

**PROCEEDINGS AT HEARING
OF
DECEMBER 3, 2020**

COMMISSIONER AUSTIN F. CULLEN

INDEX OF PROCEEDINGS

Witness	Description	Page
	Proceedings commenced at 9:30 a.m.	1
Barbara McIsaac (for the commission)	Examination by Ms. Patel	1
	Proceedings adjourned at 10:59 a.m.	64
	Proceedings reconvened at 11:14 a.m.	65
Barbara McIsaac (for the commission)	Examination by Ms. Patel (continuing)	65
	Examination by Ms. Friesen	89
	Examination by Mr. Brongers	95
	Examination by Ms. George	106
	Examination by Ms. Magonet	110
	Examination by Mr. Rauch-Davis	122
	Examination by Ms. Patel (continuing)	130
	Proceedings adjourned at 12:41 p.m. to December 4, 2020	132

INDEX OF EXHIBITS FOR IDENTIFICATION

Letter	Description	Page
	No exhibits for identification marked.	

INDEX OF EXHIBITS

No.	Description	Page
318	Curriculum Vitae of Barbara McIsaac, QC	4
319	Report for the Cullen Commission on Privacy Laws and Information Sharing - November 17, 2020	6
320	OPCC – Financial Transactions and Reports Analysis Centre of Canada Audit Report of the Privacy Commissioner of Canada (2013)	130

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

December 3, 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, Madam Registrar. Yes, Ms. Patel.

MS. PATEL: Mr. Commissioner, we have with us today Barbara McIsaac, QC, who is appearing from Ontario. She is here to speak to a report drafted for the commission on information sharing and privacy laws.

THE COMMISSIONER: Thank you.

**BARBARA McISAAC, a
witness for the
commission, affirmed.**

THE REGISTRAR: Please state your full name and spell your first and last name for the record.

THE WITNESS: Barbara McIsaac. B-a-r-b-a-r-a
M-c-I-s-a-a-c.

THE COMMISSIONER: Yes, Ms. Patel.

MS. PATEL: Madam Registrar, if you could please pull up Ms. McIsaac's CV.

EXAMINATION BY MS. PATEL:

Q Ms. McIsaac, do you recognize this as your CV?

1 A Yes, I do.

2 Q Okay. I'll just touch on some of the highlights
3 here. You are a practising lawyer in Ontario;
4 is that right?

5 A Yes, I am. Yes.

6 Q And you've had positions as a civil litigator
7 with the Department of Justice of Canada?

8 A That's correct.

9 Q Okay. And you are also a litigation partner
10 with McCarthy Tétrault and Borden Ladner
11 Gervais?

12 A Yes, I was a counsel at Borden Ladner.

13 Q And you're also a fellow of the American College
14 of Trial Lawyers?

15 A Yes, I am.

16 Q With respect to the material that we will be
17 addressing today, you have expertise, experience
18 with privacy and information law. Can you just
19 tell us a little bit about your background and
20 your qualifications there?

21 A Sure. It was interesting when I joined the
22 Department of Justice in early 80s the federal
23 *Access to Information Act* and the federal
24 *Privacy Act* had just come into play and one of
25 my earliest areas of endeavour with the

1 department was litigation involving both the
2 *Access to Information Act* and the *Privacy Act*.
3 Subsequently when I joined McCarthy's in I think
4 it was 2001 when PIPEDA, the *Personal*
5 *Information Protection Electronic Documents Act*,
6 was introduced I was asked by Carswell if I'd be
7 interested in preparing a looseleaf book dealing
8 with privacy laws, and in fact we ultimately did
9 with two co-authors. It's called the *Law of*
10 *Privacy in Canada* and it canvasses all of the
11 various provinces, including the public sector
12 and private sector legislation where it exists,
13 the health privacy legislation in the provinces
14 that have it, as well as that we have a section
15 on the European Union and the data protection
16 laws that apply there. Now, I must say that
17 over the last year, I have not done any of the
18 heavy lifting with respect to keeping the book
19 up to date. That's fallen to Mr. Klein and
20 Mr. Brown who do most of the work now. I'm
21 still a named author, but I'm not as involved as
22 I was.

23 Q In the tradition of scholarly texts. So you
24 would agree that you could be fairly described
25 as an expert in privacy and access to information

1 laws in Canada?

2 A I think that's fair enough, yes.

3 Q And would you also agree that your expertise is
4 not with respect to specific pieces of
5 legislation that may incidentally bear on
6 privacy matters, for example at the provincial
7 level?

8 A That's correct. Or even at the federal level.
9 Particularly I'm not the expert in the
10 regulation of financial institutions and have
11 dealt with it from time to time as I do in the
12 report when it intersects with issues related to
13 privacy and the sharing of information.

14 Q And before we move on from your CV I'll just
15 note that you also served as senior counsel on
16 the Somalia inquiry and the Arar inquiry for the
17 Government of Canada?

18 A That's correct.

19 MS. PATEL: Madam Registrar, Mr. Commissioner, if we
20 could please have this marked as the next
21 exhibit.

22 THE COMMISSIONER: Very well. That will be
23 exhibit 318.

24 THE REGISTRAR: Exhibit 318.

25 **EXHIBIT 318: Curriculum Vitae of Barbara**

1 **McIsaac, QC**

2 MS. PATEL: Madam Registrar, you can take that
3 document down now. If you could please pull up
4 Ms. McIsaac's report dated November 17th, 2020.

5 Q And, Ms. McIsaac, you recognize this document as
6 the covering page of a report that you have
7 drafted for the commission, "Report for the
8 Cullen Commission on Privacy Laws and
9 Information Sharing"?

10 A That's correct.

11 Q All right. And I will just note the date. It
12 was finalized on September 17, 2020; is that
13 right?

14 A That's correct.

15 Q And the timing there was perhaps fortunate for
16 what you were required to do in terms of
17 drafting but unfortunate in terms of other
18 events. What was the event that occurred on
19 November 17th, 2020, that could bear on this
20 report?

21 A I think it was November 17th so it may have been
22 the day before or after the government
23 introduced Bill C-11, which is a new charter of
24 digital rights. And includes an extensive
25 reworking of the federal *Personal Information*

1 *Protection and Electronic Documents Act*. Now, I
2 might mention that I did take a quick look
3 through the legislation and when it -- proposed
4 legislation, and when it comes to the sections
5 dealing with the sharing or disclosure of
6 personal information without consent, which is
7 what I address in my report, the sections are
8 essentially the same as they are in the current
9 PEPIDA legislation. So there's nothing there
10 that materially affects that portion of my
11 report.

12 Q Okay. And we'll come back to that I think
13 probably a little bit later and we'll just
14 canvass it in the context of the evidence that
15 you're about to give and ensure we've got a full
16 picture of where that legislation might impact
17 what you've set out in your report.

18 MS. PATEL: Madam Registrar, if we could please have
19 this report marked as the next exhibit.

20 THE COMMISSIONER: 319.

21 THE REGISTRAR: Exhibit 319.

22 **EXHIBIT 319: Report for the Cullen Commission**
23 **on Privacy Laws and Information Sharing -**
24 **November 17, 2020**

25 MS. PATEL: Thank you. And, Madam Registrar, if

1 could you scroll down to the first page of text.

2 There we are.

3 Q And before I begin with the report itself,
4 Ms. McIsaac, I understand that there may be a
5 correction that you would like to make?

6 A Yes. Indeed. And I thank counsel for the
7 Attorney General of Canada for pointing this
8 out. Beginning at page 97 where I deal with
9 federally incorporated credit unions, I
10 mistakenly ascribe their regulatory regime to be
11 *Cooperative Credit Associations Act*, which is
12 incorrect. There are two federally incorporated
13 credit unions. Both of those are in fact banks
14 within the meaning of that term in the *Bank Act*
15 and my comments with respect to the *Bank Act*
16 would apply equally to them. Same as they would
17 for banks. And that being the case they would
18 be subject to PEPIDA, not the provincial
19 *Personal Information Protection Act*. And I
20 apologize for that error.

21 Q Thank you for clarifying. And so just to be
22 precise, the correction is one that has the
23 effect of clarifying that federally incorporated
24 credit unions are regulated under the *Bank Act*?

25 A That's correct.

1 Q And privacy --

2 A And -- I'm sorry.

3 Q And then any privacy laws, any laws relating to
4 the sharing of personal information that pertain
5 to banks would also pertain to those credit
6 unions?

7 A That's correct.

8 Q Okay.

9 A And then there was also a minor error. I
10 believe you may have sent an email out, but at
11 page 98 I believe it is, there was a footnote
12 missing and you were going to send something out
13 to counsel so they had that reference.

14 MS. PATEL: Yes. Mr. Commissioner, there was a
15 footnote missing and perhaps after our break I
16 can deal with that, but participants have been
17 advised of the omission and given the reference
18 that ought to have been there.

19 THE COMMISSIONER: Thank you.

20 MS. PATEL:

21 Q Ms. McIsaac, before I start asking you questions
22 about the substance of your report I'd like to
23 address its scope and here we're at the
24 introduction to your report page 4, and you say
25 here you've been asked by the commission of --

1 You were at the right place, Madam
2 Registrar. That's great. Thank you.

3 You've been asked by the Commission of
4 Inquiry Into Money Laundering in
5 British Columbia to prepare a report on the
6 privacy and other laws impacting the flow of
7 information, particularly personal information,
8 between various private and public sector
9 entities that either have a role in combatting
10 money laundering in Canada or that may have
11 information relevant to combatting money
12 laundering activity in British Columbia
13 specifically. And you alluded to this a moment
14 ago that really what the report focuses on is
15 the disclosure of personal information without
16 the consent of the person in respect of whom the
17 information relates; is that right?

18 A That's correct, yes.

19 Q Okay. And in focusing your report specifically
20 on that, are there areas of information, access
21 to information and privacy law, that you have
22 deliberately because of the scope of the
23 question put to you left out of this report?

24 A Yes. There's really two main areas. We may get
25 into this later, but generally speaking the

1 information regimes certainly at the provincial
2 level include both access to information and
3 protection of privacy in a single piece of
4 legislation, so I point out the federal
5 government is different in that it has an *Access*
6 *to Information Act* and a *Privacy Act*. I did not
7 deal with the disclosure of personal information
8 that might result from an access request by a
9 third party to either a -- to a government
10 institution. Although some of the case law that
11 I have cited is useful in the interpretation of
12 perhaps what constitutes an investigative body,
13 that sort of thing is based on decisions of the
14 privacy commissioner in BC relating to access to
15 information requests, but my focus was, as you
16 point out, the disclosure of personal
17 information by organizations without the consent
18 of the individual and presumably for a purpose
19 not directly related to the purpose for which it
20 was collected or the mandate of that particular
21 organization.

22 Q Okay. And in -- I'll say your report is -- can
23 be roughly broken down into three parts. You
24 first address the British Columbia provincial
25 legislative scheme, then the federal legislative

1 scheme with respect to privacy and access to
2 information laws generally, and then you address
3 specific sectors and bodies that may have
4 possession of personal information that could be
5 useful to money laundering, anti-money
6 laundering efforts.

7 A That's correct. When we move outside of the
8 privacy legislation I don't believe any of the
9 legislative regimes, the regulatory regimes make
10 much of a distinction between personal
11 information and information generally, so
12 obviously when not dealing strictly with the
13 privacy legislation I think many of the comments
14 might well apply to non-personal information as
15 well.

16 The other point that I forgot to make that
17 it is made in my report is that there is a
18 distinction between disclosure of information
19 that might not violate privacy legislation.
20 That does not automatically mean that it would
21 be not a violation of the charter in the course
22 of a criminal prosecution, and there are a
23 number of cases that I have at least provided a
24 cite for where the supreme court has dealt with
25 the distinction between the disclosure or

1 collection, if you will, of personal information
2 that may be within the scope of privacy
3 legislation, but nevertheless the court is not
4 satisfied that it meets the requirements in
5 section 8 of the charter.

6 Q In other words, you don't deal with the
7 admissibility of evidence?

8 A Absolutely not, no.

9 Q I'd like to turn to page 5, Madam Registrar, if
10 you could scroll down. Under "Limitations of
11 This Report" you say:

12 "By way of introduction, a caution must be
13 added regarding the scope of this report.
14 The report is only intended to be a
15 general canvassing of the legislative and
16 common-law restrictions that may constrain
17 the ability of the entities discussed to
18 disclose personal or other information,
19 the disclosure of which might aid
20 authorities in the combatting of money
21 laundering."

22 And just I wanted to make sure that that scope,
23 we've addressed that scope of caution there. Is
24 there anything that you'd like to add to what
25 you set out there?

1 A Yes, indeed. When I was looking at the various
2 provisions I'm basically looking at them very
3 much in the abstract, so I'm not in a position
4 to say whether a particular piece of information
5 held by a particular organization would or would
6 not depending on the circumstances be
7 disclosable. So it's a general approach looking
8 at the general parameters of what's available in
9 terms of information sharing.

10 Q And before we get into the body of the report
11 and start looking at the various governing
12 pieces of legislation, I'd like to ask you to
13 give us a little bit of a conceptual grounding.
14 First of all, at a very basic level, when we're
15 talking about privacy laws, what do they do and
16 what is -- and further to that, and it might be
17 a natural segue so I'll ask the second part now,
18 is what -- can you give us a bit of a background
19 to the history of privacy laws in Canada.

20 A Why don't I start a bit with the history, if you
21 don't mind. To the best of my knowledge the
22 issue really started to arise in the late 70s as
23 computers and the idea that there could be
24 linking, I guess as much as anything else, of
25 personal information that it could be stored in

1 a more comprehensive manner, retrieved more
2 quickly, that sort of thing. There was a task
3 force struck by the federal government in the
4 late 1970s. And then in 1977 at the federal
5 level, privacy legislation was first introduced
6 as part of the *Human Rights Act*. And it was
7 subsequent to that in 1983 that we had the
8 combination of a federal *Privacy Act* and the
9 *Access to Information Act*. And what the
10 legislation basically does is it provides
11 parameters for the collection use and disclosure
12 of personal information, and the lynchpin of all
13 of this is really consent that neither
14 governments nor corporations, private entities
15 should be collecting personal information
16 without the consent of the individual or, in the
17 case of governments, unless it's essential for
18 the delivery of a particular program that the
19 individual is entitled benefits and such that
20 they're entitled to receive.

21 And I think I can probably in the private
22 sector give you the best sort of background as
23 to what the legislation generally is trying to
24 achieve if we go to the purpose of the
25 Bill C-11, the new legislation, and the purpose

1 is set out in that bill in section 5 of what
2 will be the new private sector privacy
3 legislation.

4 "The purpose of this Act is to establish -
5 in an era in which data is constantly
6 flowing across borders and geographical
7 boundary and significant economic activity
8 relies on the analysis, circulation and
9 exchange of personal information - rules
10 to govern the protection of personal
11 information in a manner that recognizes
12 the right of privacy of individuals with
13 respect to their personal information and
14 the need for organizations to collect, use
15 and disclose information for purposes that
16 a reasonable person would consider
17 appropriate in the circumstances."

18 Q And, Madam Registrar, if you could just pull up
19 Bill C-11. I believe that we have it on hand.

20 A Yeah, that legislation, as I indicated earlier,
21 will, if and when passed, replace the *Personal*
22 *Information Protection Act* with the *Consumer*
23 *Privacy Protection Act* it's going to be called,
24 and the privacy legislation in the private
25 sector of course is focused on the personal

1 information that individuals provide primarily
2 in a commercial context. And then it also
3 creates something called the data protection
4 tribunal which will be an appeal tribunal from
5 decisions of the federal privacy commissioner in
6 some circumstances.

7 Q With respect to the purpose of this bill as set
8 out in section 5 that you just read --

9 Madam Registrar, you can scroll to page 5 of
10 the PDF that has the reference.

11 -- is it fair to say that what's expressed
12 there is an evolution of what you've described
13 as the original reasons of the -- for privacy
14 legislation in Canada? In other words, the
15 availability of information in what was, you
16 know, the dawning of the digital age and that's
17 simply something that is a concern that has
18 grown but it has [indiscernible] roots?

19 A Yes, in the private sector in particular. In
20 the public sector, though, as the legislative
21 schemes suggest, it was also part of that
22 general trend to a more open government which is
23 the access to information side of things. So
24 that there was a combination of there ought to
25 be more transparency with respect to government

1 decision-making as well as more transparency as
2 to what kind of information governments were
3 collecting, why they were collecting it and how
4 they were using it. So there was sort of a
5 combination of both factors at the public level.

6 Q And the couple of concepts that I wanted to
7 cover here is, what is the relationship of
8 privacy laws to personal information?

9 A You mean the definition of what is personal
10 information?

11 Q Yeah, that's a better way of asking my question.
12 What is understood as being personal
13 information? And I appreciate that each piece
14 of legislation will have its own definitions,
15 but if you can draw some common threads.

16 A Well, the common thread is that it's information
17 about an identifiable individual and obviously
18 the aspects of personal information that the
19 legislation is most concerned with is the sort
20 of things that we would think of as being highly
21 personal. Health information, information about
22 ethnicity, information about religion, sexual
23 orientation, obviously financial information and
24 that sort of thing. So it focuses on I think
25 what the supreme court is talking about sort of

1 a core aspect of one's private life. And of
2 course as you well appreciate when we deal with
3 government we provide government with lots of
4 information, banking information, certainly
5 information about age, ethnicity and that sort
6 of thing very often. Similarly in the
7 commercial sector it's amazing what information
8 we may provide to online shopping areas, not
9 only the banking information that we might
10 provide, but for the next thing, you know, they
11 know what size I am because I've been ordering
12 clothes from them and that sort of thing. So
13 all of that is considered in a general way to be
14 personal information, some obviously much more
15 sensitive than other.

16 Q And just to emphasize, you've said this but
17 because we are looking in particular at personal
18 information that may bear on anti-money
19 laundering efforts, financial information of an
20 individual is included?

21 A Yes. And in the continuum if you will, I think
22 the courts and privacy commissioners generally
23 thought of health information and financial
24 information as being on the more sensitive end
25 of the continuum.

1 Q And what's on the less sensitive end?

2 A Well, on the less sensitive end would be things
3 like my address, possibly a telephone number.
4 Some of those are actually dealt with as being
5 publicly available information. Now, just
6 because something is publicly available doesn't
7 mean it qualifies as such under the legislation.
8 For instance, PEPIDA provides that information
9 contained in a directory, so my telephone number
10 probably is public information because it will
11 be contained in a Bell Telephone telephone
12 directory. But that sort of information,
13 information that may be found in a public record
14 such as a real estate registry, that sort of
15 thing is considered publicly and probably
16 somewhat less sensitive because of its nature.

17 Q It's still personal information, but because
18 it's publicly available it might be given less
19 protection?

20 A That's correct. And the definition of what
21 constitutes publicly available information does
22 differ from one piece of legislation to another,
23 obviously.

24 Q Here I'm at page 8 of your report. You address
25 ten fair information principles. First of all

1 can you tell us what the source of these ten
2 fair information principles is?

3 A I think I took those actually from the
4 Government of British Columbia website. They
5 also in different formats appear in all the
6 international sites, the European Union Data
7 Protection Regulation and that sort of thing.
8 But this particular list came, as footnote
9 number 8 shows, from a Government of British
10 Columbia website.

11 Q But as you've just alluded, these fair
12 information principles, they're not a creation
13 of the Government of British Columbia?

14 A No.

15 Q Are they part of the larger body of privacy law
16 and philosophy?

17 A Absolutely. And they are essentially identical
18 to what you see in the federal privacy PIPEDA
19 legislation and the legislation of the other --
20 I think Alberta having the similar legislation
21 in the private sector to British Columbia.

22 Q I note you just looked at footnote number 8 of
23 your report. Following the reference to the
24 Government of British Columbia site from which
25 this list is taken there's a reference to the

1 International Association of Privacy
2 Professionals?

3 A That's correct.

4 Q Can you tell us a little bit about that
5 association.

6 A As it suggests, it's an organization that
7 actually does some accreditation for individuals
8 who are what we call privacy professionals. And
9 as you know, most government organizations will
10 have a department -- not a department but a
11 group within a department or an organization
12 that's focused on dealing with access to
13 information and privacy. Private organizations
14 that are subject to, for instance, BC PIPA or
15 PEPIDA are required to have a chief privacy
16 officer. This is an organization, it's an NGO
17 that provides their own accreditation. They
18 have conferences on a regular basis. They
19 provide webinars and that sort of thing.

20 Q And I won't ask you to go through each of these
21 fair information principles. I mean, they're
22 set out in your report. But with respect to the
23 issues that we've asked you to look at here, the
24 sharing of information without consent of the
25 information -- the person from whom the

1 information -- the person in respect of whom the
2 information is, which are the principles that
3 are -- that govern the restrictions or the laws
4 around such sharing without consent?

5 A Well, obviously consent itself is probably the
6 most important. The lynchpin, as I said, is
7 that information should only be collected with
8 the consent of the individual. This is much
9 more important in the context of the private
10 sector because often governments by the very
11 nature of the fact that they're delivering
12 universal programs will not be obtaining consent
13 quite the same way. But it's also informed
14 consent and that's why it says "knowledge and
15 consent," so the individual has to understand
16 what they are consenting to and how the
17 information is to be collected, what's to be
18 collected and how it will be used. And I think
19 if you go to the various privacy commissioner
20 websites across the country, they all have
21 extensive documentation and information
22 materials that they have prepared indicating
23 what constitutes an appropriate approach to
24 consent, what really is an informed consent and
25 how consent should be obtained. So that's key.

1 The other one is the limitation on
2 collection which again applies, and I think I've
3 mentioned this in the report, not only is it
4 important for an organization if it's a
5 government or private organization that is
6 disclosing personal information to stay within
7 the parameters of what's acceptable, but we have
8 to look at the flip side as well. It may be
9 okay for organization A to disclose personal
10 information, but one also has to look at the
11 question of whether organization B if it's
12 covered by the legislation has the right to
13 collect it. And that is really number 4, which
14 is the collection is limited to that which is
15 needed for the purposes identified by the
16 organization. And perhaps I can give just an
17 example when it comes to a very straightforward
18 one. If I subscribe to a magazine -- I don't
19 think anybody does that anymore, but the
20 magazine will have to have my financial
21 information, they will have to have my address
22 so that they can send me the magazine and send
23 me renewal notices and that sort of thing. But
24 in order to provide me with that magazine, they
25 don't need to know, for instance, how tall I am,

1 how much I weigh or any of that sort of stuff.
2 But that might be useful information for them to
3 pass on to other marketers. They don't need to
4 know my gender either, but that might be useful
5 information. But the point is it's -- their
6 collection of that kind of information is to be
7 limited to that which they need for providing me
8 with the service that they're going to provide
9 me.

10 Q And you've just provided an example of a private
11 organization, a for profit organization
12 collecting information, but equally these
13 principles apply to government entities?

14 A That's correct.

15 Q And then so that was the limited collection.
16 Number 5 I imagine is also -- I mean, that's
17 directly at issue in what we're talking about
18 today?

19 A Well, that's right. Because information is to
20 be used for the purpose for which it was
21 collected. So going back to my magazine
22 subscription is a fairly simple example that I'm
23 using, but the information that has been
24 collected to provide me with the magazine should
25 not without my consent be provided or sold to

1 other organizations so that they can market
2 products to me. So it has to be clear that I
3 have consented, that I understand what's going
4 to happen. And I think we all see that when we
5 subscribe for something, particularly online.
6 There's usually an opt in or an opt out. The
7 privacy commissioner certainly prefers opt in,
8 that the information I have provided can be used
9 to market other products to me or not, and I
10 have to give my consent to allow that to happen.

11 Q Then I was going to go next to the principle
12 number 10 which is just on the next page, Madam
13 Registrar, if you want to scroll down, which is
14 to provide a recourse.

15 A Yeah, well, that ties in really to the earlier
16 ones about having access to your personal
17 information and an opportunity to challenge your
18 personal information or the accuracy of the
19 personal information. And then finally
20 challenging compliance. So for instance, if you
21 are not given access to personal information
22 that you've requested or you take the position
23 that the information is inaccurate and you want
24 to have it corrected, or if your position is
25 that the information has been used improperly,

1 disclosed improperly is often what happens, then
2 you would have recourse. For the most
3 part that's recourse to -- the first level
4 anyway is to the privacy and/or *Privacy Access*
5 commissioner at the federal level or at the
6 provincial level depending on which legislation
7 is applicable to you.

8 Q Now, I'd like to go back to the summary, which
9 is at page 5 I believe, Madam Registrar. And if
10 you could scroll down a little bit further,
11 please. And down again, please. Sorry I think
12 I was wrong. There we go. We can stop.

13 You say here under the "Overview" you say:
14 "While there may be an assumption among
15 some that privacy laws in Canada act to
16 deter the disclosure of personal
17 information related to combatting money
18 laundering, it is my view that properly
19 understood they do not prohibit such
20 activity."

21 First of all, can I just ask you has it been
22 your experience in addressing privacy and
23 information sharing issues and giving advice
24 that there is an assumption that against sharing
25 of information?

1 A There certainly is. And I think we've all come
2 across it. I call it using privacy as a shield.
3 We've all listened to a news report where
4 there's been perhaps an investigation into
5 police conduct or activity or something like CBC
6 *Marketplace* where there will be an investigation
7 into the actions of a bank or similar
8 organization. And the response of the
9 organization being investigated is that well, we
10 can't disclose because of privacy laws. So
11 that's what I call using privacy as a shield.
12 And sometimes it's an accurate statement that
13 there are privacy laws don't allow the
14 information to be disclosed, but very often, as
15 I say, it's being used a as shield to protect
16 the organization from having to provide the
17 information. And then the second side of that,
18 and I think I deal with this in the next
19 paragraph, is there is a reluctance to share
20 information if you don't have to because you
21 might make a mistake and you might share
22 information that's going to result in a
23 complaint to a privacy commissioner and a
24 finding that you've been improperly sharing
25 information. So the default or easiest position

1 I think frequently is to say no, we won't if we
2 don't have to.

3 Q M'mm-hmm. And this isn't intended as a
4 criticism of privacy legislation, nor am I
5 trying to elicit a criticism from you, but is it
6 fair to say that the legislation that we're
7 about to look at is structured in such a way
8 that it disincentivizes sharing of personal
9 information but -- and does not incentivize
10 sharing?

11 A Yeah, and that's probably fair enough because
12 after all the focus of the legislation is to
13 protect personal information. So what
14 legislatures have tried to do, I mean, that is
15 the focus. Then there is a recognition that
16 there are legitimate circumstances in which the
17 information needs to be shared, should be shared
18 and they have tried to build in, as I've looked
19 at, various provisions that would allow for that
20 sharing. But by and large they allow for it,
21 they don't require it unless there's a court
22 order or subpoena. So the natural tendency I
23 think of many organizations and government
24 organizations as well would be to err on the
25 side of caution and be reluctant to disclose

1 information unless it's clear that it's
2 appropriate to do so.

3 Q And in the second paragraph here under
4 "Overview" you say:

5 "Generally the provisions that allow for
6 the sharing of personal information are
7 discretionary, not mandatory.
8 Accordingly, the principle way in which
9 Canadian privacy laws may be detrimental
10 to combatting money laundering is in their
11 perception."

12 A Well, that's correct. I think what I mean there
13 is the perception that it may be detrimental to
14 the organization to be too liberal in its
15 information sharing practices and that there is
16 no incentive, if I could put it that way, to
17 necessarily -- I think I used the term "push the
18 envelope" at some point as well.

19 Q And you go on to say:

20 "Without clear guidance as to when
21 information sharing is permitted,
22 potential information sharers will be more
23 likely to err on the side of caution and
24 to default on the position of
25 non-disclosure."

1 It's the issue we've just discussed.

2 A That's correct, yes.

3 Q And then you conclude that:

4 "In order to better combat money
5 laundering in Canada, public bodies and
6 private organizations need to have a
7 better understanding of the current laws
8 and a clearer direction from the
9 regulators as to when information sharing
10 for the purposes of combatting money
11 laundering will be acceptable."

12 And --

13 A Yes -- sorry. Go ahead.

14 Q My question was going to be, and it may be that
15 this develops just as we discuss the
16 legislation, where is that better understanding
17 going to come from? Which regulators are you
18 speaking of?

19 A I'm speaking of the privacy commissioners. And
20 obviously there's intention there, because the
21 job of privacy commissioners is to protect
22 privacy, so it is their job or their focus is
23 going to be on interpretations that protect
24 personal information. And I think generally,
25 and this isn't a criticism of privacy

1 commissioners either, they also are going to be
2 fairly conservative, if I can put it that way,
3 in terms of their guidance as to what kinds of
4 personal information can be shared. And
5 obviously the privacy legislation doesn't focus
6 on any one activity. So the laws that deal with
7 the disclosure of personal information under
8 privacy legislation are not focused on
9 combatting money laundering or indeed combatting
10 any other criminal activity, so their focus is
11 more general and I don't know to what extent
12 privacy commissioners, for instance, have turned
13 their minds specifically to the unique
14 requirements that might be out there for the
15 purposes of combatting money laundering or
16 indeed other activities such as perhaps, you
17 know, child pornography and things like that
18 which clearly have public interest imperatives
19 that need to be balanced off against the privacy
20 imperatives found in the legislation.

21 Q As public bodies and private organizations seek
22 to have a better understanding of laws and
23 regulations regarding the disclosure of personal
24 information, what role can the privacy
25 commissioners, and we're talking there's privacy

1 commissioners provincially and federally, and if
2 there's a distinction between what role they
3 could play in helping to achieve that
4 understanding at the federal and provincial
5 level I'd ask you to set that out. But what
6 role does the privacy commissioner or could the
7 privacy commissioners play in providing this
8 clarity?

9 A Well, I think they could -- I think it would be
10 a matter of looking more closely at what kinds
11 of information are likely to be held that would
12 be useful for the purposes of combatting money
13 laundering. It may be that at the end of the
14 day some kind of legislative amendments are
15 required to address money laundering
16 specifically. We already have legislation at
17 the federal level that clearly information can
18 be disclosed to FINTRAC for the purposes of
19 money laundering and that legislation, but I
20 think it might be that a better understanding on
21 everybody's part, which of course is part of the
22 focus of this commission, as to what information
23 is out there, what information is needed by
24 various bodies and how that can best be shared
25 would go a long way towards perhaps legislative

1 amendments, perhaps clarity with respect to
2 interpretation bulletins. The commissioners do
3 issue interpretation type bulletins. They're
4 obviously not binding. The courts have to
5 ultimately make those decisions, but guidance of
6 that sort would be perhaps more [indiscernible].

7 Q Do privacy commissioners offer more targeted
8 advice or opinions to entities that are
9 concerned with their information sharing
10 practices?

11 A Yes, they do, in a general sort of way. I think
12 all of them have issued guidelines that might
13 address particular aspects of, you know,
14 online -- getting consent from children, for
15 instance, would be a good example because the
16 legislation doesn't address things like that.
17 So there are instances of which the various
18 privacy commissioners have issued guidance on
19 specific topics and that sort of thing. I'm not
20 aware of anything that deals specifically with
21 money laundering and information sharing in that
22 sense.

23 Q I'm going to move now into the section of your
24 report that looks in overview fashion at the
25 privacy and information sharing laws governing

1 in British Columbia. And I understand from your
2 report that there is three pieces of legislation
3 that bear on this issue, and if you could just
4 confirm. I've got the *Freedom of Information*
5 *and Privacy Protection Act* and this is an area
6 that's rife with acronyms, so FIPPA?

7 A That's right.

8 Q That's right.

9 A And that governs basically provincial government
10 departments and organizations and there's a list
11 in the various schedules of who's covered, local
12 bodies as well.

13 Q And then the second piece of legislation is the
14 *Personal Information Protection Act*?

15 A That's right. That deals with the private
16 sector.

17 Q Thank you. And then the last piece of
18 legislation that you look at in this section of
19 the report is the *Privacy Act*?

20 A That's right. And not to be confused with the
21 federal *Privacy Act*, the BC *Privacy Act* creates
22 a tort of invasion of privacy statute.

23 Q All right. So I'd like to -- Madam Registrar,
24 you can go to page 10 of the report.

25 I'd like to start with the *Freedom of*

1 *Information and Protection of Privacy Act*, and
2 you've already said that this applies to
3 government bodies. Can you just tell us in
4 broad strokes what this act does.

5 A Well, as I said at the very beginning it really
6 has two parts. The Freedom of Information side
7 of it is a mechanism whereby individuals can
8 make an application to a government public body
9 or local public body, as I set out here at
10 page 10, for access to information. Then of
11 course there are a whole series of situations
12 under which that information can be denied on
13 the basis of various criteria. The second
14 part deals with the protection of personal
15 information, which includes limitations on the
16 collection use and disclosure of that
17 information. And also a provision whereby an
18 individual can obtain access to their own
19 personal information held by a public body or
20 local public body.

21 Q And we'll be focusing on part 3 of FIPPA in our
22 discussion today which has to do with
23 restrictions on the sharing of personal
24 information. Can you just review what are --
25 first of all what are the restrictions on the

1 other end of it, on the collection of personal
2 information?

3 A Well, same as the restrictions that we dealt
4 with, I think I actually have it, the collection
5 of personal information is set out I think as
6 well in part 3 and it deals with the limitations
7 which we discussed earlier. Information is to
8 be collected only for the purposes of a program
9 that the public body is engaged in. It's to be
10 limited to the appropriate amount of
11 information. Consent is to be obtained. So the
12 factors that we looked at earlier in the ten
13 fair information principles are generally found
14 to be in that part of FIPPA as well, dealing
15 with the collection and use of personal
16 information.

17 Q Before we move into the disclosure of personal
18 information you've noted in your report that the
19 BC government publishes a FIPPA policies and
20 procedures manual.

21 A That's correct, yes.

22 Q And what type of guidance does that provide?

23 A Well, it's general guidance for the most
24 part but it assists bodies both in terms of what
25 to do if they receive a request for personal

1 information under the -- or actually any kind of
2 information under the access to information
3 provisions in the statute and it also deals with
4 a number of instances giving some general
5 clarity and advice with respect to circumstances
6 where the information can be disclosed under the
7 disclosure without consent provisions.

8 Q Okay.

9 A So it's sort of a user manual, if you will, but
10 in many ways it's kind of general and I have to
11 emphasize that one always has to go back to
12 specific circumstances of any particular
13 situation, both with requests for personal
14 information and/or whether it can be disclosed.

15 Q And at page 15 of your report, you summarize
16 and, Madam Registrar, if you could go there.

17 At page 15 of your report you summarize the
18 principle means conditions in which information
19 can be shared without consent?

20 A That's right. What I've done here, and I
21 certainly may have included some that will be
22 less relevant, I've looked at the various
23 provisions of sections 32 and 33 which deal with
24 disclosure without consent, and I have
25 identified those which may be relevant to the

1 sharing of personal information in the context
2 of combatting money laundering. So I've left
3 out, for instance, those that deal with
4 disclosing personal information for the purpose
5 of, you know, locating next of kin of a person
6 who is deceased and those sorts of provisions
7 that seem to me not to be particularly relevant
8 to the issues.

9 Q I appreciate that. And I won't -- I mean, your
10 report speaks for itself. You set out the
11 legislative provisions and instances of their
12 interpretation where available. I just want to
13 highlight a few of them. So can you discuss the
14 first one that you list which is for the
15 purpose -- consistent with the purpose for which
16 the information was collected, obtained or
17 compiled.

18 A That's right. So my understanding of that
19 provision is that often for the purpose of
20 delivering a program or implementing the
21 purposes for which the information was
22 collected, it may be necessary to disclose it,
23 for instance, to provide banking information,
24 that sort of thing. I think what we have to be
25 careful about here, though, is that you have to

1 look at why the information was collected and
2 what is really consistent with that. And I
3 think when we get to that section there is some
4 guidance that was provided both by the
5 commissioner and by the BC manual that there are
6 limitations on what is consistent and what the
7 purpose is, why it was compiled in the first
8 place.

9 Q Let me ask you, if a public body had an express
10 legislative mandate to -- an express legislative
11 anti-money laundering mandate, would that allow
12 it to share information collected for that
13 purpose, or is --

14 A Yes. If it was collected for that purpose. And
15 I think this is where one has to be careful.
16 Particularly with regulatory agencies that may
17 have a money laundering function or anti-money
18 laundering function, the information may,
19 however, have been collected for some other
20 purpose. So again it is going to have to be
21 fact specific as to whether the particular
22 information in question was actually collected
23 for the purposes of combatting money laundering
24 or it was collected for some other purpose and
25 then you have to get into the question as to

1 whether disclosure would be consistent to that
2 original purpose.

3 Q And is there -- is there connection between the
4 purpose for which information is collected and
5 communication to the person from whom it's
6 collected about that purpose?

7 A Indeed, that is the consent side of things. So
8 as I am providing personal information I'm
9 supposed to do so with consent and that goes
10 back to the disclosure provisions that we talked
11 about in the fair information principles is that
12 there should be a privacy policy typically is
13 what's required that sets out why you're
14 collecting the personal information, how you're
15 going to use it and whom you're going to
16 disclose it to.

17 Q So for an entity that's sharing information for
18 anti-money laundering purposes, the person from
19 whom that information is collected in the first
20 place ought to know that that's one of the
21 purposes of collection?

22 A If that's a direct purpose of collection,
23 absolutely.

24 Q The next condition under which information can
25 be shared about consent I'd like to touch on at

1 page 17 of your report -- I know you have it
2 there with you if you want to look, to follow
3 along with me -- is "in accordance with an
4 enactment of British Columbia, other than FIPPA,
5 or Canada that authorizes or requires
6 disclosure"?

7 A Yes.

8 Q And you note, of course, that the most
9 significant piece of legislation here that would
10 authorize disclosure without consent at the
11 federal level is the proceeds of *Crime (Money*
12 *Laundering) and Terrorist Financing Act*?

13 A Yes, to the extent it requires the disclosure of
14 personal [indiscernible] information. Another
15 example would be if information is required to
16 be disclosed for purposes of regulation. So the
17 legislation requires the public body to disclose
18 certain personal information to, for instance,
19 the BC financial authority for the purposes of
20 regulation of some kind. The most obvious one
21 is obviously FINTRAC.

22 Q I'd like to touch next on at page 19 you address
23 information sharing "for the purposes of
24 licensing, registration, insurance,
25 investigation or discipline of persons regulated

1 inside or outside Canada by governing bodies or
2 professions and occupations." And if you could
3 describe what this might encompass.

4 A Well, it struck me that that one might apply to,
5 for instance, the Law Society of British
6 Columbia or other licensing bodies that may be
7 licensing real estate agents, that if there were
8 inquiries or the necessity of sharing
9 information for the purposes of dealing with a
10 similar licensing body in another jurisdiction I
11 think that might also apply to chartered
12 accountants, so there is a specific provision
13 that allows sharing of that kind of information
14 without specific consent.

15 Q The next one that I wanted to look at is
16 33.1(2) (a) the disclosure by a law enforcement
17 agency, and this begins at the bottom of page 19
18 of your report. I'd like to discuss it in
19 connection with 33.2(i) which you discuss at
20 page 21 because both have to do with disclosure
21 by a law enforcement agency or to a law
22 enforcement agency. So first can you describe
23 what is permitted by 33.1(2) (a), and again, this
24 is the one that's at the bottom -- the
25 discussion starts at the bottom of page 19 and

1 probably --

2 A Yeah, I think the first thing we have to
3 distinguish is between there are two provisions.
4 One allows for disclosure generally. The other
5 is limited to disclosure within Canada only.

6 Q And I understand that the disclosure within
7 Canada only is the second provision?

8 A That's right, 33.2(i).

9 Q And since we're there, and that's at page 21 of
10 your report, who is permitted to make
11 disclosures under this section?

12 A Sorry, I can't quite see it on my screen. Okay.
13 It deals with a specific investigation and I
14 think the terms are not defined in the section,
15 but if you look at the earlier definitions in
16 FIPPA you'll see that there are some definitions
17 and the FIPPA manual provides an example of
18 providing more clarity as to a particular
19 provision dealing with what definitions can be
20 used for the term investigation likely result
21 with a view to. But it's very specific, this
22 particular provision, that it deals with a
23 specific investigation. And I think that's the
24 most important part of it. Not a fishing
25 expedition or I'd like to get some information,

1 but the disclosure to the public body or to the
2 law enforcement agency must be in the context of
3 a very specific investigation, as I understand
4 it.

5 Q So this provision enables any public body to
6 make disclosure to a law enforcement agency to
7 assist in a specific investigation and --

8 A Theoretically, yes.

9 Q And so what it seems to presume is a knowledge
10 of an existing investigation into a specific
11 matter?

12 A Yes. And I presume that this would result only
13 in circumstances of a request from the receiving
14 body which would come to the public body and
15 say, I am -- we are conducting an investigation
16 into such and such and in that context we meet
17 these criteria and we'd like to be have certain
18 information.

19 Q So it's not -- it doesn't -- it seems that the
20 provision doesn't contemplate a spontaneous or a
21 voluntary disclosure of information to law
22 enforcement from the public agency?

23 A I wouldn't have thought so because the public
24 agency -- or pardon me, the public body would
25 have to make a determination that the criteria

1 different -- relates to law enforcement as well
2 but is a different provision allowing
3 disclosure. Can you describe this.

4 A All right. Well, there are a number of criteria
5 and I think the heading that I have there may be
6 a summary of what this provision actually says
7 which is set out at page 15. So the law
8 enforcement agency may disclose if it is to
9 another law enforcement agency in Canada or a
10 law enforcement agency in a foreign country
11 under an arrangement, written agreement or
12 treaty or provincial or Canadian legislative
13 authority. And I've noted in the footnote on
14 page 15 the definition of law enforcement from
15 FIPPA which means policing, including criminal
16 intelligence operations, investigations that
17 lead or could lead to a penalty or sanction
18 being imposed or proceedings that lead or could
19 lead to a penalty or sanction being imposed.
20 And that is from the definitions in schedule 1
21 of FIPPA.

22 Q And in contrast to 33.2(i) which we've looked at
23 previously this allows disclosure only by an
24 entity that either is a law enforcement agency?

25 A Yes.

1 Q Or has some law enforcement function; is that
2 right?

3 A That's correct. Yeah.

4 Q Okay. And I just note that you at page 20 of
5 the report that you -- that the FIPPA manual
6 identifies examples. It's not an exhaustive
7 list but examples of public bodies with law
8 enforcement responsibilities that don't come
9 within the definition of law enforcement
10 agencies, and they give, for example, the
11 BC Financial Services Authority as an instance?

12 A Yes.

13 Q And municipal bylaw enforcement officers?

14 A Yes.

15 Q And so those are public bodies that despite not
16 being law enforcement per se can share
17 information with law enforcement?

18 A That's correct, provided that the criteria are
19 met. We have the necessary agreements in place.
20 And I would also point out that the FIPPA manual
21 alludes back to the discussion that we had
22 earlier which is that "public bodies have the
23 discretion not to disclose personal information
24 to other public bodies or law enforcement
25 agencies if the request relates to an

1 investigation that is not focused and where
2 personal information is sought on suspicion,
3 surmise or guesses." So the onus goes back on
4 the disclosing organization to be satisfied that
5 all of the criteria are met. Quite frankly even
6 if they are satisfied they are all met, there's
7 no compulsion to actually disclose the
8 information.

9 Q And then I'd like to turn, so we've covered of
10 course it's also you can share information
11 without consent of the individual subject to a
12 legal requirement such as a subpoena or a
13 summons?

14 A That's right. In fact that's the only one as I
15 understand it in all of the legislation that is
16 a mandatory sharing. Of course there's
17 mandatory sharing that arises from other
18 legislation such as the money laundering
19 legislation and disclosures that are required to
20 FINTRAC. But within the privacy legislation
21 itself.

22 Q One other section that appears to me to create a
23 mandatory sharing is the public interest
24 override, and you discuss this at page 22. And
25 the public interest override, I understand, is a

1 provision that's not unique to FIPPA.

2 A No.

3 Q Okay. Does it appear in each of the pieces of
4 privacy legislation?

5 A Certainly it appears in the federal *Privacy Act*.
6 There is a provision for a public interest
7 override there. And I think the other
8 provincial statutes do as well. I don't think
9 it appears in quite those same terms in the
10 private sector legislation, PEPIDA or PIPA. But
11 I wouldn't call it mandatory either because it
12 is a discretionary provision, and what you see
13 is that the discretion to make the determination
14 as to whether the public interest in fact
15 requires the disclosure is with the head of the
16 institution in question.

17 Q Right. The mandatory aspects comes from if the
18 determination is made that it is in the public
19 interest --

20 A Yes. Right.

21 Q - to disclose, you must disclose?

22 A That's right. But that it's based on the
23 discretionary determination in the first place
24 as to whether the public interest overrides it
25 or not.

1 Q So the official could be wrong in two ways.
2 They could be wrong in determining that the
3 public interest doesn't apply; they could be
4 wrong in determining that it does apply. What I
5 mean is that the results could be wrong in two
6 ways. One is you could have wrongful disclosure
7 and the other way you could have that you could
8 be wrong in determining that you ought not to
9 disclose?

10 A That's correct. And the other important part of
11 those sections particularly when it comes to the
12 disclosures that might be related in some way to
13 money laundering is subsection 3 which requires
14 disclosures if practical.

15 Q Sorry, can you repeat the connection there to
16 the money laundering concern.

17 A Well, before disclosing personal information
18 under the public interest override there is a
19 requirement in subsection 3 that the head of the
20 public body must, if practicable, notify any
21 third party to whom the information relates and
22 the commissioner. So before disclosure, if it's
23 at all possible, one should advise the
24 individual to whom the information relates, and
25 you're also supposed to give prior disclosure or

1 prior notice, pardon me, to the commissioner.
2 And the federal statute works the same way, the
3 federal *Privacy Act*. So this is an unusual
4 provision that is supposed to be used sparingly.
5 And then subsection (4) provides that if it's
6 not practical to give the disclosure beforehand
7 you must do it as soon as practical afterwards.

8 Q Is there a judicial consideration of what is
9 practicable under section 3 that you're aware
10 of?

11 A I am not aware of any. That doesn't mean there
12 isn't some, but I wasn't -- I'm not aware of
13 any, didn't find any when I was doing my
14 research.

15 Q I'd like to move on to disincentives to
16 disclosure under part 3.

17 A Just going back to that for a moment. The
18 circumstances in which I have seen that
19 provision come into play relate mostly to public
20 health issues and perhaps issues where somebody
21 has gone missing, so that it's not practical to
22 tell the person that you're going to advise
23 information that you might have about their
24 whereabouts because it's urgent that the
25 disclosure be made. So I've seen it in the

1 public health context and I've seen it in the
2 context of missing persons, mostly at the
3 federal level. So it's simply not practical in
4 that sense to advise ahead of time. I do not
5 believe it would apply because it's not
6 practical to advise ahead of time because it
7 might discourage or alert the individual that
8 they are being investigated or something along
9 those lines.

10 Q Moving to disincentives to disclosure under
11 FIPPA, what are the consequences of wrongful or
12 let's say mistaken disclosure, wrongful
13 disclosure being simply by that I mean
14 disclosure that's not in accordance with the act
15 and mistaken, being perhaps you were relying on
16 one of the legislative conditions for releasing
17 information but it turns out that you were
18 incorrect in your assessment?

19 A Well, let's deal first with the more usual one
20 which would be I think in this context a
21 disclosure where you thought you were doing the
22 right thing and it turns out the privacy
23 commissioner disagrees and that disclosure was
24 not in accordance with one of the provisions.
25 In that case the privacy commissioner would

1 likely issue a report and that report would take
2 the public body to task for having disclosed
3 personal information in a context that didn't
4 meet one the criteria in the disclosure
5 provisions.

6 There are other sections that aren't really
7 pertinent here that deal with data breaches and
8 deliberate disclosures of information perhaps by
9 a rogue employee that ought not to have been
10 disclosed, but in this context the most
11 pertinent one would be a misinterpretation of
12 the legislation, a disclosure of personal
13 information and a finding subsequently by the
14 privacy commissioner, usually on a complaint,
15 that the disclosure was contrary to the
16 provisions of the legislation, which is not a
17 monetary sanction or anything of that nature but
18 it's certainly a blow, if you will, to the
19 reputation of the organization, or could be.

20 Q The reputational consequences to such a
21 disclosure?

22 A That's right.

23 Q Okay. And then the more serious type of
24 disclosure is where it's not based on a mistake
25 I understand can amount to an offence under the

1 act?

2 A That's right. You know, deliberate breaching of
3 the disclosure provisions, again not a -- data
4 breaches have to be reported to the privacy
5 commissioner, and there are provisions for,
6 could be a number of class actions relating to
7 inadvertent data breaches and that sort of
8 thing. But for our purposes the most important
9 would be the reputational hit that an
10 organization may not wish to take by stretching
11 the envelope and disclosing personal information
12 if they're not absolutely certain that it's
13 appropriate to do so.

14 Q I'm going to move on to the second piece of
15 BC legislation, and my intention in going
16 through FIPPA in some detail was to provide the
17 framework for conditions for disclosure and to
18 set out what some of the disincentives to
19 wrongful or mistaken disclosure might be. So
20 except to the extent where the *Personal*
21 *Information Protection Act* diverges from FIPPA I
22 don't intend to go into it in greater detail.

23 A All right.

24 Q Can you start by telling the Commissioner what
25 is the application of the *Personal Information*

1 *Protection Act* in BC?

2 A All right. You'll find that at page 25 of my
3 report where I've set out the definition of an
4 organization. And that basically is everybody
5 except the ones that are excluded. So in that
6 sense it's slightly broader than PEPIDA because
7 PEPIDA applies to commercial activities and to
8 the activities of federal works and undertakings
9 both in their commercial capacity and with
10 respect to their employees. PIPA is broader
11 because it applies to employees. It applies to
12 unincorporated associations. So you don't have
13 to actually be involved in a commercial
14 activity, but you'll note that it does not apply
15 to the organizations or the activities set out
16 in (a) through (e). And then there are also
17 some categories of personal information that
18 aren't covered and it's not intended to deal
19 with some of the aspects of civil litigation and
20 court proceedings.

21 Q Okay. Just to clarify, because we haven't
22 gotten to the federal legislation yet, PEPIDA,
23 you're speaking of the parallel federal act?

24 A That's correct, yes, the private sector federal
25 act.

1 Q Okay. When it comes to the use of personal
2 information that's collected by organizations
3 governed by PIPA, what are the restrictions on
4 their use of that information?

5 A Again it's the same principles really as we
6 looked at with FIPPA. The information must be
7 collected with consent for a reasonable purpose,
8 and it must be only used or disclosed within the
9 confines of what is reasonable and what has been
10 consented to. There are also requirements with
11 respect to the organization's responsibility.
12 Generally that includes disclosure provisions
13 such as privacy policies, having an individual
14 who is in charge, a privacy officer to whom
15 complaints can be made, to whom questions may be
16 posed and that sort of thing.

17 Q And at page 29 you summarize the provisions that
18 are most likely to be relevant to -- the
19 provisions of PIPA most likely to be relevant to
20 the disclosure without consent of personal
21 information for the purposes of combatting money
22 laundering?

23 A Yes, and again what I have done -- these are all
24 found at section 18 of PIPA, and what I've done
25 as I did with the FIPPA legislation is I haven't

1 set out all the circumstances under which
2 information can be disclosed without consent. I
3 have identified those which struck me as being
4 the ones that might be most likely to apply to a
5 circumstance where an organization wants to
6 disclose information related to combatting money
7 laundering.

8 Q I was wondering with respect to 18.1(c) which
9 the first bullet point at 29 is:

10 "It's reasonable to expect the disclosure
11 with the consent would compromise an
12 investigation or proceeding and the
13 disclosure is reasonable for purposes
14 related to an investigation or a
15 proceeding."

16 A Right.

17 Q And then the fourth bullet point:

18 "The disclosure is to a public body or law
19 enforcement agency in Canada, concerning
20 an offence under the laws of Canada or a
21 province, to assist an investigation, or
22 in the making of a decision to undertake
23 an investigation, to determine whether an
24 offence has taken place or to prepare for
25 the laying of a charge or the prosecution

1 particular case must first exist. An
2 organization must have a reasonable belief
3 that the individual who is the subject of
4 the investigation contravened a law."

5 So again what you're doing is either if this is
6 to be a voluntary disclosure the organization
7 making the disclosure has to meet those
8 requirements and has to be an investigation and
9 they have to conclude that there is a reasonable
10 belief that the individual who is being
11 investigated contravened to law. The *Surrey*
12 *Creep Catcher* case related to one of these
13 vigilante groups that were investigating
14 individuals and collecting information about
15 people they thought might be involved in
16 inappropriate activities, either with children
17 or other individuals.

18 Q And can you tell us a little bit about what the
19 complaint was there?

20 A Well, the complaint was that they were
21 collecting this information improperly and it's
22 in the context of this that the -- I don't have
23 the case in front of me, that the commissioner
24 made the determination or gave these outlines
25 and criteria that are useful in determining what

1 criteria have to be met in order to have an
2 actual investigation. The term "proceeding" of
3 course is also defined in the legislation. And
4 again with reference to another decision of the
5 commissioner, a union's investigation of a
6 potential violation of a breach, the labour
7 relations code, included a proceeding. So there
8 are terms and limitations on what actually
9 constitutes appropriate circumstances, and again
10 it's up to the organizations that's making the
11 disclosure to be satisfied that all of these
12 criteria have been met. And again the emphasis
13 may well be on unless one is 100 percent certain
14 to simply say, I'm going to not bother
15 disclosing this information because I cannot be
16 totally satisfied that I meet all the
17 appropriate criteria.

18 Q Again it's a discretionary decision to disclose
19 or not?

20 A A discretionary decision even if there's a
21 request for the information from the other
22 organization.

23 Q Right.

24 A So it can be based on a request or it can be
25 based on the basis of a voluntary proactive

1 disclosure.

2 Q Subject of course to the receipt of a summons or
3 a subpoena again, which would --

4 A Well, of course, yes. Yes.

5 Q -- take the discretionary part out of it. And
6 then again as with FIPPA there's disincentives
7 to wrongful or mistaken disclosure under this
8 act. Can you please describe what those are?

9 A Well, those are the same. There is an
10 investigation by the privacy commissioner and a
11 finding that the information was disclosed
12 improperly contrary to the legislation, so that
13 is the reputational harm again. And then there
14 may be circumstances depending on how the
15 information was released or the reasons it was
16 released and such where the *Privacy Act* and the
17 right to sue for breach of privacy can come in.
18 Perhaps unlikely in a circumstance like this
19 where there's a sort of honest mistake, if you
20 will, but certainly a possibility that you'd be
21 faced with legal action even if it weren't
22 successful.

23 Q And then that brings us to the final piece of
24 legislation in the general overview of
25 British Columbia privacy and access to

1 information law which is the *Privacy Act*, and
2 can you just describe what that adds to what
3 we've already discussed.

4 A Yeah, maybe by just a way of a bit of
5 background. In Ontario and most of the other
6 provinces -- there are a couple that do have
7 similar legislation -- there is no statutory
8 report of invasion of privacy, and the Ontario
9 courts -- let me see, 2012 in the decision I
10 mentioned there *Jones v. Tsige* I think it's
11 pronounced, recognized a common law cause of
12 action for what they call intrusion upon
13 seclusion, and the elements of that tort are set
14 out on page 33. There are really three of them,
15 the main one being in that case that the conduct
16 had to be intentional or at least reckless. The
17 common law does not require proof of harm to a
18 recognized economic interest but where there was
19 no tangible economic loss of any kind, damages
20 are likely to be fairly nominal.

21 In British Columbia, however, you have the
22 *Privacy Act* which actually creates a statutory
23 tort similar to the common law tort of intrusion
24 upon seclusion. The BC courts have, however,
25 ruled that because you have the statutory tort

1 available that they will not recognize a
2 comparable common law tort and there are -- I've
3 sited the *Demcak* case. There are a couple of
4 more recent cases which have reiterated the same
5 position with respect to the fact that there is
6 no common law tort of invasion of privacy in
7 British Columbia.

8 The elements of the tort are set out at
9 page 34. Again you don't have to have proof of
10 damages, but the person has to have willfully
11 and without claim of right violated the privacy
12 of another person. Excuse me, I just seem to
13 have lost my --

14 Q That's all right. I think for our purposes --

15 A You can see me, but I can't see you. There we
16 are.

17 Q All right. For our purposes I think that the
18 importance of the *Privacy Act* is that what it
19 adds to is to the array of consequences to
20 wrongful disclosure of information that can act
21 as a disincentive to information sharing.

22 A That's correct. Now, I think it's fair to say
23 in most circumstances a disclosure either under
24 PIPA or FIPPA that is made in good faith and is
25 not made let's say willfully and without claim

1 of right would not give rise to a successful
2 suit under the privacy legislation. Of course
3 we all know that that doesn't deter plaintiffs
4 from commencing litigation if they think there's
5 any chance of getting somewhere with it. So the
6 fact that it might not be successful wouldn't
7 necessarily mean it's not going to happen. But
8 it is perhaps not that much of a disincentive,
9 but it is a disincentive to some extent.

10 Q Okay. I'd like to move to what I think will --
11 because we've covered a lot of ground on basic
12 principles and how the statutes work. I'd like
13 to move to a fairly brief overview of the
14 federal privacy legislation.

15 MS. PATEL: So I think that this is probably actually
16 a good moment to take our break,
17 Mr. Commissioner. If you agree.

18 THE COMMISSIONER: All right. Thank you, Ms. Patel.
19 We'll take 15 minutes.

20 THE WITNESS: Thank you.

21 THE REGISTRAR: The hearing is now adjourned for a
22 15-minute recess until 11:14 a.m. Please mute
23 your mic and turn off your video. Thank you.

24 **(WITNESS STOOD DOWN)**

25 **(PROCEEDINGS ADJOURNED AT 10:59 A.M.)**

1 **(PROCEEDINGS RECONVENED AT 11:14 A.M.)**

2 **BARBARA McISAAC, for the**
3 **commission, recalled.**

4 THE REGISTRAR: Thank you for waiting. The hearing
5 is resumed, Mr. Commissioner.

6 THE COMMISSIONER: Thank you, Madam Registrar.

7 Yes, Ms. Patel.

8 **EXAMINATION BY MS. PATEL (continuing):**

9 Q Ms. McIsaac, I'm moving on to the federal
10 legislative scheme and here for your reference
11 we're at page 40 of your report. What are the
12 principal pieces of legislation that apply
13 federally?

14 A Federally there will be two. There will be the
15 *Privacy Act* the federal *Privacy Act* and the
16 federal *Personal Information Protection*
17 *Electronic Documents Act* or PEPIDA.

18 Q Okay. And --

19 A I was just going to say it's important to note
20 that at the provincial level you have one piece
21 of legislation that deals with access to
22 government information, including personal
23 information as well as the protection of
24 personal information held by government
25 institutions. Federally there are two pieces of

1 legislation. The *Privacy Act* deals with the
2 collection, use and disclosure of personal
3 information by government agencies, government
4 [indiscernible] *Access to Information Act* deals
5 with the requests to government departments for
6 access to information, including non-personal
7 information, and there are two commissioners so
8 there's a bit of a tension sometimes between the
9 access side of things and the privacy side of
10 things because you have this split between both
11 of the legislation in two different
12 commissioners.

13 Q And to whom does the *Privacy Act* apply? Just
14 to --

15 A Well, it applies, they are called government
16 institutions, but basically as I've set out here
17 it's any department or ministry of the
18 Government of Canada, so that would be all
19 departments. There's bodies listed in the
20 schedule, so for instance from our point of view
21 FINTRAC, the Office of the Superintendent of
22 Financial Institutions, organizations of that
23 nature, not actually government departments are
24 covered, and then it covers a number of Crown
25 corporations again set out in the *Financial*

1 *Administration Act* and then there are schedules
2 that set out these various organizations and who
3 in the organization is considered to be the head
4 of the government institution.

5 Q And PEPIDA applies to whom?

6 A PEPIDA applies to organizations with respect to
7 their commercial activities, and we have to go
8 to the definition of -- well, we'll probably get
9 there, but it's focused on the commercial
10 activities of organizations. Then it also
11 covers the commercial activities of federal
12 works and undertakings, so that would include
13 the banks, airlines, telecommunications
14 providers and in that context it also applies to
15 their employees. And of course these are
16 constitutional issues as to the scope of the
17 legislation dealing with the private sector.

18 Q And as with the British Columbia legislation
19 both pieces of legislation set out restrictions
20 on the collection and use of personal
21 information; is that right?

22 A That's correct. The federal *Privacy Act* is much
23 older of course and whereas the information --
24 the legislation in BC, the FIPPA legislation in
25 BC, Alberta, Ontario to some extent and the

1 other provinces follows a pattern. The
2 *Privacy Act* federally is a bit out of date. And
3 I know that there's an initiative underway as we
4 speak by the Department of Justice. They're
5 collecting comments and such, and I would expect
6 that perhaps in the -- well, depends, maybe in
7 the next year we would see new privacy
8 legislation for the public sector introduced.

9 Q At page 43 and 44 of the report, you set out the
10 restrictions on sharing of personal information
11 and conversely at the bottom of 43 you start to
12 list the provisions that are likely to be
13 relevant to combatting money laundering, the
14 ability to share information.

15 A That's correct. And much like the
16 BC legislation these are all the information may
17 be shared, you do not have to share it, they're
18 not compulsory sharing obligations. Some of
19 them are focused on proactive sharing. Some of
20 them require a request before the information
21 can be shared. Of course again with the
22 exception of the subpoena power or court order.

23 Q Are there any differences in the *Privacy Act*
24 between the *Privacy Act* and FIPPA with respect
25 to the ability to share information without

1 consent, any significant differences between the
2 conditions in which information can be shared
3 that should be highlighted?

4 A Yes. I think a couple of the most important
5 ones are the two of them, there are some --
6 there are some good case law that I have noted
7 that is not different, but it deals with this
8 idea of the consistent use, because one of the
9 things that comes up I think occasionally is
10 information that was collected for one purpose
11 and then is to be disclosed or even used for
12 another purpose and the issue that arises is is
13 it consistent or not. And we saw in the
14 discussion of the FIPPA legislation that
15 BC manual had provided some guidance as had the
16 commissioner with respect to consistency. And
17 the courts have done so as well, particularly
18 the Supreme Court of Canada in the *Bernard* case,
19 which is referenced at the top of page 46. And
20 I think one thing that should be kept in mind,
21 these pieces of legislation are all focused on
22 the same issues and the same questions that
23 often something like the *Bernard* decision, since
24 it's a Supreme Court of Canada decision dealing
25 with this issue of what constitutes a consistent

1 use would also be applicable in the provincial
2 context because the terminology and such is much
3 the same. So I think much guidance would be
4 achieved by looking at the supreme court
5 decision in cases like this with respect to how
6 the same terminology would be interpreted in
7 British Columbia.

8 Q And is there anything in the legislative
9 provisions themselves that indicates either a
10 greater or a more restrictive ability to share
11 information, share personal information --

12 A Yeah, I think a couple are somewhat more
13 restrictive. If we look for instance -- these
14 are all found in subsection 8(2) of the
15 *Privacy Act* and I think in particular 8(2)(e),
16 which deals with the sharing of law enforcement
17 agencies.

18 Q You're right, page 44.

19 A The discussion is at page 47.

20 Q All right.

21 A To an investigative body specified in the
22 regulation. So rather than having a definition
23 of investigation and such which may be somewhat
24 more elastic, under the federal legislation you
25 may only disclose to those bodies that are

1 specified in the regulations. And I think we
2 set out in appendix C to the report those bodies
3 that are listed in the regulation that's
4 applicable. So there is a more specified and
5 confined group of investigative bodies so just
6 because you might think you are an investigative
7 body doesn't mean that the information will be
8 disclosed to you; you also have to be specified
9 in the regulations.

10 The other one I think that is important is
11 sub(f) because sub(f) deals with the sharing of
12 information with investigative bodies at the
13 provincial or international level. So there is
14 a provision for the sharing of information in
15 those contexts, but there is a very specific
16 test which I have set out at page 48. So key,
17 there has to be an agreement of some kind or an
18 arrangement. And I think there have been a
19 couple of cases where -- there are two kinds of
20 agreements that seem to have been in place. One
21 of them is a more general agreement between the
22 province and the Government of Canada. So it's
23 not specific to organization A or B or to a
24 particular department. It's more of a blanket
25 agreement for the sharing of information. The

1 tendency now is to move more towards a specific
2 agreement. So for instance, take the aviation,
3 the CATSA, the Canadian Aviation Transport
4 Security Authority, they would have specific
5 arrangements by way of agreement with provincial
6 police forces for the purposes of disclosing the
7 information as opposed to usually operating
8 under a broader government-wide agreement. So
9 one of the things is there has to be some kind
10 of agreement. The requesting institution must
11 be of a kind listed in the provision, so it has
12 to be an institution of the provincial
13 government or an international government. For
14 the purpose of combating money laundering,
15 typically in my view those would be law
16 enforcement agencies and that sort of thing
17 specifically. And then --

18 THE COMMISSIONER: Ms. McIsaac, I am sorry to
19 interrupt, but when you turn away from the
20 screen and are reading, I think what happens is
21 your voice either becomes muted or otherwise
22 garbled by the microphone.

23 THE WITNESS: Oh, sorry, okay.

24 THE COMMISSIONER: That's fine. Thank you.

25 THE WITNESS: I'm going to -- because it's late in

1 the day here in Ottawa I'm going to turn a light
2 on, because the reason I was doing that was so I
3 could see.

4 THE COMMISSIONER: Of course.

5 THE WITNESS: Is that still okay?

6 THE COMMISSIONER: That's just fine. Thank you.

7 THE WITNESS: Okay. Now I can see better without
8 turning away. Thank you. I was just going to
9 say that the requesting organization needs to
10 specify the purpose for which it's requesting
11 the information in the first place as well, so
12 again there are a number of criteria which are
13 perhaps difficult in some circumstances to be
14 certain have been met other than the existence
15 of an agreement.

16 Q And sorry, there may be uncertainty about
17 whether or not there is an agreement because
18 many agreements are at the federal and
19 provincial levels rather than with the specific
20 bodies?

21 A Yeah, that's why the trend is to move more
22 towards the idea of having specific agreements
23 with specific organizations, but I think the
24 more difficulty is whether the other criteria
25 are met. Is the purpose for an investigation?

1 Is there a law that's being investigated and the
2 other criteria that you find in 8(2)(f).

3 Q It seems to me that the requirement here that
4 the request is to administer or enforce a law.
5 I mean, it's broader than what we saw under
6 FIPPA which was a requirement to be providing
7 information for a -- in one instance, in any
8 event, to be providing information in support of
9 a specific investigation.

10 A Well, that's correct and another issue that has
11 arisen which I do not know the answer is what
12 the exact distinction between enforcing a law
13 and administering a law might actually be. I'm
14 not aware of any jurisprudence that deals with
15 that specifically. I have some ideas myself as
16 to what the difference might be, but I don't
17 think there's anything definitive that I'm aware
18 of.

19 Q Unless there's any other provisions permitting
20 disclosure without consents that you think are
21 sufficiently different than what we've seen in
22 the provincial context that we should look at, I
23 was going to move to disincentives to disclosure
24 under the *Privacy Act*.

25 A All right. I think the only other point that

1 I'd' make, and that's also made at page 48, is
2 that the treasury board which generally provides
3 direction with respect to the administration of
4 both the *Access Act* and *Privacy Act* has in fact
5 issued an interim directive which deals
6 specifically with 8(2)(e) and again makes the
7 point that this is not disclosure that's to be
8 made in the context of a fishing expedition.

9 Q I see. Have they made that direction with
10 respect to 8(2)(f)?

11 A There is not one with respect to 8(2)(f). I've
12 only found one with respect to (e).

13 Q Okay. And disincentives to disclosure under the
14 *Privacy Act* are they similar to what one might
15 see under the provincial act, the reputational
16 consequences?

17 A I think again, yes, the reputational consequence
18 would be the most significant. The other thing
19 we have to keep in mind is that the privacy
20 commissioner has -- the federal privacy
21 commission, as does the provincial privacy
22 commissioner, has the ability to conduct audits
23 and investigations that aren't necessarily
24 triggered by a complaint. And we have seen
25 circumstances where the commissioner has

1 principles in the various sections within the
2 legislation. But again as you can see at the
3 top of page 51 the principles are essentially
4 the same as we looked at with the ten privacy
5 principles and those are the factors that are
6 addressed in the legislation. Then with respect
7 to its applicability I have set out the
8 definition basically of the organizations it
9 applies to, so federal works and undertakings,
10 banks, airlines, telecommunications providers
11 would all be covered. And then it applies to
12 other organizations in respect of the personal
13 information they collect, use or disclose in the
14 context of commercial activities, and commercial
15 activity is then -- I set out that definition
16 further down on page 51. The other important
17 factor is that with respect to BC, Alberta and
18 Quebec, all of which have their own legislation
19 dealing with the private sector, there are
20 provisions within PEPIDA to say that the
21 legislation does not apply to those
22 organizations with respect to their
23 intra-provincial collection use and disclosure
24 of personal information. So in the other
25 provinces, Ontario being a prime example,

1 organizations, even if they operate only within
2 the province of Ontario, are subject to PEPIDA
3 because Ontario does not have its own private
4 sector privacy information. And I might as well
5 point out that needless to say there are
6 questions that arise constantly as to whether
7 the provincial legislation or the federal
8 legislation applies to an organization say in
9 BC depending on where it's customers are, what
10 its scope of activities are and such. And the
11 privacy commissioner has published a couple of
12 papers in conjunction with the commissioners in
13 both Alberta and British Columbia to try to
14 bring some clarity to which legislation would be
15 applicable in which circumstances.

16 Q And as with the other pieces of legislation
17 you've set out both restrictions on the sharing
18 of personal information and the conditions in
19 which personal information can be shared under
20 the act, and you set those out at pages 53 and
21 54 of the report.

22 A Yes.

23 Q I'll ask you the same question that I asked with
24 respect to the *Privacy Act*. Is there anything
25 in those conditions under which information can

1 be shared which is distinct from what we've seen
2 under the parallel provincial legislation, if
3 you could highlight those?

4 A Yeah, I mean, one that strikes me is the
5 section 73(c)(2) there is a specific provision
6 that allows disclosure of information to FINTRAC
7 which in my view probably isn't necessary
8 because there's a provision that also allows for
9 disclosure if it's required by law. So that may
10 be a bit of extra that's not really needed
11 there. It allows for disclosure not only to
12 government institutions, but there is in
13 73(d)(1) a provision for disclosure to another
14 organization, not a government organization in
15 circumstances where it's for the purpose of
16 investigating a breach of an agreement or a
17 contravention of laws in Canada. Or a province.

18 Q Any other distinctions that we should be alerted
19 to?

20 A No, I think generally speaking the provisions
21 are much the same and we are faced with the same
22 issue is that it is up to the disclosing
23 organization to satisfy itself that all the
24 criteria within the disclosure have been met and
25 it will be very fact specific in many

1 circumstances, which of course will lead again
2 to this sense I have that the default position
3 would be very careful and not to disclose unless
4 it's absolutely clear that one has to.

5 Q And of course if one gets it wrong there are
6 disincentives to disclosure as with the other
7 acts which can have reputational and monetary
8 consequences?

9 A Yes. So again, I don't want to overstate. The
10 reputational consequences are certainly there.
11 I think we have to be careful with the monetary
12 consequences. There is, as I pointed out, an
13 ability to seek damages at the federal court,
14 but the courts again have been fairly careful to
15 deal with situations where it has been either a
16 deliberate or reckless flouting of the
17 legislation. I think the courts would be and
18 I'm sure they are very reluctant in good faith
19 circumstances to actually grant any damages and
20 of course depending on whether you can actually
21 prove any monetary damages would be another
22 factor. But nevertheless there is the -- it is
23 a disincentive because nobody wants to be in the
24 position of being sued.

25 Q I'm going to just with respect to the next part

1 of your report, what you do there is you, and it
2 was at our request, covered specific sectoral
3 legislation applying to various entities that
4 may find themselves in possession of personal
5 information that could be usefully shared if
6 allowable for anti-money laundering purposes.
7 There's quite a list of sectors that you go
8 through there and I don't intend to go through
9 them. I just wanted to note what it was that
10 you were seeking to do here.

11 A Yes, and I think a couple of points. The main
12 intersection I think between the sectoral
13 legislation, whether it be at the federal level
14 or at the provincial level, is that all of the
15 privacy legislation, FIPPA, PIPA, *Privacy Act*
16 and PEPIDA recognize that if you are obliged to
17 disclose personal information pursuant to some
18 other law, perhaps for instance some regulatory
19 provision or statute, that those are all
20 recognized as appropriate disclosures of
21 personal information because you are required to
22 do so by virtue of the other statute. I think
23 the other thing that's important is I don't
24 believe that in any of the legislation that
25 deals with the various sectors it specifically

1 addresses personal information as opposed to
2 information more generally, so the requirements
3 for confidentiality that may be found there
4 and/or the ability to disclose information or
5 indeed the requirements to disclose information
6 might be broader than covered by the privacy
7 legislation because it would encompass all kinds
8 of information that might be within the
9 possession of the organization in question.

10 Q I'd like to turn to towards the end of your
11 report at the conclusion, you speak to the issue
12 of safe harbour provisions?

13 A Yes.

14 Q And I would like you just if you would explain
15 for the Commissioner what is a safe harbour
16 provision?

17 A Basically a safe harbour provision is actually
18 it's used in a number of contexts and perhaps
19 people who are familiar with privacy law is one
20 of the main places or contexts in which it is
21 used. European Union had negotiated what they
22 called safe harbour provisions, particularly
23 with United States, which doesn't have the
24 comprehensive privacy laws. And they were for
25 the purpose of allowing for the transport or

1 transfer of personal information and a
2 recognition that there were sufficient
3 safeguards in place to allow for that transfer.
4 What I'm talking about in this context in the
5 recommendation that has been made by a number of
6 organizations, including the Canadian Bankers
7 Association, is essentially a provision that
8 would insulate an organization that made
9 disclosures contrary to the privacy legislation,
10 and it would be a statutory provision that goes
11 over and beyond what the courts might have
12 already found with respect to disclosures that
13 have been made in good faith and pursuant to an
14 understanding that the disclosure is required by
15 certain legislation.

16 Q And just for reference you've conveniently set
17 out a sample, the US safe harbour provision with
18 respect to financial institutions making
19 voluntary disclosures at page 111 of the report.

20 A Yes, that as I understand it, the recommendation
21 from the Canadian Bankers Association and others
22 is not particularly specific, but they do
23 mention, and I believe this is the kind of safe
24 harbour, as they call it, discussion that
25 they're talking about which would be a voluntary

1 disclosure of any possible violation of law or
2 regulation to a government agency, usually, as
3 long as it's made in good faith, there would not
4 be consequences for having made that disclosure.
5 Now, as I say, we do have the provisions in our
6 BC *Privacy Act* and certainly under the common
7 law breach of privacy that talk about reckless
8 or willful behaviour, so I'd presume there would
9 always be a good faith defence or due diligence
10 defence available with respect to any finding
11 under our breach of privacy laws, but this would
12 give I believe an extra bit of comfort, if you
13 will, particularly to financial institutions and
14 particularly in the context of disclosing
15 information related to potential money
16 laundering activities.

17 Q And this relates back to what has been a theme
18 of our discussion is that many of the
19 voluntary -- the voluntary disclosure -- the
20 conditions under which a body may disclose
21 personal information without consent are
22 discretionary?

23 A That's correct.

24 Q On behalf of the body doing the disclosure and
25 this takes some of the -- I suppose the

1 possibly -- the purpose of it is to take some of
2 the anxiety out of making pulling the trigger on
3 finally making that determination and sending
4 information over?

5 A That's correct. Another aspect of it would be
6 what we typically refer to as third party
7 caveats which would be that if information were
8 to be disclosed to, say, a government agency for
9 a particular purpose, it -- often these types of
10 safe harbour provisions also require that to
11 take advantage of it, the information must be
12 caveated in that it will not be further
13 disclosed by the receiving organization and it
14 will only be used by the receiving organization
15 for the purpose for which it was disclosed.
16 Now, some of that's sort of typically built into
17 privacy legislation in any event because if
18 personal information is collected by
19 organization B even though it's through a
20 voluntary disclosure by organization A, the
21 receiving organization has to have the privacy
22 imprimatur, if you will, to be able to collect
23 it and may only use it for the purpose for which
24 it was given to them in the first place.

25 Q And that actually nicely cleans up a point that

1 I was going to return to which is what are the
2 assurances or restrictions around the use of
3 personal information once they are forwarded
4 under one of the legislative conditions for
5 sharing without consent. And I think that
6 answers it nicely.

7 A That's right. You have to take it back to the
8 receiving organization will itself when it comes
9 to personal information be subject to the
10 purposes for which it can collect, use and
11 further disclose that personal information.

12 Q At page 110 of your report, you've cited the CBA
13 recommendation about the inclusion of a safe
14 harbour provision in the *Proceeds of Crime*
15 *(Money Laundering) Terrorist Financing Act?*

16 A Yes.

17 Q You note that such a recommendation might allow
18 for and encourage more robust sharing of
19 information between federally regulated
20 financial institutions such as banks and trust
21 companies, provided that FINTRAC is notified
22 upon each occurring of such sharing. I just
23 wanted to make clear or clarify, the
24 recommendation there or the suggestion there is
25 to a safe harbour provision to allow information

1 sharing between financial institutions
2 themselves. Is that what you are alluding to
3 here?

4 A Give me a moment, please.

5 Q Thanks. I'm looking at the paragraph that's
6 right underneath --

7 A Yes. Well, they're talking about having
8 something similar to what's in the United States
9 and I believe that is sharing only with the
10 government agency.

11 Q Okay. I'm looking at the --

12 A Through a government agency. So I would
13 understand the CBA's recommendation to be -- I
14 think this ties into the voluntary, not the
15 compulsory reporting to FINTRAC, but the
16 voluntary reporting to FINTRAC that I speak
17 about in the discussion of FINTRAC.

18 Q All right. Well, to be fair, this was not your
19 recommendation, so I won't probe you further on
20 what was intended by the wording of it.

21 You say in the paragraph below that:

22 "Not only might such a safe harbour
23 provision in the proceeds of *Proceeds of*
24 *Crime (Money Laundering) and Terrorist*
25 *Financing Act* facilitate voluntary sharing

1 of information with FINTRAC, but similar
2 provisions and privacy legislation and
3 sectoral legislation might be considered."

4 So can you elaborate a little bit on what you
5 mean by that.

6 A Well, I guess it presupposes that I am correct
7 in that there is a reluctance to share
8 information because of the disincentives that I
9 have discussed. And to the extent that those
10 disincentives are actually working to
11 disincentivize -- I've used the word too
12 often -- the sharing of information or
13 discourage the sharing of information, it occurs
14 to me that it might be the case that some kind
15 of clearer provision in the legislation itself,
16 particularly to the extent that, for instance,
17 the new private sector legislation proposed by
18 C-11 is going to include the ability to award
19 damages and this new tribunal, that a clearer
20 enunciation of a due diligence offence, if you
21 will -- defence, pardon me, might be useful in
22 terms of encouraging or giving more comfort to
23 organizations that are required to share
24 personal information in this context.

25 Q I'm going to leave that topic. I had indicated

1 at the beginning that I was going to return in
2 case there was anything in the text of Bill C-11
3 that impacts on the discussion we've had today,
4 in particular about the ability to share
5 information about consent that you think should
6 be just drawn to the commissioner's attention.
7 And appreciating that it's just proposed
8 legislation at this point.

9 A Yeah, there's not actually. I went to the
10 trouble of doing a comparison of the provisions.
11 It's structures very differently, but I did a
12 comparison with provisions that allow for the
13 disclosure of personal information without
14 consent and they're virtually identical to the
15 provisions in the current legislation, so
16 there's very little difference.

17 MS. PATEL: Mr. Commissioner, those are my questions
18 for this witness.

19 THE COMMISSIONER: Thank you, Ms. Patel. I
20 understand that Ms. Friesen on behalf of the
21 province wishes to examine Ms. McIsaac and has
22 been allocated 20 minutes.

23 MS. FRIESEN: Yes, thank you Mr. Commissioner.

24 **EXAMINATION BY MS. FRIESEN:**

25 Q Ms. McIsaac, can you hear me all right?

1 A Yes, I can.

2 Q Great. Thank you. I'm counsel for the
3 province. I wanted to first ask you about the
4 third agency rule which you touched on briefly
5 in response to questions from Ms. Patel. Can
6 you describe the reasons why the inclusion of
7 the third agency rule is important when
8 considering the safe harbour provisions.

9 A Yes. It really is an articulation of the
10 restrictions that are already indicated in
11 privacy legislation. But basically what it is
12 is that if I disclose personal information or
13 any information to you, that would include a
14 caveat that you will -- I'm disclosing it to you
15 for a specific purpose. You are to use it only
16 for that purpose and you are not to further
17 disclose it without my agreement. So that's
18 what I'm talking about with respect to the third
19 party caveat which then continues to protect the
20 information in the way it was originally
21 protected by the disclosing organization.

22 Q Right. Okay. And with respect to the
23 restriction on sharing the information any
24 further, there may be circumstances where the
25 integrity of an investigation, for example,

1 requires that the information go no further.

2 Would you agree with that?

3 A That's true. Absolutely.

4 Q Okay. I just wanted to talk a little bit about
5 the scope of your report. You've already
6 provided us with some evidence regarding the
7 scope of your report, what you set out to do and
8 what you didn't set out to do in the report, and
9 as I understand your evidence, the purpose or
10 intention of the report is to generally canvass
11 the legislative and common law restrictions that
12 may constrain the ability of entities discussed
13 to disclose personal or other information. Did
14 I summarize that accurately?

15 A That's correct. And the focus really on
16 personal information and the privacy
17 legislation.

18 Q Okay. And indeed your report does cover a lot
19 of ground in terms of identifying relevant
20 legislation in BC and Canada. And as I
21 understand it and just to clarify, the intention
22 of the report was not to conduct a comprehensive
23 analysis on how safe harbour provisions would
24 operate within specific provincial privacy
25 legislation?

1 A Absolutely not, no.

2 Q Okay. And likewise -- sorry.

3 A I mention that at the end simply because it has
4 been a recommendation. I think it was also
5 dealt with by a parliamentary committee at the
6 federal level as something that is being
7 discussed as a possible add-on, particularly to
8 the proceeds of crime legislation.

9 Q Right. And likewise the intention of your
10 report was not to conduct a comprehensive
11 analysis on how safe harbour provisions would
12 operate within specific sectoral legislation?

13 A Not at all.

14 Q Okay. And likewise the intention was not to
15 conduct a comprehensive analysis regarding how
16 safe harbour provisions within a particular
17 sectoral legislation may impact the work of
18 regulators in that sector?

19 A Absolutely not and I'd be the first to say that
20 one would have to do a very detailed analysis of
21 any particular regulatory situation in order to
22 determine if indeed a safe harbour provision
23 were appropriate or not.

24 Q Yes, thank you. I just had a few questions for
25 you regarding the provincial application of the

1 federal legislation PEPIDA. And in particular I
2 just wanted to ask you, and you touch on this in
3 your report, about section 26(2) of PEPIDA, and
4 you explain in your report that section 26(2)
5 allows for a province to be exempt from PEPIDA
6 if it has legislation that is substantially
7 similar to part 1 of PEPIDA; correct?

8 A That's correct, yes.

9 Q And then part 1 of PEPIDA that deals with the
10 collection, use and disclosure of personal
11 information; correct?

12 A That's correct.

13 Q And BC businesses are currently except from
14 PEPIDA by order on the basis that BC has
15 equivalent legislation; correct?

16 A Yes, but if you have a BC business that has a
17 cross-border operation so it would be collecting
18 personal information from individuals in Alberta
19 or Ontario, whatever the case may be, it most
20 likely is subject to PEPIDA for the
21 interprovincial collection of information. So
22 it may be subject to both.

23 Q Right. Okay. And so fair enough so for those
24 ones. And then for ones that don't have this
25 cross border business in that same way, for

1 those that that don't fall into that category,
2 they would be except pursuant to this order?

3 A That's right. They would be subject only to
4 PEPIDA. Or PIPA, excuse me.

5 Q Right, yes. Too many acronyms. So it's fair to
6 say that if BC does not have legislation that is
7 substantially similar to PEPIDA, it may lose
8 that except status?

9 A Theoretically I think that's possible.

10 Q Okay. You'll agree with me, then, that
11 contemplating changes to provincial legislation
12 that this is an important factor to take into
13 account?

14 A Absolutely. I would have thought that -- and
15 you know, it's also something that the
16 provincial government might be interested in
17 commenting on the proposed federal legislation
18 if there's something in the new federal
19 legislation that would make PIPA, for instance,
20 no longer substantially similar. I didn't see
21 anything, but I think that's a factor that would
22 want to be considered by everybody.

23 MS. FRIESEN: Okay. Thank you. Those are my
24 questions, Mr. Commissioner.

25 THE COMMISSIONER: Thank you, Ms. Friesen. Now,

1 Mr. Brongers on behalf of Canada who has been
2 allocated ten minutes.

3 MR. BRONGERS: Thank you, Mr. Commissioner.

4 **EXAMINATION BY MR. BRONGERS:**

5 Q Good afternoon, Ms. McIsaac. To begin with, can
6 you confirm that you are hearing me clearly?

7 A Yes, I am, thank you, Mr. Brongers.

8 Q So the questions I'm going to ask you today are
9 for the sole purpose of clarifying some of the
10 factual assertions you make in your report about
11 the state of the law in Canada, and in order to
12 give you fair notice, I asked commission counsel
13 to inform you in advance of of the three
14 specific assertions in your report that I wanted
15 to question you about. Can you confirm that you
16 received that notice from the commission?

17 A I did indeed.

18 Q Can you also confirm that you and I did not
19 communicate directly about this matter prior to
20 your testimony today?

21 A No, we did not.

22 Q Now, at the outset of your testimony you
23 addressed one of the assertions that I was going
24 to question you on and that was the issue of
25 what federal law regulates federal credit unions

1 and you confirmed today that in fact they are
2 regulated under the *Banks Act* and not the
3 *Cooperative Credit Associations Act*; is that
4 correct?

5 A Indeed that is absolutely correct and that was
6 my error, for which I apologize.

7 Q And just to confirm, given this clarification
8 that federal credit unions are regulated under
9 the *Bank Act* and not under the *Cooperative*
10 *Credit Associations Act* I trust that this
11 doesn't impact any of the opinions that you've
12 expressed in your report; is that right?

13 A Not at all. The only change would be that the
14 credit unions as banks would only be subject
15 to -- well, there are only two of them and they
16 do I understand operate interprovincially, but
17 even if they didn't, being federal works and
18 undertakings they would only be subject to
19 PEPIDA.

20 Q So that means that there are only two remaining
21 factual assertions that I'd like to ask you
22 about today, and again just for the purpose of
23 clarifying their veracity. And let me just say
24 that I wish there was an easier way to do this
25 than through cross-examination, but I thank you

1 in advance for bearing with me on this.

2 So the first assertion is in the section of
3 your report that deals with the confidentiality
4 provisions that apply to the Office of the
5 Superintendent of Financial Institutions, or
6 OSFI, and that's at pages 99 to 101 of your
7 report.

8 So, Madam Registrar, can you please display
9 page 99 of Ms. McIsaac's report on the screen.
10 Thank you.

11 So, Ms. McIsaac, I'd like to direct your
12 attention to the first full paragraph on this
13 page under the heading of "Office of the
14 Superintendent of Financial Institutions
15 (OSFI)," which I'll read. It says:

16 "OSFI is an independent federal government
17 agency that regulates and supervises
18 federally regulated financial institutions
19 (FRFIs). FRFIs include, *inter alia*, a
20 bank within the meaning of section 2 of
21 the *Bank Act*, an authorized foreign bank
22 within the meaning of section 2 of the
23 *Bank Act*, a company to which the *Trust and*
24 *Loan Companies Act* applies, and an
25 association to which the *Cooperative*

1 *Credit Associations Act* applies."

2 Now, I'll just stop there. In light of your
3 previous testimony you would agree with me that
4 another type of federally regulated financial
5 institution that is regulated and supervised by
6 OSFI is the federal credit union within the
7 meaning of section 2 of the *Bank Act*?

8 A Absolutely.

9 Q And turning back to the paragraph on page 99,
10 the last sentence it says:

11 "In the course of its regulatory
12 activities, OSFI receives some customer
13 information from the entities that it
14 regulates, including customer personal
15 information."

16 Is that correct?

17 A Yes.

18 Q And then in the next paragraph you wrote:

19 "The *Office of the Superintendent of*
20 *Financial Institutions Act* has the
21 following provisions regarding
22 confidentiality."

23 And then you set out section 22 of that act;
24 correct?

25 A Yes.

1 Q And in particular you've set out in
2 subsection 22(1) which sets out generally that
3 information received by OSFI is confidential and
4 is to be treated accordingly; correct?

5 A Yeah.

6 Q And then you've also set out subsection 22(1.1)
7 which creates an exception to subsection 22(1)
8 that allows OSFI to disclose information to
9 FINTRAC; correct?

10 A Yes, that's correct.

11 Q And I'll just read subsection 22(1.1). It says:
12 "Despite subsection (1), subsection 606(1)
13 and 636(1) of the *Bank Act*, subsection
14 435(1) of the *Cooperative Credit*
15 *Associations Act*, subsection 672(1) of the
16 *Insurance Companies Act* and subsection
17 503(1) of the *Trust and Loan Companies*
18 *Act*, the Superintendent may disclose to
19 the Financial Transactions and Reports
20 Analysis Centre of Canada established by
21 section 41 of the *Proceeds of Crime (Money*
22 *Laundering) and Terrorist Financing Act*
23 information relating to policies and
24 procedures that financial institutions
25 adopt to ensure their compliance with

1 Parts 1 and 1.1 of the *Proceeds of Crime*
2 *(Money Laundering) and Terrorist Financing*
3 *Act.*"

4 That's what it says; right?

5 A That's what it says, yes.

6 Q I'll turn now to the factual assertion that I'll
7 be questioning you about specifically and that's
8 at page 101 of the report.

9 Madam Registrar, could you please move
10 forward to page 101. Thank you.

11 So I'll just read the first full
12 paragraph on this page. It says:

13 "Additionally OSFI is responsible for
14 other legislation, including the *Bank Act*
15 (discussed above), the *Trust and Loan*
16 *Companies Act, the Cooperative Credit*
17 *Associations Act, the Insurance Companies*
18 *Act, the Pension Benefits Standards Act,*
19 1985, and the *Pooled Registered Pension*
20 *Plans Act.*"

21 And here's the key sentence:

22 "With the exception of the *Bank Act*, none
23 of the these documents contain any mention
24 of privacy or the protection of personal
25 information."

1 Now, Ms. McIsaac, you would agree with me that a
2 fair reading of that last sentence would be that
3 none of the six pieces of federal legislation
4 mentioned in the first sentence other than the
5 *Bank Act* impose any obligations on OSFI to
6 protect personal information?

7 A No, and the reason for that is I was talking
8 about -- they all talk about information
9 generally. It's a poorly worded sentence; I
10 will agree with you there. But what I was
11 intending to say that they do not deal
12 specifically with personal information as
13 opposed to information generally. And again,
14 reading it now I can see where it could have
15 been much better worded.

16 Q Thanks, Ms. McIsaac. The concern of course that
17 I'm raising is I don't want to -- I want to make
18 sure there is no suggestion that those other
19 pieces of legislation mentioned there, the *Trust*
20 *and Loan Companies Act*, the *Cooperative Credit*
21 *Associations Act* and the *Insurance Companies Act*
22 that there should be no suggestion they don't
23 contain provisions which limit what OSFI can do
24 with confidential information. Would you agree
25 with me?

1 A Well, and I think that's clear because if you go
2 back to page 98 I've actually cited section 435
3 of the *Cooperative Credit Associations Act* and I
4 have -- well, that's where the missing footnote
5 is, 503 of the *Loan Trust Companies Act*, both of
6 which are headed "Confidential Information." I
7 didn't repeat the section from the *Trust and*
8 *Loan Companies Act* because it's virtually
9 identical to the provision in the *Cooperative*
10 *Credit Associations Act*. And then of course I
11 didn't deal specifically with the other
12 legislation. They contain similar
13 confidentiality provisions but are not directed
14 specifically to personal information, which is
15 what intended in that sentence.

16 Q Perfect. And again just the clarify, and
17 perhaps the simplest way of doing this is going
18 back to page 99 and that quoting of
19 section 22(1.1). And, Ms. McIsaac, you'll see
20 that it lists there a number of provisions,
21 subsection 606(1) and 636(1) of the *Bank Act*,
22 subsection 435(1) of the *Cooperative Credit*
23 *Associations Act*, subsection 672(1) of the
24 *Insurance Companies Act* and subsection 503(1) of
25 the *Trust and Loan Companies Act*. You would

1 agree with me that those provisions do expressly
2 place limits on what OSFI can disclose in terms
3 of personal information?

4 A As well as other information, yes.

5 Q Thank you, Ms. McIsaac. And again just to
6 confirm, I trust obviously that this factual
7 correction doesn't impact any of the opinions
8 you've expressed in your report?

9 A Absolutely not, no.

10 Q Thank you. So the final aspect of your report
11 that I'd like to ask you about is the one
12 relating to the extent of federal privacy
13 legislation that impacts information sharing by
14 federal agencies. And specifically I'd like to
15 ask you about the suggestion at page 4 in your
16 report that the *Privacy Act* is the only piece of
17 federal legislation that impacts the flow of
18 information between private and public sector
19 entities that have a role in combatting money
20 laundering. And I say that your report suggests
21 this because the only federal privacy
22 legislation that's mentioned in the report that
23 deals with information sharing by public sector
24 entities that combat money laundering is the
25 *Privacy Act*. Would you agree with this?

1 A Well, I don't agree with the suggestion. I
2 agree that I've said what I said, but I think as
3 we indicated at the opening I was asked
4 specifically to look at the federal *Privacy Act*
5 and the *Personal Information Protection and*
6 *Electronic Documents Act*, and of course other
7 legislation, including the proceeds of crime
8 legislation, the *Bank Act*, all have provisions
9 that in one way or another do deal with the
10 sharing of information including personal
11 information, and I don't believe there is a
12 suggestion that it's only the *Privacy Act* that
13 deals with federal sharing of information.

14 Q Thank you, Ms. McIsaac. Indeed I asked
15 commission council to alert you to the fact that
16 section 107 of the *Customs Act* and section 241
17 of the *Income Tax Act* also impose limits on the
18 flow of information received from private
19 entities by federal agencies that play a role in
20 combatting money laundering. Specifically in
21 those cases, of course, it's the Canadian Border
22 Services Agency, the CBSA, and the Canadian
23 Revenue Agency, CRA, with section 107 of the
24 *Customs Act* relating to the CBSA and section 241
25 of the *Income Tax Act* relating to the CRA. Did

1 absolutely it doesn't change anything.

2 MR. BRONGERS: Thank you very much, Ms. McIsaac.

3 Mr. Commissioner, I have no further questions.

4 THE WITNESS: Thank you.

5 THE COMMISSIONER: Thank you, Mr. Brongers. Next

6 Ms. George and behalf of the Law Society of

7 British Columbia. You have been allocated

8 five minutes.

9 **EXAMINATION BY MS. GEORGE:**

10 Q Good afternoon, Ms. McIsaac. My name is
11 Catherine George and I'm counsel for the Law
12 Society of British Columbia. I just have some
13 brief questions today expanding on what you said
14 about sectoral legislation applicable to lawyers
15 in your report.

16 A All right.

17 MS. GEORGE: Madam Registrar, can I ask you to please
18 display page 78 of Ms. McIsaac's report. The
19 previous, that's 78 in the PDF. Yes.

20 Q So at the bottom of the page here, Ms. McIsaac,
21 this is the section of your report dealing with
22 lawyers?

23 A Yes, just a minute. Whenever she does that I
24 lose my screen. Okay.

25 MS. GEORGE: So, Madam Registrar, can you scroll down

1 to the next page of the report, please.

2 Perfect, thank you.

3 Q And, Ms. McIsaac, you say here in the beginning
4 of the second paragraph that the most relevant
5 provisions of the *Legal Profession Act* are
6 section 88 of the *Legal Profession Act*; that's
7 right?

8 A Yes.

9 Q And so when you say "most relevant," that means
10 that the provision listed here is not the only
11 provision in the *Legal Profession Act* relevant
12 to the law society and lawyers that involve
13 privacy and the flow of information that may be
14 relevant to anti-money laundering?

15 A Absolutely not, and indeed the overall
16 requirement, of course, is solicitor/client
17 privilege which is going to govern and perhaps
18 in many cases trump everything. What I tried to
19 do here was identify some of the specific
20 provisions that might go over and above the
21 requirements of either the PEPIDA legislation or
22 the -- or complement or go over and above the
23 requirements to the PEPIDA legislation or FIPPA.

24 Q Thank you. What I'm going to now take you to is
25 not meant to suggest that there is a gap in the

1 report so much as it is to just put a particular
2 provision on the record.

3 So, Madam Registrar, if I could ask you to
4 bring up the copy of the *Legal Profession Act*
5 that we provided by email last week. And then
6 if you could go to page 67 of the PDF. And this
7 begins section 87 of the *Legal Profession Act*.
8 I think the majority of the text is on the next
9 page, so perhaps, Madam Registrar, if you could
10 scroll to the next page. Thank you.

11 Ms. McIsaac, do you recall if you looked at
12 section 87 of the *Legal Profession Act* in your
13 review for the preparation of your report?

14 A I tried to read the entire legislation and
15 identify those that I thought were most
16 relevant, so I expect I did, but which provision
17 in particular? Oh, you're talking about
18 complaints?

19 Q Yes. So this is a provision that regulates and
20 restricts the use of information acquired in the
21 course of law society investigations or
22 complaints.

23 A That's correct, yes.

24 Q So just a general sense, you would agree that
25 this is a provision that is relevant to the flow

1 sharing and handling of information by the law
2 society that may be relevant to anti-money
3 laundering activities?

4 A Possibly. One of the difficulties with writing
5 a report of this nature is that we're not
6 looking at specific information, so I had to
7 make some assumptions as to what kind of
8 information might be relevant to combatting
9 money laundering in particular circumstances,
10 who might have it, when they might wish to
11 disclose it, and I think I do recall looking at
12 this one now and saying that in the scheme of
13 things it wasn't completely clear to me to what
14 extent this type of complaint would involve
15 information relevant to the investigation of
16 money laundering necessarily.

17 MR. GEORGE: All right. Thank you. Those are my
18 questions.

19 THE COMMISSIONER: Thank you, Ms. George. Now, on
20 behalf of the British Columbia Lottery
21 Corporation Ms. Ramsay who has been allocated
22 ten minutes.

23 MS. RAMSAY: Thank you, Mr. Commissioner. I actually
24 have no questions for this witness.

25 THE COMMISSIONER: Thank you, Ms. Ramsay. And on

1 behalf of the British Columbia Civil Liberties
2 Association Ms. Magonet who has been allocated
3 15 minutes.

4 MS. MAGONET: Sorry, I was muted. Thank you,
5 Mr. Commissioner.

6 **EXAMINATION BY MS. MAGONET:**

7 Q Can you hear me, Ms. McIsaac?

8 A McIsaac. Yes, I can.

9 Q McIsaac. Thank you. My apologies. So I'm
10 going to start with some general questions about
11 the benefits and risks of information sharing.
12 You would agree with me that under Canadian
13 privacy legislation information sharing of
14 personal information without the informed
15 consent of the individuals whose information it
16 is is meant to be the exception not the rule?

17 A Absolutely.

18 Q And you would agree that increased information
19 sharing without the consent of affected
20 individuals can undermine privacy protection for
21 individuals who are not involved in criminal
22 activity?

23 A Yes, probably. I mean, that's a very general
24 statement which I would generally agree with,
25 but I think it's always a matter of balancing

1 the public interest in sharing of information
2 which may from time to time have to override
3 privacy interests.

4 Q Thank you. You would agree that there's no
5 evidence in your report that insufficient
6 information sharing is currently hindering the
7 fight against money laundering in
8 British Columbia?

9 A No, there is not. And my report was not based
10 on -- it was based perhaps on the assumption
11 that might be a problem because I was asked to
12 review the information sharing sections in the
13 privacy legislation, but I cannot say and would
14 not say that those provisions are actually
15 hindering the investigation of money laundering
16 activity.

17 Q Thank you. And there's also no evidence in your
18 report that if more information sharing were
19 occurring there would be less money laundering?

20 A There is not.

21 Q Great. I will now move to some questions about
22 the incentives and disincentives for sharing
23 information. You would agree that your report
24 does not look at empirical evidence of how
25 frequently entities are voluntarily sharing

1 information relevant to fighting money
2 laundering --

3 A No, and I'm not aware that -- I mean, that
4 wasn't within my mandate and I would doubt very
5 much that there is empirical evidence on that
6 point, though I may be wrong.

7 Q Okay. Thank you. On page 6 of your report you
8 speak to the fact that provisions in privacy
9 legislation which permit the -- sharing of
10 personal information without consent are
11 generally discretionary not mandatory?

12 A That's correct.

13 Q And you write:

14 "Without clear guidance as to when
15 information sharing is permitted,
16 potential information sharers will be more
17 likely to err on the side of caution and
18 default to the position of
19 non-disclosure."

20 A That's correct.

21 Q You would agree that that is an assumption, that
22 there's no empirical evidence in this report
23 looking at how these provisions influence
24 decision-making for individuals who hold
25 personal information?

1 A No empirical evidence, though I've spent a lot
2 of time advising various organizations and I
3 think I mentioned earlier that privacy is often
4 used as a shield, and as a lawyer unless I were
5 perfectly certain that disclosure were
6 appropriate I would advise against it. So my
7 sense, and I have to admit that it's nothing
8 more than that, is that there would be a
9 default, not sharing if necessary.

10 Q Thank you. You would agree that even if the
11 privacy legislation does not encourage sharing
12 personal information without consent other laws
13 may encourage this information sharing and in
14 fact even require it?

15 A Absolutely.

16 Q And an example of that would be the *Proceeds of*
17 *Crime (Money Laundering) and Terrorist Financing*
18 *Act* --

19 A That's correct.

20 Q -- which in some cases requires information
21 sharing?

22 A That's correct.

23 Q I would like to take you --

24 MS. MAGONET: Or rather, Madam Registrar, if you
25 could please pull up the 2013 audit of FINTRAC

1 and suspicious transaction reports that
2 did not demonstrate 'reasonable grounds'
3 to suspect money laundering or terrorist
4 financing activities."

5 You would agree that here the OPC found that
6 entities were in fact overreporting to FINTRAC?

7 A Absolutely.

8 Q And that it does not appear here that privacy
9 legislation deterred them from disclosing more
10 personal information than they were required to
11 do?

12 A That would appear to be the case, yes.

13 Q Okay. Thank you.

14 You can take that document down, Madam
15 Registrar.

16 I'll close with some questions about safe
17 harbour provisions. So your report discusses
18 the potential adoption of safe harbour
19 provisions in public sector and private sector
20 privacy legislation as well as in the PCMLTFA as
21 one method of promoting information sharing?

22 A To be clear it's not a recommendation by me. It
23 is merely a report to the commission that such
24 recommendations have been made, particularly by
25 the Canadian Bankers Association.

1 Q Understood. You would agree that if public
2 sector information included a safe harbour
3 provision that would mean that a public entity
4 could have complete immunity if it shares
5 personal information with a bank so long as they
6 did so within good faith and that other
7 conditions of the provision were met?

8 A Well, it would depend exactly on how the
9 provision was worded. I mean, we're talking in
10 the abstract here, but that potentially could be
11 the result, but typically it would require good
12 faith and acting in accordance with legislative
13 provisions.

14 Q Thank you. On page 7 of your report you write
15 that safe harbour provisions would likely be a
16 welcome addition to both the public and private
17 sector privacy regimes. But you would agree
18 that citizens whose privacy rights would be
19 curtailed by these provisions may not welcome
20 their adoption?

21 A Like everything else it's a balancing, isn't it.
22 You have to balance the rights to privacy of
23 individuals against the more communal right, if
24 you will, focused on combatting money
25 laundering, which I understanding is a

1 significant problem in British Columbia. So
2 yes, as an individual I might not welcome it,
3 particularly somebody whose information is going
4 to be disclosed, but on a broader sense it might
5 be an appropriate or useful tool to include to
6 allow more robust information sharing.

7 Q Would you also agree that safe harbour
8 provisions undermine the fair information
9 principle of providing recourse to individuals
10 whose privacy rights are violated?

11 A Yes and no. I mean, at the moment the recourse
12 is limited by and large other than reports by
13 privacy commissioners, but certainly damages and
14 such are limited to willful or reckless
15 disclosure of personal information. So there
16 may be some lessening of rights on the part of
17 individuals, but quite frankly I don't think it
18 would be that significant.

19 Q In your report you say that safe harbour
20 provisions would have to be tightly worded and
21 the focus of them would need to be limited. Why
22 would that be important?

23 A Well, for the very reason you just stated.
24 These provisions would have to fit into the
25 balancing between the imperatives of protecting

1 privacy and if appropriate the imperative in
2 encouraging greater information sharing for the
3 purpose of combatting money laundering, so you
4 would want to have a very carefully worded -- if
5 you were to introduce something of this nature,
6 very carefully worded and tightly constrained
7 provision so that you are not undermining
8 privacy rights any more than is deemed to be
9 absolutely necessary.

10 Q And you would agree that there's no evidence in
11 your report that jurisdictions with these types
12 of provisions have less money laundering?

13 A No.

14 Q Thank you.

15 Madam Registrar, if you could please pull up
16 the 2013 audit of FINTRAC again by the office of
17 the privacy commissioner. And perhaps while
18 you're doing that I'll ask Ms. McIsaac another
19 question.

20 You would agree that your report discusses
21 the potential adoption of safe harbour
22 provisions into the *Proceeds of Crime (Money*
23 *Laundering) and Terrorist Financing Act*?

24 A Well, that was the recommendation of the
25 Canadian Bankers Association. I believe it was

1 limited to the proceeds of crime legislation.
2 And I think it was directed at the voluntary
3 disclosure of information section.

4 Q And that you would agree that if such a
5 provision was potentially adopted this could
6 lead to further disclosures to FINTRAC if this
7 gave banks more confidence in their ability to
8 make such disclosures?

9 A I presume that was the reason that Canadian
10 Bankers Association has recommended it.

11 MS. MAGONET: Madam Registrar, if you could please go
12 to page 3 of this audit.

13 Q And, Ms. McIsaac, you would agree at the bottom
14 of this page it say that is the OPC found that
15 FINTRAC had made limited progress in addressing
16 5 of 10 audit recommendations made in 2009?

17 A Correct. That's what says.

18 MS. MAGONET: Madam Registrar, if you could please go
19 to page 4 of this report.

20 Q Ms. McIsaac, you would agree that in this audit
21 they found that FINTRAC continues to receive and
22 retain personal information not directly related
23 to its mandate?

24 A That's correct.

25 MS. GEORGE: Madam Registrar, if you could please

1 pull up the OPC audit of FINTRAC from 2017. I'm
2 sorry to toggle you through so many documents.
3 If you could please scroll down to page 4 of
4 this audit. Oh, yes, sorry, it's at the top of
5 page 4.

6 Q Ms. McIsaac, you would agree that in this report
7 that the OPC found that:

8 "FINTRAC continues to receive and retain
9 personal information outside of the
10 legislated thresholds for reporting. This
11 presents risks to privacy by making
12 personal information that should have
13 never been provided to FINTRAC available
14 for FINTRAC's use and potential
15 disclosure."

16 A That's true. Yes, that's what it says.

17 Q Would you agree that if there is increased
18 information sharing with FINTRAC, in light of
19 these reports there are increased risks that
20 personal information will not be adequately
21 protected?

22 A Yes, and I think it goes back again to the
23 balancing and perhaps the dilemma that will be
24 facing the Commissioner when he writes his final
25 report is the question of whether introducing

1 more robust information sharing practices will
2 meet a public interest goal or whether the
3 undermining of the protection of privacy is such
4 that it's not something that ought to be done,
5 and that's the -- that, of course, is the
6 balancing and the dilemma that one is faced in
7 trying to deal with robust investigation of
8 money laundering activities while at the same
9 time ensuring appropriate protection of privacy
10 rights.

11 Q But you would agree that in light of FINTRAC's
12 record of failing to adequately protect personal
13 information that increased disclosure to FINTRAC
14 presents particular risks?

15 A I think it's a factor that ought to be
16 considered very seriously. Now, I don't know
17 whether FINTRAC has pulled up its socks or not
18 since the second report of the privacy
19 commissioner because I don't believe there has
20 been a further audit.

21 MS. MAGONET: Thank you. Those are my questions,
22 Ms. McIsaac.

23 THE WITNESS: Thank you.

24 THE COMMISSIONER: Mr. Rauch-Davis for the
25 Transparency International Coalition who has

1 been allocated 15 minutes.

2 MR. RAUCH-DAVIS: Thank you, Mr. Commissioner.

3 **EXAMINATION BY MR. RAUCH-DAVIS:**

4 Q Ms. McIsaac, in your report in the sector
5 section you reference the *Land Owner*
6 *Transparency Act*. Are you aware of that?

7 A Yes.

8 MR. RAUCH-DAVIS: And so I wonder if Madam Registrar
9 could go to page 73 of the report, Ms. McIsaac's
10 report.

11 Q While that is going on, Ms. McIsaac, I take it
12 you would agree that in researching this act you
13 found that the purpose of the act was to make
14 ownership information available to law
15 enforcement and the public generally with the
16 end goal of ending hidden ownership of land and
17 addressing the use of private entities for money
18 laundering, tax fraud and tax evasion?

19 A That's the purpose as I understand it. That's
20 right.

21 Q And so I take it from your report that your
22 finding with respect to this act is that
23 essentially the province is legislated within
24 the remaining privacy statutes, I believe it's
25 PIPA and PEPIDA, the province is legislated

1 within those statutes by ensuring the
2 collection, use and disclosure of information
3 was in line with the purpose of the enabling
4 statute with the purpose of the *Land Owner*
5 *Transparency Act*?

6 A Well, the authority itself would be the
7 survey -- where are we? I'm sorry. I didn't
8 really understand your question.

9 Q I can rephrase it. So in your direct evidence
10 this morning you mentioned that the intersection
11 between the sectoral legislation and the privacy
12 legislation referenced in your report recognizes
13 that if a person or an entity is required to
14 disclose personal information --

15 A Yes.

16 Q -- that those are all recognized as appropriate
17 and that is essentially?

18 A That's right.

19 Q And that's essentially what this act sets up as
20 well, this is an example of that evidence;
21 correct?

22 A That's right. This is an example of other
23 legislation that requires the disclosure of
24 personal information which is consistent with
25 what FIPPA said, or PIPA or PIPA say, excuse me.

- 1 MR. RAUCH-DAVIS: Thank you. And so, Madam
2 Registrar, if you could please turn the page to
3 page 74.
- 4 Q At page 74 you go into the substance of the *Land*
5 *Owner Transparency Act* which is the filing of a
6 transparency report?
- 7 A That's correct.
- 8 Q And part of the transparency report includes
9 what is known as primary identification
10 information, and that's available to the general
11 public; that's right?
- 12 A That's correct as I understand it, yes.
- 13 Q And so at page 74 under "individual" you say
14 example trustee or settlor of a relevant trust.
15 You see that?
- 16 A Yes.
- 17 Q And I take it individual also just means a
18 natural person reporting under -- I don't take
19 it -- I'll put to you that an individual also
20 includes a natural person under the act?
- 21 A Absolutely, yes.
- 22 Q And under primary information for the individual
23 is full name, citizenship or permanent
24 residence, city and province of residence as
25 well as an incorporation number and

1 jurisdiction. Do you see that?

2 A Yes, I do. Yes.

3 Q And so I see that citizenship or permanent
4 residence is included in the publicly available
5 information; right?

6 A Yes, this is taken from the website of the
7 authority.

8 Q And would you agree that --

9 A Dealing with the registry.

10 Q And so compared to current citizenship and
11 permanent residence information to your mind are
12 there further privacy interests engaged in
13 information relating to past citizenship history
14 or permanent residency?

15 A I would think generally speaking, yes. I mean,
16 personal information includes citizenship, place
17 of residency and that sort of thing. It's more
18 or less sensitive, perhaps, depending on the
19 circumstances.

20 Q I guess it's a case-by-case basis is what your
21 evidence would be?

22 A I think it's personal information in all cases.
23 The degree of sensitivity I think would depend
24 on the circumstances.

25 Q But I mean --

1 A I mean, the fact that I'm a Canadian citizen is
2 personal information, but it's not particularly
3 sensitive, though it may be very sensitive for a
4 person who's a Canadian citizen and finds
5 themselves in Hong Kong or China or something
6 like that. So yes, the circumstances will be
7 important.

8 Q And you would say that the distinction between
9 current citizenship and past citizenship that
10 there is a distinction in terms of privacy
11 interest engaged between those two?

12 A No, they're both personal information.

13 Q They have the same privacy interest engaged is
14 what I take your evidence to be.

15 A Yes, for all of them the degree of privacy
16 interest or the importance of their privacy
17 interests will be circumstance dependent.

18 Q Thank you. So following the roadmap set up by
19 the Land Ownership Transparency Act -- or *Land*
20 *Owner Transparency Act*, none of the legislation
21 identified in your report, PIPA or any of the
22 associated statutes would prevent the province
23 from creating a corporate beneficial ownership
24 registry, would it?

25 A No. By separate statute.

1 Q So long as there was a separate statute, a
2 separate purpose of the act set up and specific
3 provisions relating to disclosure and collection
4 and use of personal information; correct?

5 A Well, that's correct. I'm not familiar with the
6 BC Corporations Act, but most corporations act
7 require list of directors which contain certain
8 personal information already which would fall
9 easily within the scope of the requirement of
10 another piece of legislation or perhaps be
11 publicly available sort of information.

12 Q Thank you. And finally I'd just like to get
13 your take on a few questions here. So in your
14 opinion does the fact that a person owns a
15 company have any degree of special privacy
16 interest?

17 A Again I think it depends on the circumstances.
18 The fact that I am a shareholder or an owner of
19 a particular company is personal information.
20 The degree of sensitivity of that information
21 will vary from circumstance to circumstance.

22 Q And I take that opinion is informed by the
23 jurisprudence. Your opinion is informed by the
24 jurisprudence?

25 A It's informed by the jurisprudence and a

1 difficulty arises, for instance -- this may not
2 be completely on point, but the bank accounts of
3 a corporation are not generally considered to be
4 personal -- the financial information of a
5 corporation is not generally considered to be
6 personal information. However, if that is a
7 corporation that has one shareholder, it's a
8 closely held corporation and it's really
9 impossible to disentangle the corporate
10 information from the personal information of the
11 individual who owns that corporation or is the
12 sole shareholder, there are circumstances in
13 which that has been found to be personal
14 information.

15 Q So again I take it your evidence is that it's a
16 case-by-case basis.

17 A That's correct.

18 Q And compared to trusts would you agree that
19 there's no real difference from a corporation
20 and a trust in terms of the privacy interest
21 engaged? It's a case by --

22 A I wouldn't have thought so, no.

23 Q It's again going to be a case by case assessment
24 on what type of privacy interest is engaged?

25 A Right. I mean, the fact that I may be a

1 beneficiary of a trust I think is clearly
2 personal information about myself. The
3 circumstances of my beneficial interest, any
4 payments I might receive from the trust, those
5 are all personal information about me. The
6 trust itself, again if it's a family trust for
7 instance, it would be difficult not to come to
8 the conclusion that information about the trust
9 itself is personal information about the members
10 of the family who have set up a trust.

11 MR. RAUCH-DAVIS: Right. Thank you, Ms. McIsaac.
12 Those are my questions.

13 THE WITNESS: Thank you.

14 THE COMMISSIONER: Thank you, Mr. Rauch-Davis.

15 Anything arising, Ms. Magonet?

16 MS. MAGONET: No, Mr. Commissioner. But I did
17 realize, and I'm not sure if this is the right
18 time to raise it, that I failed to ask if the
19 two documents I called up could be marked as
20 exhibits. So the OPC audits from 2013 and 2017.

21 THE COMMISSIONER: All right. Those will be marked
22 as the next two exhibits consecutively. I think
23 we're at 320, Madam Registrar, and 321.

24 THE REGISTRAR: That's correct, Mr. Commissioner.

25 THE COMMISSIONER: So 320 for the 2013 audit and 321

1 for the 2017 audit.

2 **EXHIBIT 320: OPCC - Financial Transactions and**
3 **Reports Analysis Centre of Canada Audit Report**
4 **of the Privacy Commissioner of Canada (2013)**

5 **EXHIBIT 321: OPCC - Financial Transactions and**
6 **Reports Analysis Centre of Canada Audit Report**
7 **of the Privacy Commissioner of Canada (2017)**

8 MS. MAGONET: Thank you, Mr. Commissioner.

9 THE COMMISSIONER: Thank you, Ms. Magonet.

10 Ms. George?

11 MS. GEORGE: Nothing arising, Mr. Commissioner.

12 THE COMMISSIONER: Thank you.

13 Mr. Brongers?

14 MR. BRONGERS: No, thank you, Mr. Commissioner.

15 THE COMMISSIONER: Thank you.

16 Ms. Friesen?

17 MS. FRIESEN: Nothing arising, Mr. Commissioner.

18 THE COMMISSIONER: Thank you.

19 And Ms. Patel?

20 MS. PATEL: Just one thing, Mr. Commissioner.

21 **EXAMINATION BY MS. PATEL (continuing):**

22 Q Ms. McIsaac, you discussed a correction to the
23 report that you sent out by email which was sent
24 to me and I distributed it to participants by
25 email, and I just want to be assured that the

1 correction is on the record. And it's fairly
2 small so I think we can just do it right here.

3 Madam Registrar, if you could pull up
4 page 98 of the report. Perfect, thanks.

5 Ms. McIsaac, can you identify where the
6 error, the omission, occurred on this page?

7 A Yes. At the very bottom of the page after the
8 words "Financial Consumer Agency of Canada"
9 there's a little 14. That should have in fact
10 been the next footnote, which I believe would
11 have been 175, and it should have been a
12 reference to section 503 of the *Trust and Loan*
13 *Companies Act* of Canada, which I think I pointed
14 out earlier is virtually very similar to 435 of
15 the *Co-Op Credit Associations Act* provision that
16 I cite above it.

17 MS. PATEL: Thank you. That's the only matter
18 arising, Mr. Commissioner.

19 THE COMMISSIONER: Thank you, Ms. Patel.

20 And thank you, Ms. McIsaac. You've helped
21 guide us through a real labyrinth of legislation
22 and I think it will be of great benefit to the
23 commission, so I'm grateful to you and you are
24 now excused from further testimony.

25 THE WITNESS: Well, thank you for the opportunity to

1 assist, sir.

2 **(WITNESS EXCUSED)**

3 THE COMMISSIONER: All right. Now, I understand,
4 Mr. McGowan, that we're resuming tomorrow
5 morning at 8:30. Is that correct?

6 MR. MCGOWAN: Yes, Mr. Commissioner, an early start
7 to accommodate a time change.

8 THE COMMISSIONER: Thank you. We will adjourn, then,
9 to 8:30 tomorrow morning to resume the evidence.

10 THE REGISTRAR: The hearing is now adjourned until
11 December 4th, 2020 at 8:30 a.m. Thank you.

12 THE COMMISSIONER: Thank you.

13 **(PROCEEDINGS ADJOURNED AT 12:41 P.M. TO DECEMBER 4, 2020)**

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