

**PROCEEDINGS AT HEARING
OF
NOVEMBER 19, 2020**

COMMISSIONER AUSTIN F. CULLEN

INDEX OF PROCEEDINGS

Witness	Description	Page
	Proceedings commenced at 9:30 a.m.	1
Craig Ferris (for the commission) Donald Avison (for the commission) Jeanette McPhee (for the commission) Gurprit Bains (for the commission)	Examination by Mr. Isaac (continuing)	1
	Proceedings adjourned at 11:09 a.m.	75
	Proceedings reconvened at 11:23 a.m.	75
Craig Ferris (for the commission) Donald Avison (for the commission) Jeanette McPhee (for the commission) Gurprit Bains (for the commission)	Examination by Mr. Isaac (continuing)	76
	Examination by Ms. Herbst	133
	Colloquy	148
	Proceedings adjourned to November 20, 2020	148

INDEX OF EXHIBITS FOR IDENTIFICATION

Letter	Description	Page
---------------	--------------------	-------------

No exhibits for identification marked.

INDEX OF EXHIBITS

No.	Description	Page
235	Memo to FLSC AMLTF Working Group, CIV Working Group from Jeanette McPhee re Source of Funds and Wealth – October 25, 2019	18
236	Email from Jeanette McPhee re CIV Rules – March 26, 2019	27
237	LSBC Briefing Note for Cullen Commission – October 7, 2020	39
238	Email from Karen Mok re Law Firm Regulation AML Issues – January 29, 2019	75
239	Email from Jeanette McPhee to Varro & Wilson re Further Issues for Phase 2, Update from BC – May 29, 2019	82
240	LSBC Memo to Jeanette McPhee from Eva Milz re Resources – April 24, 2017	99
241	Letter from Catherine George re Question to the LSBC re Information sharing with law enforcement entities – September 24, 2020	113
242	LSBC Guidelines for Disclosing Information to Law Enforcement	113
243	Letter from Catherine George - October 26, 2020 (redacted)	113

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

1

1

November 19, 2020

2

(Via Videoconference)

3

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

4

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

5

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

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CRAIG FERRIS, a witness
for the commission,
sworn.

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DONALD AVISON, a witness
for the commission,
sworn.

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JEANETTE MCPHEE, a
witness for the
commission, affirmed.

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16

17

GURPRIT BAINS, a witness
for the commission,
affirmed.

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EXAMINATION BY MR. ISAAC (continuing):

21

Q Thank you. I'd like to turn, please, to the
third of the rules that I said we would be
examining and those are the client
identification and verification rules.

22

23

24

25

MR. ISAAC: And, Madam Registrar, if you could pull

1 up, please, the regulation summary, and that is
2 exhibit 224.

3 Q As that comes up I'll say that the background
4 and content of the CIV rules are set out at
5 paragraphs 35 to 50 of the regulation summary.
6 And if we go down to paragraph 38. I don't
7 intend to go through all of the intricate
8 details of the CIV rules with the panel today,
9 but paragraph 38 summarizes the six main
10 requirements of the current CIV rules, and if we
11 look there, there's a requirement to identify
12 the client and that's in all circumstances.
13 There's an extended requirement to verify the
14 client's identity in relation to financial
15 transactions, again with respect to financial
16 transactions a requirement to obtain and record
17 information about the source of money. There's
18 also a requirement to maintain and retain
19 records. And then a requirement to withdraw if
20 the lawyer knows or ought to know that he or she
21 is assisting in fraud or other illegal conduct,
22 and finally a requirement to monitor. And just
23 before we look into these a little bit in more
24 detail, if I could ask that you explain the
25 significance of these rules and their role

1 within the broader AML regime of the Law Society
2 please.

3 A (DA) Well, I think we can give you a fair amount
4 of information about we've already talked about
5 the origin of a lot of this and the work that
6 has been done with the federation, but these are
7 the many of the key components that are
8 consistently brought to the attention of the
9 profession in relation to their areas of
10 obligation, and I might invite Ms. McPhee and
11 Ms. Bains to provide some further comment in
12 relation to some of the components.

13 (GB) Sure, I can assist. Good morning,
14 everybody. The purpose of these rules is I
15 think I would expand on what Ms. Wilson said
16 earlier this week. It's the very important
17 obligations to know your client, to verify that
18 your client is who the client says they are,
19 with "client" having quite a broad definition
20 including the instructing individual and what
21 I'll call the beneficial client for whose
22 benefit the work is being done, understanding
23 the purpose of your retainer, understanding the
24 source of money that is involved in the legal
25 services that you are providing. It's all a

1 part of that, which really goes to understanding
2 the risks in providing those legal services and
3 being able to mitigate against those risks so
4 that you're not furthering any inappropriate
5 illegal, dishonest fraudulent conduct.

6 Q Thank you. I do want to turn to ask just a
7 couple of questions about the scope of the
8 rules. The first focus is on the verification
9 requirement. That requirement currently only
10 applies or is triggered by financial
11 transactions and those are defined in the rules.
12 Are there other non-financial transaction types
13 of services such as the incorporation of a
14 company or the formation of a trust, areas that
15 we've seen have been identified as potential AML
16 risks where the lawyer verifying identity may be
17 an important part of their gatekeeper function,
18 and if so, is that something that the Law
19 Society either alone or in conjunction with the
20 Federation has looked at potentially expanding
21 the verification requirements to other services
22 where such risks may be present?

23 A (GB) Yeah, so I think an important starting
24 point is understanding what the language means
25 and when the rules, the verification rules

1 apply. And so the verification requirement
2 comes into play if there is a financial
3 transaction. A financial transaction has a very
4 broad definition in the rules and I'm just going
5 to refer to it so I don't misstate it. It means
6 the receipt, payment or transfer of money on
7 behalf of a client or giving instructions on
8 behalf of a client in respect of the receipt
9 payment or transfer of money so the financial
10 transaction can be triggered even if there are
11 no funds flowing through a lawyer's trust
12 account. And the second important component of
13 that rule is money has a -- is also defined in
14 the rules and money has a very broad definition.
15 And the definition of money in the rule includes
16 what you would think it would include, cash,
17 currency, but it extends beyond that. It
18 includes securities, share, share transfers,
19 negotiable instruments or any other financial
20 instrument in any form that indicates a person's
21 title or interest to or interest in them. So
22 it's quite a broad definition and that would
23 capture share transfers, it would capture
24 mortgages, it would capture other types of
25 security documents for loans where the lawyers

1 giving or receiving instructions in respect to
2 that transaction. So it has quite a broad
3 application. In respect to whether we've looked
4 at expanding that, I think that looking at
5 whether these roles should be expanded more
6 broadly, that's always on our horizon and if we
7 identify a potential issue, gap, concern, then
8 we would consider whether there should be
9 further measures in place. But I think it's
10 really important that the practice of law is
11 very varied and the services lawyers provide are
12 varied. And it's very difficult to capture, and
13 I don't think from my own perspective it's good
14 rule-making to, in a piecemeal way, try to
15 expand the rule. I think we want to look at it
16 much more holistically and looking at this
17 holistically the client identification and
18 verification rules are one part of a lawyer's
19 obligations to know your client and understand
20 the risks. They are not the only part.

21 So when lawyers are providing other services
22 that may not get captured by a financial
23 transaction they still have to comply with the
24 code provisions. And so in particular rule
25 3.2-7 and it's commentary, they have to be alive

1 to the risks, so for example, if they are
2 incorporating a company or establishing a trust,
3 they need to be aware of those risks and if
4 there are suspicious, objectively suspicious
5 circumstances they have a duty to make
6 reasonable inquiries, very similar to the type
7 of inquiries that the monitoring and these
8 client identification and verification rules
9 require. So I think that reading the
10 obligations, they have to be read as a whole.

11 Q Thank you. Just focusing a little bit on what
12 you said there. You would agree that at least
13 with respect to the formation of a company, the
14 suspicion may not necessarily be apparent or the
15 ultimate use to which the company may ultimately
16 be put may not be apparent necessarily at the
17 time of formation. Is that fair?

18 A (GB) No, I don't agree with that. I mean, a
19 part of practising law is practising competently
20 and understanding the purpose of your retainer.
21 I think those are just fundamental obligations
22 and pretty basic expectations of a lawyer.
23 Lawyers ought not to be providing legal services
24 if they don't understand why they are providing
25 them. And so if a lawyer is being asked to

1 incorporate a company, at a minimum they need to
2 understand what is the purpose of this company.
3 I would say those are quite basic questions that
4 you'd expect a lawyer to ask.

5 Q There are lawyers in the province of
6 British Columbia that offer services such as the
7 sale of shelf companies for the formation of
8 other companies. Do you think -- I think this
9 leads into a question, a related question which
10 concerns beneficial ownership transparency. One
11 of the issues that our commission will be
12 hearing evidence about relates to beneficial
13 ownership transparency and potential registries
14 in that regard, and one of the issues that early
15 adopters of those registries such as the UK are
16 increasingly focused on is ensuring the accuracy
17 of the information in the registry. Has -- to
18 the extent that lawyers play an important role
19 in company formation and dealing with companies,
20 has the Law Society considered whether or not
21 lawyers might have an enhanced or particular
22 role in terms of assisting were such a registry
23 to be created in ensuring the accuracy of the
24 information in such a registry, whether that's
25 through a sort of a gatekeeper, as I've

1 suggested potentially having a verification
2 requirement extend specifically to company
3 formation, or potentially some obligation to
4 report inaccuracies within such a registry if
5 they were to come across them in any part of
6 their practice? Is that something that the Law
7 Society has considered? I appreciate many of
8 these are very much forward looking. There
9 isn't such a registry in place now, but is that
10 something that the Law Society has considered
11 and contemplated going forward?

12 A (DA) Well, we have. So we've had discussions
13 and have had them for some period of time with
14 the Province of British Columbia around the
15 development of some of the registries, including
16 the one that you mentioned just now, Mr. Isaac,
17 and have indicated a willingness to engage with
18 and assist government in the design of those
19 programs and looking at some of the issues
20 associated with system architecture.

21 I'll mention also the *Land Owner*
22 *Transparency Act*, there's been engagement
23 between the Law Society and the land title
24 survey authority with respect to issues like
25 system architecture and how those programs might

1 be best developed to ensure that they do produce
2 a kind of information that, frankly, would be
3 very helpful for lawyers in having the
4 background information that would be useful to
5 them.

6 So Ms. Bains I think can speak to this. She
7 has been directly in involved in some
8 discussions with the land title and survey
9 authority around the development of that system
10 architecture and I anticipate later today we
11 have some recommendations that we would like to
12 the commission to consider, one of which relates
13 to the development of what has come to be known
14 as the LOTR registry.

15 Q Thank you. And, Mr. Avison, part of the
16 question was about potential, not just the use
17 of the registry and support of the registry, but
18 the potential for lawyers potentially having a
19 role in verification and whether that, as I
20 said, is through kind of the gatekeeper front
21 end or potentially having an obligation to
22 report inaccuracies. Is that specifically
23 something that has been looked at by the Law
24 Society?

25 A (DA) I think it anticipates something that

1 hasn't yet happened, but certainly the Law
2 Society would be prepared, has been in fact
3 engaged with discussions around some of the
4 registries that are in development, but I think
5 those are the kinds of questions that together
6 with other entities, including government, we
7 would work through as these programs are
8 developed.

9 (CF) Mr. Isaac, I'd just like to say one
10 thing because I think it's important, which it's
11 about the approach to regulation. And you know,
12 I've attended an international conference where
13 I've sat and listened to presentations by
14 representatives of the SRA with respect to their
15 anti-money laundering framework and it's no
16 great hope. They have problems with compliance.
17 They have problems with lawyers thinking if they
18 check the box they are then entitled to go and
19 do whatever they want because they have checked
20 a box. And it's not simply -- the loading on of
21 more regulations and more box checking is not
22 necessarily more effective. And so I think
23 there's a danger, and I think maybe Ms. Bains
24 referred to this a bit earlier, there's a danger
25 of loading up more rules, rules and more rules.

1 And the question I think that we are constantly
2 asking ourselves is whether more prescriptive
3 rules is better or whether having an obligation
4 which requires lawyers to be vigilant, lawyers
5 to open their minds and their eyes and to
6 investigate each situation as it comes in is a
7 better process.

8 And so, you know, the idea of a rule for
9 every risk I just would caution you is not
10 necessarily the best way to regulate lawyers in
11 particular.

12 (GB) Mr. Isaac, can I add with respect to
13 lawyer's obligations in terms of beneficial --
14 statutory beneficial ownership registry. If a
15 lawyer is aware that a registry is incorrect
16 from information from the client and the client
17 refuses to instruct, allow the lawyer and
18 instruct the lawyer to correct the registry and
19 the client doesn't correct the registry on their
20 own, the lawyer can't continue acting. Lawyers
21 can't facilitate conduct that is contrary to the
22 law. So that would be a situation where the
23 lawyer would have to withdraw. They can't
24 continue to facilitate something that's contrary
25 to law.

1 Q Thank you. The second component that I wanted
2 to look at with respect to the CIV rules focuses
3 on the requirement to record source of money,
4 which is the requirement that is referred to in
5 the subparagraph 3. And the term in the rule is
6 source of money but I understand that the Law
7 Society of British Columbia has included
8 guidance that goes into some detail about what
9 specifically was required under the source of
10 money requirement. And that goes into the sort
11 of level of detail that almost gets to the point
12 of source of funds. And I just wanted to look
13 at whether or not there is any issue with
14 respect to the location of that in the guidance
15 as opposed to the rule.

16 MR. ISAAC: Madam Registrar, if you would bring up
17 please document 5250-1.

18 Q And this is an October 2019 memo regarding
19 source -- the heading here is "Source of Funds
20 (or Money) and Wealth," October 25, 2019, to the
21 federation working group regarding phase 2 and
22 it's from Ms. McPhee. And if we could go to
23 page 2, please, of this memo. This sets out
24 sort of a helpful summary of some of the issues
25 around what does source of money mean, how might

1 it be interpreted, and the memo says:

2 "Through our discussions and as evidenced
3 in our findings and compliance audits and
4 investigations, the meaning behind the
5 term source of funds and requirements
6 around it are not always clear and can be
7 interpreted in many different ways.
8 Specifically, economic origin may not be
9 considered when obtaining the source of
10 funny. A common example is that the
11 source can be interpreted as 'form of
12 funds', or the type of financial
13 instrument, such a 'cheque' or 'bank
14 draft,' which is often recorded as source
15 of funds. Other interpretations is that
16 the source of funds is the person who has
17 provided the funds, such as "Client - John
18 Doe." Another common example that is
19 recorded is the financial institution who
20 issued the cheque or electronic funds ...
21 as 'Royal Bank.'"

22 She goes on to explain a couple of other issues
23 in terms of the potential ambiguity, at least of
24 the term "source of funds." Now, I understand
25 that the Law Society, as I said, has issued

1 additional guidance around this. There's a
2 reference here to having encountered lawyers
3 potentially interpreting this in a way that it's
4 more narrow than the guidance would suggest. Is
5 that something that has continued to be an issue
6 in terms of some lawyers still interpreting this
7 in a narrower way in the manner in which is sort
8 of described in this memo?

9 A (GB) I think I would say at the time was -- the
10 memo is from October 2019 and the source of
11 money requirement didn't come into place until
12 January 1st, 2020, when the CIV, the client
13 identification and verification rule amendment
14 came into force. But the issue is a live issue
15 and we recognize that the guidance is -- the
16 guidance put together by primarily by
17 Ms. Buchanan, our practice advisor, is really
18 quite good and she is someone who understands
19 these rules probably better than anyone else.
20 Put a lot of thought and care into drafting what
21 would be required for the source of money
22 obligations. But we do recognize that having it
23 in the rules is best practices and is ideal.
24 There has been lots of consideration of this at
25 the federation, in the federation working group,

1 and we've had a lot of very robust discussion
2 about how do we address this concern and do we
3 expand on the rule itself, do we put this as a
4 definition within the rules, how are we going to
5 alert lawyers to what we mean by source of money
6 or source of funds. And that is, I would say, a
7 high priority on the list of things to address
8 and the guidance is intended to alert the
9 profession to it while we sort out those issues.

10 And in addition to the Benchers' Bulletin
11 publications, Ms. Buchanan has also included it,
12 I think it might be the very first topic on her
13 FAQ page which is the page that lawyers go to,
14 should go to, if they have questions about how
15 to interpret and comply with the rules.

16 Q Thank you.

17 A (DA) It is in the FAQ that is posted on the
18 website. We've made that part of the website
19 accessible to the profession in addition to the
20 various other materials that go out from time to
21 time, and Ms. Bains mentioned the role that's
22 been played by Barbara Buchanan, QC, in relation
23 to the development of the guidance here in
24 British Columbia and also with respect to the
25 FAQs, but also a very significant role in the

1 development of those materials at a national
2 level with the federation. In fact over the
3 course of the last several months, Ms. Buchanan
4 has been working almost exclusively in relation
5 to the development of those materials. She is
6 normally within, still is part of the practice
7 advice group.

8 So that's the other part that we haven't
9 added is that in the materials there is a
10 consistent identification that beyond those
11 written materials that the profession could look
12 to there's also the option of asking questions
13 if you have a difficult issue with practice
14 advisors at the Law Society. This year those
15 questions continue. Call volumes, it won't
16 surprise you, were up significantly as a result
17 of a number of other kinds of issues that have
18 materialized as a result of the COVID-19
19 situation.

20 MR. ISAAC: Thank you. If we could mark this,
21 please, as the next exhibit.

22 THE COMMISSIONER: Very well. Madam Registrar, can
23 you -- I think we are at.

24 THE REGISTRAR: Next number is 235.

25 THE COMMISSIONER: Thank you.

1 **EXHIBIT 235: Memo to FLSC AMLTF Working Group,**
2 **CIV Working Group from Jeanette McPhee re Source**
3 **of Funds and Wealth - October 25,**
4 **2019**

5 THE WITNESS: (JM) I wonder if I could add one more
6 thing on this topic. From an audit
7 perspective -- and certainly source of funds,
8 source of money is -- our term is source of
9 money which is source of funds -- from an audit
10 perspective we audit to the standard, to the
11 standard of the guidance. The guidance that was
12 issued by the federation when the rules were
13 initially came out talks about source of funds
14 in this way and certainly our auditors and when
15 they do look at any files, that is the view that
16 they look at it with and either educate if --
17 and if it's a suspicious issue then it will be
18 referred for investigations. So it's certainly
19 a large focus of the audit process.

20 MR. ISAAC:

21 Q Thank you. I appreciate from Mr. Avison's and
22 Ms. Bains' comments that this is something that
23 is currently being looked at, but I would like
24 to -- because it does connect to what Mr. Ferris
25 said about how do we look about the value of

1 rules versus sort of overarching obligations and
2 just in terms of the placement of where this
3 expanded understanding of source of money is.
4 If we could bring up, please, LSB document
5 5522-1. And this is an email chain in
6 March 2019 from Ms. McPhee to other members of
7 the Law Society including copying Ms. Buchanan,
8 and the subject is "CIV Rules." And I just want
9 to highlight a couple of portions of it. The
10 first page, third paragraph discussion,
11 Ms. McPhee, you say:

12 "As we investigate and try to enforce our
13 rule, the guidance helps, but if it isn't
14 in the rule, it is not effective."

15 And you go on in the next paragraph to describe
16 source of funds. And you say the rule says
17 obtain from the client and you go on to say:

18 "Nothing else specific in the rules.

19 There is guidance but this is not
20 enforceable."

21 I just pause and try to understand the
22 enforceability of the guidance and your comment
23 about this is the standard that the trust audit
24 is using is to the elevated standard, but when
25 you say that it's not enforceable if it's in the

1 guidance, what do you mean by that?

2 A (JM) I think it's a complex issue, and you know,
3 there is a combination of rules and guidance
4 that can be used to make it clear what is
5 required, and I think both do help assist the
6 profession to understand the obligations that
7 they have, but I certainly would say that both
8 of those are -- can be effective in enforcing --
9 in monitoring and enforcing and dealing with the
10 issue.

11 Q And --

12 A (GB) Mr. Isaac, may I just expand on that a
13 little bit, please. Sort of tying in the
14 discussion we had yesterday about what was the
15 standard expected with respect to trust accounts
16 prior to rule 3-58.1. I think that is a good
17 example of how the ultimate question should a
18 matter go to a hearing panel is whether the
19 conduct is professional misconduct, whether it's
20 a marked departure from the conduct the Law
21 Society expects of a member. And to determine
22 what's the conduct the Law Society expects of a
23 member we would look to what do the rules say,
24 what does the code say, what has the profession
25 been told about what we expect them to do and

1 that's where guidance, Benchers' Bulletin, FAQs,
2 discipline advisories, risk advisories, all
3 these publications we have come into play and we
4 saw that in the decision that I read out
5 yesterday as well, that those are informative.
6 So I think it's keeping that in mind that we are
7 not a profession much you have rule A, rule B,
8 rule C. We are a profession of you have ethical
9 standards and the ethical standards are found in
10 different places and lawyers should be keeping
11 up to date and reading the guidance and the
12 advisories that we put out because that is where
13 collectively and holistically you can assess
14 what standard is expected of you.

15 So I think that the tension comes in is with
16 audits. The audits are audits focusing on the
17 trust accounting rules and I think there's
18 always a preference to have things black and
19 white because it's easier to audit, but that
20 doesn't take away from it's still professional
21 misconduct if your conduct falls below the
22 standard expected of you, which the guidance
23 informs what the standards expected of you are.

24 Q Thank you. Mr. Ferris, I just want to say this
25 may connect as well with the comment that you

1 had about, you know, the challenge of not
2 veering to an extreme of having a series of
3 very, very specific rules for every instance but
4 also relying on overarching obligations and, you
5 know, perhaps the challenge when it comes to
6 enforceability in some circumstances. And I
7 suppose would you agree that there is at least a
8 balance there, that there is a greater certainty
9 with respect to enforceability when you have
10 specific rules and that there is a place for
11 both, there is an identified risk where a
12 specific rule may help to address that?

13 A (GB) Are you addressing this to Mr. Ferris?

14 Q I am. I think Mr. Ferris is muted.

15 A (CF) I'm back on. Thank you. I don't disagree
16 that there is a balance, but I do say that I
17 certainly have spent a decade of my life trying
18 to achieve that balance at the Law Society and I
19 think Ms. Bains and Ms. McPhee have spent more
20 than that. And so that balance is something
21 that we concern ourselves with most days in
22 thinking about these issues. And so the danger
23 of the checkbox is that you don't actually get
24 lawyers thinking about their overarching
25 obligations. They think they're free and clear

1 if they've checked the boxes and that is not the
2 way we want the profession to operate. We want
3 the profession to be professional about their
4 obligations. And we talked yesterday about the
5 Whac-A-Mole situation and you create a rule and
6 something else pops up and you have to be
7 fearful of, you know, you have talked quite a
8 bit about the SRA. There's now law firms in the
9 UK that do nothing other than advise lawyers
10 about their regulatory obligations, and when you
11 think of the added cost and access issues that a
12 regulatory scheme like that adds to the
13 profession, that's a balance that needs to
14 factor in this sort of overarching incredible
15 regulatory scheme that this places on lawyers.

16 And so I personally am of the view, you
17 know, everything can be improved, but we've done
18 I think a very good job of achieving that
19 balance to date and we continue to review these
20 rules and try to think about ways where we can
21 maintain that balance and still ensure effective
22 regulation of lawyers in the AML area.

23 Q Thank you. Ms. Bains or Ms. McPhee, this may be
24 something that you are able to address, just in
25 terms of the main mechanisms, the principle

1 mechanisms that the Law Society has to monitor
2 for non-compliance of the CIV rules in
3 particular. We will discuss the trust audits
4 program a little bit, but if you could identify
5 what are the main mechanisms that is the Law
6 Society uses to monitor potential non-compliance
7 with these CIV rules?

8 A (JM) I can speak to that. So first we would
9 have an compliance audit as I spoke previously.
10 We look at sample client files and within those
11 client files we -- very detailed review of the
12 evidence that the rule has been complied with
13 and that the information is there in all those
14 six main areas. So it's through that process.
15 If there is -- as I mentioned yesterday, if
16 there is a breach at a certain level it will be
17 referred to investigations for further
18 investigation. We also asked through the annual
19 trust report about their CIV system and the know
20 your client obligations and we will also follow
21 up on that also.

22 Q Thank you. And before we leave, move on from
23 the examination of the rules, I did want to
24 touch -- it has come up several times and I
25 think its the origins predate back into the

1 1920s, some of these overarching obligations
2 that we spoke of. And those overarching
3 obligations of a lawyer to know their client not
4 act if she or he knows or ought to know that
5 they are facilitating illegal conduct, those are
6 summarized as paragraphs 18 to 27 of the
7 regulation summary.

8 But I'd like to just ask you just to situate
9 -- and some of you have already touched on this
10 but just what role that those types of
11 obligations play in relation to the specific
12 rules and what level of importance they have to
13 the overall AML program of the Law Society?

14 A (GB) I mean, I guess I would say that those
15 ethical obligations set out in the code, they
16 are fundamental and they are critical to a
17 lawyer effectively guarding against being used
18 by an unscrupulous client for any inappropriate
19 objective. So understanding those rules is
20 really, you know, that is the foundation to
21 practising ethically and complying with all
22 these other obligations.

23 In terms of -- I think -- I don't know if
24 you want me to go through the rules, and I don't
25 have that paragraph, those paragraphs before me,

1 but I think it starts right from the barrister's
2 oath, the oath that you take when you become a
3 lawyer. I don't have the oath in front of me
4 either, but the obligations to practice
5 honourably and to discharge all your
6 professional obligations with honour and
7 integrity, I mean, that is really right out of
8 the gate, that's the expectation, and if we
9 drill it down to the base level everything else
10 flows from that and the various other, you know,
11 how we've broken it down really comes down to
12 that, being ethical, being honourable, acting
13 with integrity, abiding by the law, fighting for
14 your clients but fighting within the parameters
15 of what is ethical and legal, you know, not
16 doing -- not engaging in conduct that brings the
17 administration of justice into disrepute, that
18 brings the profession into disrepute. All of
19 those things. 3.2-7 which we've spoken about at
20 some length. Those obligations to be on the
21 lookout, to be on guard against being used by
22 anyone to facilitate any dishonest conduct or
23 crime, fraud or illegality.

24 MR. ISAAC: It should be -- I wasn't trying to be
25 mysterious by not having that document in front

1 you have, Ms. Bains; it wasn't a memory test.

2 But perhaps that is a good reminder if we could
3 mark the last document as the next exhibit, and
4 I think that would be exhibit 236.

5 THE REGISTRAR: Yes. Exhibit 236.

6 **EXHIBIT 236: Email from Jeanette McPhee re CIV**
7 **Rules - March 26, 2019**

8 MR. ISAAC:

9 Q Yes, Mr. Avison.

10 A (DA) So just before we move off that document,
11 that one and a number of the others that you
12 brought up I think reflects something that is
13 quite significant, whether it's within the Law
14 Society itself or in our discussions with other
15 law societies or the Federation, the discussion
16 in relation to areas of potential gaps and where
17 the rules might be approved in getting the
18 balance right with respect to guidance and the
19 rules, that discussion is going on all the time.
20 And I also want to add to the point that
21 Ms. Bains made about the expectation of members
22 of the profession right out of the gate from the
23 time of the swearing of the oath, that's true.
24 It goes back even further than that. So in the
25 professional legal training program there are

1 significant materials, and I know we'll get into
2 education in a bit more detail, but there are
3 significant elements of the program now that
4 deal with these obligations, with the ethical
5 obligations that are specific to some of the
6 implications or some of the vulnerabilities
7 associated with anti-money laundering and a
8 number of other elements that I think all go to
9 this issue indeed. I think increasingly we've
10 seen that there has been some attention paid to
11 these matters at the law school level, so not
12 only members of the profession but emerging
13 members of the profession have these issues
14 brought to their attention pretty consistently
15 all the way through.

16 Q Thank you.

17 MR. ISAAC: If we could actually bring up, Madam
18 Registrar, exhibit 224. If we go to
19 paragraphs 18 through 27. Just as we are
20 discussing these overarching obligations, they
21 are set out there.

22 Q And in particular there's rule 3-109 which is
23 referred to and also portions of the canon of
24 legal ethics and then the code rule 3.2-7 that
25 Ms. Bains made reference to. In terms of -- and

1 I do want to look, we will look at the role of
2 education and perhaps this is a preclude to
3 that. Both when we think about the CIV rules
4 and the obligations to withdraw and all of these
5 other obligations, would you agree that the
6 value of these rules is not in the recording of
7 the information or taking the specific steps but
8 in the lawyer being able to identify whether or
9 not that information ought to trigger suspicions
10 or red flags and trigger their professional
11 obligations to act accordingly? So the CIV
12 rule, really, and those other specific sort of
13 steps that are taken, the real -- life is
14 breathed into them through the knowledge of the
15 lawyer that they have to actually what they do
16 with that information. Is that fair?

17 A (DA) yeah, I think that's true. I think when
18 you take it as a whole there's an expectation of
19 a culture of inquiry in relation to the purpose
20 of your retainer and your obligations as a
21 professional, so yeah, I would agree with that.

22 (GB) The recording is quite important on a
23 number of levels. I think it's important in
24 recognizing that at a firm a file may pass
25 through many hands and if there has been

1 recording by one lawyer of the required
2 information and the next lawyer takes it on and
3 reviews that information, that informs them in
4 considering their obligations and whether there
5 are heightened concern that they need to have
6 and they can build on that, because the
7 obligation to monitor is for periodic monitoring
8 throughout the life of the file. So having that
9 recording is important in the management of
10 those risks and it's also really important from
11 our perspective in auditing and investigating
12 when you know a year later or six months later,
13 whatever the period is, we are asking the lawyer
14 what inquiries did you make and show me the
15 written record of those so that we can talk
16 about them and we can look at whether that met
17 the requirement. So the recording is an
18 important part. I don't want to diminish that
19 obligation.

20 Q Thank you. When we look at the content of these
21 overarching obligations, as you know,
22 section 462.31 of the *Criminal Code* was recently
23 amended. That's the money-laundering provision
24 in the code. It now includes language of
25 recklessness. We heard from Dr. Benson's

1 testimony that in the UK, and I think the
2 reasonable inference same likely applies here,
3 that proving guilty knowledge is often one of
4 the most challenging components in obtaining
5 convictions at least in the UK with respect to
6 legal professionals. Although appreciating that
7 law societies own regulatory proceedings have a
8 different focus and a different standard of
9 proof, has the Law Society considered revising
10 these rule 3-109 or any of the other code to
11 track that recklessness language? Would there
12 be any benefit or change in it doing so? Is
13 that something that has been considered?

14 A (DA) We have discussed it. We don't believe
15 it's necessary. I'll have Ms. Bains explain to
16 you why.

17 (GB) I think we were ahead of the curve on
18 that one. The 3.2-7 and the knowing that you
19 are facilitating illegal conduct, that knowing
20 *mens rea*, the mental element of knowing includes
21 actually knowing, being willfully blind or being
22 reckless. So recklessness is already a mental
23 component of that mental element test. So there
24 is no need to revise that wording of 3.2-7 or of
25 3-109.

1 Q Thank you. And we touched on I think sort of
2 the animating, the need for lawyers to have the
3 knowledge to give meaning to these rules. And
4 that takes us into the next topic I would like
5 to address with you, which is the topic of
6 education. And there is a summary that has been
7 provided which is exhibit 226. If we could
8 bring that up, please. You'll see on the table
9 of contents here, it breaks down the educational
10 resources into two broad categories, resources
11 that are available for lawyers and resources
12 that are available for students. If we go into
13 the body, there are a number of -- when we look
14 at the resources that at least are available for
15 lawyers they are broken into several categories
16 of the Law Society website, benchers bulletins,
17 discipline advisories, practice support through
18 practice advisor, and then AML programs. If I
19 could ask that you briefly introduce what each
20 of those is and its significance, please.

21 A (DA) sure. Happy to do that. I'm wondering if
22 we might turn back to the index on the document.
23 So I'll use that just to illustrate a number of
24 the things that have been taking place for some
25 period of time now. So as you mentioned,

1 Mr. Isaac, there are extensive materials that
2 are on the website and they are regularly
3 updated. We did take some action over the
4 course of the last year or two to do what we
5 thought was necessary to make that even more
6 approachable and more available, more
7 accessible. On the website there are bench
8 bulletins that go out on a regular basis where
9 this has been a consistent theme identified for
10 the membership. Discipline advisories that are
11 more specific in relation to matters that the
12 Law Society has addressed. I'll also mention
13 the FAQs. It's come up a couple of times in the
14 discussions that we've had, but I think that is
15 one of the more important documents for lawyers
16 to get quick and easy answers to some of the
17 things that they might be coming into contact
18 with. The practice advisors, I've mentioned by
19 Barbara Buchanan, QC, a number of times, and
20 there are a number of other colleagues in that
21 group that are available to provide advice to
22 members of the profession and many of the
23 materials we have on the website or that go out
24 independently frequently indicate that the
25 followup might well be getting in touch with

1 practice advisors and they are very accessible
2 in relation to the provision of their email
3 addresses and their telephone numbers so that is
4 something that can be done pretty quickly.
5 We've increased the number of educational
6 programs that are provided through practice
7 advice and the trust auditors. In fact there's
8 one that I think shows up in the materials that
9 was done by Barb Buchanan and by Tina Kaminski
10 who we made reference to yesterday in some of
11 the proceedings with the program on AML. I
12 think in the document that you have up on the
13 screen at the moment that there was a reference
14 to the number of times that program is now
15 available electronically, and I think at the
16 time this document was prepared the number of
17 viewings was in the order of about 2,400 and as
18 of yesterday it was closer to 2,800. We don't
19 know the answer to the question how many lawyers
20 have viewed that because of course it's possible
21 that more than one person was watching when it
22 was up on the screen, but we are quite happy
23 about the level of takeup in relation to that
24 educational program.

25 And there have been a number of AML specific

1 programs delivered either directly through the
2 Law Society or in association with other
3 entities like the Continuing Legal Education
4 Society of British Columbia where programs have
5 been available. Barbara Buchanan has been a
6 regular participant and contributor on that
7 front, has actually worked with Dr. Peter German
8 in relation to the delivery of some programs.
9 And we've also made resources available for some
10 of the programs that have been delivered at a
11 national level. So the amount of material and
12 the programs developed and delivered has been
13 significant for quite some period of time and
14 we've increased the level of that activity over
15 the course of the last two or three years.

16 Q Thank you.

17 A (CF) Mr. Isaac, can I just add one thing. You
18 read these things anew you realize there's one
19 thing missing. And the one thing missing is
20 that all of our members are invited to phone a
21 bencher if they ever have an ethical issue. So
22 I get calls a couple of times a month from
23 members about ethical issues and I've certainly
24 received at least one call confidentially about
25 a potential AML issue from a member. So that's

1 another educational resource that's available to
2 the members of our society.

3 (DA) I think it's a very good point, and I'd
4 add to that those coming into the profession we
5 also have bencher interviews. So some of these
6 professional obligations are the kinds of things
7 that are addressed during the course of those
8 processes as well.

9 Q Thank you. We heard Ms. Wilson from the
10 Federation describe how the sort of emerging
11 risk-based approach, she characterized it as
12 something that's still a process that's ongoing
13 in terms of implementing that risk-based
14 approach, has a significant educational
15 component. Are you able to appreciate -- that's
16 what she said. But are you able to explain how
17 risk features into the educational programs that
18 the Law Society has implemented and what it's
19 doing in that regard?

20 A (DA) I think the identification of potential
21 risk has been at the heart of the educational
22 programming really from the start. I was
23 looking at one of the documents that goes back
24 about 18 years where much of the focus in
25 relation to the materials that were being

1 provided to the profession were all about the
2 potential for risk and the identification of it
3 and the kinds of elements that lawyers may wish
4 to take into account in avoiding that risk. So
5 it's been at the heart of the development of
6 those educational materials really from day one.

7 Q Thank you. I would like to look at one
8 particular aspect of education, and I take it
9 all of the resources that we've just described,
10 leaving aside the PLTC course as well as certain
11 aspects of the CPD or the continuing
12 professional development course, these are
13 resources that are available but they're not
14 mandatory. The mandatory current components of
15 the law society's educational program are that
16 professional legal training course where
17 students or those seeking admission to the bar
18 are required to take and then a requirement that
19 all practising lawyers complete 12 hours of CPD
20 per year with a 2 hour ethical and practice
21 management component. Do I have that right?

22 A (DA) You do. The one addition that I'm going to
23 add is some benchers last year made the decision
24 that there would be a mandatory program in
25 relation to indigenous cultural competency.

1 That program is in development and we anticipate
2 that it will be available into 2021 with the
3 expectation that there will be six hours of a
4 mandatory requirement associated with that
5 program.

6 Q It is as illustrated I think perhaps by that
7 example you've just given, Mr. Avison, it's the
8 Law Society alone that can set the contents and
9 requirements of the educational requirements for
10 the profession in the province; is that right?

11 A Yes.

12 Q And I think I did mention the mandatory, that
13 there is a two-hour component currently for the
14 CPD. Of the 12 hours, 2 hours have to be
15 related to practice management or practice
16 ethics. And that might include money-laundering
17 related, but it is a broader category certainly
18 than just that. That's right?

19 A (DA) It is.

20 Q Okay. I'd like to if we could bring up Law
21 Society document 27515, please. This is a
22 briefing note that was prepared by the Law
23 Society for the commission that provides some
24 more breakdown and detail of the CPD courses and
25 attendance that have been offered over time by

1 the Law Society with information or educational
2 components involving some degree of anti-money
3 laundering. And if we could mark this please as
4 the next exhibit.

5 THE COMMISSIONER: 237.

6 THE REGISTRAR: Exhibit 237.

7 **EXHIBIT 237: LSBC Briefing Note for Cullen**

8 **Commission - October 7, 2020**

9 MR. ISAAC:

10 Q And you'll see at the top there's a chart which
11 maps in blue the number of such courses that
12 contain some degree of information relating to
13 money-laundering and then in orange the
14 attendance -- I should say the confirmed CPD,
15 those who actually claimed CPD credits for
16 attending those courses; is that right?

17 A (DA) Yes.

18 Q Then there's quite a lengthy -- over 110
19 pages of text that follows that provides a
20 description of each of the courses along with
21 the numbers of people that attended. And I just
22 want to look briefly at what these data show and
23 ask some questions relating to that. So if we
24 do go down into the -- into the appendix.
25 Sorry, it's not described as an appendix but

1 starting on page 2. A number of the courses, I
2 think particularly those that existed prior to
3 '18, they show at least a relatively small, in
4 some cases just one or two confirmed attendance.
5 And I want to ask when the Commissioner
6 interprets these data, it's possible that in
7 some cases there may be overlap; right? There
8 may be the same very eager lawyer who is
9 attending multiple of these courses. Is that
10 accurate?

11 A (DA) well, I think something that you have to be
12 cautious about in looking at this data is the
13 requirement of the recording of the 12 hours
14 often being some lawyers will record the
15 12 hours, so it might not reflect all of the
16 continuing professional development that they
17 have engaged in over the course of the year. So
18 I would add that caution. What I would also say
19 is that in relation to this area specifically
20 and not surprisingly I think we've seen, and I
21 think it was evident from that first chart, an
22 increase in the level of activity in relation to
23 matters that touch upon money-laundering and
24 terrorist financing and as reflected by the data
25 in relation to the program that's available

1 electronically, those numbers have gone up quite
2 significantly over the course of the last year
3 alone.

4 Q I think that is illustrated if we look at the
5 chart back on page 1, please. There is a
6 significant spike obviously in attendance in
7 2019 and 2020. I want to ask about that in a
8 moment. But If we look at the preceding years,
9 the average confirmed attendance, and along with
10 that caveat, Mr. Avison, that you provided that
11 this may not be reflective of every lawyer, it
12 illustrates that those that confirmed their
13 attendance, but the average attendance over
14 between 2009 and 2017 is 55 which is per year,
15 which is it is under 1 percent of the lawyers
16 practising in British Columbia. And is that
17 fair? I appreciate none of you have calculators
18 with you, but you would agree that it's likely
19 under that amount?

20 A (DA) I would agree that those numbers are
21 smaller, but I don't think that actually tells
22 you the whole of the story because if you take a
23 look at the amount of material that has gone out
24 from the Law Society and the guidance to the
25 profession, whether it's the benchers bulletin,

1 the discipline digests, there is a considerable
2 amount of material that goes out that I would
3 characterize as having a substantial educational
4 component. Does it fall within the scope of
5 what one can claim by way of professional
6 development? No. But I think it's a very
7 important -- of the educational ecosystem, if I
8 can describe it that way, for the nature of the
9 materials that are available to people to inform
10 themselves about the nature of their obligations
11 and also what is happening in respect of those
12 matters that have come before the Law Society
13 for investigation and discipline.

14 Q Just focusing appreciating we are only looking
15 at one part of the ecosystem at this point, but
16 in 2019, the significant increase, the text on
17 page 1 of this briefing summary describes that a
18 significant portion of that increase is
19 attributed to two courses in particular, or two
20 programs is probably more accurate. There's
21 about -- of the 804 lawyers that claim credit in
22 2019, the vast majority were either attending
23 the CLEBC anti-money laundering CIB rules
24 program, there were under 600 lawyers that
25 reported attendance in that. And then the

1 second was over 150 lawyers that reported
2 attendance in the CLEBC's CLE-TV anti-money
3 laundering for lawyers and trust law firm
4 programs. I wanted to ask was there anything
5 unique or otherwise remarkable about those
6 programs or the way in which they were offered
7 or perhaps about 2019 that you think may explain
8 that significant increase?

9 A (DA) Oh, I don't think it's difficult. I think
10 it was at a point in time when some significant
11 changes to the rules were taking place. In the
12 environment there was a significant
13 concentration on what was happening in relation
14 to the AML environment, so I think that also
15 elevated the extent to which there was an
16 enhanced interest in the profession in informing
17 themselves. But I'd also note that I don't
18 think this data actually tells you the whole
19 story looking at the 804 and the 678. I'd go
20 back to what I said a moment ago about the
21 volume of almost 3,000 in relation to that one
22 program which clearly is not adequately
23 reflected in these numbers. So I think what
24 that tells you in that you have people who are
25 informing themselves maybe recording other

1 credits, haven't fully recorded their credits
2 that are directly applicable to AML educational
3 programs.

4 Q But the only -- fair to say that the only
5 confirmed information we have obviously is -- as
6 you said, it may be there are others who are not
7 lawyers who are watching. It's hard to know
8 what to make perhaps of those other aspects, but
9 these two courses were offered as online and for
10 free. Is that accurate?

11 A (DA) I know at least one of them was offered for
12 free. There was a very low cost at least in the
13 beginning in relation to the program that was
14 offered by the Continuing Legal Education
15 Society.

16 Q Okay. I do want to explore the question of
17 whether or not a mandatory educational component
18 may be appropriate. I would just like to
19 explore that a little bit. And that is that
20 attendance in these courses, leaving aside the
21 requirement to meet your 12 hours and the
22 2 hours attributable to professional ethics and
23 practice management. Attendance now and
24 throughout the period we are looking at is
25 ultimately voluntary. It's up to the individual

1 lawyer to decide whether or not they are going
2 to attend one of these AML specific programs.
3 That's right?

4 A (DA) Yes.

5 Q I'm going to suggest that decision may have
6 little or possibly no direct relationship on
7 whether or not that lawyer practises in a higher
8 AML risk or a lower AML risk area. Is that
9 fair?

10 A (DA) It's hard to know the answer to that
11 question. I think it's likely that those who
12 work in areas that are more likely to have some
13 engagement with the areas that are at higher
14 risk would participate in the programs, but I
15 think the level of general interest has also
16 gone up quite significantly. So is it possible
17 that we have some members of the profession in
18 areas where the risk is lower taking advantage
19 of these programs because of the general
20 interest? I think the answer to that question
21 is yes.

22 (CF) Mr. Isaac, if I can just add for a
23 second here, because, you know, lawyers have a
24 duty to be competent and to be competent in the
25 areas in which they practise. And so the

1 suggestion that it seems to be being made is
2 that lawyers are not complying with that
3 obligation because they are not learning about
4 the rules by taking educational components, and
5 I think that that is wrong. I haven't seen any
6 evidence of lawyers not educating themselves
7 with respect to the rules where they are
8 operating in a high risk areas. And I think any
9 lawyer operating in those areas would be -- it
10 would be foolhardy for them to not educate
11 themselves. But the question of a mandatory
12 course I think cuts further. It cuts across the
13 13,000 lawyers in the whole profession and you
14 have to start to ask yourself the question
15 whether that is too heavy a hammer for the
16 profession, again thinking about what other
17 people do. So, for example, would it be useful
18 for legal aid lawyers to be required to take a
19 mandatory AML course? I think probably not.
20 Then you ask yourself the question well, should
21 we make a mandatory within specific practice
22 areas if you report a specific practice area.
23 Well, in British Columbia we've never regulated
24 to have specialization of practices. Every
25 lawyer if they comply with their duty of

1 competence is entitled to practise in particular
2 areas. And we are certainly looking at whether
3 or not we should be designating specializations.
4 But again, that is not something that we
5 currently have and so the idea of mandatory for
6 particular people who practise heavily in one
7 area is a bit difficult to administer and it can
8 get too broad if it's mandatory to the whole
9 profession. And so it's not something that is
10 likely easily done and easily recognized. So
11 you know, I am a just not sure that whether a --
12 you know, we compare to cultural competency
13 which is something we think every lawyer and
14 every practice area needs to have knowledge of,
15 it's a bit of a different issue.

16 Q Thank you, Mr. Ferris. Picking up on a couple
17 of the points that you just made. You indicated
18 that it's unlikely that lawyers, you know, with
19 their obligation to maintain competence are
20 going to be unaware of the rules that apply.
21 But you'd agree that particularly when we are
22 looking at anti-money laundering the educational
23 value goes beyond the rules. It may extend to
24 things that a competent lawyer may otherwise be
25 unfamiliar with in terms of what are emerging

1 money-laundering typologies and what are threats
2 that may be specific to their practice area
3 which, you know, touching on the Whac-A-Mole
4 issue may change year to year. So I would just
5 perhaps ask whether or not that is going beyond
6 the question of whether or not a lawyer is
7 competent in their practice area, but there is a
8 broader value to potentially in particularly
9 AML-related education that may serve those sorts
10 of specific ability to identify threats and
11 risks that may emerge in a lawyer's practice.

12 A (CF) So I think we have a different definition
13 of what competence is. But I don't disagree
14 with the premise of your question. So should
15 lawyers have knowledge and be aware of on an
16 ongoing basis about threats of AML in their
17 practice? Of course they should. But
18 competence is broader than simple having legal
19 competence to draft a will or to do a real
20 estate conveyance. Competence encompasses
21 competence to practice ethically, which includes
22 a duty to identify threats of anti-money
23 laundering issues in your practice, and those
24 will change as they go on. And a decade ago
25 there was sort of a false settlement of lawsuits

1 and, you know, write a demand letter and people
2 send you money, and you had to be alive to that
3 issue. Doesn't happen as much anymore. But all
4 lawyers have a duty to be competent and to be
5 ethically competent, which means an ongoing
6 obligation to be aware of the risks to your
7 practice area. So that is present right now and
8 if lawyers are not doing it, they are not
9 complying with their obligations. Again I have
10 no evidence that.

11 So that is really the difference I think
12 with what you are saying is I think that
13 obligation is already there to be aware of those
14 issues and I don't think adding a mandatory
15 component would add to that, and frankly it
16 would just be again something that would be a
17 checking the box as something I have to do.

18 Q Just looking at the CPD component here and
19 unpacking a little bit in terms of what the
20 current state of affairs is, it's fair to say
21 that given the voluntary nature at least and
22 appreciating, Mr. Ferris, the issues you've
23 raised about potentially moving to some
24 mandatory component. But under a voluntary
25 system with respect to AML, you could have a

1 very senior employer many years removed from
2 PLTC who is regularly conducting high volume
3 real estate transactions, for example, who has
4 never attended an AML specific CPD course,
5 whereas a junior litigation lawyer without a
6 trust account may have attended several. I
7 mean, that is the -- I suppose the current limit
8 with an entirely voluntary system. Would you
9 agree that that is a possibility?

10 A (CF) Well, so this is sort of the sky-is-falling
11 scenario. You know, we can always think of
12 scenarios which are possible but which are
13 unlikely. And, you know, dealing with the realm
14 of extreme possibilities I don't think a good
15 way to base policy. If someone is aware of a
16 lawyer who is in a high risk practice group who
17 hasn't either through a course or through an
18 education of him or herself taken steps to
19 become aware of AML issues and risks in their
20 practice, well, then they are breaching the
21 rules, and that is an unacceptable way to
22 practise. Adding a mandatory component to that
23 simply so we can be sure that that person is
24 doing it, I'm not sure is additive to the
25 professional obligations.

1 profession. 100 percent of the profession has
2 made available to them the guidance to the
3 profession and the other materials that are
4 published on the website, the frequently asked
5 questions and other materials that go directly
6 to these kinds of issues.

7 Q Okay. The mandatory educational component, I
8 know Mr. Ferris made reference to the
9 consideration for example of a UK, some of the
10 measures that the UK has in place, and whether
11 or not those are advisable, there may be issues
12 and that are related to that as well. But
13 mandatory AML education is a component in the UK
14 and something that the Law Society here is aware
15 of; is that right?

16 A (CF) Well, I just want to make sure you are
17 clear about who's subject to the regulation in
18 the UK. Because they don't have the same
19 definition of practice of law as we do and
20 there's only reserved areas that are for people
21 who are called lawyers which are much narrower,
22 so there's whole segment of the population who
23 are doing what we would consider the practice of
24 law in Canada who are not subject to the
25 regulation of the SRA. So yes, I am aware of

1 it, but I'm also aware of the much narrower
2 purview that people of lawyers have the ability
3 to exclusively practise in.

4 Q And in terms of there is another -- I think the
5 Real Estate Council of British Columbia also
6 recently implemented a mandatory AML course here
7 as well which realtors are required to pass to
8 renew their licence. Mr. Ferris,
9 notwithstanding I appreciate the reservations
10 you've expressed and the concerns about imposing
11 an additional burden that may be a check-box
12 approach and may be unnecessary, but the Law
13 Society is it looking at potentially including a
14 mandatory AML educational component, if not for
15 all lawyers in British Columbia perhaps those
16 with trust accounts or those that are practising
17 in what are seem to be potentially higher risk
18 practice areas?

19 A (CF) I'll let Mr. Avison respond to that one.

20 (DA) We have had some discussions to the
21 question to consideration of that issue. Those
22 things are always some consideration by the Law
23 Society. I think it much more likely that if
24 anything ultimately took place on this point it
25 would be at a much more targeted level than an

1 expectation that it would cover the whole of the
2 profession.

3 Q Thank you. And looking both at the UK SRA
4 model, and it's similar to what exists for some
5 other entities in Canada now under the new
6 regulations, but the educational component is
7 part of a broader risk-based approach and the
8 same is in place in the UK as well and there are
9 a couple of other ones. And we heard Dr. Benson
10 refer to some of these in her testimony. One of
11 them is an AML compliance officer, sort of a
12 point person within the firm or practice or for
13 the other sectors in Canada who is the sort of
14 go-to person on AML. And the other is a written
15 AML risk assessment, so in the UK at least every
16 firm are required to have a risk policy that
17 identifies risks relevant to the particular
18 practice, clients, types of services, et cetera.
19 And then the third is to have policies in place
20 that build on that and are responsive to that.
21 Are those measures that the Law Society is
22 specifically looking at either alone or in
23 conjunction with the federation?

24 A (DA) We are aware of them and it is an area
25 where we are giving some consideration as to

1 whether or not any of those programs that are
2 more targeted in nature would have some utility
3 in the BC context.

4 (CF) So I just remind, Mr. Isaac, that when
5 we talk about law firms in British Columbia, we
6 are talking about sole practitioners as well and
7 there's a significant amount of sole
8 practitioners, and so the sort of conceptual
9 idea of a compliance officer, while it would
10 work great at my firm, sometimes doesn't drill
11 down and address the specific issues that you
12 have in British Columbia.

13 Q Mr. Ferris, I was curious about how that
14 compliance officer might work in the BC context
15 particularly if you had a small regional sort of
16 rural sole practitioner, for example. Do you
17 know whether or not is that a function of the
18 difference between the UK and the BC systems?
19 Is that something that you are familiar with at
20 all?

21 A (CF) I can only tell you anecdotally, I think we
22 do have a greater number of sole practitioners
23 in BC than in the UK system and I think it may
24 be a function again of their narrow area of what
25 they call reserved areas for the -- exclusively

1 for barristers or solicitors in the UK versus
2 what we have in British Columbia, so it's a bit
3 different. While we have -- and we are in the
4 process of moving to a law firm regulation mode
5 and in that definition of law firm regulation,
6 as opposed to lawyer regulation, we have
7 included sole practitioners in that and so they
8 are going to be required in part of that program
9 to have the same types of policies as larger
10 firms. But it is an increase of a regulatory
11 burden on those firms and in a time of access to
12 justice concerns, the idea that we would
13 continue to increase the regulatory burden on
14 those lawyers in smaller practices, marginal
15 practices who are helping some of the
16 disadvantaged in our society, it requires a
17 weighing of factors as to how you actually would
18 do that.

19 Q Mr. Ferris, the access to justice issues, you've
20 identified them in several contexts now. Could
21 you explain a little bit more about what you
22 mean by that and how the access to justice
23 issues come into the consideration when looking
24 at potential additional regulations relevant to
25 AML, please.

1 A (CF) Well, they come into -- when we are looking
2 at any regulation which is the way we operate in
3 BC is we have one standard, one code that
4 applies to all lawyers and applies to them
5 equally. So when we are looking at these
6 issues, and we are not like other segments that
7 you referred to, the securities dealers or
8 financial institutions, where people are doing
9 pretty much the same thing all of the time or
10 working in the same areas or always working with
11 money. We have a very diverse profession and we
12 have people that have all sorts of different
13 types of practices. So we have to look at it in
14 that context, and what we don't want to do in
15 British Columbia is we don't want to increase
16 the cost or the paper filing burden for those
17 people in those types of practices because it
18 would drive people out of the practice of law.
19 And we do have an access to justice crisis in
20 this province. I think the statistics are that
21 85 percent of the people with legal issues don't
22 get legal advice and so we don't want to make
23 that problem worse and we don't want to make
24 that problem worse when we are dealing with
25 COVID, when we're dealing with AML or we're

1 dealing with any other issue. So it's a
2 constant sort of balancing of these factors in
3 our minds about not increasing costs, about not
4 increasing paperwork, about not creating
5 impediments to marginalized people getting legal
6 advice in BC, and it is a bit of a delicate
7 balance at times.

8 Q And in seeking to strike that balance,
9 Mr. Ferris, does that suggest that as much as
10 possible a risk-based approach is the right way
11 to go, trying to identify the areas of highest
12 risk and applying regulations there while
13 seeking not to apply [indiscernible] increase
14 additional burdens unnecessarily?

15 A I think that's correct, and we've committed
16 ourselves to being a risk-based regulator, but I
17 just would say this, how best is it to become
18 and to act as a risk-based regulator? Well, if
19 you have an overarching rule that somebody needs
20 to be competent, well, then when you look at
21 somebody's competence, you look at their
22 competence in the practice that they are in.
23 And that allows us to apply risks to that
24 specific practice. As opposed to if you have a
25 very strict prescriptive form of regulation

1 where you have to do A, B and C and D, then it
2 doesn't allow you as much to look at the sort of
3 individual nature of that practice. So I think
4 we've had this sort of back and forth a little
5 bit here which is the value of ethical
6 obligations which apply to a lawyer which
7 requires that lawyer to look at the
8 circumstances of the retainer, the circumstances
9 of the practice and to be vigilant and ethical
10 in that situation. As opposed to taking
11 prescriptive rules and applying them to everyone
12 even when the risks are low.

13 Q Thank you.

14 A (GB) Can I add that something to what Mr. Ferris
15 said and something that Ms. Wilson said earlier
16 this week. I do think and my own view is that
17 the vast majority of lawyers want to practise
18 ethically in compliance with our rules and want
19 to understand clearly what those ethical
20 obligations are, and I think that is an
21 important part of the approach we take. So
22 whether it's technically a risk based or a
23 combination of risk based plus rules or whatever
24 kind of scheme that we have, I think that is
25 always an important feature of it that lawyers,

1 the vast majority want to understand what the
2 expectations are and want to understand what the
3 risks are. And in looking at what is the best
4 educational approach, I would just add that we
5 all learn in different ways and everyone does
6 not learn through online modules, everyone does
7 not learn through an in-person course. People
8 need to receive information in different ways
9 and having written materials, I'd hope is a
10 fundamental and critical part of that. I mean,
11 the risk advisories that were created that we
12 created with the federation were intended to be
13 something that hopefully lawyers who practise in
14 those particular higher risk areas can print off
15 those two or three pages, put them on their
16 bulletin board and stare at it every day so that
17 they understand the risk advisories. I do that
18 think that is an important part of the
19 educational piece. It's very much tailored
20 to -- there's general risks that we all need to
21 understand, geographic risks and country risks
22 and just general risks, but there are very
23 specific risks to those particular practice
24 areas and that's an important part of whatever
25 we end up doing with education, it can't be

1 fluff. It has to be substantive and it has to
2 drill down into what does this particular
3 practitioner need to know because of the area
4 they practise in. And that is a challenge in
5 producing educational materials. For example,
6 with the Real Estate Council's course, they were
7 kind enough -- we've had discussions with them
8 about their course because we were very
9 interested in this, Ms. McPhee and I have, and
10 they shared their course with me and I watched
11 all the modules. It's extremely well done. But
12 they have the benefit of their -- those
13 professionals have a very narrow scope of
14 practice, and so taking that kind of concept and
15 applying it to the practice of law, it's not
16 just let's just copy that. It's much more
17 challenging and it needs careful consideration
18 as to what is the best way of giving lawyers the
19 information and resources they need to
20 understand their obligations.

21 So I don't think it's -- on paper I think
22 this can seem very straightforward, let's have a
23 mandatory course, but I don't think that -- with
24 many of these issues, and I think you'll have
25 seen from the documents we've disclosed, things

1 are complicated and they need careful
2 consideration with lots of moving parts as to
3 what is the best way to approach these things.

4 Q Thank you. Sorry, Ms. McPhee.

5 A (JM) Sorry, just to add to that, another part of
6 education that we consider important is through
7 the compliance audit program because we do
8 consider it not only an audit program but an
9 educational program. And so part of the rule of
10 the auditor is to provide advice and education
11 on the rules, on the obligations that they have.
12 So that is big part of it and we do a
13 significant number of audits each year, 675 last
14 year, more than 600 a year is the plan going
15 forward. And also the trust report is also an
16 educational opportunity because that trust
17 report, it's an annual trust report, is
18 completed by the firm and it highlights the main
19 rules and obligations around trust accounts, and
20 so we consider that another important piece of
21 the education.

22 (DA) I think also just by way of context, if
23 I might, just to illustrate what that 675 number
24 actually means. So that was the significant
25 increase in the number of audits compared to

1 only five years before. So we went from around
2 400 and change up to 675 last year. Even with
3 the challenges of COVID we anticipate that we
4 will complete well in excess of 500 audits this
5 year which also includes that educational
6 component that Ms. McPhee referred to a moment
7 ago.

8 Q Thank you. And I don't want to leave these
9 three components of the -- that the has I know
10 has in place, but we've also seen that these are
11 areas that the ministry, the Department of
12 Finance has recommended through the federation
13 working group for the Federation's consideration
14 and we do see reference to them as well in
15 certain of the specific areas that are under
16 consideration as part of phase 2 of the
17 federation working group, and appreciating
18 Ms. Bains, and I think we'll see this in some of
19 the documents, that some of the complexity
20 around this is whether or not these are good
21 potential changes and also how they might work
22 in terms of a broader law practice management
23 model and it's not as simple as just flipping a
24 switch when we look at those three components of
25 potential responsible lawyer, risk policies,

1 and -- sorry, risk assessment and risk policy.

2 MR. ISAAC: Madam Registrar, if we could bring up
3 document 5611-1, please.

4 Q This is an email chain, again appreciating
5 Mr. Avison your comment that this does
6 illustrate the live debate that sometimes goes
7 none in consideration of many of these sort of
8 complex issues. But the topic here is law firm
9 regulation AML issues. If we go down please to
10 the last page. So it will be the second to last
11 page but the very bottom of it. It's a message
12 from Ms. Bains to a number of people, including
13 Ms. McPhee and Buchanan, Ms. Milz, and it says:

14 "Hi all. I was speaking to Don --"

15 I take that's probably you, Mr. Avison.

16 A (DA) It is.

17 Q "-- about the role of law firms in AML and
18 the SRA's approach."

19 And that is the solicitors regulator authority
20 in the UK.

21 "He asked why don't we do that same. I
22 agree. I don't think we've built an AML
23 component into LFR."

24 Is that law firm regulation?

25 A (DA) It is.

1 Q Okay.

2 "But this is something we need to look at.
3 The SRA requires the AML compliance
4 officers to attend training. They did an
5 audit of AML firm processes in compliance
6 recently."

7 And then there's a link to an audit I believe
8 that the UK SRA did on how well that system was
9 working. Ms. Bains goes on to say:

10 "I really like the SRA risk-based approach
11 and the clear materials and guidance they
12 provide on their website. Thoughts on
13 this? Is it something for the task force
14 to consider if we want to add it to the
15 self-assessment? We'd likely want to wait
16 for the Federation AML's materials to be
17 finalized first and then supplement those
18 with additional resources but we could get
19 started on this now."

20 If we go up to page 1 of this same document.
21 It's page 2. Are this is Ms. McPhee's response
22 to the chain. And she says:

23 "I agree with the idea of a compliance
24 officer, and mandatory trust accounting
25 training (and certainly for AML training),

1 although I think this should be expanded
2 to all lawyers who have trust accounts."

3 Goes on to say:

4 "Also of note, during our participation on
5 the federation AML Working Group, we
6 pushed the working group to recommend
7 compliance officers for all law societies,
8 but it did not stick. Eva and I feel
9 strongly about this, especially in light
10 of the fact that the other reporting
11 entities under the federal regulations who
12 are similar to us, i.e., notaries,
13 accountants, real estate, are required to
14 have a compliance officer and AML systems
15 in place and related training."

16 I'm just pausing there. I appreciate this was
17 not a document prepared with the intention that
18 it would be -- you know, it was a discussion
19 sort of behind the scenes, if you will.

20 Ms. McPhee, you mention here that the
21 recommendation for a compliance officer did not
22 stick at the work working group. Can you
23 explain, was there specific concerns raised with
24 the idea of having a compliance officer? Was
25 there a reason why it didn't stick at the

1 working group level?

2 A (JM) I think what I can say is as Ms. Wilson
3 commented earlier this week, one of the issues
4 is that is on the working group, federation
5 working group's agenda is to consider compliance
6 officer risk assessment and other surrounding
7 issues. So it is a live debate. It is being
8 looked at from all areas and exactly how it
9 should be implemented still needs to be
10 considered. And we need to consider all aspects
11 to see the best way to do that.

12 Q Thank you. You go on in this email, Ms. McPhee,
13 to say, further down it's the second-to-last
14 paragraph on the page:

15 "Another way to approach the idea of a
16 'compliance officer' is to have a
17 'responsible lawyer' model as they call it
18 in Alberta and Manitoba. This person is
19 the contact for trust accounts and must
20 take trust accounting training. This will
21 help us as then we have just one person to
22 correspond with for a particular location
23 and they have responsibility on trust
24 issues."

25 Pausing there it appears at least Alberta and

1 Manitoba have a responsible lawyer. That's not
2 specific to money-laundering, though, is it?

3 A (JM) That is specific -- my understanding is
4 it's specific to trust accounts.

5 Q Okay. It's sort of it is that sort of idea of
6 having essentially a contact person, one focal
7 point. Do you know if they have that in single
8 sole practitioner firms or is it only for larger
9 firms?

10 A (JM) I don't know. We actually do have
11 designated reps for the law firms in BC so we do
12 have specific contacts for a law firm.

13 Q Okay. And just above that portion that I read,
14 you also raise the question of whether or not as
15 part of the law firm regulation mandatory
16 education might be a component of that. And I
17 did note, in reviewing the AML strategic plan
18 that is the appendix to the Law Society summary
19 and other documents, I haven't seen any
20 reference to mandatory education. Is there any
21 significance to that? Is that something where
22 it is presently one of the options that the Law
23 Society is looking at or is that just something
24 that is embedded within other categories perhaps
25 and it isn't specifically mentioned?

1 A (JM) I think in the operational plan we do talk
2 about AML courses and additional education.
3 Whether it's mandatory or not, I don't recall
4 whether it's in the operational plan, but
5 there's different views on how it should be
6 mandatory and who it should be mandatory for.

7 Q The last paragraph of this email from you,
8 Ms. McPhee, says this. It starts off:

9 "Also, there has been recent talk about
10 licensing trust accounts but our view (Eva
11 and I) is that the above responsible
12 lawyer mandatory training may be a more
13 manageable way to implement the AML
14 strategy."

15 Then you say this:

16 "The other thing we need to do is that
17 stronger fines, penalties, suspension on
18 the discipline hearing side for serious
19 trust accounting issues as currently they
20 are very minimal compared to the amount of
21 time we spend internally on these files in
22 all areas of Law Society of British
23 Columbia."

24 What do you mean by the need to have stronger
25 fines, penalties and suspension on the

1 discipline side? Can you explain that, please.

2 A (JM) I think it's an issue that actually has --
3 Mr. Avison referred to yesterday in looking at
4 investigative costs and other issues surrounding
5 some of these issues that do come up. So I
6 think it's in that regard and I think Mr. Avison
7 referred to that yesterday.

8 (DA) That's correct. This is an area that I
9 did speak about yesterday in relation to the
10 process review that has been done by our
11 professional conduct group, and there have been
12 a number of proposals that have been developed,
13 some of which have made their way to the bench
14 table already and I anticipate there will be
15 further ones over the course of the coming year.
16 So we've looked at issues associated with
17 increased capacity with respect to investigative
18 costs and other matters. Some other areas where
19 we may require some legislative changes, but
20 that is an area that is under active
21 consideration.

22 Q And focusing on the penalties, fines, penalties
23 suspension component, I appreciate that the
24 hearing panels relying on precedent and
25 independent hearing panels in terms of imposing

1 penalties for professional misconduct, but are
2 there other mechanisms that the Law Society has
3 looked at for strengthening potential penalties
4 whether that's through administrative penalties
5 or otherwise? Is that what you are referring
6 to, Mr. Avison?

7 A (DA) No. What I was talking about more was in
8 relation to some of the investigative costs and
9 some of the other associated areas, but some of
10 those other matters are things that we have
11 talked about from time to time and may
12 ultimately form part of the administrative
13 environment in the future. So we are constantly
14 looking at what additional tools might be useful
15 and appropriate to deal more effectively and
16 perhaps in a more efficient way with a number of
17 matter that is are coming before us.

18 (GB) Mr. Isaac, can I give you an example of
19 something that we've done in the investigation
20 side of things. So for a number of years now
21 where we feel that there is a risk from a
22 lawyer, for example, operating a trust account,
23 we've gotten undertakings from them to either no
24 longer operate a trust account or to operate it
25 under trust supervision as a way of ensuring the

1 public is protected. That is a different
2 mechanism than going down the route of having
3 fines, penalties or whatnot because in certain
4 circumstances that is a better means of
5 protecting the public. So there are things like
6 that that we do employ that don't involve the
7 traditional discipline route.

8 Q Do you think that the fines, penalties
9 consequences for serious breaches of the trust
10 accounting or the other AML issues should be
11 strengthened?

12 A (GB) To me or to Mr. Avison?

13 Q Anyone. I saw Mr. Ferris speaking, but I think
14 he was on mute.

15 A (CF) Sorry. Mr. Isaac, I'll say this, as I
16 understand it our fining capability under the
17 legislation is \$50,000. I was recently part of
18 a panel of the tribunal that wrote a decision
19 which said that panels need to stop thinking
20 about sort of former precedents and actually
21 bring those dollars forward into current dollar
22 standards and to think about the seriousness of
23 the crime. So I do think that precedent is now
24 out there and will move the tribunal forward to
25 in their consideration of fines and I can say as

1 part of that tribunal I think that our fines
2 need to get into 2020 as opposed to 2000. And I
3 think that process is underway. With respect to
4 what Mr. Avison said, the benchers approved the
5 recovery of investigative costs and that is now
6 working its way through the process. And from
7 what Ms. McPhee just said those costs could be
8 significant in any particular case and so that
9 is I think a further strengthening of potential
10 sanctions.

11 What I would caution you about, though, is
12 our tribunal is an independent tribunal. It has
13 one bencher on it. It has one lawyer who is a
14 non-bencher and then it has one public
15 representative on it who is a non-lawyer
16 non-bencher, and those tribunals have an
17 independent view as to how they would sanction
18 matters. And so it's like the courts. It's a
19 question of building on the precedents that are
20 out there and the cases that are presented to
21 them with respect to how serious the violations
22 are.

23 MR. ISAAC: Thank you. If we could please mark that
24 as the next exhibit.

25 THE COMMISSIONER: Very well.

1 THE WITNESS: (GB) Can I just make one more comment
2 with respect to this exhibit. If we could
3 scroll up to I think it's the first page.
4 Perhaps a little bit lower. I wanted to
5 highlight something about the exchange. This is
6 back in 2019 where we are having this exchange
7 about what is the best way to proceed. But one
8 of the things that I think -- could we please
9 scroll down a little bit more -- that I
10 responded saying is sort of the crux of all
11 this. Ms. McPhee made her comments and I
12 responded saying:

13 "Very good points, Jeanette. So much to
14 discuss/consider to make sure we have the
15 most robust approach to regulating AML
16 issues."

17 And that is the key of all these internal
18 discussions we have. We really are trying to
19 get to a place where what we are putting forward
20 as potential revisions for the benchers'
21 consideration are the most robust approach to
22 regulating these AML issues in keeping with our
23 public interest mandate. We spent a
24 considerable amount of time debating,
25 discussing. I mean, even after this email

1 exchange we had meetings to talk about whether
2 law firm regulation was a viable avenue to
3 pursue some of these objectives and it's a big
4 part of the time that we spend is considering
5 how best to move forward and what
6 recommendations we should be making to the
7 benchers.

8 MR. ISAAC: Thank you. Looking at the time,
9 Mr. Commissioner, I'm not sure if this wouldn't
10 be a convenient time for a break.

11 THE COMMISSIONER: Yes, that's fine, Mr. Isaac.
12 We'll take 15 minutes.

13 THE REGISTRAR: Before we break I want to confirm
14 this document will be exhibit 238,
15 Mr. Commissioner.

16 **EXHIBIT 238: Email from Karen Mok re Law Firm**
17 **Regulation AML Issues - January 29, 2019**

18 THE COMMISSIONER: Thank you. Madam Registrar. All
19 right. We'll adjourn for 15 minutes.

20 THE REGISTRAR: Yes. This hearing is adjourned for
21 15 minute recess until 11:24 a.m. Please mute
22 your mic and turn off your video. Thank you.

23 **(WITNESSES STOOD DOWN)**

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

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

1 Federation of Law Societies' consideration.

2 And if we go down to page 2 of this chain, the
3 bottom there's an email from Ms. McPhee to Ms.
4 Wilson as well as Mr. Varro of the Law Society
5 of Ontario and copying herself as well, and
6 Ms. McPhee writes:

7 "Hi Jim and Frederica. We have been
8 actively looking at AML issues in cases we
9 are encountering and we are exploring
10 further changes to our rules to clarify
11 lawyer AML obligations and reduce risk."

12 Then you go on to identify some specific areas.

13 "Some of those issues are 1) source of
14 funds declarations by client (similar to
15 investment firm requirements.). 2) an
16 overall risk assessment system requirement
17 perhaps similar to what the SRA requires.
18 3) a compliance officer requirement
19 similar to the federal regulations. 4)
20 Cap on an amount of professional fees that
21 can be received and/or receipt of cash
22 must be commensurate ... 5) Additional
23 client information on funds flow when
24 attached to mortgage or liens when trust
25 account is not being used."

1 We have identified and discussed a number of
2 these issues thus far, and Ms. McPhee goes on to
3 say that:

4 "I want to advise you of this and ask a
5 co-chairs if these are issues that the
6 federation AMLTF working group may want to
7 explore in phase 2 of the work on the AML
8 rules."

9 Ms. Wilson responds:

10 "I would definitely like to discuss these
11 issues. As you know I'm very concerned
12 about ending up with a patchwork of rules
13 across the country. I believe that
14 consistency is absolutely essential. For
15 that reason I think it is best to deal
16 with all issues through the working group
17 rather than each Law Society tackling
18 issues on its own."

19 Mr. Varro from the Law Society of Ontario
20 responds and mentions also the concern I think
21 similar to what Mr. Ferris was averting to in
22 terms of regulatory burden and keeping that in
23 mind. Then finally above Ms. McPhee, her
24 response, she provides an update on where we are
25 in BC. And in the second paragraph of that

1 email Ms. McPhee writes:

2 "We'll be setting an effective date
3 farther out so that we can have further
4 discussion with the federation working
5 group on the issue we have identified."

6 She goes on to say:

7 "In addition to below, we have a number of
8 other items to be dealt with. In light of
9 the activity in BC it is critical that
10 issues get dealt with quickly at the
11 federation working group, both those noted
12 below and other issues that we brought up
13 previously."

14 I just want to pause there and ask, appreciating
15 I'd asked a question about this yesterday early
16 on with the panel about the potential tension
17 between the need or desire to deal with things
18 quickly and the understandable focus of the
19 Federation on a Pan-Canadian approach. If
20 initiatives such as SRA style risk assessments
21 or risk policies responsible lawyers and
22 mandatory training ultimately do not stick at
23 the Federation level are not dealt with with
24 sufficient speed, are these reforms areas that
25 the Law Society would be prepared to move on

1 independently? Sorry, Mr. Avison, I think you
2 are still muted.

3 A (DA) Thank you, Mr. Isaac. It's difficult to
4 answer that question at this point in time
5 because I think what the memoranda demonstrates
6 is that these are the kind of items that inform
7 the agenda for consideration at the working
8 group. As you heard from Ms. Wilson a couple
9 of days ago there are a number of items that
10 were enumerated that will be part of the agenda
11 for the meetings taking place in December and
12 then into 2021, so I think there are a number of
13 things that have been taken up already for
14 consideration that are relevant to some of the
15 items that Ms. McPhee identified here. So I
16 think always for a number of reasons that
17 Mr. Ferris referred to yesterday that
18 Pan-Canadian approach and having consistency
19 across the country makes a deal of sense. So
20 that is the preferred option. We are pretty
21 optimistic in relation to the progress that we
22 can make with the federation as was said
23 yesterday. They are us. So the collaboration
24 with that group nationally I think has been very
25 productive over the course of the time that

1 we've been working together on this. So my
2 expectation is it's reasonable to be optimistic
3 that a number of these agenda items will receive
4 further consideration and we won't have to
5 answer that question.

6 (CF) Mr. Isaac, if I could just add one
7 thing. I think if you go back and take a look
8 at the German report, one thing that's made
9 clear in the report is that the Rockies and the
10 Pacific are not barriers to money-laundering and
11 that a lot of the recommendations that were made
12 in the German report were asking people to
13 consult with other jurisdictions within Canada.
14 I think that is sensible because it recognizes
15 the flow of funds and flow of capital and flow
16 of ideas and thoughts of how to do these things
17 is a national issue and an international issue.
18 And so I think what Mr. Avison just said, the
19 approach, the approach to work through our
20 branch office in Ottawa, our federation with our
21 partner law societies is the preferred option,
22 and if we ever got to a respondent, which we've
23 never been to as far as I know, and the benchers
24 were faced with the situation where our staff
25 believed and put to us a policy idea that we

1 thought was in our interest which was not being
2 adopted by the federation, well, we would look
3 at that in that context at the bench table as
4 we do any other policy option. But I don't
5 think we've ever gotten to the point where we
6 thought the federation just refused to listen to
7 something that we thought was a good idea.

8 Q Thank you. And in fairness, I believe we did
9 see that many of these items, including the SRA
10 style matters, are reflected at least in the
11 phase 2 agenda items that are under
12 consideration at the federation. So I think we
13 did see that that is at least something that is
14 reflected as being on the working group's agenda
15 at the federation level.

16 MR. ISAAC: Madam Registrar, if we could mark this
17 please as the next exhibit.

18 THE REGISTRAR: Exhibit 239.

19 **EXHIBIT 239: Email from Jeanette McPhee to**
20 **Varro & Wilson re Further Issues for Phase 2,**
21 **Update from BC - May 29, 2019**

22 MR. ISAAC:

23 Q I would like to move forward to speak about the
24 trust assurance program. And there's a summary
25 that helpfully spells out a lot of the details

1 and background on the trust assurance program.
2 That's exhibit 225. If we could pull that up
3 please. I don't intend to take the panel
4 through every aspect of this but just to touch
5 on some of the key components of the trust
6 assurance program. The first component is the
7 compliance audit program and there's a
8 description of that starting at paragraph 8.
9 Perhaps you could just -- we have touched on it
10 and this point, but if you could briefly
11 introduce what the trust assurance program is
12 and how it features into the AML monitoring
13 system of the Law Society.

14 A (JM) So as I've mentioned before, the compliance
15 program focuses on an examination of a law
16 firm's books records and accounts, and just to
17 mention a law firm will include many lawyers.
18 So we have about 13,000 practising lawyers but
19 we have about 2,600 law firms -- sorry, 3,600
20 law firms, 2,600 have trust accounts. So the
21 compliance audit is a risk-based approach to the
22 audits. We have four cycles of audits. First
23 we look at high practice risk areas, real estate
24 and wills and estates, and we perform an audit a
25 at least every four years, sometimes more if

1 they were considered a higher risk firm and
2 other issues of non-compliance. We also have a
3 regular audit cycle at least once every
4 six years where we will go into a firm. We also
5 have high risk or repeat audits where there is
6 lower compliance or there are other concerns
7 that we would like to go in more often.
8 Sometimes it's every two or three years and
9 maybe the next year there may be followup. So
10 there are a number of factors that are taken
11 into consideration. Then we also look at firms,
12 the fourth area is firms that don't hold trust
13 accounts but we do do sample audits of those
14 firms to ensure that there are not trust
15 accounts or trust funds being held by the firm.
16 So our program is, as I mentioned earlier, we
17 did 675 last year. The goal is to do more than
18 600 a year. In fact in 2020 we actually expect
19 to do more than 600 audits. And we have
20 increased our scope of the audit program and
21 also the number of audits over the last number
22 of years as Mr. Avison mentioned earlier.

23 So we also for some firms where there's
24 lower compliance or higher risk we do actually
25 require an external audit by -- an annual

1 external audit by a CPA firm to look at the
2 trust accounts, so that is just an additional
3 risk factor that is taken into account. We will
4 also schedule an audit if there is a referral or
5 a complaint or some concern that has been
6 brought up by another department such as
7 investigations. And through this compliance
8 audit if there are serious concerns there will
9 be referrals to investigations or further
10 review. Our staff is 22 staff. We have
11 14 auditors, deputy director, two team leaders
12 and 5 administrative staff and they all work in
13 the various areas of the program which would
14 include the compliance audit process.

15 Q One of the areas identified by Dr. German, in
16 one of the sort of might be seen as a
17 recommendation was the implementation of
18 anti-money laundering training for staff. Can
19 you address, I understand that the Law Society
20 has taken some steps in that regard. Can you
21 explain what it has done in terms of anti-money
22 laundering training?

23 A (JM) For the trust assurance department,
24 actually prior to the recommendation our
25 management has taken [indiscernible]

1 certification in the anti-money laundering
2 specialist, so CAMS is the designation. So all
3 of our management took that in 2017 and since
4 then we have, it's effectively a mandatory
5 requirement and since then we have seven
6 certified specialists and nine in the process of
7 taking it. But we also have other education, I
8 mean, not only our own guidance and information
9 but our internal meetings, our retreats always
10 have an AML component. So it's certainly a
11 major educational component that we emphasize.
12 In addition, all you have our auditors and
13 management are CPAs, so charter professional
14 accountants, and also a number also hold the
15 certified fraud examiner, the CFE designation.

16 Q Thank you. Does the audit department use any
17 sort of data analytics or other sorts of
18 technology to assist in the audit process? I'm
19 not asking you to describe the secret sauce, if
20 you will, but if you could explain whether or
21 not technology is something that is used as part
22 of the audit process?

23 A (JM) Yes, we do have a data analytic software
24 program that we run through with compliance
25 audits. So we have -- it helps the auditor in

1 scanning the records, the transactions, the
2 files and we have algorithms and queries that
3 will highlight unusual activity. Deposits,
4 EFTs, other information that we are interested
5 in, and it really helps not only the efficiency
6 of doing especially larger firm audits but also
7 the effectiveness from it, looking at the firm
8 and selecting files and selecting transactions.

9 Q I think we touched on at several points over the
10 panel's evidence as well that there are breaches
11 of some of the AML rules are sometimes perhaps
12 more complex to detect through the audit
13 process. Does the technology help with that as
14 well and is that something that is more
15 challenging in terms of the audit process
16 detecting non-compliance with some of the AML
17 specific rules that we've discussed?

18 A (JM) A number of the queries will be addressing
19 the AML rules. It also addresses other issues
20 that we are also concerned about on trust
21 accounts, but it does help to identify specific
22 AML issues.

23 Q Thank you. If we could go forward to page 5
24 please on the summary that we are looking at.
25 There's a chart here of compliance. Figure 2

1 shows compliance audits per year. You'll see
2 there's -- you mentioned the 675 number. There
3 is a pretty significant jump from 463 in 2018
4 and numbers in the 400 range up to 675. Was
5 there a particular reason for that? I think you
6 mentioned there was a change in audit frequency,
7 but is there a reason for that uptick in 2019?

8 A (JM) Well, I think since 2015 we have increased
9 the scope of the audit and also the resources
10 and staffing that we have in the trust assurance
11 program. So I think it's a combination of
12 focusing on the anti-money laundering
13 initiatives. It's focusing on other areas of
14 risk and really some of the cycles that I just
15 talked about increases the number of audits that
16 we have done and are doing.

17 Q And if we go forward to page 7 of the summary,
18 there is a figure 3 on this page, is a
19 reflection of the number of administrative
20 suspensions per year. And again we see there's
21 almost a tripling of the number of suspensions
22 in 2018 and 2019. Can you explain what the
23 reason for that increase is?

24 A I don't have specifics but this would include
25 compliance audits and trust reports because it's

1 another part of the program is the compliance
2 audit, the annual trust reports which I've
3 mentioned before, and so if records are not
4 produced or we don't get the information
5 required, we do have administrative suspensions
6 to make sure that we can get those records from
7 the law firm. So overall it's actually a small
8 percentage overall of the number of firms and
9 number of lawyers, but most of the time it's
10 making sure that we get the records that we need
11 to complete the compliance audit or the trust
12 report.

13 Q And you referred to non-compliance and just to
14 clarify that, it is not an option for a lawyer
15 not to cooperate with the law society's audit
16 program; is that right?

17 A That's correct. So it is a mandatory audit
18 program and all books, records and accounts need
19 to be produced, and if we have further questions
20 and want further information, we need to receive
21 it. And also just to mention, it's all of the
22 records because whether there's privilege or
23 confidentiality, it is a full view of what is in
24 a law firm.

25 Q So similarly as we may see in the investigative

1 side of the law society's powers, not complying
2 on the part of the member is not an option and
3 not complying can result in its own suspensions
4 and other consequences; is that right?

5 A (JM) Correct.

6 Q Okay. If we go forward, please, to page 9 of
7 this document. Figure 4 shows the percentage of
8 referrals from the compliance audits. So the
9 percentage of referrals I would gather from
10 investigations -- sorry, to investigations; is
11 that correct?

12 A (JM) That's correct.

13 Q And just we'll see here the numbers here appear
14 relatively stable. So we are seeing something
15 in around the 14 percent range between 2017 and
16 2019. And just in terms of how the commission
17 ought to interpret these various statistics
18 together, it does seem as though despite the
19 increase in audits, there's a stable percentage
20 that are being referred to investigations. Does
21 this suggest that the Law Society hasn't reached
22 a tipping point yet or a point of sort of
23 diminishing returns where the proportion of
24 referrals is decreasing?

25 A (JM) I think just to point out a couple of

1 things in the referral percentages and the firms
2 that we are looking at, there is always a
3 turnover in law firms, so some law firms go away
4 and new law firms are formed. So there is
5 always a turnover of firms that we are looking
6 at. New law firms come up each year. So we are
7 not always looking at the same firms, but the
8 other point to make here is the increase in 2017
9 is due to the increased focus on the CIV rule
10 and the anti-money laundering initiatives around
11 that, so that is another reason it's gone up.
12 But I would say that it's not a diminishing
13 return. I would say it's an important function
14 and it's not only for referrals to
15 investigations, which are important, but it's
16 also the education factor of the compliance
17 audits and to ensure that vehicle is used to get
18 the information, to provide advice and ensure
19 that lawyers are aware of the rules and the code
20 around trust accounts.

21 Q So even if one's firm is not audited the fact
22 that one might be has a broader significance in
23 terms of assisting compliance. Is that what you
24 mean by that, Ms. McPhee?

25 A (JM) I am sorry. I didn't hear your comment.

1 Q I'm saying that -- even if one's firm is not
2 audited, the fact that audits are a likelihood
3 or strong possibility that that in and of itself
4 has a strong deterrent effect for
5 non-compliance. Is that what you mean by that,
6 the broader significance?

7 A (JM) Yeah. I think any audit program, including
8 our audit program, is part of it is education
9 and advice and to help ensure compliance and
10 support compliance, but also it's a deterrence
11 because the audit program is there and lawyers
12 and law firms are aware of the program, and in
13 addition it's the detection of serious or minor
14 or serious issues to help compliance. So I
15 think all of those factors go into an audit
16 program and the importance of it and the
17 importance of protecting the public interest,
18 which is the goal of the program.

19 Q If we go on to page 13 of this summary, figure 5
20 shows referrals to investigations group per
21 year, and then again if we go on to page 15,
22 figure 6 here is a referrals to investigations
23 broken down by the specific to the no-cash rule
24 misuse trust account, failure to make inquiries
25 and CIV rules. Sort of the AML specific rules

1 that we've been discussing. If we look here at
2 2019 it appears that a significant proportion of
3 these are for breaches of the CIV cash and trust
4 accounting rules. So over half of the referral,
5 the total referrals that we saw in figure 5, 67
6 of them are in reference to the AML specific
7 rules. Are these areas of higher risk of
8 non-compliance, or is there something else that
9 is going on that reflects the significant
10 proportion of these rules in particular that are
11 detected and referred as part of this?

12 A (JM) I think it shows the focus of the audit
13 program and just the focus overall on AML,
14 especially over the last four or five years.
15 And so it's a focus. It is a focus of the
16 program. We have other focuses, too, to protect
17 client, to protect the funds that are handled
18 within the trust account. But certainly with
19 increased knowledge of typologies, increased
20 knowledge of other information that we obtain,
21 the increased collaboration we have with other
22 agencies, certainly increase the focus and
23 increase the focus of the audit program to
24 really make sure that it's looked at carefully
25 and we have referral standards when there are

1 serious issues that need to go to
2 investigations, it happens.

3 Q If we could go back to page 3 of this document,
4 please. When we were looking at the increase in
5 the number of audits, you mentioned there was an
6 increase in the budget of the -- and staffing of
7 the audit group. We will see here at the top of
8 this page there is a showing of the budget of
9 the audit and in the narrative as well it goes
10 into some detail about this. We see a
11 significant roughly 30 percent or \$1.5 million
12 increase in the trust assurance group's budget
13 between 2015 and 2020. What was the impetus for
14 that increase over that period of time?

15 A (JM) I think it's similar to what I've been
16 talking about. We have increased the scope of
17 the audit. We have added additional audit
18 procedures. We've changed some of the audit
19 cycles. We focus on higher risk. In some
20 cases -- also in the other areas of the program
21 which would be not just compliance audits but
22 trust report review. Also lawyer self-reports
23 and the education and advice, we have specific
24 programs and courses and information that we
25 produce. So I think it's in all those areas

1 that it's been a major focus to enhance the
2 program and also increase the coverage of the
3 program.

4 Q Would it be fair to say that in 2017, 2018,
5 before the sort of largest part of this
6 increase, that the trust assurance budget was
7 strained or was at least certainly at its limits
8 before that increase?

9 A I think every year we go through a budgeting
10 process and we look at the scope and we look at
11 the resources we have. We do that in all areas
12 of the Law Society. Especially being a CFO I'm
13 certainly very aware of that. So I think every
14 year we do that and we make sure that for the
15 mandate of the program and the goals of the
16 program we are sufficiently resourced. So I
17 think it's an ongoing issue each year and even
18 within outside of the budget time.

19 (CF) Mr. Isaac, again one of the hats I've
20 worn at the Law Society was I was chair of
21 finance for a couple of years, and I can't
22 remember a budget ever being presented to the
23 benchers where the benchers asked that amounts
24 to the trust assurance program be reduced. And
25 so as I recollect here today, trust assurance

1 has always been given the money that they have
2 asked for to properly staff themselves at least
3 during my tenure as a bencher.

4 (DA) I'd like to add to that if I could
5 because that has been the case in relation to
6 not only trust assurance and trust audit but
7 also with respect to the budget associated with
8 professional conduct. So through that same
9 period of time there would be increases that
10 would be mirrored in the budget that was
11 allocated to the professional conduct group. I
12 can indicate to the commission that in seeking
13 those additional resources, certainly over the
14 course of the last couple of years that I've
15 been here, we've had considerable support not
16 only through the finance and audit committee but
17 through the benchers and I have to say through
18 them to the profession. There was one year in
19 particular where there was an increase of \$120
20 to the practice fee, much of which you could
21 trace back to the increased resources to elevate
22 the level of surveillance in relation to the
23 audit program and also to carry out the work in
24 relation to professional conduct. So we've had
25 considerable support in my now three years with

1 the Law Society, not one occasion where there
2 has been pushback in relation to the need for
3 investments in these areas.

4 Q Thank you. And if we just look briefly please
5 at LSB9224-1. Ms. McPhee, you were referring to
6 the sort of ongoing review and this is a 2017
7 memo regarding the budget of the trust assurance
8 department. And I don't intend to take you
9 through every aspect of this document, but this
10 would be kind of if we situate ourselves on the
11 timeline we were looking at before the
12 significant increase, page 1, paragraph 1 the
13 last sentence does say:

14 "With our current resources we are unable
15 to meet our mandate to audit every law
16 firm within a six year cycle."

17 Page 2 at the very top goes on to say:

18 "We think there has been good progress in
19 this area but additional resources are
20 required to perform the program in an
21 effective and efficient way."

22 I say it's important that we -- obviously the
23 budget increase did happen and that speaks to
24 both what all of you were saying in terms of the
25 responsiveness in addressing those areas. If we

1 look at page 8 of the document, please. This
2 does say, describes that currently there's -- in
3 order to hit the target there is a need to audit
4 649 firms annually and that there's a need for
5 16.2 auditors, you'll see in the table there. I
6 understood Ms. McPhee and in the summary it says
7 that there are currently 14 auditors presently
8 and obviously this was before some of the
9 increased audit frequency. Currently does the
10 trust assurance program have enough resources to
11 meet its mandate and what is the current state
12 of that sufficiency as things stand right now?

13 A (JM) I think what you're referring to, the 16,
14 now this was back in 2017, so it's never going
15 to be exactly the same of where we are now. We
16 have 14 auditors, we have five administrative
17 staff because we have coordinators who also do
18 work within the program, so the exact mix of
19 staff will vary from year to year. And also
20 after 2017 we would have looked at 2018 and 2019
21 and 2020, and so it's never going to be exactly
22 what may be proposed because the program changes
23 and it's an evolution.

24 What I can say is when we put forward our
25 budget, we look at the mandate and the goals of

1 the program and we ensure that we ask for what
2 we need, and as was mentioned we are very
3 analytical and we have lots of information to
4 make sure that we meet the mandate, and we
5 continue to do that. So I can say that I think
6 that we are always looking at resources and
7 ensuring that we have the right resources to run
8 the program effectively.

9 MR. ISAAC: If we could please mark this as the next
10 exhibit.

11 THE COMMISSIONER: 240.

12 THE REGISTRAR: Exhibit 240.

13 **EXHIBIT 240: LSBC Memo to Jeanette McPhee from**
14 **Eva Milz re Resources - April 24, 2017**

15 MR. ISAAC:

16 Q I'd like to move forward to speak a little bit
17 about the investigative side which is obviously
18 related, and there is a summary as well that
19 explains and provides a lot of background in
20 that. I don't intend to take you through every
21 aspect of that. That's exhibit 223. This
22 provides a bunch of background information about
23 the investigative activities of the Law Society.
24 Perhaps I could ask, and this may be best suited
25 to Ms. Bains. But are there unique features and

1 challenges presented by AML type investigations
2 as opposed to other discipline issues that the
3 Law Society has to grapple with? We've heard
4 for law enforcement, for example, that AML
5 investigations can be sometimes more complex,
6 more challenging. But from the Law Society's
7 perspective how do those investigations compare?

8 A (GB) I think every investigation is somewhat
9 different, and I wouldn't want to in a broad way
10 say that all what would we would consider to be
11 AML-related investigations result in complex
12 investigations. I don't think that is the case.
13 I think that it's more valuable to break it down
14 into what are we investigating and if what we
15 are investigating, for example, is a potential
16 breach of the cash transaction rule, that is not
17 a complicated investigation. That is often a
18 very straightforward investigation. If we are
19 investigating a breach of a lawyer's obligation
20 under rule 3.2-7 and a concern that there could
21 have been -- they either knew or ought to have
22 known they were facilitating dishonesty, crime
23 or fraud, that is a very different investigation
24 than a cash transaction rule investigation. And
25 so it is very difficult to make broad sweeping

1 statements because the files are so very
2 different. I think every file requires the
3 investigators to use the significant powers and
4 tools that we have under the Law Society rules
5 and the *Legal Profession Act* and use those tools
6 to conduct the investigation in the most
7 effective way. And I think in understanding how
8 we could do that, it is important for the -- I
9 think to spend a little bit of time talking
10 about what the makeup of the group is because --
11 and what the tools are. So if you'll allow me,
12 can I go into that?

13 Q Please?

14 A (GB) Thank you. The group consists of about
15 20 staff and it's comprised of 12 investigating
16 staff lawyers. Four of the lawyers have been at
17 the Law Society for close to or over ten years.
18 The lawyers come from very different
19 backgrounds. They are a mix of litigators and
20 solicitors. Some have fraud litigation
21 experience, some have tax experience. They've
22 got a wide range of prior practice backgrounds.
23 They also come and we do recruit for individuals
24 who have prior investigative experience because
25 practising law and conducting an investigation

1 are very different things. And some of our
2 investigating staff lawyers come from an
3 investigative background. They have conducted
4 civil fraud litigation that has helped their
5 investigative skills. We've got a staff lawyer
6 who worked at the Canadian Border Services
7 Agency and we've got a staff lawyer who used to
8 work at the independent investigations office
9 conducting those investigations. So the lawyers
10 have quite a mix of knowledge and experience
11 that they are bringing to bear to their
12 investigations. In addition, we've got a
13 investigative analyst who is a CPA and a
14 certified fraud examiner. And she also has
15 prior experience at a provincial securities
16 commission, which has been very valuable for us.
17 We've got an investigator who is not a lawyer.
18 He is a former RCMP CSIS officer and he is also
19 a certified fraud examiner. So I talk about
20 investigators, I'm going to talk about both our
21 former police officer investigator and our staff
22 lawyers and accountants. So I'm grouping them
23 all together as investigators.

24 And we've got various other paralegals and
25 support staff to assist us on our files. We

1 really do try to employ best practices both in
2 terms of evidence handling. Our former -- our
3 investigator who is the former RCMP officer is
4 integral to setting up the best practices that
5 we've put in place for evidence handling to
6 ensure continuity and chain of custody and all
7 the things that he's learned from his prior
8 experiences.

9 We also try to employ best practices in
10 terms of how we conduct our investigations and
11 how we gather evidence from witnesses or the
12 subject lawyer. And looking at the powers we
13 have under the rules, they're set out in part 3
14 division 1 and particularly rule 3-5. Lawyers
15 are required to cooperate with our
16 investigations. There is no right to remain
17 silent when the Law Society comes knocking and
18 asks questions of you. There is a requirement
19 to produce documents that are in the lawyer's
20 possession or control and this extends to client
21 files, accounting records, email communications
22 that might be relevant to the investigation.
23 Now with text messaging and WeChat messages and
24 all these other different forms of
25 communication, it extends to all of that.

1 Lawyers cannot refuse to produce documents to us
2 on the basis of privilege. We have and are
3 entitled to review everything in the lawyer's
4 file. And I think that is a significant point
5 because it means that we have full visibility to
6 not only the accounting side of the practice,
7 but to the client communication so that we can
8 really understand what was happening on these
9 transactions and make an assessment on the
10 conduct issues that are before us. Lawyers also
11 are required under rule 3-5 to make their staff
12 available for us to speak with and this is also
13 quite important on many of the investigations
14 where we need to speak with non-lawyers,
15 paralegals, bookkeepers or other individuals in
16 the office.

17 We also under rule 3-5 have the ability to
18 attend at the law office during business hours
19 during an investigation. On the -- with respect
20 to non-lawyers, section 26 of the *Legal*
21 *Profession Act* allows us to issue an order
22 requiring anyone to produce material to us that
23 is in their possession or control or to attend
24 and answer questions under oath. And that power
25 allows us to -- those orders, we've used those

1 orders and they are very valuable in our
2 investigations, both to get information from
3 really anybody, financial institutions, other
4 corporate entities in the province, where --
5 it's not the case that they are not cooperative
6 in our investigations; it's that they have their
7 own privacy considerations and in the absence of
8 an order, they would not be able to share that
9 information with us.

10 So in addition to those powers, in matters
11 where we feel that there is -- there are serious
12 matters under investigation and there is a need
13 to secure evidence or for other reasons, we do
14 have the ability to under rule 455 of the Law
15 Society rules request that the chair of the
16 discipline committee authorize an order under
17 rule 455, and that order allows us to conduct a
18 forensic investigation of the books, records and
19 accounts of the practice. It's not narrow.
20 It's not limited to particular conduct issues.
21 It's a full investigation of that lawyer or law
22 firm's practice. The order is usually obtained
23 without notice to the subject lawyer. We take
24 the order, serve it on the subject lawyer and it
25 allows us to mirror image their hard drives and

1 any other electronic storage devices they might
2 have like tablets or cellphones if we have
3 reason to believe the cellphone contains
4 information related to their law practice. It
5 is a very strong power and we use it in matters
6 where we need to.

7 In instances where lawyers are not prepared
8 to cooperate with our investigation, under rule
9 3-6 we have the able to administratively suspend
10 them until they do cooperate and provide the
11 full and substantive responses we are seeking.
12 So our orders, the powers that we have are I
13 think very extensive. And as it relates to
14 the -- sorry, one other thing I did want to
15 mention is that at the outset of every
16 investigation and during the course of an
17 investigation we conduct an assessment of
18 whether the public is at risk, and if we have
19 sufficient information indicating that
20 extraordinary measures are necessary to protect
21 the public, we have two mechanisms of doing
22 that. We can obtain voluntary undertakings from
23 the lawyer if they are prepared to give them.
24 And in the most serious of matters where we feel
25 that there is no conditions that would satisfy

1 us to protect the public, we would seek a
2 non-practising undertaking that the lawyer not
3 practice law either for a fee or on a pro bono
4 basis until the investigation is concluded and
5 any proceedings that may arise from it are
6 concluded.

7 In other matters where we feel that
8 conditions are sufficient, the conditions might
9 include the lawyer no longer operating their
10 trust account or the lawyer operating their
11 trust account with a supervisor, a trust
12 supervisor who is going to be signing off, who
13 is going to be a mandatory signatory signing off
14 on all trust transactions and overseeing the
15 trust accounting portion of the practice.

16 We are quite I think open and creative in
17 respect to the undertakings that we seek trying
18 to minimize the impact while always ensuring the
19 public is protected. Those undertakings, unless
20 they relate to medical issues that are
21 confidential, those undertakings or posted on
22 our website. They are linked to the lawyer's
23 profile on the lawyer directory so that the
24 public is aware of the undertaking. The
25 undertakings and any conditions imposed on a

1 lawyer's practice are actively monitored by our
2 manager of monitoring and enforcement. In cases
3 where a lawyer is not prepared to give a
4 voluntary undertaking but we are concerned the
5 public is at risk we have the ability, with
6 Mr. Avison's approval, to proceed with
7 proceedings under rule 3-10 of the Law Society
8 rules and rule 3-10 allows three benchers to
9 consider whether extraordinary measures are
10 necessary to protect the public which could be a
11 suspension or conditions or limitations on their
12 practice.

13 With respect to AML investigations and the
14 use of these powers I think that in the
15 investigations, putting aside the cash
16 transaction rule and client identification and
17 verification rules, because those are very
18 different types of investigations generally, if
19 we are looking at investigations involving a
20 failure to make inquiries in the face of
21 suspicious circumstances or the more serious
22 knowingly or in circumstances where you ought to
23 have known actually facilitating dishonesty
24 crime or fraud, the investigators -- they can be
25 more complicated and a lot of this, a lot of it

1 is looking at what is missing. What's missing
2 from the client file? What do we expect to see
3 in a normal transaction that isn't here? What
4 is unusual, if anything, about the
5 circumstances? It is a different assessment.
6 In many of our other investigations the
7 assessment may be about lawyer did A, B, C, and
8 D and the standards are clear, what didn't they
9 do to meet the standard? That's not quite what
10 these investigations are about, and there is a
11 very broad approach taken to them because we
12 need to understand stepping back from the
13 specific issue we're looking at what's going on
14 in the practice in a different way. So they
15 certainly can be much more complicated and
16 resource intensive. There's no question about
17 that.

18 Q I'd like to address what the role of information
19 sharing, because you talk about stepping back.
20 And one of the features that we have heard about
21 in terms of money-laundering is that given the
22 complexity it can be very difficult for any one
23 person or entity looking within their own field
24 of view to sometimes have enough of the picture
25 to detect where something is missing or where

1 there's the indication of a predicate offence or
2 other areas that might otherwise raise those
3 sorts of concerns. So can you just address what
4 the significance of information sharing, both
5 information coming -- particularly I think from
6 your perspective information coming into the Law
7 Society and what is most useful particularly in
8 relation to investigating the potential
9 involvement of lawyers in that regard.

10 A (GB) Yeah, the information sharing part of it is
11 critical to investigations. There's no question
12 about that. And it is a significant part of the
13 time that I spent in building relationships with
14 other entities because we need that. We need to
15 understand and we need a flow of information on
16 many levels, starting from what are the
17 typologies out there and how are those changing.
18 So there's the general information sharing about
19 what's going on and what do we need to be aware
20 of. And more specifically on these files --
21 maybe I'll break it down a little bit. So with
22 respect to law enforcement in the province, we
23 have a memo of understanding with all municipal
24 police and with the RCMP under which we make
25 requests for information where we believe that

1 the law enforcement may have information
2 relevant to our investigations. That has been
3 in place since I think -- well, the most recent
4 version has been in place since 2000 and I'm not
5 entirely sure what was in place before then.
6 But we have very good relationships with law
7 enforcement and the cooperation and
8 communication and dialogue that we have with
9 them is very helpful on our investigations
10 because we don't always have the information
11 from the other investigative tools that we have
12 that we need.

13 So in addition to the MOU with law
14 enforcement we've also built very strong
15 relationships with other regulators. For,
16 example the BC Securities Commission we don't
17 have a formal information sharing MOU with them,
18 but they are able to share information with us
19 on -- as it relates to our investigations and
20 they also do refer matters to us where they have
21 concerns about a lawyer's conduct that comes to
22 their attention through their investigations.
23 So that has been a very important relationship
24 and we value the information sharing that has
25 taken place with them. We also --

1 Q Sorry, I was about to say I think it might be
2 helpful just to put a couple of documents. We
3 did ask the Law Society about the topic of
4 information sharing and we received several
5 documents in response and I think it would be
6 helpful to put up. One is document 27512,
7 please. This is a letter September 24, 2020,
8 from the Law Society that identifies its main
9 information sharing arrangements in two
10 categories, information sharing flowing into the
11 Law Society and then the second category being
12 information flowing out of the Law Society. And
13 if we could mark -- maybe I'll pull up the three
14 documents I'm referring to here. Accompanying
15 that letter was also guidelines for disclosing
16 information that was recently implemented.
17 That's document 27511. That is I believe a
18 recently implemented guidelines for the exercise
19 of the executive director's discretion to
20 disclose information to law enforcement. And
21 then finally we asked some further questions
22 because obviously there's the availability of
23 pathways and there's how frequently they are
24 used. So there is a question that addresses
25 that specific question. That's document 27514,

1 please. This is a document that provides some
2 information about the specific metrics of how
3 often each of these pathways is used.

4 MR. ISAAC: If we could please mark those as the next
5 three exhibits.

6 THE COMMISSIONER: The information sharing will be
7 241. The guidelines will be 242 and the
8 frequency of use document will be 243.

9 THE REGISTRAR: Exhibit 241 to 243.

10 **EXHIBIT 241: Letter from Catherine George re**
11 **Question to the LSBC re Information sharing with**
12 **law enforcement entities - September 24, 2020**

13 **EXHIBIT 242: LSBC Guidelines for Disclosing**
14 **Information to Law Enforcement**

15 **EXHIBIT 243: Letter from Catherine George -**
16 **October 26, 2020 (redacted)**

17 MR. ISAAC:

18 Q Ms. Bains, perhaps I can ask, and I appreciate
19 in the interest of time I've covered a lot of
20 ground and yet still time is fast approaching
21 the end of the evidence, but can you just
22 identify what is the information that is most
23 useful to you? We heard Ms. Wilson describe
24 that general typologies and information about
25 what money-laundering apparently looked like in

1 2009 is less important, but from an
2 investigative standpoint what is the type of
3 information that is most helpful to either
4 initiate or assist the Law Society's
5 investigations?

6 A It's a difficult question to answer because it's
7 very fact specific and to the circumstances, so
8 I think that generally we encourage -- well, I
9 encourage everybody I speak with to refer
10 matters to us where they have concerns
11 about lawyers, and the quality about the
12 information they have is going to vary depending
13 on where they got that information from or what
14 their role is. And so what I've said to them
15 is, I'll do the filtering; send it to me in
16 whatever form you have as extensive as you can
17 because obviously the more information we get
18 the easier it is for us to assess whether
19 there's a substantiated concern that requires an
20 investigation. But all of that has value, so
21 it's very difficult to answer what is the most
22 valuable. I think at the end of the day we want
23 to serve our public interest mandate and we want
24 to uncover concerns about lawyer misconduct that
25 otherwise may not come to our attention in

1 whatever form law enforcement or other
2 regulators are able to provide that given the
3 constraints that they may or may not have in
4 sharing that information with us.

5 Q Thank you. And perhaps Mr. Avison and others
6 may have a view on the other category of
7 information, information flowing out from the
8 Law Society. There is reference to a couple of
9 different mechanisms that are involved there and
10 available there, but what are the ways in which
11 the Law Society might seek to expand the lawful
12 and appropriate sharing of information out of
13 the Law Society?

14 A (DA) Mr. Isaac, there are probably a number of
15 areas that I would like to cover here. The
16 first is you had a document up on the screen a
17 moment ago that talked about the revisions to
18 process around the release of information, so
19 for a period of time there were processes that
20 contemplated three different committees at the
21 Law Society having some role with respect to
22 decisions about providing information to other
23 investigative entities. That has been
24 rationalized now so that there is one committee
25 that has a role in that respect. It's the

1 discipline committee. So it is, if I can put it
2 this way, somewhat easier to be able to
3 accommodate that. The Law Society in the past
4 has had a number of matters where we have
5 provided information to investigative
6 authorities in relation to matters where it was
7 evident that members of the profession had acted
8 not just unprofessionally but unlawfully.
9 Perhaps the most significant example of that in
10 the recent times is the Wyrick [phonetic] matter
11 where a substantive amount of investigative
12 material was released by the Law Society to
13 investigative entities. There are regular
14 information sessions that take place with
15 entities like the RCMP and the financial
16 integrity unit. If I'm hesitating there, it's
17 because I think if there's a limitation, it's
18 the strain on the resource that is available to
19 the RCMP to be able to engage in those kinds of
20 exchanges to the extent that I think they would
21 like to. That is an issue that comes up pretty
22 consistently. And as you were you were asking
23 the question of Ms. Bains I was thinking about
24 the number of activities that we've undertaken
25 over the course of the last three years or so to

1 make sure that other entities, investigative
2 authorities and others, are aware of what the
3 Law Society does and what authorities we have
4 available to us in the pursuit of investigations
5 if they were to provide information to the Law
6 Society. So I can name a number of those and
7 these are meetings that I've been involved in
8 directly, often in the company of with Ms. Bains
9 and Ms. McPhee. Discussions with the ministry
10 of the solicitor general, not just with the
11 deputy but also with the head of the policing
12 branch, with the asset forfeiture group, in all
13 cases indicating to them that if there are
14 circumstances where they are aware of or if they
15 become aware of circumstances where lawyers may
16 have acted inappropriately that they should
17 bring that our attention. Similar discussions
18 with the ministry of the attorney general. In
19 fact I think I've indicated in those discussions
20 that as members of the profession if they have
21 knowledge of lawyers acting inappropriately they
22 actually have a professional obligation to bring
23 that to our attention. As I've indicated,
24 regular discussions have taken place with the
25 RCMP and I think Ms. Bains and the individual

1 referred to earlier on with RCMP experience in
2 the past has now been with the Law Society for
3 quite some period of time, that individual
4 regularly engages in formal discussions that
5 take place with investigative entities regarding
6 typologies and methodologies. So the level of
7 activity I think is quite substantial. There
8 are some gaps from my perspective and one of the
9 significant ones is with respect to the
10 information that is provided to some of the
11 federal entities, including FINTRAC. I don't
12 think there's an adequate recognition of the
13 investigative responsibilities that the Law
14 Society has and, as a result, we don't have
15 access to the intelligence reports that a number
16 of other entities might. This is an issue that
17 came up in the context of the report of
18 Professor Maloney in the expert panel, but we
19 think it would be particularly helpful if the
20 Law Society and other law societies did have the
21 benefit of those intelligence reports. It does
22 require action at the federal level, and it
23 would be quite helpful if the commission could
24 address that issue in making a recommendation
25 either directly to the federal government or

1 recommendation that the attorney general of the
2 Province of British Columbia, perhaps through
3 the federal, provincial, territorial table of
4 ministers of justice could invite the federal
5 minister of justice and perhaps his colleague
6 minister responsible for finance to ensure that
7 that gap is addressed. We think that, too,
8 would be very helpful with respect to
9 information flow.

10 Q Thank you.

11 A (CF) Mr. Isaac, I just want to say one quick
12 thing, sorry, because I just didn't want it to
13 get lost in the mix. You couched your question
14 as appropriate information outflow. I just want
15 to make sure that because of what Ms. Bains has
16 testified about with respect to our access to
17 privileged and confidential information, that's
18 why we have relatively strict guidelines
19 internally as to our information outflow and
20 when we actually report people to law
21 enforcement agencies. So just didn't want that
22 to get lost in the mix as to the reason why we
23 have these procedures in place.

24 MR. ISAAC: Mr. Commissioner, I recognize the time it
25 is. I think we have 15 minutes currently set

1 aside for questions from participants. I will
2 say -- I appreciate we haven't taken a second
3 break. I'm prepared to continue on and I'd hope
4 that I would be able to finish in the next
5 ten minutes, but I'm in your hands if we are
6 able to sit a few minutes longer or if we would
7 like to proceed without a break or if I can hit
8 only the high points in the next few minutes.

9 THE COMMISSIONER: That's fine, Mr. Isaac. We can
10 certainly sit longer. But I do encourage anyone
11 who would like to take a break to indicate that
12 because as I say, we are not constrained by our
13 1:30 deadline, so if somebody would like to take
14 a break we will do that and then resume in the
15 expectation that everyone will be heard from
16 according to their allocation of time. I don't
17 see any clamouring for a break, so let's carry
18 on.

19 MR. ISAAC: Thank you.

20 Q These are significant points, Mr. Avison. You
21 mentioned that that recommendation of Professor
22 Maloney would be a particularly meaningful one
23 to assist the Law Society. Perhaps we could
24 just step back. I had perhaps saved this as the
25 grand finale question and what other reforms

1 other changes might be made both within the four
2 corners of the Law Society but also more broadly
3 that would be of greatest assistance to the Law
4 Society in carrying out its AML function. I
5 should take the pressure off and say it probably
6 won't be my last question.

7 A (DA) There are a number of areas where I think
8 it might be useful to consider some
9 recommendations that the Commissioner might wish
10 to consider making that we think would be
11 useful. And some of this I think has come up
12 during the course of some of the testimony not
13 only with the Law Society representatives but in
14 other parts of the commission hearing. We were
15 talking only moments ago in relation to
16 inter-agency collaboration. I think our focus,
17 it would be quite helpful to increase the focus
18 on inter-agency collaboration rather than what I
19 would characterize as unproductive litigation,
20 and I think on that front there have been
21 encouraging signs, significantly with respect to
22 the work that has been taking place more
23 recently with the Government of Canada and the
24 federation working group, of which
25 British Columbia is a very active participant on

1 that front, but I think more also can be done at
2 a regional level with respect to inter-regency
3 collaboration. A recommendation that law
4 enforcement bodies and government agencies and
5 other regulators should continue and in some
6 cases escalate reporting of concerns in relation
7 to lawyer conduct to the Law Society. I think
8 we've seen some encouraging signs on that front
9 as well, and there's been a lot of outreach to
10 other organizations. Ms. Bains mentioned a
11 moment ago some of the discussions with the
12 securities commission and with the regulators
13 and the real estate context.

14 A recommendation that all law enforcement
15 bodies and government agencies and regulators
16 identify an AML liaison officer to be the
17 primary point of contact for improved
18 collaboration and information sharing. I can
19 say that for the Law Society we've done that
20 already. So Gurprit Bains, the deputy CLO and
21 the person responsible for investigations
22 monitoring and enforcement is that person with
23 assistance both for me as the CEO and Ms. McPhee
24 as the chief financial officer responsible for
25 the trust assurance program.

1 A recommendation that all law enforcement
2 bodies, government agencies and regulators
3 should ensure adequate staff training on AML
4 mandate roles and other entities working on AML
5 matters in British Columbia. We've talked about
6 that significantly as well already throughout
7 some of the course of these proceedings.

8 So those are some of the kinds of things
9 that we think would be useful to consider. I
10 anticipate that we will have some additional
11 recommendations that we'll communicate through
12 our counsel, Ms. Herbst, in the latter stages of
13 the work of the commission.

14 Q Thank you. Does anyone else on that -- I
15 appreciate Mr. Avison may have been given the
16 torch to carry on that one, but does anyone else
17 have anything to add from the perspective of the
18 areas that they are in in terms of the specific
19 changes that may assist in their role? Okay.
20 I'll take that as Mr. Avison had the torch and
21 he carried it.

22 Just looking then at one of the other
23 related recommendations that was made in
24 Dr. German's report and this question was posed
25 to Ms. Wilson as well of the federation, but one

1 of the suggestions made was that the Law Society
2 can play a role as sort of a blind, an agency
3 through which lawyers might report suspicions
4 and act as a sort of a third party, a blind that
5 would be able to use its investigative powers,
6 the ones that Ms. Bains described but to
7 essentially act as a blind in that capacity.

8 Does the Law Society have a perspective on the
9 necessity or feasibility of such a proposal?

10 A (DA) It's more with respect of the latter
11 element of that on feasibility because the
12 threshold expected of lawyers in relation to
13 when they would withdraw in the face of
14 suspicious circumstances are concerned is very
15 low. So we would substantially adopt the same
16 answer that was provided the other day by
17 Ms. Wilson in relation to the utility of that
18 proposal. So it's one where I think the
19 feasibility is challenging and we think much of
20 the energy ought to be better concentrated on
21 some of the other items that I mentioned a
22 moment ago.

23 There's one other and there's some aspects
24 of this that I think we can address as
25 submissions are made later in the process of the

1 commission, but work has been done, as you know,
2 in relation to legislation being passed with
3 respect to land owner transparency and the land
4 titles survey authority has been at work for
5 some period much time now developing a registry
6 associated with the registration of documents in
7 the land titles office. We have had some direct
8 engagement with the LTSA and found them very
9 helpful as colleagues in concerning a number of
10 the issues that we think warrant consideration,
11 some of which has also gone to the issue of the
12 architecture of some of the systems that will be
13 developed to support that program. So there we
14 think it would be really quite helpful to
15 develop system architecture in a way so that we
16 could have the capacity to search by the name of
17 a certificate holder, a lawyer, who affixes
18 their digital signature to a registration
19 document and an ability to search by name the
20 individual that submits a document for filing.

21 So those are ongoing discussions that are
22 taking place with the LTSA as they design that
23 program and I suspect it will evolve over a
24 period of time. Those are some of the areas
25 where I think we can get the greatest benefit

1 from interagency collaboration.

2 Q And just following up on a couple of the other
3 elements that were in Dr. German's report
4 mentioned. One of them was what was described
5 as the anomaly of lawyers acting as realtors.
6 I'm wondering whether or not one of the
7 documents -- I don't propose to bring it up, a
8 memorandum. It's exhibit 228 which discusses a
9 number of the findings or the comments in
10 German's report does touch on this comment and
11 refers to this further study of that anomaly as
12 warranted. And I wonder whether the Law Society
13 has looked at how big of an issue or anomaly is
14 this and is it something that the Law Society is
15 looking to perhaps address through prohibiting
16 that sort of conduct or any other measures that
17 are being taken?

18 A (DA) We think it is smaller in number and
19 anomaly. I think I mentioned yesterday during
20 the course of my testimony that Dr. German has
21 been very helpful in engagement with the
22 benchers and Law Society staff so that is one of
23 the issues. There were many that were discussed
24 in the sessions that were held with staff both
25 from investigations, from professional conduct

1 and from trust assurance and accounting to
2 identify some of the areas that we need to be
3 looking at either when we do audits or in other
4 parts of the work of the Law Society. But we
5 think that is at the more modest end of the
6 scale in relation to the nature of activity
7 that's taking place.

8 (CF) Mr. Isaac -- sorry, Ms. Bains, why
9 don't you go ahead.

10 (GB) sorry, I was just going to say it's
11 important to understand what that actually mean.
12 It's not lawyers acting as realtors. I don't
13 think that is necessarily accurate. It's the
14 *Real Estate Services Act* under section 3 gives
15 an exemption to lawyers, they don't -- the act
16 doesn't apply to them if they are performing
17 those real estate services as defined in the act
18 in the course of their practice and so what it's
19 a recognition of is that there are services that
20 lawyers do that are legal services that also
21 fall within the definition of real estate
22 services. There's overlap there. And so it's a
23 recognition that clearly if a lawyer is
24 performing legal services, we are the regulator
25 and we regulate that. And so to the extent they

1 are performing real estate services in the
2 course of their practice, all our rules apply
3 and whether it's the client identification rules
4 or everything else we've talked about, including
5 the code, would apply to that conduct. So it's
6 not the case that they are out there
7 unregulated, you know, fast and loose. We are
8 regulating them.

9 (CF) Yeah, so the idea that it's lawyers out
10 there hanging a sign on a house acting as a
11 realtor because they are lawyers and not
12 providing any legal services, that is an
13 incorrect impression of from -- and I'm not sure
14 if that is what Dr. German held, but that's not
15 accurate based on the intersection between the
16 regulatory schemes.

17 Q And one other -- I appreciate it may be like a
18 miscellaneous thing to bring up at this point,
19 but one of the areas that has received some
20 attention in the media and otherwise, an area of
21 concern is private lending, and lawyer's
22 involvement in potential private lending both in
23 structuring stage of private lending
24 transactions as well as potentially at the stage
25 of enforcing private lending arrangements, and

1 what role that may play in the money-laundering
2 risks that may be present in those sorts of
3 transactions. I have seen some reference to in
4 some of the plan documents to flow of funds
5 declarations or other ways of potentially
6 addressing those risks and I appreciate there
7 was a trusted -- a practice advisory that was
8 issued with respect to the risks. Is there
9 anything else that the Law Society is looking at
10 to potentially mitigate the risks that may arise
11 in private lending?

12 A (DA) I think the advisories were some of the key
13 elements of that, but it's certainly something
14 that is on the radar screen as one of the areas
15 that we need to be aware of.

16 Q Now, this is, I promise, the last question. We
17 did with Ms. Wilson, we took her to a memorandum
18 regarding a meeting in 2018 between the
19 federation and representatives of the federal
20 government and that memorandum described in the
21 meeting that after the impression that there was
22 going to be successor federal legislation that
23 that impression was at least from the
24 federation's perspective appeared to have been
25 dispelled at that front. Given the role of the

1 history of litigation, the history of attempts
2 to create federal legislation and apply it to
3 lawyers has played over the last 15-plus years,
4 if that potential has diminished, is there a
5 risk that the commission should be concerned
6 about that the focus on these issues that we've
7 been describing, the focus on money-laundering
8 as a problem, may also diminish and the
9 attention that's being focused on it by the
10 legal profession?

11 A (CF) Mr. Avison, if I could just jump in here
12 for one second here. Because I was involved in
13 both litigation and I've been involved as a
14 bencher and I just want to say that I think that
15 that idea that the threat is somewhat useful is
16 just a complete and utter misconception. If you
17 look -- if you put the litigation on the
18 chronology here of efforts taken by a law
19 society to deal with this issue, you'll see that
20 the problem the most unproductive time was the
21 time that people were in litigation. And when
22 actually -- and that results from there being
23 the threat of more legislation. The litigation
24 results from that. And so we have sort of two
25 paths here forward. The one path is the idea

1 that you are going to try to legislate something
2 which on my reading of the federation case I
3 think would be impossible. Or we can go on a
4 path of collaboration and working out a
5 made-in-Canada approach to how we deal with
6 these issues. One is productive, one is
7 destructive. And the idea that legislation that
8 the threat of it there and the threat of further
9 litigation, what that does is that freezes
10 people in place, it makes them worry about the
11 choices they're making, it makes them worry
12 about the documents they are writing, it stops
13 the free flow information and so it's just
14 simply unhelpful to a regulatory process and it
15 really puts us behind the game. So I would ask
16 the commission to just completely dispel
17 themselves of the notion that that threat is
18 somehow useful in this process.

19 Q Mr. Avison, did you have something to add?

20 A (DA) No, I have absolutely nothing to add. I
21 think that fully captured where we are at at the
22 moment and where we should be headed. I think
23 there were 15 years where the discussion that
24 needs to take place was not happening. It is
25 now and that is where our energy ought to be

1 concentrated.

2 MR. ISAAC: Thank you. Those are all of my questions
3 for the witnesses, Mr. Commissioner.

4 THE COMMISSIONER: Thank you, Mr. Isaac. Now,
5 Mr. Westell for the Canadian Bar Association
6 BC Branch and the Criminal Defence Advocacy
7 Society. Mr. Westell, I understand you've been
8 allocated 25 minutes.

9 MR. WESTELL: My apologies. I had a technical
10 difficulty there. Especially given the last
11 30 minutes of the testimony from the witnesses
12 on this panel I don't have further questions.
13 It's been covered, and our interest has been
14 duly covered especially with the last set of
15 comments by Mr. Ferris and their reiteration in
16 support for Mr. Avison. So thank you. We
17 concede our time.

18 THE COMMISSIONER: Thank you, Mr. Westell.
19 Ms. Herbst, you too have been allocated
20 25 minutes. Thank you.

21 MS. HERBST: Thank you, Mr. Commissioner, and I just
22 want to touch on a few topics arising out of the
23 testimony this week as well as a few points that
24 came up in the will-says, but given the
25 constraints on Mr. Isaac's time I think haven't

1 been yet covered in the testimony and made part
2 of the record, so I'll deal with a few of those.

3 And just at the outset with respect to some
4 of the cross-referencing that has been happening
5 in terms of the testimony this week I wanted to
6 put on the record that the members of the Law
7 Society panel all received an exemption from the
8 witness exclusion order that has been made.

9 THE COMMISSIONER: I assumed that to be the case,
10 Ms. Herbst.

11 MR. ISAAC: I confirm that to be the case as well.

12 MR. WESTELL: Thank you. It was given on
13 October 23rd, so even prior to the order, and
14 thank you very much for that.

15 **EXAMINATION BY MS. HERBST:**

16 Q First, if I can turn to Ms. McPhee with a couple
17 of specific points and one arises out of the
18 discussion yesterday with respect to the annual
19 reports that are provided by lawyers, and
20 Ms. McPhee, you were going to try to confirm how
21 long there has been a followup process where a
22 lawyer reports on exceeding or getting to the
23 threshold of the \$7,500 restriction. Were you
24 able to find that information?

25 A (JM) Yes. I was able to confirm that the

1 question and followup has been in place at least
2 since 2007. I started with the Law Society in
3 2006 so I can confirm it has been in place since
4 2007.

5 Q Thank you. And, Ms. McPhee, you had today in
6 your testimony when discussing compliance audits
7 with Mr. Isaac drawn a distinction between the
8 number of lawyers that are in the province and
9 the number of law firms, and I just wanted to
10 confirm we've heard the number 675 compliance
11 audits in the testimony. Is that 675 lawyers
12 who are being audited or firms that are being
13 audited?

14 A (JM) That is law firms. We do the law firm
15 which may have one lawyer or many lawyers. So
16 there are 13,000 practising lawyers, but there's
17 3,600 law firms and about 2,600 who hold trust
18 funds or have trust accounts, so 675 is in
19 relation to the 2,600 law firms.

20 Q Thank you. So on a more general note on
21 Wednesday Mr. Isaac during his questions right
22 at the outset took the panel members to their
23 role with the Law Society and their involvement
24 in AML efforts with the Law Society. Just
25 stepping back a bit from that, I wondered if the

1 panel members could cover off a bit more about
2 their professional qualifications and
3 backgrounds apart from or prior to the Law
4 Society itself. And perhaps running through
5 alphabetically by last name if we could start
6 with Mr. Avison?

7 A (DA) Sure, happy to do that. I've been with the
8 Law Society for the past three years in the
9 capacity as the Chief Executive Officer and as
10 Executive Director much of my career has been on
11 what I would characterize as public side. So I
12 have a served as a Deputy Minister in education
13 and in health in this jurisdiction and Deputy
14 Minister of Justice in another jurisdiction. I
15 was with the Federal Department of Justice for
16 much of the early part of my career, and I was
17 actually with the offices of the assistant
18 attorney general of criminal law in Ottawa at
19 the time that the first proceeds of crime
20 legislation was developed and implemented and
21 had some role in working with our regional
22 office. I was subsequently to that point in
23 time chief Crown attorney for the Northwest
24 Territories and spent ten years as the president
25 responsible for the University of Residence

1 Council in British Columbia.

2 Q And, Ms. Bains, could you also run through your
3 qualifications and your background?

4 A (GB) Sure. I was called to the bar in 1999 in
5 BC. Prior to that I was a high school teacher
6 so I have a keen interest in education and am
7 very supportive of those endeavours. I
8 practised litigation before joining the Law
9 Society in 2005. I left in 2010, returned to
10 private practice in and came back in 2013. So
11 collectively I think I've been at the Law
12 Society over 11 years. And I think I've handled
13 over 500 investigation files during the course
14 of my time here when I was an investigator. I'm
15 also a certified anti-money laundering
16 specialist. I've got the CAMS designation. And
17 I neglected to mention that three of my staff
18 lawyers are also certified anti-money laundering
19 specialists with a fourth one working towards
20 that designation.

21 Q Thank you, Ms. Bains. And, Mr. Ferris, could I
22 ask you to do the same.

23 A (CF) I always find it remarkable how
24 unremarkable my history is when I hear other
25 people. So I was called on the Ides of March in

1 1991 after clerking for a year with the court of
2 appeal. I've practised at Lawson Lundell ever
3 since and I continue to practise there today. I
4 have general commercial litigation practice.
5 The only thing I can add to my Law Society
6 experience is that prior to becoming a bencher
7 on January 1, 2014 I did serve as a non-bencher
8 member of a discipline committee for three of
9 the previous four years, so I did get some
10 introduction to AML issues during that time.

11 Q Thanks, Mr. Ferris. Ms. McPhee, could you also
12 run through your professional qualifications and
13 your background.

14 A (JM) So I'm a CPA chartered professional
15 accountant, have been for more than 30 years and
16 working in industry and in regulation. I've
17 been with the Law Society since 2006, so almost
18 15 years, and prior to that I was with an
19 aerospace company and television and a chartered
20 accountancy, national chartered accountancy
21 firm. I also held my certified anti-money
22 laundering specialist designation, also
23 certification in risk assurance management. And
24 I also want to mention that our forensic
25 accounting department also three of four hold

1 the CAMS designation and one is in the process
2 of taking it. And so I think that's the
3 summary. Thank you.

4 Q Thank you very much. Now, Ms. Bains, I wanted
5 to touch on a little bit of the discussion that
6 you and Mr. Isaac had I believe yesterday about
7 complaints and the source of complaints, and you
8 mentioned that sometimes even an unscrupulous
9 client may be the source of a complaint. Could
10 you explain what a complaint is in Law Society
11 terminology.

12 A (GB) Yeah, that's important to understand that.
13 A complaint is any information that indicates a
14 lawyer may have committed a discipline
15 violation. A complaint doesn't need to be in a
16 specific form and it's such a broad definition.
17 That information can come to us from a variety
18 of sources: client complaints, opposing
19 parties, other lawyers including other lawyers
20 who have a mandatory duty to report under I
21 think it's 7.1-3 of the code, including when
22 there's circumstances and concerns about a
23 lawyer's trustworthiness or honesty. The
24 complaints can come to us from within the Law
25 Society. They can be Law Society generated in

1 the sense that their referrals from the trust
2 assurance department arising from the audit
3 program. They can be referrals from other parts
4 of the Law Society from other departments where
5 they have uncovered issues. And they can be
6 files that we generate of our own initiative
7 from reviews of court decisions, civil
8 forfeiture proceedings. Another investigation
9 that indicates a different lawyer's conduct, we
10 may open a separate file on that. We receive
11 information from the courts, from really a
12 variety of sources.

13 Q Thank you. And just on another particular
14 point, there's been some discussion this week of
15 administrative penalties versus discipline and a
16 suggestion of a contrast between the two. Is
17 there -- and I believe at one point during
18 Ms. Wilson's testimony there was a suggestion
19 that the Law Society was proposing some
20 administrative penalties in response to some
21 rule breaches perhaps as opposed to disciplinary
22 measures. Is your understanding that there's a
23 contrast or is it a combination?

24 A (GB) Yeah, I mean that was a good point. So as
25 a part of our work we are always looking at are

1 there different ways to regulate, are there
2 different means of achieving the objectives that
3 we want to achieve from our investigative and
4 disciplinary processes. And one of the issues
5 that we've looked at are administrative
6 penalties. And whether they can have a role in
7 some of the particularly rule breach
8 circumstances. And so when we considered this,
9 and this has not gone to benchers, it's really
10 us considering it and debating it, what we had
11 envisioned were administrative penalties that
12 would form a part of a lawyer's professional
13 conduct record and so they would be
14 disciplinary. They wouldn't be distinct from
15 discipline. They would form a part of their
16 disciplinary record and that is what we had
17 envisioned.

18 Q Now, on another specific topic that came up,
19 there was some discussion yesterday I believe of
20 the law society's operational plan. And my note
21 is that Mr. Avison said this is a breakdown of
22 projects, priorities and their status at the Law
23 Society. I just was hoping to understand and
24 whether by referring to projects is that a
25 reference to future-looking matters? Is the

1 operational plan also to do with baseline
2 activities that are already ongoing?

3 A (DA) It's a bit of both. So it relates both to
4 matters that are currently underway, and you'll
5 see in the document that it breaks out some of
6 those in relation to the quarters within the
7 year when those are being addressed, but some of
8 it is also forward looking.

9 Q And there was in the testimony yesterday,
10 Mr. Avison, I believe you referred to the
11 strategic plan as a specific document but that
12 there had been an overall Law Society strategic
13 plan I believe you said in 2017. Are there any
14 documents that were precursors to the
15 operational plan as well?

16 A (DA) Those were the primary ones, but I should
17 mention that the existing strategic plan was
18 passed by the benchers at their meeting that
19 would have taken place in December of 2017.
20 We're in the process of completing the next
21 strategic plan, so my expectation is that matter
22 will come before the benchers right before the
23 end of this year.

24 Q All right.

25 A (CF) So if I could just add here, as I

1 understood the strategic plan when we approved
2 it and the operational plan, a lot of it was
3 collection of ongoing activities to sort of
4 bring it together from other documents and the
5 programs into one space so we could keep track
6 of it in one way. It wasn't that adopting the
7 operational plan in 2019 we were sort of
8 starting all of the activities at that time.
9 That's not how the document should be
10 interpreted. That document was created to
11 collect a lot of existing programs in one place
12 so they could be tracked.

13 Q Okay. Now, I think two more topic areas. So we
14 have some notice that on Friday when Professor
15 Levi is here one of the topics he may deal with
16 is an American Bar Association model rule, I
17 believe it's 1.2(d), and a formal opinion that
18 the AVA has issued about it. And I believe the
19 rule is or the model rule is a lawyer shall not
20 counsel a client to engage or assist a client in
21 conduct that the lawyer knows is criminal or
22 fraudulent. And I'm wondering if the panel
23 members, perhaps Ms. Bains, could assist in
24 terms of explaining whether that has an analogy
25 to the BC rules? Or obligations, is there a

1 comparison to be drawn?

2 A (GB) Yeah, I'm certainly not an expert or really
3 have no -- I can't speak to the US law, but from
4 my reading of their recent opinion their
5 standard seems significantly higher than the
6 obligation we impose on the obligation that
7 BC lawyers are expected to meet. So our rule
8 3.2-7 and its commentary requires a lawyer to
9 make reasonable inquiries if there are
10 objective -- if the circumstances objectively
11 raise suspicion. And so that objectively raised
12 suspicion seems significantly lower than knowing
13 than that American language, so I would say that
14 the duty kicks in a lot sooner than the AVA
15 opinion would suggest for American lawyers.

16 Q And when you said, Ms. Bains, in your
17 answer that their standard seems higher, are you
18 referring to the point at which the threshold is
19 triggered?

20 A (GB) Yeah, the duty to make inquiry seems to be
21 triggered at a much higher level where our duty
22 to make inquiry is -- you know, the level of
23 suspicion required to where your duty kicks in
24 is quite low.

25 Q Now, the will-say touched on and in a few points

1 during the testimony we've heard about the
2 concept of public interest and the role of the
3 Law Society in terms of upholding and protecting
4 the public interest. Could the panel address
5 that and explain whether if at all that
6 intersects with AML efforts?

7 A (CF) If I could just start here because I'm
8 President of the Law Society and I just would
9 just harken back to the first thing I said as
10 president to the benchers in January of this
11 year which I think is sort of the motto of the
12 place is that everything we do is about the
13 public interest. Our section 3 jurisdiction,
14 our mandate is all about protecting the public
15 interest and the administration of justice and
16 that informs every decision that we make and the
17 benchers are reminded of it every time we meet.
18 And we actually make an oath at the bencher
19 table to uphold the public interest in what we
20 do. And so when you look at that strictly with
21 respect to AML, you know, you sometimes read
22 that we are here to protect lawyers or we are
23 here to do something other than that and that is
24 just completely and utterly false. Our sole
25 goal is to ensure that we have protection of the

1 public interest in everything we do, including
2 AML. Now, I'll pass it over to the rest of the
3 panel to sort of talk about specifics, but I
4 don't want there to be any misunderstanding
5 about how benchers understand their role within
6 the Law Society.

7 (DA) And a similar kind of response from me.
8 I mentioned during the course of the testimony
9 today some of the work that we've undertaken in
10 relation to engaging with other entities,
11 including government, to make sure they
12 understood the nature of the role and the
13 responsibility. All of that goes back to
14 section 3 of the act and the public interest
15 responsibility of the Law Society. So I think
16 it's core to every single thing we do.

17 (GB) I think I would just -- I don't know
18 how many ways we can say it, but I would echo
19 that because certainly in all my years here that
20 is what guides us in the decision-making on how
21 we handle our files, how we set up processes and
22 procedures, the policies that we are going to
23 implement. That's our role. We are here to
24 protect the public interest and any suggestion
25 that we are protecting anything else is just

1 not -- it's just simply not the case.

2 (JM) I can just add that I agree with
3 everything that was just said and I think
4 certainly from a staff level and a management
5 level it is key to everything that we do.

6 (GB) Can I add one more point that in
7 the years that I've been managing the group, the
8 group is very dedicated to the public interest
9 mandate and takes that obligation very
10 seriously, and there is sometimes I think there
11 can be a perception that it's lawyers protecting
12 lawyers and that is certainly nothing that I
13 have ever seen in the work that we do. We take
14 our obligations very seriously in doing what we
15 need to do to protect the public.

16 (DA) One of the areas where this shows up is
17 in the workplace engagement surveys that we do
18 with the whole of our staff where the
19 understanding of the mandate and the commitment
20 to it comes up consistently every year we do
21 that. So I think it isn't simply within the
22 groups that you've heard about today. That's
23 across the whole of the organization. So
24 tremendous level of commitment to those
25 responsibilities.

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

147

1 tomorrow at 9:30.

2 THE REGISTRAR: This hearing is adjourned until

3 November 20th, 2020 at 9:30 a.m. Thank you.

4 **(WITNESSES EXCUSED)**

5 **(PROCEEDINGS ADJOURNED TO NOVEMBER 20, 2020)**

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