

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

**COMMISSIONER AUSTIN F. CULLEN**

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**November 18, 2020**

**(Via Videoconference)**

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

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

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

Yes, Mr. McGowan.

MR. MCGOWAN: Good morning, Mr. Commissioner.

Mr. Isaac has conduct of the panel this morning.

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

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

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

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

THE WITNESS: Craig Andrew Boyd Ferris. My first

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

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

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

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

6 THE REGISTRAR: And Ms. McPhee.

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

9 THE REGISTRAR: And Ms. Bains.

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

12 THE REGISTRAR: Thank you.

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

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

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

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

25 THE REGISTRAR: Counsel.

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

1                   **EXAMINATION BY MR. ISAAC:**

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

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

1 operations.

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

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

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

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

Craig Ferris (for the commission)  
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Jeanette McPhee (for the commission)  
Gurprit Bains (for the commission)  
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1                   and also I was chair of our discipline committee  
2                   which is the charging body at the law society.

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

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

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

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

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

25                   The monitoring and enforcement part of it is



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

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

18                  Q     Thank you.

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

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

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

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

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

Craig Ferris (for the commission)  
Don Avison (for the commission)  
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Gurprit Bains (for the commission)  
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1 Law Society of BC investigations and discipline  
2 summary. The third is the Law Society of BC  
3 regulation summary. The fourth is the Law  
4 Society of BC trust assurance program summary.  
5 And finally, the fifth one is the Law Society of  
6 BC education summary.

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

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

13 THE REGISTRAR: Yes, exhibits 222 to 226.

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

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

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

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

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

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

1                   please. The introduction to law society  
2                   summary.

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

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

25                                        Mr. Avison, there are approximately 13,000

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

3 A (DA) That's correct.

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

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

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

22 A (DA) Yes.

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

1 funded?

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

1 elevated focus on these matters. Correct?

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

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

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

14 THE REGISTRAR: Exhibit 227.

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

17 MR. ISAAC:

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

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

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

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

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

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

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

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

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

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

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

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

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

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





1                   benefit with respect to collaboration of the  
2                   Federation.

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

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

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

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

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

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

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

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

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

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

1 Q Okay. And --

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

3 You can be assured that the benchers are always

4 considering what they think is best. And if it

5 came to us that there was a better rule than

6 what the Federation was considering, there's no

7 reason why there would be any bar whatsoever to

8 us adopting that. I think always remembering in

9 mind that the issue that this commission is

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

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

12 have to add in the mix whether moving ahead

13 where other jurisdictions have lesser

14 requirements, whether that makes sense or

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

16 is a bit of a complex analysis.

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

18 we'll go into the details likely of this

19 document and refer to it further, but on the

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

21 Columbia regulation summary.

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

23 believe that is the -- exhibit 224, Madam

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

25 which is at page 58, please.

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

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

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

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

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

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

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

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

1           A       (DA) Correct.

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

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

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

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

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

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

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

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



1           A       (DA) That is my understanding, yes.

2           Q       Would it be fair to say that, at least in that  
3                    early period, that the understanding or the  
4                    focus of the law society and perhaps law  
5                    societies generally was on cash in particular as  
6                    the primary threat of money laundering?

7           A       (DA) Well, I think for society generally that  
8                    cash was a much more -- it was more visible in  
9                    relation to the conduct of the economy at that  
10                   point in time. Things have evolved considerably  
11                   in the intervening period of time, but yes.

12          Q       Okay. And the next step is 2008 and that was  
13                    the implementation of the law society's customer  
14                    identification and verification or the CIV  
15                    rules. Is that right?

16          A       (DA) The client identification rules, yes.

17          Q       Yes. And those were based on the model rules  
18                    developed by the Federation; is that right?

19          A       (DA) Yes.

20          Q       And I think we heard from Ms. Wilson that those  
21                    model rules themselves track very closely the  
22                    federal regulations under the PCMLTFA that had  
23                    been put in place at around the same time.

24          A       (DA) They did.

25          Q       And just advancing forward in our timeline, we

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

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

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

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

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

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

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

1                   British Columbia during that same time period  
2                   either.

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

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

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

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

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

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

1                   we're going to develop these rules.

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

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

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

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

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

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

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

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

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

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

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

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

37

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



1 profession.

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

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

6 Which is the Law Society of Upper Canada.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

25 So I think you would find a number of these

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

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

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

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

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

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



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

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

12          A       (DA) Absolutely.

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

17          A       (DA) Correct.

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

1 financial institutions or law enforcement.

2 Would you agree with that, Mr. Avison?

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

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

22 A (DA) Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15          A       (DA) Yes.

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

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

1 Q All right. And I --

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

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

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







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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 effectiveness of lawyer regulation.

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

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

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

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

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

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

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

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

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

20          A     (DA) Correct.

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

24          A     (DA) Yes.

25          Q     And that was July 2019 that that came into



1 effect?

2 A (JM) That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

1 types of issues.

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

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

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

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

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

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

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

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

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

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

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

16                    THE COMMISSIONER: Okay. That's fine.

17                    MR. ISAAC:

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

16 A (JM) Correct.

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

21 A (JM) That's correct.

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

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

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

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

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

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

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

21 Q Okay. And --

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

1 to make sure the trust reports are accurate.

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

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

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

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

1 Q And is that something --

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

3 Q Go ahead.

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

1 MR. ISAAC: Thank you.

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

5 **(WITNESSES STOOD DOWN)**

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

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

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

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

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

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

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

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

24 MR. ISAAC: Thank you.

25

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

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

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

1 money.

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

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

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

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

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

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

22 A (DA) It is.

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

1 July of 2019 to be any cash refunded.

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

12 A (DA) Correct.

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

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

23 Q Thank you.

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

1 investigations for further review.

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

5 A (JM) Correct.

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

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

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

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

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



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

6           Q       Thank you.

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

13          Q       Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

25                Q     Thank you. And connecting that --





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

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

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

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

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

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

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

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

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

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



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

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

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



1                                   circumstances ..."

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

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

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

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

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

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

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

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

25                  Are you able to provide an update on that?

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

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

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

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

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

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

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

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

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

1                   that:

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

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

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

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

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

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

21 Q Thank you.

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



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

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

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

18 A (DA) Yes.

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

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





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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 And she writes:

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

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

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

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



1 is wrong per se.

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

5 She goes on to say:

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

8 It is not in the Model Code."

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

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

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

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

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

1 "Don't recall where this came from.

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

6 You go on to give an example

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

11 I believe you mean "not."

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

16 That's professional committee?

17 A (DA) Professional conduct.

18 Q Thank you.

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

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

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

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

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

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

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

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

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

1                   it fixed.

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

8                               Can everything else still hear me okay?

9           A       (DA) We can hear you fine.

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

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

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

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

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

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

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

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1 (CONNECTION INTERRUPTED)

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

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

8 MR. MCGOWAN: Thank you.

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

11 **(WITNESSES STOOD DOWN)**

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

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

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

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

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

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

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

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

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

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

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

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

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

18 THE COMMISSIONER: All right.

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

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

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



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

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1 THE COMMISSIONER: Yes.

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

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

8 THE COMMISSIONER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 A (JM) That's correct.

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

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

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

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

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

1 identified in the regulation summary.

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

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

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

11 "After Rule 3-58.1 --"

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

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

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

1 was provided to the commission.

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

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

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

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



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

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

14                 A     (GB) That's correct.

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

25                 A     (GB) That's right.

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

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

10            You see that.

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

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

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

24           A     (GB) Yes.

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

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

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

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

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

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

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

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

13                    THE REGISTRAR: 230, Mr. Commissioner.

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

16                    THE COMMISSIONER: Thank you.

17                    MR. ISAAC:

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

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

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

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

9 A (GB) I agree --

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

13 MR. ISAAC:

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

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

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

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

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

1 relationship and to which privilege applied.

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

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

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

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

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

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



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

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

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

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

1 a Representative Capacity."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

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

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

1 the law society currently maintain visibility?

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

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

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

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

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

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

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

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

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

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

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

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

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

25           Q       Okay. And then on the second more expanded

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

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

22 Q Okay. Thank you.

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

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

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

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



1 other members of the public.

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

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

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

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

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

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

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

1                   just that, it is only a veil.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE REGISTRAR: 231, Mr. Commissioner.

13 THE COMMISSIONER: Right, 231. Yeah.

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

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

19 MR. ISAAC:

20 Q Please. Yes.

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

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

4 MR. ISAAC:

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

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

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

15 A (DA) He is.

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

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

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

4                   And then the second is:

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Craig Ferris (for the commission)  
Don Avison (for the commission)  
Jeanette McPhee (for the commission)  
Gurprit Bains (for the commission)  
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1                   So this is an ongoing area that needs further  
2                   work, but it's -- yeah, it's complicated.

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

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

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

11          THE REGISTRAR: Exhibit 232, Mr. Commissioner.

12          THE COMMISSIONER: 232.

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

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

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

25          MR. ISAAC: 196-1.



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

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

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

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

9           Q       Yes. Yes, it is.

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

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

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

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

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

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



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

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

9           Q       Okay. Thank you.

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

12          THE COMMISSIONER: 233.

13          THE REGISTRAR: 233. Exhibit 233.

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

17          MR. ISAAC:

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

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

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

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

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

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

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

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

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

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

25 Q That a helpful clarification, Ms. Bains.

Craig Ferris (for the commission)  
Don Avison (for the commission)  
Jeanette McPhee (for the commission)  
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1 MR. ISAAC: Before I forget, if we could mark this  
2 document, please, as the next exhibit, please.

3 THE COMMISSIONER: 134.

4 THE REGISTRAR: 234, Mr. Commissioner.

5 THE COMMISSIONER: 234. I'm sorry.

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

10 MR. ISAAC:

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

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

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

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

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

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

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

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

9 Q Okay. Thank you.

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

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

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

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

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



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

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

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

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

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

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

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

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

15                                   **(WITNESSES STOOD DOWN)**

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

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