COMMISSIONER: All right. Thank you. We'll take
25 15 minutes.

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Don Avison (for the commission)
Jeanette McPhee (for the commission)
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1 MR. ISAAC: Thank you.

2 THE REGISTRAR: This hearing is adjourned for a
3 15-minute recess until 11:24 a.m. Please mute
4 your mic and turn off your video. Thank you.

5 **(WITNESSES STOOD DOWN)**

6 **(PROCEEDINGS ADJOURNED AT 11:09 A.M.)**

7 **(PROCEEDINGS RECONVENED AT 11:23 A.M.)**

8 **CRAIG FERRIS, a witness**
9 **for the commission,**
10 **recalled.**

11 **DONALD AVISON, a witness**
12 **for the commission,**
13 **recalled.**

14 **JEANETTE MCPHEE, a**
15 **witness for the**
16 **commission, recalled.**

17 **GURPRIT BAINS, a witness**
18 **for the commission,**
19 **recalled.**

20 THE REGISTRAR: Thank you for waiting. The hearing
21 is now resumed, Mr. Commissioner.

22 THE COMMISSIONER: Thank you, Madam Registrar. Yes,
23 Mr. Isaac.

24 MR. ISAAC: Thank you.

25

1 **EXAMINATION BY MR. ISAAC (continuing):**

2 Q Mr. Ferris, I'd like to return to a comment that
3 you made earlier about access to justice and the
4 exceptions to the cash rule. I did ask you
5 about this, but I will admit I'm not sure if I
6 fully understood or captured the essence of what
7 it was you were saying, and so I'm hoping we can
8 explore that a little bit more.

9 I think you indicated that the right to
10 counsel is an important consideration when we
11 look at the cash rule as well as the exceptions
12 to the rule. And I'd like to explore that
13 because it seems as though there's -- there are
14 two potential aspects of that. One might be
15 ensuring that those who don't have access to a
16 bank account are able to pay for legal services.
17 And that might take us in a direction of looking
18 at whether or not the \$7,500 limit is
19 appropriate or too high. And the other thing --
20 and I'm not sure if this is what you were also
21 referring to -- might be, you know, are there
22 circumstances in which, leaving aside the \$7,500
23 limit, a cash exception for fees is important
24 possibly for those who might not be able to get
25 a bank account because of the source of the

1 money.

2 Can you just clarify whether or not that
3 second part is a component of what you were
4 referring to and, if so, how?

5 A (CF) So what I was trying to say is that you're
6 balancing someone's fundamental right to have a
7 lawyer in a criminal proceeding, and so the
8 question you have to ask yourself is what kind
9 of impediments are you going to put in front of
10 somebody to retain a lawyer and to have the
11 benefit of legal advice in a criminal proceeding
12 so they can defend themselves and ensure that
13 the state meets the burden that's on them. And
14 that's really the question; that's the balance.
15 If you were to find through a review of the data
16 that there was -- that essentially, for example,
17 cash retainers were taken heavily by criminal
18 attorneys and they often exceeded \$7,500. Well,
19 you'd have to ask yourself the question as to
20 whether or not by restricting that you would be
21 restricting the ability of people to access
22 counsel.

23 And so that's a factor to take a look at in
24 the context of that decision. Another factor
25 would be well, what are the source of those

1 funds? And that's the factor which is the focus
2 of this commission.

3 My point was only that there are other
4 factors to be considered and whether or not --
5 whether or not in the context someone's right to
6 counsel may outweigh an investigation as to the
7 source of 10- or \$15,000 of cash. I don't know
8 the answer to that question, but that's
9 certainly something which factors into the
10 decision as to whether or not that exemption
11 should be there or should be limited in some
12 way.

13 Q Thank you. You referred to the data that's
14 available. Before we move to that question, I
15 understand that one of the changes that was also
16 implemented in July 2019 was -- and to match the
17 new Federation model rule was to require that
18 funds that are accepted in excess of \$7,500 only
19 be returned in cash. So a sort of a cash in,
20 cash out component to the rule. Is that
21 correct?

22 A (DA) It is.

23 (JM) Can I just add to that? Previously it
24 was to be refunded in cash if it was less --
25 more than \$1,000, and that was adjusted in

1 July of 2019 to be any cash refunded.

2 Q Thank you. So looking to one of the other areas
3 of detection, I understand -- and I believe,
4 Mr. Avison, you made reference to the
5 obligation, and I think it's under Rule 3-59(c),
6 that where a lawyer in British Columbia receives
7 cash which they are not allowed to do under the
8 rule or is exceptions, that they are required to
9 report that to the executive director, to
10 yourself, and that that's done by way of a
11 mandatory written report. Is that correct?

12 A (DA) Correct.

13 Q Are those reports something that are received
14 frequently or is that quite a rare thing to
15 receive?

16 A (DA) It's infrequent, and there are a number of
17 areas where reports are required. If you've
18 lost control of a file, a number of other
19 situations where reports to the executive
20 director are required. And as a matter of
21 course, any time we get those, they're referred
22 to trust assurance to follow up on.

23 Q Thank you.

24 A (JM) And just to add to that. If it was a
25 breach, it will then be referred to

1 investigations for further review.

2 Q Thank you. And I think you had indicated that's
3 now automatic for any breaches -- suspected
4 breaches of the no-cash rule. Is that right?

5 A (JM) Correct.

6 Q I'd like to turn -- if we could bring up the --

7 A (GB) Sorry, can I just add. It's always been --
8 we've always received all potential breaches of
9 the cash transaction rule. That -- from
10 inception that's been the case.

11 Q Thank you. So, Ms. Bains, if you could just
12 explain that. Maybe I'm missing a distinction
13 there. When you "we" have always received, did
14 you mean investigations?

15 A (GB) Yeah, I mean the investigations group has
16 always received potential breaches of the cash
17 transaction rule.

18 Q Okay. Is there a distinction to be drawn?
19 Perhaps I'm -- I just want to make sure that I'm
20 understanding this clearly. Between the
21 investigations receiving it and something that
22 further than that that Ms. McPhee may have been
23 referring to in terms of discipline, always
24 receiving that now, or -- do I have that
25 correct?

1 A (JM) Sorry, just to clarify. And the
2 self-reports are sent to trust assurance. Trust
3 assurance reviews all self-reports associated
4 with that. And if there is a breach of the cash
5 rule, it will be referred to investigations.

6 Q Thank you.

7 A (GB) And just to clarify a little bit further.
8 The direct reports, the self-reports of a breach
9 by a lawyer under Rule 359(6), those ones
10 generally come directly to investigations. They
11 don't -- they're not rooted through trust
12 assurance. We receive those directly.

13 Q Thank you.

14 MR. ISAAC: So if we could please turn to -- it's
15 exhibit 224. This is the law society regulation
16 summary. And if we go to paragraph 56 of this,
17 please. And this paragraph says:

18 "The Law Society has a number of
19 activities and initiatives dealing with
20 AML-related regulation proposed or in
21 progress as of September, 2020."

22 There's a reference there to the operational
23 plan.

24 And then if we go forward, please, to
25 paragraph 61 in the same document. There's a

1 statement here under "Ongoing Review and
2 Enhancement of the 'No Cash' Rule." It states:
3 "The Law Society has heard concerns that
4 the cash transaction rules are not strong
5 enough, and that exemptions to the rule
6 may expose lawyers to money laundering
7 risk. The [Federation] Working Group
8 continues to consider issues around
9 lawyers' receipt of cash, which may result
10 in some future amendments."

11 Now, we may have touched -- we may well have
12 touched on these both concerns as well as some
13 of the initiatives already, but I'd like to
14 drill down on a few of them to the extent that
15 we haven't here.

16 I know that one of the concerns that was
17 identified and that we're aware of with respect
18 to the cash transaction rule was a concern
19 identified by Dr. German in his Dirty Money
20 Report. And I'll quote from that. I don't --
21 I'm not going to turn up the report, but I'm
22 quoting from page 121 of the report.

23 "The cash rule governing the acceptance by
24 lawyers of no more than \$7,500 is limited
25 in its effect. It does not prevent

1 persons from giving tens, or hundreds of
2 thousands of dollars in cash to a lawyer
3 for bail money, or in settlement of fees
4 and expenses."

5 And Dr. German goes on to suggest that this
6 gives rise to a potential risk of money
7 laundering.

8 Is that -- I'll start first, is that an
9 accurate statement by Dr. German in terms of
10 what the rule currently permits?

11 A (DA) More or less. I think the important thing
12 is that it's an area that has been an area of
13 focus for some period of time and that's why
14 it's on the agenda for consideration by the
15 Federation working group in December, and I
16 anticipate there will be further discussions
17 about that into 2021.

18 And I think it's also important to
19 distinguish the \$7,500 rule and the amounts that
20 are available pursuant to the exception in
21 relation to fees, but all of that, I think,
22 falls within the scope of the discussions that I
23 anticipate the Federation and the working group
24 members will undertake.

25 Q Thank you. And connecting that --

1 potential breaches of the cash rule or
2 concerning circumstances surrounding the
3 acceptance of cash, over the years there have
4 been a low number and they predominantly relate
5 to either lawyers not understanding how the
6 aggregate applies. That was initially a
7 concern. They didn't appreciate that the \$7,500
8 applied for the entire client matter regardless
9 of when the funds were coming in -- the money
10 was coming in. So we had those breaches.

11 And then we had breaches of the refund part,
12 where a lawyer received, you know, \$10,000 in
13 cash for a retainer, their fees ended up being
14 8,500, there was \$1,500 to return. And they
15 didn't properly document in their trust
16 accounting records that it was the cash
17 retainer, so when they made the refund they made
18 it by trust cheque as opposed to making it by
19 cash, resulting in a breach of that refund
20 provision.

21 And those two categories account for the
22 vast majority of the referrals that we see.
23 They're one-off situations. They're partly a
24 failure of office systems, a failure of
25 recording, inadvertent mistakes. And I would

1 say over the years in looking at these files,
2 the vast majority of the profession has a strong
3 understanding of the cash transaction rule and
4 the breaches do really seem to be these one-off
5 instances where things have fallen apart in
6 their office procedures or there's been
7 inadvertent mistakes.

8 Where there's -- and all breaches --
9 regardless of them being inadvertent or not
10 being deliberate, all proven breaches are
11 referred to the discipline committee and the
12 discipline committee is our -- the equivalent of
13 a charging body. They -- it's a committee of
14 benchers 00 consisting of appointed benchers,
15 appointed benchers being non-lawyers, and
16 bencher lawyers as well as lawyers who are not
17 benchers. So it's a mixed committee.

18 They review the matters, and most of them
19 have resulted in conduct reviews. That seems to
20 be the most -- the predominant outcome of these.
21 Even when they're inadvertent and not
22 intentional, they tend to be conduct reviews.

23 In an instant where a lawyer deliberately
24 breaches the rule, deliberately accepts cash or
25 deliberately breaches the refund part of it,

1 those have resulted in citations. And I would
2 refer you to a 2017 citation involving a lawyer,
3 Mr. Larson, for breaching -- deliberately
4 breaching the refund part of the rule. And so
5 that's how we've treated those breaches. We
6 take them very seriously regardless of the
7 culpability in the breach having occurred.

8 Q Thank you, Ms. Bains. And that's -- it's very
9 helpful to understand what happens when there is
10 a breach of the rule, but I -- you know, I think
11 perhaps one of the distinctions with the concern
12 that Dr. German had identified here is that he
13 was talking -- or identifying what can happen
14 within the contours of the rule as it currently
15 exists. And I understand that -- so leaving
16 aside the -- if one is invoking, for example,
17 the professional fees exception, that the
18 comment that one could accept -- the rule is
19 currently limited -- an unlimited amount of
20 money, at least for the purposes of fees, at the
21 point that that is it something that still
22 remains a potential which wouldn't obviously
23 make its way into the disciplinary component.

24 There is an aspects of that, though, where I
25 -- you had mentioned, which is whether or not

1 the accepting of that path might trigger other
2 obligations or might trigger off -- you know,
3 for example, the overarching obligation. And
4 I'm wondering, is that something that has ever
5 come up in an investigative context? Where the
6 use of the professional fees exception and
7 circumstances that might raise red flags in
8 terms of the circumstances in which that money
9 is provided, not in the way that it's refunded
10 but that specifically, is that something that
11 has come across investigations' or discipline's
12 table?

13 A (GB) I'm going to be a little careful in
14 answering the question because I don't want to
15 comment on any ongoing investigations or the
16 particulars of any files. But I think I can say
17 that yes, we have investigated and looked at
18 those kinds of issues. Those are proper
19 referrals to us from the trust assurance group.

20 Q Thank you. Related to that, I know one of the
21 questions we -- that was identified in relation
22 to the cash rule was -- I think Mr. Ferris
23 referred to the data that's available or the
24 metrics that may be available. How -- what sort
25 of visibility does the law society have on how

1 circumstances ..."

2 So I -- that idea of requiring reporting when --
3 and that would obviously occur only where one of
4 the exceptions to the current rule is used. Is
5 that something that the law society has looked
6 at? What are its views on the necessity or
7 practicality or advisability of that sort of
8 proposal?

9 A (DA) Well, Ms. McPhee might want to expand on
10 this a bit further, but in part I think it's
11 captured by the answer to the last question in
12 relation to what is required of lawyers
13 currently.

14 (JM) And just to also add to what I
15 previously said. Where we actually get that
16 information, we look at it and if there are any
17 suspicious circumstances, we will be referring
18 it to investigations.

19 (CF) I think -- just to clarify, Mr. Isaac.
20 What Mr. German seems to be suggesting is, you
21 know, we do this annually. Ms. McPhee's group
22 gets the information, follows up on it annually
23 and would get that information. And so what
24 you're really suggesting is that there's some
25 benefit to getting that information more than

1 annually. And, you know, I guess somebody could
2 debate that question, but I'm not sure that
3 there's any strong policy reasons why the
4 practice and the rules that we follow now is
5 better than what Dr. German has suggested.

6 MR. ISAAC: Thank you. Madam Registrar, if we could
7 bring up LSB document 762, please.

8 This is a memo dated May 13th, 2019, to the
9 executive committee from Michael Lucas. And
10 it's a summary of relevant portions of Turning
11 the Tide as well as Mr. German's second report.
12 And I don't propose to take you through the
13 entire portion, but starting at page 4 of this
14 memo there is a portion that deals with the
15 proposals as they're referred to here -- I
16 understand they weren't identified as such
17 necessarily in every case by Dr. German -- and
18 some comments about some of those proposals.

19 And so the first -- you'll see there is a
20 section that deals with the comment that we
21 already addressed, and as it indicates here, it
22 says that that's something that's -- although it
23 is not currently proposed by the Federation's
24 working group.

25 Are you able to provide an update on that?

1 Is that something that it is currently under
2 consideration by the Federation's working group?
3 And I think the -- it says that the --
4 specifically it says:

5 "The report seems to propose that the
6 'no-cash' rule be tightened up to include
7 cash received for bail, fees and
8 expenses."

9 This was a May 2019 meeting, but I'm wondering
10 if there's been -- this is something that is
11 currently on the Federation working group's
12 agenda.

13 A (DA) Well, I think it was evident from what
14 Ms. Wilson had to say yesterday, and Ms. Bains
15 or Ms. McPhee may wish to speak to this in
16 greater detail, but I think it is contemplated
17 by the kinds of things that are emerging as part
18 of the agenda for some of the things that the
19 Federation working group are going to have a
20 look at at the next meeting and during the
21 course of 2021.

22 (CF) I don't mean to be pedantic here, but
23 the sentence reads that it's not one of the
24 items that was proposed by the working group at
25 that time, and that's accurate. It wasn't

1 proposed by the working group at that time.
2 Whether they were looking at it at that time and
3 whether they're looking at it now is a different
4 question.

5 Q Thank you. And that is ultimately the question
6 that I'm most interested in is whether or not
7 that's something that is currently under
8 consideration or if -- its status. There is --
9 this memo also does address the other point
10 that -- out of Peter German's report that we
11 were just discussing, and that's on the next
12 page. And this is summarized at point 4 on
13 page 5. You'll see there's a reference there to
14 the point that we were just discussing. The
15 comment in the memo is:

16 "This proposal can be kept in mind,
17 although it seems to contravene the
18 general principles outlined in the
19 Federation money-laundering case.
20 Sometimes the transaction will be
21 privileged, even if it usually isn't.
22 Moreover, if it is the client providing
23 the cash, the name and address of the
24 client may also sometimes be privileged."

25 And then it goes on in the next paragraph to say

1 that:

2 "The proposal also seems to operate on the
3 presumption that lawyers would become able
4 to accept cash. The current 'no-cash'
5 rule seems like a better way of addressing
6 money-laundering concerns, perhaps
7 enhanced so that the current rule could be
8 extended to including fees, expenses and
9 bail."

10 So at several points it seems as though that
11 idea of potentially extending the current rule
12 would be the better way to go about that. Is
13 that something that the panelists today would
14 agree with generally?

15 A (DA) Well, you know, I think the key thing that
16 you can derive from Mr. Lucas's memo here is we
17 actually have been taking seriously the reports
18 that we've seen from Dr. German and from
19 Professor Maloney and that helps to inform the
20 discussion in relation to the Federation about
21 the kinds of things that ought to receive some
22 attention and ought to be considered in the work
23 of the working group going forward.

24 So there are some areas -- and there are
25 some where we would likely disagree with the

1 observations that were made by Dr. German, but
2 there are a number of others where I think they
3 were a useful contribution. And it's probably
4 helpful to point out as well that as we went
5 through this process, Dr. German was actually
6 very helpful in engaging with the benchers
7 directly. He did that a couple of times. We've
8 had him in on at least one occasion, maybe more
9 than once, to talk to staff. I was present at
10 one where he spent about two, two and a half
11 hours with our investigation group and with
12 trust auditors and our forensic accountants
13 speaking to a number of the things that he had
14 identified during the course of his work and
15 that were expressed in his report.

16 So all of that interaction is relevant to
17 setting the agenda in relation to the kinds of
18 things that law societies and the Federation
19 should be thinking about as we consider the
20 evolution of the rules.

21 Q Thank you.

22 A (CF) And I just want to add one thing because,
23 you know -- when you go back and read the
24 Federation case, you know, the federal
25 government had moved off the idea of lawyers

1 reporting in the mid 2000s. You know, the act
2 was amended to deal with that issue, I think
3 around 2008. And so this idea of reporting
4 hasn't been something that has been even thought
5 of being required by the legislation for
6 15 years.

7 And so it does make me question a little bit
8 about the reading of that case, and so I think
9 we need to keep that in mind when looking at the
10 proposals put forward by Mr. German.

11 Q Before we move on perhaps to the next rule I'd
12 like to look at in a little bit more detail,
13 it's fair to say that there are areas where the
14 cash rule could potentially be strengthened and
15 that those are areas that the law society in
16 conjunction with the Federation is looking at.
17 Is that a fair summary?

18 A (DA) Yes.

19 Q Okay. And I appreciate that doesn't encompass
20 everything we've spoken about under the heading
21 in terms of, you know, the enforcement and
22 monitoring mechanisms.

23 A (GB) Mr. Isaac, before you leave the cash
24 transaction rule I just wanted to highlight that
25 when the initial -- my understanding is when the

1 underlying rationale for this rule is, please.

2 A (DA) I think either Ms. Bains or Ms. McPhee were
3 going to speak to this matter.

4 (GB) Sure. I can address it. The -- my
5 understanding of the impetus and rationale for
6 the rule is to preserve the importance of a
7 trust account being used truly for funds that
8 are trust funds that are directly related to
9 legal services so that the trust account is not
10 used as a flow through account, as a bank
11 account. Lawyers ought not be providing banking
12 services for clients. Those aren't proper legal
13 services and that's not a proper use of a trust
14 account.

15 So it's in recognition that there is
16 vulnerability in non-trust funds being placed
17 into a trust account because of the potential
18 privilege that may apply to those transactions.
19 So in order to ensure that it's very tight and
20 that only matters that properly ought to be in
21 the trust account are placed in the trust
22 account, this rule was put into place. And --

23 (CF) And if I could just -- sorry,
24 Ms. Bains. You can continue.

25 (GB) Sorry. I was just going to say that

1 the rule really does -- it's -- the concept, the
2 principle, this gatekeeper function that lawyers
3 have over their trust account, that existed well
4 before July of 2019. That is not a new
5 obligation. The rule is simply putting into the
6 law society rules explicitly what was already in
7 existence.

8 Q And I want to -- I will want to look at the
9 extent to which it was, you know, a
10 clarification or a codification of existing
11 obligations or -- and to the extent to which
12 there may have been some ambiguity before that.
13 But just picking up on your explanation of the
14 underlying rationale, Ms. Bains. I think
15 you'd -- you indicated it is partly based on a
16 recognition that the question of accepting --
17 beyond the question of accepting cash, access to
18 a trust account, however funds might be
19 deposited into that account, can, if misused,
20 provide money launderers or other
21 criminally-minded persons with that benefit of
22 that appearance of legitimacy to an outside
23 observer and that that's part of the rationale
24 here is to make sure that the trust account is a
25 sole-purpose account and that it is something

1 that is only used where directly related to
2 legal services and not, as you say, a sort of a
3 flow-through account. Is that fair?

4 A (GB) Yeah, I would agree with that.

5 Q Okay. And in terms of the scope of the rule
6 itself, the role currently drafted of
7 Rule 3-58.1, it now explicitly states -- and I
8 think the term is that the funds must be
9 "directly related to legal services." And also
10 there is a definition now of "trust funds" in
11 rule 1. And then there's a corresponding rule
12 as well in 3-58.1(2) requiring lawyers to
13 take reasonable steps to pay out funds held in
14 trust as soon as practicable.

15 But I want to turn to Ms. Bains. Is that --
16 that's correct? Hopefully I've gotten my
17 summary of the trust accounting rule correct
18 there. Is that right?

19 A (GB) Yeah, you have. Yes.

20 Q In terms of what existed prior to the rule, you
21 mentioned -- what was it that -- you said that
22 this was something that already existed. Can
23 you please explain what you mean by that.

24 A (GB) I think it wasn't -- it certainly wasn't
25 set out in the rules explicitly, but I think the

1 expectation from prior decisions, including the
2 Elias decision and other decisions, is that --
3 and I think in the code generally is that there
4 should be a distinction between activities that
5 lawyers do that are legal services and
6 activities that lawyers do that are not legal
7 services, and those should not be commingled.
8 And the very valid reasons for that and this
9 concept of lawyers being gatekeepers over their
10 trust account really is a part and parcel of
11 that as well. That the trust account is to be
12 used for facilitating commercial transactions or
13 other transaction where a lawyer is acting as a
14 legal advisor and not for the lawyer's personal
15 funds or other non-legal services which should
16 be dealt with outside that account.

17 The Gurney decision from 2017, which
18 obviously predated the enactment of Rule 3-58.1,
19 provides a good analysis of that and the panel
20 provides some very good language about
21 obligations that existed even without that rule.

22 (CF) And, Mr. Isaac, if I could just add
23 that when this came to the bench table, it
24 certainly came to the bench table as a
25 restatement or -- of the existing rule or the

1 existing practice as we knew it. And I can
2 certainly tell you that as -- having served on
3 discipline and ethics back to 2014, this is
4 certainly the way we had applied our rules prior
5 to that. The idea that you -- the idea that
6 trust accounts were only to be used for legal
7 services was certainly the premise upon which we
8 all acted.

9 (GB) I also refer you, Mr. Isaac to the --
10 dating back at least to 2005 the Professional
11 Conduct Handbook, the predecessor to the code,
12 was amended to add a footnote to Chapter 4,
13 Rule 6. So Chapter 4, Rule 6 is the provision
14 that says lawyers ought not to facilitate
15 dishonesty, crime or fraud. And there was a
16 footnote added -- I think it's footnote 3 or
17 3.1 -- which alerted lawyers to the need to make
18 inquiries should a client attempt to use their
19 trust account in the absence of legal services
20 with the expectation being that clearly that
21 is -- that's not appropriate.

22 MR. ISAAC: And I would like to -- if we could pull
23 up, please, LSB6725-1, please.

24 Q And this is an email chain dated 2018 May. And
25 the bottom of the email chain is an email, I

1 believe, from Ms. Armour, Deborah Armour, QC.

2 And she writes:

3 All: You are included in this email
4 because you are Chair of the AML Working
5 Group, Chair of Ethics Committee, Director
6 of Policy and Planning ...

7 I was reviewing the commentary to
8 Code rule 3.2-7 and became concerned about
9 commentary [3.1]. I reproduced the rule
10 and all commentary below."

11 And what follows is an excerpt from the
12 commentary to the rule. And it says:

13 "Commentary [3.1] says that a lawyer
14 should ask questions when faced with a
15 client who wants to use the lawyer's trust
16 account without requiring legal services.
17 That suggests that it might be ok
18 depending on the answers the lawyer
19 receives. Our view in Professional
20 Regulation is that it is never ok to allow
21 a trust account to be used without
22 providing legal services. The commentary
23 should say that the lawyer should refuse
24 to act for someone who wants to use a
25 trust account without legal services. It

1 is wrong per se.

2 Let me know if there is some basis
3 for a contrary view. This is a live and
4 very significant issue right now."

5 She goes on to say:

6 "I would be interested in knowing how this
7 commentary found its way into the Code.

8 It is not in the Model Code."

9 And just for context, the commentary we're
10 looking at here is the commentary to the
11 dishonesty and fraud 3.2-7, and it seems as
12 though the ambiguity or the concern that is
13 being expressed here is about the commentary 3.1
14 where -- and it's reproduced below:

15 "The lawyer should also make inquiry of a
16 client who:

17 (a) seeks the use of the lawyer's trust
18 account without requiring any
19 substantial legal services from the
20 lawyer in connection with the trust
21 [account]."

22 So this suggests that such a circumstance ought
23 to give rise to a trigger to make further
24 inquiries, not necessarily a prohibition.

25 If we go up, Mr. Ferris, you respond:

1 "Don't recall where this came from.

2 However historically I am not sure many
3 would have assumed lawyers could not use
4 trust accounts for client business where
5 legal services were not required."

6 You go on to give an example

7 "For example to hold good faith money so a
8 client can negotiate a deal or other
9 legitimate business uses. I understand
10 that this is now --"

11 I believe you mean "not."

12 "... the view. I am not sure much is
13 gained from a historical analysis of where
14 this commentary came from, if we want it
15 changed Profcom --"

16 That's professional committee?

17 A (DA) Professional conduct.

18 Q Thank you.

19 "-- should send a memo to Ethics asking as
20 such. It would be a relief to discuss
21 something other than changes to the model
22 code."

23 Now, without engaging in a historical
24 backwards-looking analysis, but fair to say that
25 at least this commentary does insert some

1 degree -- and this commentary obviously
2 pre-existed the new rule, but it does insert a
3 degree of ambiguity about -- on that point.

4 Is that fair, Mr. Ferris? You know,
5 obviously it's your response to that that does
6 suggest that there was -- that you at least
7 shared the view that it was not always the
8 historical view that trust accounts could only
9 be used where legal services were required. Is
10 that fair?

11 A (CF) First of all, let me apologize for the
12 typographical errors. I'm known to send out
13 emails late at night, this one was about
14 10 o'clock at night, and so I apologize for
15 that.

16 So if I could just give you some context.
17 And so the answer to your question is that
18 commentary is wrong. As Ms. Armour said, that
19 wasn't the view of professional conduct. That
20 certainly wasn't the view of the benchers. And
21 what I was trying to say to her in this email
22 was, don't care where this came from
23 historically; let's get it fixed because it's
24 not accurate.

25 And you know, some context here. I was -- I

1 graduated from law school in 1989 and can recall
2 discussing, you know, issues with lawyers over
3 the years. And a long time ago it was not
4 unusual -- and when I say a long time ago I'm
5 going to say early 1990s, it wasn't unusual for
6 someone to say well, look, I'm negotiating a
7 deal; I need to put \$50,000 in your trust
8 account so the other side knows I have the
9 deposit available, and then the deal falls apart
10 and so you were never ever engaged. And so that
11 was something that I was aware of and that was
12 something that I was talking about there. And
13 you know, very ethical lawyers, you know, in the
14 early 1990s, I think, thought that was okay.
15 And so that was the kind of context I was
16 providing. But it wasn't the view in 2015 or
17 2014.

18 I wanted to get the rule fixed to make sure
19 it was consistent with what I understood the
20 rule to be. The code sometimes can be a bit of
21 a Frankenstein in the sense that you get
22 assessments at different times and people don't
23 often go through -- go back and make sure the
24 whole thing reads consistently as a whole, and
25 Deb had picked up this issue and I wanted to get

1 it fixed.

2 Q Thank you, Mr. Ferris. And I should note it
3 does appear, at least on my screen, that my
4 video is frozen. If anyone's -- I'm feeling
5 perfectly fine and healthy. Perhaps we'll
6 continue and hope it unfreezes, but I certainly
7 can hear everything.

8 Can everything else still hear me okay?

9 A (DA) We can hear you fine.

10 Q Okay. Thank you. And perhaps just looking at
11 this commentary which you said is wrong, is it
12 still existing commentary and what is the
13 status, if so, of -- perhaps [indiscernible]
14 what appears to be a sort of vestigial ambiguity
15 in the commentary?

16 A (GB) I can respond to that. I think there was
17 discussion amongst us as staff about what this
18 commentary actually meant. And this commentary
19 came directly from what I referred to
20 previously, the 2005 Professional Conduct
21 Handbook footnote to Chapter 4, Rule 6. And
22 there was some disagreement amongst us as to
23 what the -- what this commentary actually means,
24 and some were of the view that what the
25 commentary meant is that of course you don't

1 accept the funds that aren't related to legal
2 services but you may still be acting for the
3 client.

4 So this sets out that you've got to make
5 inquiries because the fact that they were trying
6 to give you funds that weren't related to legal
7 services is a flag that requires you to make
8 inquiries. And that's what the rule is getting
9 at, that you can't just deny the funds and
10 continue acting for the client as if nothing
11 happened. You have to make the reasonable
12 inquiries to satisfy yourself it's appropriate
13 to continue to act. And I think that there's
14 some -- clearly all our rules and commentary and
15 code provisions should be clear. There
16 shouldn't be ambiguity and if we amongst
17 ourselves are not clear on and have different
18 interpretations, that's an issue.

19 And so this has been raised. It's been
20 raised with the policy group and there is going
21 to be work done to clarify it. So it's in the
22 works is what I can say.

23 Q Thank you very much. And I do want to go on and
24 ask as well about -- just briefly about
25 monitoring and enforcement of the --

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)
Exam by Mr. Isaac

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1 (CONNECTION INTERRUPTED)

2 MR. MCGOWAN: Mr. Commissioner, I'm having difficulty
3 hearing Mr. Isaac. I'm going to suggest we take
4 a five-minute break to address the --

5 THE COMMISSIONER: I think he's frozen in audio as
6 well as visual, Mr. McGowan, so we will stand
7 down for five minutes. Thank you.

8 MR. MCGOWAN: Thank you.

9 THE REGISTRAR: This hearing is stood down for
10 five minutes until 12:15 p.m. Thank you.

11 **(WITNESSES STOOD DOWN)**

12 **(PROCEEDINGS ADJOURNED AT 12:09 P.M.)**

13 **(PROCEEDINGS RECONVENED AT 12:15 P.M.)**

14 **CRAIG FERRIS, a witness**
15 **for the commission,**
16 **recalled.**

17 **DONALD AVISON, a witness**
18 **for the commission,**
19 **recalled.**

20 **JEANETTE MCPHEE, a**
21 **witness for the**
22 **commission, recalled.**

23 **GURPRIT BAINS, a witness**
24 **for the commission,**
25 **recalled.**

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)
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1 THE REGISTRAR: Thank you for waiting. The hearing
2 is now resumed, Mr. Commissioner.

3 THE COMMISSIONER: Thank you. Mr. Isaac, you have
4 rejoined us?

5 MR. ISAAC: I have. Thank you. And I think both my
6 audio and video appearing to be working now.
7 Thank you.

8 And I think we were looking just before the
9 technical issues at law society document 762.
10 If I could ask that we mark that, please, as the
11 next exhibit.

12 THE COMMISSIONER: Very well. There was one previous
13 document you referred to, Mr. Isaac. I don't
14 believe it was marked. That was ...

15 MR. ISAAC: I apologize, Mr. Commissioner. That may
16 have been the LSB762 document that I was -- I
17 just referred to.

18 THE COMMISSIONER: All right.

19 MR. ISAAC: And since that we were also looking at
20 LSB6725. So if I could have both of those
21 please marked as the next two exhibits.

22 THE COMMISSIONER: All right. We'll do it that way.
23 Thank you.

24 THE REGISTRAR: Yes. Mr. Commissioner, 762 will be
25 exhibit 228.

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)
Exam by Mr. Isaac

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1 THE COMMISSIONER: Yes.

2 **EXHIBIT 228: Law Society of British Columbia**
3 **Memo to Executive Committee from Michael Lucas**
4 **re Summary of Relevant Points in German Report**
5 **(real estate, luxury vehicle sales & horse**
6 **racings) - May 13, 2019**

7 THE REGISTRAR: And LSB6725-1 will be 229.

8 THE COMMISSIONER: Thank you.

9 **EXHIBIT 229: Email from Deborah Armour to Craig**
10 **Ferris re Code of Conduct Rule 3.2-7**
11 **Commentary - May 11, 2018**

12 THE REGISTRAR: Mr. Isaac, do you need me to bring
13 back up the document, 6725-1?

14 MR. ISAAC: You can remove both of the documents.
15 Thank you, Madam Registrar.

16 **EXAMINATION BY MR. ISAAC (continuing):**

17 Q Just briefly on the -- I was turning to ask
18 about what the principal mechanisms are -- when
19 we're looking at the trust accounting rule, what
20 are the main ways in which detection of breaches
21 of this rule come about.

22 Ms. McPhee, that may be -- or perhaps,
23 Ms. Bains, that might be an area that you're
24 best positioned to speak to.

25 A (GB) Can I take the liberty of just wrapping up

1 the conversation we had before the five-minute
2 break because I went and looked at the -- a
3 recent Yen decision of a hearing panel. And I
4 think it's important that -- if you'll indulge
5 me I just wanted to raise a few of the comments
6 made in that decision because I think they're
7 relevant to the questions you were asking about
8 what was the state and what were the obligations
9 prior to Rule 3-58.1 coming into play.

10 And in that decision the hearing panel,
11 starting at paragraph 36, does an analysis of
12 what guidance had been given to the profession
13 and what rules -- what obligations lawyers had
14 in using their trust account when there were not
15 legal services being provided. And in
16 particular the hearing panel refers to a 1999
17 notice to the profession and a 2002 Benchers'
18 Bulletin that discussed the proper use of a
19 trust account and I'm just going to read what
20 the 2002 Benchers' Bulletin stated:

21 "If you receive a request from a client
22 for services that seem to mean that you
23 are being retained to be the client's
24 banker, or if you cannot precisely
25 identify the legal services you are being

1 retained to carry out, be vigilant to
2 ensure that no person uses your trust
3 account to deal with the proceeds of
4 crime."

5 So I would refer you to that, the Yen decision,
6 in to respect to quite some good commentary on
7 the state of affairs prior to Rule 3-58.1.

8 Q Thank you, Ms. Bains. And I'm not sure -- I
9 know that the investigations and discipline
10 summary document that is being -- that is
11 exhibit 224, it does append a number of recent
12 discipline decisions. I'm not entirely sure if
13 that particular decision is appended. Would you
14 just -- kindly, just for the record, give the
15 record of the reference again for that case.

16 A (GB) Sure. It is appended to the investigation
17 and discipline summary, and it is a part of
18 appendix A.

19 Q Okay. Thank you. Thank you very much.

20 A (GB) And apologies, the pages aren't numbered,
21 so I don't have a page reference to give you.

22 Q I think that gets us close enough, so thank you
23 for that. Sorry. And I was just looking and I
24 appreciate obviously that we're going to look at
25 the trust audit program in some additional

1 detail, but just with respect to the principal
2 ways in which breaches of the new trust
3 accounting -- well, I say "new," the
4 codification of that requirement. But the
5 misuse of trust accounts where it's not directly
6 related to legal services, how are those -- what
7 are the primary mechanisms that the law society
8 has to detect those sorts of breaches?

9 A (JM) I can speak to that. So the primary way
10 would be through the compliance audit program.
11 And as an example, in 2019 we performed
12 675 compliance audits of law firms. And so
13 through that we get all the books, records and
14 accounts for the law firm for trust accounts.
15 And during the audit the auditor will select
16 certain client files to look at, and through the
17 review of the client file they will look at the
18 retainer agreement, the legal services provided,
19 any of the information in the client file as we
20 have the entire client file. Deposits,
21 withdrawals, anything associated with the file.

22 So that is the primary purpose of reviewing
23 the client file is to look at that rule and
24 ensure that legal services were provided and
25 also that the funds have been paid out as soon

1 as possible out of the trust account at the end
2 of the legal retainer.

3 Q And was that the mode of detection that -- and I
4 don't want to get into all of the specifics of
5 the case, for example the Gurney case, which is
6 another one, was identified as a rather seminal
7 decision that predated the codification of that
8 requirement to the new trust accounting rule,
9 was that the mode of -- by which the conduct in
10 issue in that case was detected?

11 A (JM) Yes, that's correct. It was a compliance
12 audit.

13 Q Okay. And do those sorts of -- those sorts of
14 checks -- it strikes that it seems as those it
15 goes beyond -- it would be more involved than
16 the typical auditing -- I say typical, but a
17 review simply of the transactions to identify
18 that sort of issue, it requires an examination
19 of what legal services are and a bit more of an
20 in-depth review. Is that fair?

21 A (JM) That's correct.

22 Q Okay. I'd like to turn just to a couple of
23 questions about the current scope of the rule
24 and areas of ambiguity. And the first -- I
25 appreciate that one of the areas of debate when

1 the current rule was being looked at was how to
2 express the degree of connection required
3 between legal services and the use of the trust
4 account. And currently the rule as stated
5 requires that the trust account must -- the
6 funds that are in the trust account must be
7 directly related to legal services. It does not
8 state that the funds in trust must be necessary
9 for those legal services and I understand that
10 was an issue that was at least flagged.

11 Is there some potential ambiguity there, or
12 do you feel that the rule combined with the
13 guidance now is sufficiently clear about what is
14 expected and that lawyers are not permitted in
15 British Columbia to use their trust accounts
16 except where for legal services?

17 A (JM) I think that the -- being directly related
18 effectively does say that, and we do have
19 additional guidance and education for the
20 profession and continually do stress that.

21 Q Okay. The next issue I want to address, I will
22 confess, is a complex one, and I hope that I
23 don't either lose myself or lose you as we get
24 into it, but it is the fiduciary property issue.
25 And I appreciate this is an issue that -- it's

1 identified in the regulation summary.

2 MR. ISAAC: If we could please bring that up again.

3 The regulation summary is exhibit 224. And if
4 we go to paragraph 57, please of the summary.

5 Q And this is a discussion here of -- that impacts
6 a little bit of the issue. You'll see at
7 paragraph 57 there is a quote that provides in
8 full the -- what is referred to as the fiduciary
9 property rule. And then if we go down a little
10 bit, at paragraph 58, below, it says:

11 "After Rule 3-58.1 --"

12 And that's the fiduciary -- sorry, that's the
13 trust accounting rule that we were looking at
14 earlier.

15 "-- was enacted, a concern was raised that
16 permitting fiduciary property to be held
17 in a trust account might complicate
18 efforts to draw a clear line respecting
19 the proper use of a trust account. Based
20 on this, the Law Society identified a need
21 to clarify how fiduciary property should
22 be handled."

23 And I just want to try to drill down a little
24 bit on what that concern is here that's being
25 identified here in the regulation summary that

1 was provided to the commission.

2 First, fiduciary property. I understand the
3 issue is the application or the interaction
4 perhaps of the trust accounting requirement that
5 we just spoke of and possibly the CIV rules and
6 how fiduciary property is handled, and fiduciary
7 property particularly in circumstances when
8 lawyers are acting in a fiduciary or
9 representative capacity. So not necessarily as
10 a lawyer, but where they are acting, for
11 example, as a trustee or under a power of
12 attorney.

13 Do I have that right, at least, at the first
14 instance?

15 A (GB) Partly. So fiduciary property is not trust
16 funds and the lawyers holding the funds in a
17 representative capacity where the -- their
18 appointment as a trustee arises from a
19 solicitor/client relationship. And that latter
20 part, arising from a solicitor/client
21 relationship, is quite important to the
22 definition of "fiduciary property."

23 Q Okay. And this -- I understand that this is an
24 issue that has been a consideration, and there
25 are two potential components of it that I just

1 want to address. The first is the extent to
2 which the fiduciary property rule may conflict
3 with or cause some issues with respect to the
4 trust accounting obligations, and the second is
5 a question regarding the application of the rule
6 possibility to what the CIV requirements are.
7 And I'd just like to deal with each of those in
8 turn.

9 So if I have this correct, Rule 3-55(6),
10 which is one component of that fiduciary
11 property rule, it allows but does not require
12 lawyers to deposit fiduciary property into their
13 trust account. Is that correct?

14 A (GB) That's correct.

15 Q Right. And when we're speaking of fiduciary
16 property, what we're referring to here are -- is
17 property that lawyers may receive when they are
18 acting in a representative or fiduciary
19 capacity, for example, as a personal
20 representative, an executor of a estate, under
21 power of attorney, as a trustee, whether that's
22 de facto or otherwise. That's some of what
23 would be captured under the definition of
24 "fiduciary property"; is that right?

25 A (GB) That's right.

1 Q Okay. And then just turning to the nature of
2 the concern, at least, from an AML perspective.
3 If we look at that summary again, and the next
4 paragraph is paragraph 59. It says -- it refers
5 to a consultation, this paragraph.

6 "Consultation with the legal profession on
7 proposed amendments to the fiduciary
8 property rule ... took place in February
9 2019."

10 You see that.

11 So if -- I'd like to turn to a document that
12 comes out of that consultation process briefly
13 just to ground ourselves in what the issues are
14 here.

15 MR. ISAAC: Madam Hearing Registrar, the document is
16 LSB4449, please. And I apologize, you just have
17 to bear with me for a moment. All of my
18 carefully preloaded documents went down when the
19 video feed did as well. I'll rely on the
20 version that's available here.

21 Q If we go down to -- on page 1, sorry, then, at
22 the bottom there's a heading that says "New
23 Considerations." Do you see that?

24 A (GB) Yes.

25 Q Okay. And under "New Considerations" there's a

1 statement here, it's the second -- begins at the
2 second sentence -- sorry, the second full
3 sentence in the paragraph, which is:

4 "The legal professional is vulnerable as
5 lawyers may be targeted by criminals
6 seeking to use a lawyer's trust account
7 for improper purposes. To the outside
8 world, there is a presumption that
9 solicitor-client privilege over
10 transactions that occur within a trust
11 account, and concerns have been raised
12 that lawyers' handling of non-trust funds
13 through a trust account makes it difficult
14 for law enforcement agencies to
15 investigate allegations of criminal
16 activity."

17 Just pausing there. That echoes, I think, one of
18 the questions that I asked earlier and I believe
19 Mr. Avison agreed with. The context we were
20 discussing, the -- some of the inherent risks
21 that lawyers are exposed to and this issue of
22 the presumption.

23 If we go on and if we could scroll down,
24 please, a little bit further in the document,
25 the third paragraph here states:

1 "Solicitor-client privilege does not apply
2 to fiduciary property, but it may apply to
3 funds deposited in trust arising from the
4 provision of legal services. Mixing funds
5 in this way sends the wrong message to the
6 public about the legal profession's
7 efforts to keep trust accounts for the
8 purposes of providing legal services."

9 MR. ISAAC: So perhaps just before I forget, if we
10 could mark this, please, as the next exhibit.

11 THE COMMISSIONER: Very well. That will be the next
12 exhibit, which I've lost track of.

13 THE REGISTRAR: 230, Mr. Commissioner.

14 **EXHIBIT 230: Amendments to Rules Relating to**
15 **Fiduciary Property Under Consideration - Undated**

16 THE COMMISSIONER: Thank you.

17 MR. ISAAC:

18 Q And just pausing there, and to break down the
19 patches that I read, one of the comments
20 obviously is that solicitor/client privilege
21 does not apply to fiduciary property, and that's
22 accurate; right?

23 A (GB) Yes, I think that's accurate. Yes.

24 Q Okay. And the memo goes on to describe that
25 point that I indicated which was that to the

1 outside world there's a presumption of privilege
2 that attaches to trust accounts. And you'd
3 agree that that presumption may include, for
4 example, financial institutions or law
5 enforcement that might otherwise be interested
6 in what's going on in an account particularly
7 one where privilege does not apply. Is that
8 fair?

9 A (GB) I agree --

10 MS. HERBST: Sorry. Just to clarify, Mr. Isaac.
11 Were you asking what the view of financial
12 institutions or law enforcement was, or ...

13 MR. ISAAC:

14 Q I'm asking whether or not the presumption or the
15 outside world that's described in this memo and
16 for whom that presumption might apply, that
17 that -- you know, and it connects with the
18 evidence -- testimony of Mr. Avison earlier in
19 terms of the effect of that. The inherent risk
20 of that is that the outside world includes
21 others such as financial institutions or
22 other -- or law enforcement or others in the --
23 that have a role in the AML regime. That the
24 presumption there is something that does apply
25 to the -- that outside world.

1 A (CF) So, Mr. Isaac, I just think those funds are
2 in the trust account and they would be -- you
3 know, that's why we've voted to get rid of the
4 rule. But, you know, how the outside world
5 looks at those funds is how the outside world
6 looks at those funds.

7 But the fiduciary property rules allowed
8 fiduciary property obtained by reason of
9 appointment that arose because of the provision
10 of legal services to be deposited in our trust
11 account. And how people view those trust
12 accounts, I can't really speak to that to a
13 great extent.

14 Q No, I think that the issue, it's trying to
15 understand, at least, what the AML concern is
16 and it seems as though one the principles that's
17 been adopted here, the reason why you don't want
18 mixing is you don't want the presumption to
19 apply anywhere where it shouldn't unnecessarily,
20 in particular. Would you agree with that?

21 A (CF) No, I think the concern that, when I voted
22 to remove the rule, came from the Federation
23 case which was based upon the presumption that
24 funds in trust accounts were funds that were
25 generated because of the solicitor/client

1 relationship and to which privilege applied.

2 And so fiduciary property, though it --
3 though the rules allowed it to be deposited only
4 when it arose from a solicitor/client
5 relationship, even accepting that, it didn't
6 fulfill those requirements for the Federation
7 case as to what type of trust funds ought to be
8 in a trust account and therefore protected in
9 the way that the Federation case decided.

10 So at least when I voted on these rules and
11 considered them, I wasn't looking at how they
12 were viewed -- trust funds were viewed by the
13 outside world. I was looking those principles
14 espoused by the Federation case.

15 Q Okay. And what about the underlying principle
16 that I'd expressed, which is that -- and
17 perhaps -- whether or not it was in your mind
18 when you voted for the rule or not, Mr. Ferris,
19 the underlying rationale of not mixing accounts,
20 for example, where one would expect that they're
21 are only for the purposes of legal services,
22 with potentially other types of business -- and
23 I think we would identify that it's one of the
24 rationales for the current trust accounting rule
25 and just in general as a matter of good

1 regulatory practice -- seeking to separate out
2 services in which a lawyer may be involved where
3 privilege may apply from services that they may
4 be involved in that -- where no such privilege
5 is likely to apply, something that may not be
6 apparent to an outside observer. Is that -- do
7 you agree, at least, with the -- with that as a
8 good principle to pursue?

9 A (CF) So I can't tell you whether there is a
10 difference to an outside observer if they
11 receive a cheque from a lawyer's general account
12 versus from a lawyer's trust account. I'm not
13 sure people make those kind of distinctions, and
14 I don't know. I can only tell you that what I
15 was concerned with in looking at these rules was
16 that the Supreme Court of Canada made it pretty
17 clear as to what types of funds should be
18 deposited into trust because those types of
19 funds would be funds that would be exempt from
20 the requirements of reporting. And I was
21 concerned in making sure that we weren't mixing
22 funds that didn't bear those characteristics
23 into our trust accounts.

24 Now, what flows from that is that those
25 funds should only be outside of our trust

1 accounts and therefore they are transparent in
2 the same way as any other funds are in Canadian
3 society. That they don't have that client
4 exemption to reporting under the FINTRAC rules.
5 And so that deals, I think, with what your
6 concern is, which is the money laundering
7 concern. But maybe there is a suggestion
8 somewhere, but I would be surprised if people
9 viewed lawyer's funds that are outside of trust
10 accounts, which are transparent to -- through
11 FINTRAC rules, versus funds from a trust
12 account, that they view those somewhat
13 differently.

14 Q I would like to pick on that -- pick up on that
15 exact point, Mr. Ferris. And just to understand
16 that it may take us slightly beyond just the
17 fiduciary property question.

18 MR. ISAAC: But if we could look, please, at -- Madam
19 Registrar, at law society document 4402-1,
20 please.

21 Q So this is email correspondence, it's four
22 pages, and it's a correspondence between various
23 staff members at the law society. If you could
24 please go to page 2. And the subject here is
25 "Model Trust Accounting Rule - Lawyers Acting in

1 a Representative Capacity."

2 And on page 2 of this document there's an
3 email from a Ms. Kaminski to Eva Milz. This
4 ends up being forwarded on to Ms. McPhee. But
5 can you just briefly identify who are
6 Ms. Kaminski and Ms. Milz?

7 A (JM) Eva Milz is the Deputy Director of trust
8 assurance and Tina Kaminski is team leader in
9 trust assurance.

10 Q Okay. And if we could go down just to the --
11 there's a passage here at the bottom of page 2
12 in Ms. Kaminski's email here, which is -- the
13 heading is "My Thoughts". And I'll read from
14 that portion. It says:

15 "If we remove the ability of lawyers to
16 put FP --"

17 Which in the context I think means fiduciary
18 property.

19 "-- in a trust account, I think we would
20 get a bit (not a lot) of pushback. A lot
21 of lawyers put [fiduciary property] into
22 trust so that it gets accounted for
23 properly (e.g. recorded and reconciled in
24 a timely manner and appropriate records
25 maintained). Lawyers who keep [fiduciary

1 property] outside of trust are not as
2 diligent about record-keeping or
3 maintenance."

4 And I'll just pause there. I understand that
5 one of the rationales for the trust accounting
6 rule that is currently under review about
7 removing it was to try to get lawyers to keep
8 more property in their trust accounting rule
9 because it has more protections and is subject
10 to greater due diligence.

11 Is that a fair summary of what the original
12 rationale was for that requirement, or at
13 least -- I shouldn't say requirement. At least
14 the option of putting fiduciary property into
15 the trust account; is that correct?

16 A (GB) That one's difficult to answer because I
17 don't -- I certainly don't have direct knowledge
18 of those circumstances, but I think it's
19 unpacking this a little bit.

20 Prior to this permissive Rule 3-55 we had
21 actually -- the fiduciary property exemption
22 didn't exist and no funds -- fiduciary property
23 funds could be put in the trust account. And
24 that was an amendment made to the previous rule
25 that said all fiduciary property has to go in

1 the trust account. So the rule -- the treatment
2 of fiduciary property over the last seven or
3 eight years has -- there's been a bit of an
4 evolution with that rule.

5 It's quite -- I simplified it significantly
6 because it is quite complex and I'm not sure
7 it's all relevant or you need to get into all of
8 the details of it. But -- so there has been a
9 little bit of an evolution and part of that is
10 understanding how lawyers, particularly lawyers
11 who practice wills and estates, how they are
12 handling fiduciary property that they may be
13 responsible for as trustees, and considering and
14 weighing the convenience of some of them wanting
15 it to be in the trust account versus
16 consideration of others who cannot put it into
17 trust account because, for example, it involves
18 a significant amount of cash from the estate
19 proceeds, and that cash can't go into the trust
20 account.

21 So there's all these various factors that
22 come into play and as a regulator our wanting to
23 have our eyes on this and wanting there to be
24 proper recordkeeping. The rules -- contrary to
25 what -- I think I would disagree little bit with

1 what's in this email because the rules do
2 provide and Rule 3-55 does require lawyers who
3 are handling fiduciary property to keep a
4 detailed set of records. And that rule sets out
5 what those records are and it does require
6 proper accounting to take place. It's not the
7 same amount of recordkeeping that trust funds
8 need, but there is enough that it would be -- it
9 makes it auditable. We can audit it and trace
10 those funds and properly conduct investigations
11 should those matters require an investigation.

12 And so I think it's a balance between -- the
13 rule has sort of developed as balancing all
14 those factors. So wanting to ensure the public
15 is protected versus the flexibility in dealing
16 with fiduciary property and all these other
17 concerns. So then when we brought in
18 Rule 3-58.1 and wanted to have clear distinction
19 between what really truly are trust funds and
20 fiduciary property, we got to where we're now
21 where the benchers have in principle voted to
22 remove the fiduciary property exemption. But
23 that doesn't mean there won't be recordkeeping.
24 Lawyers are still required to keep those records
25 and would still be required to keep the records

1 laundering or terrorist financing]. For
2 example, lawyer deposits \$500K cash into
3 his trust or general account. The bank
4 does not file an STR. If the lawyer opens
5 a non-trust bank account using his firm
6 name and deposits [fiduciary property]
7 into that account, my assumption is that
8 the bank will not file STRs for that
9 account either since it is connected with
10 the law practice. If our goal is to have
11 the banks take a closer look at the
12 transactions, the account should not be
13 under the law firm's name and the bank
14 will have to run KYC/CIV --"

15 That's know your client and client
16 identification.

17 "-- procedures on the actual client and
18 the circumstances of opening a new
19 account."

20 Now, I want to step back because that's quite --
21 there's quite a lot in that one paragraph. But
22 it does pick up on a point that Mr. Ferris
23 indicated is that perhaps to an outside observer
24 distinctions won't be drawn necessarily between
25 what occurs in a trust account and what occurs

1 in a general account. And that seems to be what
2 Ms. Kaminski is saying here is that the
3 potential for money laundering exists whether
4 the funds are deposit into a lawyer's bank
5 account, whether it be trust, general or other.

6 And just touching on that. So is that
7 consistent, Mr. Ferris, with what you had
8 indicated that -- and I will say, you know,
9 Ms. Kaminski is commenting here on what the
10 outside world -- the impression that the outside
11 world or steps that the outside world, including
12 in particular financial institutions, might take
13 when looking at accounts that are associated
14 with a lawyer.

15 But is that consistent with what you were
16 saying about -- that for those outside
17 observers, they may not be drawing distinctions
18 between trust accounts and otherwise?

19 A (CF) Right. So what I was saying was that the
20 only funds that are exempt from the reporting --
21 the requirements under the federal legislation,
22 FINTRAC, are trust accounts. True trust
23 accounts. And so when they go outside into a
24 general account, those accounts should be
25 subject to the same rules at any other account.

1 We can't control how a bank or a financial
2 institution reviews those other accounts which
3 don't have the exemptions -- the client
4 exemption that was set out in the Federation
5 case. That's up to the financial institution.

6 And so I'm not generally aware of how banks
7 do these things. I trust Ms. Milz has some
8 information on this. But if that is what
9 they're doing, you know, I would say to them
10 that those accounts should be treated like any
11 other accounts and shouldn't be treated any --
12 specially just because it's a lawyer's fiduciary
13 account on behalf of an estate of which he or
14 she is an executor of.

15 Q May I -- and picking up on that, Mr. Ferris, and
16 I appreciate that -- and this is where the
17 question of, you know, who's doing the
18 gatekeeping and who's doing the due diligence
19 comes about. And it seems as though
20 Ms. Kaminski's email is suggesting here that,
21 you know, the -- as you seem to have as well is
22 that there -- you're not sure -- I appreciate
23 that you're obviously not sure exactly what a
24 bank, for example, may interpret with respect to
25 a general account or business account, but does

1 the law society currently maintain visibility?

2 I appreciate the trust accounts are subject
3 to audit and trust property may also be
4 reviewed. But does the law society presently
5 maintain visibility through its trust assurance
6 program or otherwise on what a lawyer might be
7 doing in, for example, their general account or
8 in other bank accounts that they might open?

9 A (JM) I can speak to the -- from a compliance
10 audit perspective. We do get the records, books
11 and accounts for trust accounts and general
12 accounts and any other accounts that are held by
13 the law firm or lawyers. Fiduciary property is
14 also provided. They do advise what fiduciary
15 property they hold and why they hold it. So
16 that is provided to the law society.

17 Q Is there -- and I -- this connects with that
18 question of where the lines of responsibility
19 are. And the question that I asked earlier in
20 connection with the 2015 risk assessment about,
21 you know, the goal of ensuring that the reach of
22 the law society as a regulator extends as far as
23 the presumptions might apply and the risks that
24 might be associated with those presumptions.
25 And I -- the question is has the law society

1 considered requiring lawyers to open bank
2 accounts -- when -- you know, when we're
3 talking -- outside of the trust account context,
4 but when they may be handling property for
5 others outside of those traditional legal
6 services, to do so in the client's -- I know
7 "client" may be a bit of a loaded term because
8 maybe we're not dealing with a legal services.
9 But when handling property for anyone else that
10 they do so in the name of that person or entity
11 to ensure that the financial institution is
12 conducting due diligence on that person and not
13 on the lawyer who may have -- as I said, from
14 that outside world might have the -- a
15 presumption that's been assumed in those
16 contexts. Is that something that the law
17 society has considered at all or looked at?
18 A (DA) Well, it's one option that might be
19 considered. But, if I might, Mr. Isaac, I think
20 I want to go back and just cover off a couple of
21 points that have come up in this discussion.
22 The first one relates to the content of not just
23 this memorandum, but some others. I think
24 what's disclosed by that is that there is a very
25 active discussion going on within the law

1 society all the time in relation to how these
2 rules are administered and what the implications
3 might be and trying to get the balance right,
4 then, in the way that we address those kinds of
5 issues. And so the fact that that discussion
6 takes place and it's been evident in a number of
7 the memoranda that you've put up on the screen I
8 think is a very positive and productive thing.

9 With respect to any changes in relation to
10 the fiduciary property rule, there is work
11 underway in relation to the guidance to the
12 profession on that front as well. So the issue
13 in relation to the degree of attention that is
14 paid to recordkeeping in relation to matters
15 beyond the trust account I fully anticipate will
16 be part of what gets addressed there.

17 And then the other issue that hasn't come up
18 in the conversation but I think it should is the
19 importance of engagement of the law society with
20 other entities. So as we make these changes, it
21 becomes really quite important to make sure that
22 other entities that have a common interest in
23 issues associated with AML understand what it is
24 that the law society has done and why. And that
25 is why participation in groups like CIFA, prior

1 to that point in time Project Athena, is really
2 quite important so that banks have a very clear
3 understanding in relation to the changes that
4 have taken place and why.

5 I'd also to offer the view that the degree of
6 sophistication amongst many of those entities is
7 perhaps greater than one of your questions
8 contemplated. The in-house counsel with banks
9 certainly have a very clear understanding in
10 relation to what those obligations are, and as
11 the question was being asked earlier on I was
12 thinking about some of the interaction that
13 we've had with the financial integrity unit of
14 the RCMP. The members of that group that we
15 meet with are actually members of the
16 profession. So I think they have a fairly
17 sophisticated understanding in relation to how
18 the rules operate.

19 Q Thank you. So appreciating that there are
20 obviously a number of moving pieces underway
21 particularly with respect to the fiduciary
22 property, and perhaps I could just clarify. I
23 understand that currently the fiduciary property
24 rule that we looked at, the sub-rule that makes
25 it a possibility to put fiduciary property into

1 the trust account, that is -- I believe it had
2 been voted on or at least it's in the process of
3 being deleted. Is that right, And what's the
4 current status of that?

5 A (GB) Yeah, that's correct. So there was -- the
6 benchers had asked for consultation with the
7 profession, which took place, and that then
8 guidelines be prepared so that -- for the
9 profession so that there's clear understanding
10 as to what constitutes legal services and what's
11 fiduciary property so that the profession's able
12 to comply. I mean, deleting the rule but there
13 being confusion as to what they're supposed to
14 do with fiduciary property or what even
15 constitutes fiduciary property is not helpful.

16 So the guidelines are quite critical to
17 having the rule take effect and actually do --
18 you know, having the deletion of the rule be
19 effective. So that's where we're at. We've
20 drafted -- the guidelines are drafted. They're
21 to go out to the profession, which I understand
22 should be shortly, for any comments and they'll
23 be clarified if clarification is needed before
24 the rule is deleted.

25 Q Okay. And then on the second more expanded

1 issue that I touched on. As I understand it
2 from your response, Mr. Avison, that's not
3 something that the law society is presently
4 looking at in terms of, you know, what more
5 potentially might be done to potentially put
6 restrictions, for example, or requirements where
7 lawyers may be, for example, potentially opening
8 bank accounts outside of the trust account and
9 potentially putting in some rules around
10 requiring that to be done in the name
11 entitlement of the individual. Essentially
12 lawyers not, outside of the trust account
13 process, using banks that they've opened in
14 either their own name or the name of their law
15 firm for the purposes of handling property for
16 others. Is that -- do I have that right just in
17 terms of where things stand on both of those
18 issues?

19 A (DA) I think it would be fair to say that the
20 focus is on the other items that we've
21 discussed.

22 Q Okay. Thank you.

23 A (GB) Mr. Isaac, can I just add something that I
24 thought of. Financial institutions are
25 reporting entities and they have obligations

1 under the federal legislation. And my
2 understanding is that part of that is inquiring
3 into beneficial ownership and doing their due
4 diligence. And if a lawyer is opening an
5 account and the beneficial owner or
6 beneficiaries or whoever is the beneficiaries of
7 the trust, I mean, those are inquiries that the
8 financial institution should be making.

9 And so nothing we've ever put out is
10 signalling to financial institutions that they
11 ought not to be following their proper due
12 diligence. We would encourage them, and it's
13 completely in the public interest for them to be
14 following their stringent requirements and not
15 to be -- not following them because someone
16 happens to be a lawyer. A lawyer is in no
17 better position and no different position than
18 any other member of the public in opening an
19 account that does not relate to legal services.

20 Q The -- but perhaps where they may be in a
21 different position is in the presumptions that
22 we talked about in terms of the inherent risk,
23 the presumptions that are reflected in
24 Ms. Kaminski's email, and may apply to lawyers
25 given their position but not necessarily to

1 other members of the public.

2 And I do want to ask as well about -- I
3 appreciate that regulated entities -- and there
4 are requirements now which we'll get to later,
5 probably tomorrow, about beneficial ownership
6 verification.

7 But you would agree, Ms. Bains in our own
8 experience as an investigator of what you know,
9 although entities may have an obligation or --
10 to look behind and seek beneficial ownership, it
11 is always far more difficult to do that, to seek
12 to look behind a beneficial ownership from a due
13 diligence and know your client perspective than
14 it is when you're dealing with -- when there's a
15 direct correspondence between the name on the
16 account and the person who is actually handling
17 that property. That's fair, isn't it?

18 A (GB) I mean, I can't -- I'm not sure because I
19 can't speak to what financial institutions or
20 other entities that are making those kinds of
21 inquiries would do or not do. So I'm not sure I
22 can comment. I don't have expertise to comment
23 on that.

24 What I would say is that the FINTRAC report
25 that we saw that was entered into evidence

1 earlier this week and Mr. Wallace's evidence
2 with respect to suspicious transaction reports
3 and large cash transactions filed involving or
4 naming a lawyer clearly indicate that financial
5 institutions and reporting entities are filing
6 STRs, suspicious transaction reports, in keeping
7 with their obligations, at least to the extent
8 that he was able to show us for that period.

9 So I don't think the -- we have any
10 information to suggest that no -- that financial
11 institutions are turning a blind eye to their
12 obligations because someone happens to be a
13 lawyer. So I really can't comment further about
14 what they do or don't do.

15 Q No, I think to be fair, I mean, Ms. Kaminski
16 certainly is indicating -- and not -- it's not
17 in the term of turning a blind eye but that
18 there is an element to which the veil of
19 legitimacy, which may in come cases be an
20 entirely legitimate veil, maybe a veil that is
21 actually not a veil at all. It is privilege, it
22 is constitutionally recognized and it is
23 entirely legitimate and necessary as recognized
24 by the Supreme Court of Canada. But there may
25 also be some circumstances where that veil is

1 just that, it is only a veil.

2 And the question I had posed earlier to
3 Mr. Avison was, you know, as much as possible to
4 make sure that the veil only exists where it
5 properly belongs. And that's the substance of
6 the question here, and I understood Mr. Avison
7 to agree with that at least as a general
8 principle.

9 And, Mr. Avison, if you don't agree, with
10 that, please let me know, but I understand we're
11 at least on the -- we're on the same page with
12 that.

13 A (CF) Mr. Isaac, can I just say this. You know,
14 if we do our job well, lawyers should be
15 considered to be a honourable and respectful --
16 respected profession. And so that's a
17 consequence I think of good lawyers and good
18 regulation.

19 I think what Ms. Bains was saying to you was
20 that we can't comment on the business practices
21 of financial institutions and -- you know, and
22 whether they comply with their legal
23 obligations, which are pretty clear from the
24 legislation and the regulations. And so I think
25 when you're refer to Mr. Avison's comments, I

1 think he was talking about what I said to the
2 former that yes, we expect lawyers are respected
3 generally in the public. But Ms. Bains is
4 talking about something more particular that we
5 can't speak to the practices of financial
6 institutions.

7 Q Thank you. And I should say, I mean, one of the
8 dynamics that we as a commission often see are
9 the degree to which different sectors are
10 interconnected.

11 So without speaking about what a financial
12 institution may do, I think it would be
13 reasonable, certainly as Ms. Kaminski seems to
14 be indicating here, that requiring lawyers to
15 potentially open accounts in the names of the --
16 I say clients, but really the -- you know, the
17 true owners potentially of property that may be
18 occurring. And appreciating this may not be
19 something that is actually a real threat --
20 there's -- you know, there's no indication
21 here -- but that doing so might make the due
22 diligence by another reporting entity, another
23 entity involved in the AML regime easier, and
24 that might reduce the overall system risk.

25 And that is the question, and if that's

1 something that anyone disagrees with, I invite
2 your response to that.

3 A (GB) I think the one thing I would comment on is
4 that if we accept the presumption that criminals
5 are attracted to the privilege and want to take
6 advantage of the privilege that attaches to
7 their communications with lawyers and want to
8 potentially use trust accounts improperly, if we
9 take away the benefit of the privilege, arguably
10 we would be stripping away a motivator to go to
11 a lawyer to want to improperly have funds moved
12 through an account. And so if there is a risk
13 with fiduciary property being used by
14 unsavoury -- for an unsavoury purpose, stripping
15 away the privilege because it never really had
16 any privilege attached to it seems consistent
17 with anti-money laundering objectives.

18 MR. ISAAC: Thank you. I should just pause to note I
19 had interpreted my technical glitch as a break,
20 but I appreciate that may not have been
21 everyone's experience. So I should just pause
22 there and just see whether or not,
23 Mr. Commissioner, you would like a break. I'm
24 prepared to continue on until 1:30, but if
25 either the -- Mr. Commissioner would like a

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1 break or if the witnesses require one, I just
2 wanted to flag that.

3 THE COMMISSIONER: No, thank you. As far as I'm
4 concerned, Mr. Isaac, I'm quite happy to forge
5 on. But if anyone wishes a break, by all means
6 put up our virtual hand and we can do that.

7 MR. ISAAC: Thank you. And just returning to --
8 sorry. And I should -- if we could please mark
9 that last document, the 4402-1, please, as the
10 next exhibit.

11 THE COMMISSIONER: Yes. I think we're at 131 now.

12 THE REGISTRAR: 231, Mr. Commissioner.

13 THE COMMISSIONER: Right, 231. Yeah.

14 **EXHIBIT 231: Email from Jeanette McPhee to**
15 **Michael Lucas re Model Trust Accounting Rule,**
16 **comments from Eva Milz - October 11, 2018**

17 THE WITNESS: (JM) Could I just make one comment in
18 this discussion.

19 MR. ISAAC:

20 Q Please. Yes.

21 A (JM) So for trust accounts, lawyers need to
22 name the account as a trust account and only a
23 trust account in trust. And so any general
24 accounts or any accounts outside of trust cannot
25 be named as a trust account. So from a

1 financial institution point of view, they should
2 be very clear which accounts for a law firm are
3 trust accounts versus not trust accounts.

4 MR. ISAAC:

5 Q Thank you, Ms. McPhee. And I think -- so I want
6 to return to that question briefly of the actual
7 fiduciary property. So retracting our focus,
8 our lens back in to the question of trust
9 accounts and the question of fiduciary property.

10 MR. ISAAC: If we could pull up, please, LSB document
11 LSB4607.

12 Q And this is an email. It's one page. It's
13 between -- Mr. Wedel to Ms. Bains. Is Mr. Wedel
14 a staff member at the law society?

15 A (DA) He is.

16 Q Okay. And Mr. Wedel writes to Ms. Bains -- the
17 title is -- this the January 14th, 2019. It
18 says "Fiduciary Property Examples." And
19 Mr. Wedel writes:

20 "Hi. You asked for a quick summary of
21 fiduciary property examples we've faced:
22 1. A tax lawyer advises his client on
23 potential tax consequences of a
24 proposed transaction. As part of the
25 advice, the lawyer recommends that he

1 receive certain payments as a trustee
2 (and uses his law firm's trust account
3 to do so)."

4 And then the second is:

5 "A lawyer and his client have a
6 long-standing lawyer-client
7 relationship. Unrelated to any
8 specific file, but arising from the
9 familiarity and trust established
10 through the lawyer-client
11 relationship, the client asks the
12 lawyer to hold as trustee funds to be
13 available for the client's children's
14 emergency use in the event the client
15 is indisposed. The lawyer does so
16 using his law firm's trust account."

17 And I just pause there. Mr. Wedel describes
18 this as "fiduciary property examples that we've
19 faced." Am I correct to understand that these
20 are -- and I'm not asking you to connect them to
21 specific lawyers or specific names, but that
22 these are real examples of ways in which
23 fiduciary property might have been handled or
24 perhaps mishandled, at least according to the
25 recent codified rule? And are these the sorts

1 of examples that the law society is seeking to
2 address by doing away with that rule?

3 A (GB) I think they're examples of -- examples
4 that would have come to Mr. Wedel's attention,
5 whether they were in the context of an
6 investigation or not, that I don't know for
7 certain.

8 Q Okay. And has the issue of lawyers holding
9 money in their trust accounts that's unrelated
10 to the delivery of legal services and where that
11 relationship is not fully documented, is that
12 something that has been observed to occur at
13 least in some audits?

14 A (GB) Well, both in audits and matters that have
15 been referred to us for investigation, yes.

16 Q So it's not just a hypothetical issue that's
17 being addressed both through the codification
18 and the clarifications that are being sought
19 now. These are things that have come up and
20 issues that have come up and identified by the
21 law society. Is that -- that's right, Ms.
22 Bains?

23 A (GB) Use of a trust account in the absence of
24 substantial legal services, yes.

25 Q Okay. And I don't want to go too far down a

1 rabbit hole, but I'll briefly ask. I have seen
2 reference to this in some of the documents, but
3 are funds in escrow -- are lawyers permitted to
4 hold fund as escrow service agents in their
5 trust accounts?

6 A (GB) This is a complicated question. I think
7 part of it depends on what do you define as
8 escrow or not, and there isn't always a common
9 definition around that. But if a lawyer -- if
10 any person is acting as a true escrow, my
11 understanding is that they don't have a client
12 because of their escrow status, and in those
13 cases there may not be any legal services
14 connected with the holding of those escrow
15 funds.

16 It's not always black and white, and that's
17 what makes the practice of law very complicated
18 and that's what makes dealing with escrow funds
19 very complicated. There are other instances
20 where lawyers say they're acting as escrow but
21 they're actually not acting as escrow. They're
22 actually holding funds in furtherance of a
23 solicitor/client relationship where there are
24 trust conditions that need to be satisfied
25 before -- or undertakings satisfied before the

1 release of those funds. That is not an escrow.
2 But I think the term gets used in many different
3 ways in the profession and outside the
4 profession, so it's a little bit of a
5 complicated issue.

6 Q No kidding. I appreciate that, and I did want
7 to -- is that an area where -- the ambiguity or
8 complexity around that and the potential for
9 ambiguity to be exploited, is that something
10 that the law society is looking at all to
11 address?

12 A (GB) Yeah. So we've raised -- we've considered
13 how to address the escrow issue and had some
14 research done by one of the -- by one of our
15 staff. I can't remember how long ago it was,
16 but we wanted to look at -- do a comparative
17 analysis: what do other jurisdictions do and
18 what kind of guidance or rules do they have
19 around escrows? And we looked at -- beyond
20 Canadian jurisdictions, we looked at some of the
21 American jurisdictions and abroad. And it's a
22 very challenging area.

23 And so we did do some of that work and as a
24 part of the fiduciary property guidelines we
25 attempted to address the escrow role as well.

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1 So this is an ongoing area that needs further
2 work, but it's -- yeah, it's complicated.

3 Q That's probably sufficient. As I said, it's a
4 rabbit hole that -- we probably could spend
5 another two days going down the escrow rabbit
6 hole.

7 MR. ISAAC: If we could please, before I forget, mark
8 this document that we're look at, the 4607,
9 please, as the next exhibit.

10 THE COMMISSIONER: Very well. That will be 231.

11 THE REGISTRAR: Exhibit 232, Mr. Commissioner.

12 THE COMMISSIONER: 232.

13 **EXHIBIT 232: Email from Gurprit Bains re**
14 **Fiduciary Property Examples - January 14, 2019**

15 MR. ISAAC: Thank you. And I was asking about the --
16 we looked at that document there about the
17 extent to which this issue of property being
18 held in a manner that is now inconsistent with
19 the rule has not just been a hypothetical issue.
20 And there's another document I'd like to show in
21 that respect. It's law society document 196-1,
22 please. And --

23 THE REGISTRAR: Sorry, Mr. Isaac. Can you repeat the
24 number again. One nine ...

25 MR. ISAAC: 196-1.

1 Q And this is a combination of different documents
2 that are appended to an agenda. And I don't
3 intend to take you through all of them. If we
4 could go to page 5 of the document, there's a
5 July 15th, 2019 memo regarding the amendments to
6 the fiduciary property rule, rule 3-55. It's
7 prepared for the benchers by the executive
8 committee, and the purpose of this is for
9 discussion and decision.

10 And if we go on to page 7 of the memo,
11 there's a discussion here of the fiduciary
12 property issue. I'd like to focus on the new
13 considerations, the portion that starts under
14 "New Considerations." And that's -- you'll see
15 at the bottom of the page just as paragraph 11.
16 There's a discussion here about what the current
17 status of this is. And then if you go down to
18 paragraph 16, please, this is the paragraph I'd
19 like to focus on. It says:

20 "However, the Investigations and Trust
21 Assurance Departments have reported that
22 some audits have disclosed that lawyers
23 have held money in a trust account that is
24 not related to the delivery of legal
25 services for a client where the

1 relationship is not documented. When
2 questioned, the lawyer has stated that
3 they or she is holding it 'as a fiduciary'
4 and therefore it is ' fiduciary property.'
5 This opens the possibility that a client
6 could, with reference to the fiduciary
7 property rule, tell a lawyer to hold any
8 funds in a trust account in trust for the
9 client, even where no legal services are
10 performed or where the lawyer is not being
11 asked to manage the assets as a fiduciary.
12 Nevertheless, because the lawyer would be
13 holding the funds in a fiduciary capacity
14 derived from a solicitor-client
15 relationship, the lawyer could argue that
16 the funds are fiduciary property and that
17 holding them in a trust account is
18 permitted. This would be contrary to the
19 intent of the rules, but could be
20 difficult to refute."

21 Do you have any sense -- and obviously there's a
22 reference here that some audits have disclosed
23 that this was occurring, that money was being
24 held in a trust account not delivered -- not
25 related to legal services. Without asking you

1 for specific numbers, was this something that
2 was the occasional example or was it something
3 that was at least a significant number of
4 examples where that sort of issue was being
5 identified?

6 A (GB) Sorry, so as it relates to fiduciary
7 property specifically? Is that what you're
8 asking, Mr. Isaac?

9 Q Yes. Yes, it is.

10 A (GB) Okay. There were some. I wouldn't say --
11 sorry, I don't want to misstate, but my
12 recollection is that we have had some. I don't
13 think it's -- I don't think it's been a large
14 number, and an important point to make is that
15 although some of those have been referred to us,
16 there isn't in many cases any suspicious
17 circumstances whatsoever. It's just a use of
18 the fiduciary property rule and use of the trust
19 account, but there's nothing nefarious or
20 there's no red flags about what the person's
21 doing. There may be in some, but certainly not
22 all of them.

23 And so that's an important feature to this,
24 that just the fact that lawyers were and are
25 using the fiduciary property rule does not mean

1 there's money laundering or something -- or
2 criminality takes place or, you know, anything
3 like that. I just want to draw that distinction
4 so there isn't the impression that these are all
5 improper because that certainly is not the case.

6 Q And in fairness, Ms. Bains, I think that's a
7 caveat or a comment that I think is important is
8 we will be looking at some other statistics
9 about breaches of other rules and to understand
10 that not every time that one of the AML rules is
11 breached is because it was an example of money
12 laundering. In some cases it's -- you know,
13 it's a breach, at least, of the letter and the
14 spirit of the rule but with nothing further. So
15 thank you, I do -- that is appreciated.

16 But I -- and just to confirm because I
17 appreciate that certain -- to a certain extent
18 some of the issues we spoke about in this
19 context are -- will likely be resolved by the
20 pending removal of this portion of the rule.

21 And, Mr. Avison, can you confirm again what
22 the timeline -- when will this -- if that's
23 something that's possible, at least, at this
24 point. I don't know if there's a date certain.
25 But just give a sense to the commissioner of

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1 when this sub-rule permitting the use of the
2 deposit of fiduciary property into the trust
3 account will -- what the next steps are on that,
4 please.

5 A (DA) There's some work going on on the
6 completion of some of the guidance to the
7 profession work associated with this, so I do
8 anticipate it will be coming back fairly soon.

9 Q Okay. Thank you.

10 MR. ISAAC: If we could mark this, please, as the
11 next exhibit. That's document 196-1.

12 THE COMMISSIONER: 233.

13 THE REGISTRAR: 233. Exhibit 233.

14 **EXHIBIT 233: Law Society of British Columbia**
15 **Agenda for Act and Rules Committee - October 24,**
16 **2019**

17 MR. ISAAC:

18 Q Thank you. And I promised at the beginning of
19 our going down on the fiduciary property path
20 that there was a second issue that I did want to
21 address, and that's the potential questions
22 arising about the application of the CIV
23 requirements when a lawyer is acting in a
24 representative capacity. Is there --

25 MR. ISAAC: So if we could please bring up LSB4401-1.

1 Q And we are -- we should be looking at an
2 email -- it's one page -- between Ms. Kaminski
3 and Ms. McPhee. And there's -- I'd just like to
4 look -- it's dated October 9th, 2018. The
5 subject is again "Model Trust Accounting Rule -
6 Lawyers Acting in a Representative Capacity."
7 On the first page in the middle there's the
8 email from Ms. Kaminski to Ms. McPhee copying
9 Ms. Milz. And there's a portion that says
10 "summary." And there Ms. Kaminski writes:
11 "LSB's current CIV rules and the proposed
12 rules both require lawyers to adhere to
13 the CIV rule when lawyers are retained to
14 provide legal services. If acting in a
15 fiduciary role is not providing legal
16 services, this is a loophole for lawyers
17 to not identify or verify their client."
18 So just stepping back, I'll just ask the
19 question, and maybe that's being resolved by the
20 rule as it's been adapted and maybe Ms. Kaminski
21 isn't incorrect here. But do the CIV -- is that
22 correct, do the CIV rules apply when a lawyer
23 may be acting in a representative capacity but
24 not necessarily in connection with the provision
25 of legal services.

1 A (GB) So if a lawyer is holding fiduciary
2 property, it has to arise from a solicitor/
3 client relationship, and so the triggering event
4 for identification under the client
5 identification and verification rules is that a
6 lawyer is providing legal services to a client.
7 And so there would have been an obligation to
8 identify the client at the time that those legal
9 services were provided that makes the thing
10 fiduciary property. So that part of the rule
11 certainly would apply.

12 Whether the verification part of the rule
13 and the other portions of the client
14 identification and verification rules apply
15 would depend on whether there was a financial
16 transaction at that time prior to the lawyer
17 accepting fiduciary property, and that would
18 vary from matter to matter. So I think it's
19 partly correct, but it all hinges on
20 fiduciary -- the holding of fiduciary property
21 is not the provision of legal services.

22 Q But as you say, there has to be the -- there has
23 to be a pre-existing or otherwise existing
24 solicitor/client relationship in order to
25 validly engage and use the fiduciary property

1 rule. Do I have that right, Ms. Bains?

2 A (GB) Yes, that's correct. I also -- maybe can I
3 take this opportunity just to clarify something
4 from Ms. Wilson's evidence just in case there's
5 any misunderstanding as it relates to BC rules,
6 and our rules are not identical to others in
7 respect to fiduciary property.

8 If a lawyer is going to place fiduciary
9 property into their trust account, our rule
10 requires that they comply with all of the trust
11 accounting rules. And one of the trust
12 accounting rules is the cash transaction rule.
13 So a lawyer cannot take \$50,000 in cash as
14 fiduciary property and put that into a trust
15 account because that would be a breach of the
16 cash transaction rule. There's no exemption
17 because it's fiduciary property to the cash
18 transaction rule.

19 So that's to say under no circumstances,
20 whether it's fiduciary property or not, can a
21 lawyer put cash greater than 7,500 into their
22 trust account unless one of the cash transaction
23 rule exceptions apply. There isn't some kind of
24 loophole for fiduciary property.

25 Q That a helpful clarification, Ms. Bains.

Craig Ferris (for the commission)
Don Avison (for the commission)
Jeanette McPhee (for the commission)
Gurprit Bains (for the commission)
Exam by Mr. Isaac

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1 MR. ISAAC: Before I forget, if we could mark this
2 document, please, as the next exhibit, please.

3 THE COMMISSIONER: 134.

4 THE REGISTRAR: 234, Mr. Commissioner.

5 THE COMMISSIONER: 234. I'm sorry.

6 **EXHIBIT 234: Email from Jeanette McPhee to**
7 **Michael Lucas re Model Trust Accounting Rule**
8 **Lawyers Acting in a Representative Capacity -**
9 **October 11, 2018**

10 MR. ISAAC:

11 Q Just one other point I'd like to end on and that
12 will take us to the end of fiduciary property,
13 thankfully. Won't have to revisit that
14 tomorrow.

15 But is the question of the degree to which
16 the law society has visibility from an audit
17 perspective on what goes on in fiduciary
18 property accounts versus, for example, trust
19 accounts -- and I have seen reference and I can
20 take you to the records, but some reference, at
21 least, to the accounting guidelines for
22 fiduciary property. There are pretty detailed
23 accounting guidelines but they are not to the
24 same level or give the same amount of visibility
25 to law society auditors or investigators as the

1 rules that would apply in the trust accounting
2 context. So I'm hoping I could just address
3 that, and also if there's anything being thought
4 of in terms of potentially increasing or adding
5 more detail to the guidelines or more -- or
6 areas to gain more visibility to the extent you
7 think it's required on the fiduciary property
8 side of what lawyers may be engaged in.

9 A (JM) I can speak to that. So from an audit
10 perspective the fiduciary property information
11 is to be produced during an audit, and they --
12 each year they need to declare if they have
13 fiduciary property and provide that during an
14 audit. It is not audited. It's not part of the
15 scope of the audit as the audit is focusing on
16 the trust account and the general account
17 mainly, and mainly the trust account.

18 To be clear, we have had discussions
19 internally whether that should be looked at
20 throughout the discussion on fiduciary property,
21 which we've been having in the past while, and
22 so it's a consideration but it's -- so it's
23 being discussed.

24 Q Okay. Are you able to give a sense of what
25 the -- beyond being discussed, is there any sort

1 of action items on the immediate horizon or is
2 it something that it remains under consideration
3 along with the other AML issues, for example,
4 that are in the strategic plan that's attached
5 to the introduction to the law society?

6 A (JM) In our operational plan we do have
7 fiduciary property in that as a specific item,
8 and that is being discussed in that capacity.

9 Q Okay. Thank you.

10 A (GB) Mr. Isaac, can I just add from the
11 investigations perspective. If we were to
12 receive a complaint either from a beneficiary,
13 another member of the public or a referral from
14 the audit group in relation to fiduciary
15 property, those records are deemed to form a
16 part of a lawyer's books, records and accounts,
17 which means that lawyers are required to provide
18 them to us in the course of our investigation.

19 We haven't really talked about investigative
20 powers, but beyond that we have quite broad
21 powers to require whatever information we
22 consider necessary for our investigation and we
23 have broad powers to make an order against
24 others including a financial institution if --
25 under section 26 of the Legal Profession Act if

1 we require further financial information to
2 further our investigation.

3 And so because these issues fall within our
4 jurisdiction and it's conduct that could
5 potentially be a discipline violation if there's
6 a mishandling of fiduciary property, we do have
7 those broad powers to investigate that
8 regardless of it not being identical -- not
9 being the same requirements that the trust
10 accounting rules require.

11 Q Thank you. Ms. Bains, I suppose one of the -- I
12 would expect that one of the traditional issues
13 that might arise when you're dealing with
14 fiduciary property is a lawyer potentially
15 mishandling the fiduciary property qua
16 fiduciary. And I suppose that's a slightly
17 different concern than the issue of a potential
18 AML -- from an AML perspective. And that's
19 something that we will, I assure you, look at
20 some of the investigative powers. But a broader
21 challenge, I suppose, or distinction might be
22 that, whereas you can usually rely on a client
23 to complain if a lawyer mishandles their
24 fiduciary property, you are unlikely to have a
25 lawyer complain -- sorry, a client complain if a

1 lawyer has assisted them to handle property in
2 such a way to facilitate money laundering.

3 And so I appreciate that distinction, and
4 that's where I -- at least I understand the
5 audit side of the program to be a very important
6 component of the type of breach identification
7 or suspicion identification that's particularly
8 important from an AML perspective.

9 Is that a fair comment just in terms of
10 looking at this from a -- you know, what might
11 trigger an AML-related investigation as opposed
12 to a mishandling of fiduciary property
13 investigation?

14 A (GB) I mean, it's rare, but we have had -- what
15 would I call them -- unscrupulous clients make
16 complaints to us. So it does -- believe it or
17 not, it does happen. But I would say generally
18 the more eyes we have from the audit side, from
19 an investigative perspective, I will always take
20 that information and be happy to have that
21 oversight and those matters referred to us
22 because really our interest is in protecting the
23 public. And similar to what we do with all
24 external -- you know, external -- whether it's
25 law enforcement or other regulators, we want

1 these matters to come to us; we want to be
2 investigating them; we don't want lawyer --
3 potential lawyer misconduct to continue, whether
4 it's done innocently or intentionally. We want
5 to be pursuing those matters, so...

6 MR. ISAAC: Thank you. Mr. Commissioner, I'm looking
7 at the time. I think it's probably a good time
8 to break and continue with the evidence of the
9 panel tomorrow.

10 THE COMMISSIONER: All right. Thank you, Mr. Isaac
11 and to the panelists. So we will adjourn until
12 tomorrow morning at 9:30.

13 THE REGISTRAR: This hearing is adjourned until
14 November 19, 2020, at 9:30 a.m. Thank you.

15 **(WITNESSES STOOD DOWN)**

16 **(PROCEEDINGS ADJOURNED AT 1:30 P.M. TO NOVEMBER 19,**
17 **2020)**

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