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FARRIS

File No: 01590-0082

July 9, 2021

BY EMAIL

Commission of Inquiry into Money Laundering in British Columbia
PO Box 10073, 601 – 700 West Georgia Street
Vancouver, BC V7Y 1B6

Attention: Brock Martland, Q.C. and Patrick McGowan, Q.C.

Dear Sirs:

Re: Commission of Inquiry into Money Laundering in BC
Closing Submissions of the Law Society of British Columbia

Enclosed please find the Closing Submissions of the Law Society of British Columbia (the "Law Society"). With respect to the length of the submissions, we refer to our letter of June 4, 2021, requesting an increase of the page limit for the Law Society's submissions from 30 pages to 45 pages (with 1.5-spaced footnotes), and Mr. Martland's email of June 30, 2021, confirming that the Commissioner had directed a page limit extension in accordance with said request.

Yours truly,
FARRIS LLP

Per: LB Herbst
Ludmila B. Herbst, Q.C.

LBH/trw
c.c.: client

COMMISSION OF INQUIRY INTO MONEY LAUNDERING IN BRITISH COLUMBIA

CLOSING SUBMISSIONS OF THE LAW SOCIETY OF BRITISH COLUMBIA

July 9, 2021

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PART 1 - OVERVIEW

1. The Law Society of British Columbia (**Law Society**) has invested very significant time, energy and member resources in addressing money laundering (**ML**) in this province, and participated actively in the Commission's hearings, both directly and through counsel. Its Closing Submissions chiefly respond to questions set out in Commission counsel's outline of May 21, 2021 (**CC Outline**) as well as other points arising from evidence tendered in the hearings. Beyond its Closing Submissions, the Law Society relies on the testimony of its witness panel, which no participant challenged in cross-examination; its Opening Statement; and its summaries and briefing notes.[1]

PART 2 - ARE LEGAL PROFESSIONALS EXPOSED TO ML RISKS AND, IF SO, WHAT IS THE NATURE AND EXTENT OF THOSE RISKS?[2]

2. Legal professionals are exposed to ML risks. The Law Society has been mindful of these issues since at least the late 1980s, as reflected in its engagement in considering anti-money laundering (**AML**) measures.[3] As Frederica Wilson of the Federation of Law Societies of Canada (**FLSC**) noted, "it's obvious that the nature of legal practice, all of the various things that lawyers do, assisting in real estate transactions, assisting in incorporations, assisting in all kinds of transactions, mergers and acquisitions … means that there is a possibility that … the criminally minded in the

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[1] Transcript (18-19 November 2020); Opening Statement dated 18 February 2020 and Transcript (24 February 2020) p. 68 l. 7 - p. 91 l. 34; Exs. 222-226 and portions of Exs. 191-192 referred to therein; Exs. 237, 241-243, 992

[2] CC Outline Question 18

[3] Ex. 192, para. 73; Transcript (18 November 2020) p. 29 ll. 6-21 (Avison). Law Society witnesses emphasized longstanding awareness of the risks prior to the 2015 release of the Department of Finance's "Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada" (Ex. 396): Transcript (18 November 2020) p. 42 l. 3 - p. 44 l. 20 (Avison/Ferris)

public might seek to launder money through those types of services".[4]

3. Three Law Society representatives, including two of the witnesses who testified before this Commission, participate in the FLSC's Anti-Money Laundering and Terrorist Financing Working Group (**FLSC AML Working Group**).[5] The nature and extent of the main ML risks facing the legal profession in Canada are outlined in the "Risk Advisories for the Legal Profession"[6] and "Risk Assessment Case Studies"[7] issued by the FLSC AML Working Group in December 2019 and February 2020, respectively; while not exhaustive, the documents set out risks related to real estate, trusts, private lending, shell corporations and litigation. The risk of misuse of lawyer trust accounts, which during the course of the Commission hearings was the most commonly pointed to ML risk related to lawyers, is discussed in Part 4 of these Closing Submissions.

4. The Commission has heard from some witnesses that criminals may persist with tried-and-true ML methods,[8] and from others that criminals may adapt to AML measures by adopting new ML methods.[9] The Law Society works to keep up to date on all matters related to ML and the legal profession,[10] including through carefully monitoring this inquiry. Its proposed Recommendations #1, 5 and 6 (Part 7) are directed at improving timely Law Society access to information about relevant and potentially evolving ML typologies.

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[4] Transcript (16 November 2020) p. 137 l. 20 – p. 138 l. 4 (Wilson)

[5] Ex. 191, para. 15

[6] Ex. 191, App. J; Ex. 193, App. S; Ex. 214; see also Ex. 233, pp. 11-12

[7] Ex. 215

[8] E.g., Ex. 959, pp. 2-3

[9] E.g., Transcript (2 December 2020) p. 49 ll. 4-17 (Barrow); Ex. 828, p. 19

[10] Ex. 222, paras. 23-28; App. B (Law Society Anti-Money Laundering Strategic Plan), para. 1; App. C (Law Society AML Operational Plan), pp. 2, 13, 16; Transcript (19 November 2020) p. 71 ll. 13-17 (Avison)

PART 3 - WHAT EVIDENCE IS THERE THAT LEGAL PROFESSIONALS HAVE BEEN INVOLVED IN OR FACILITATED ML IN BC?[11]

5. The existence of a ML risk does not, of course, equate to ML's actual occurrence. Discussions of "inherent" risk refer to the level of risk that exists without consideration of any mitigating measures, such as Law Society regulation.[12] With such mitigating measures, the risk may not come to fruition at all, or at least not as often as it otherwise might. Dr. Benson rightly underlined the importance of not simply presuming that lawyers are involved in ML. She testified that she had become involved in her UK-specific research because of concerns she had that "the construction of professional facilitation of [ML] in official discourse and much of the academic literature – which sees professionals as playing critical and increasing role in the laundering of criminal proceeds – has weak empirical foundations", that there is usually little evidence given to support the assertion, and that "the concern that professionals play a critical role in the facilitation of [ML]…does not have a solid evidentiary basis".[13] Her own research looked at what was occurring rather than at its scale or frequency.[14]

6. At the same time, although the Law Society consistently encourages reporting to it of any concerns and carefully monitors for breach of rules that are intended to reduce the likelihood of ML occurring, ML is clandestine by nature and intended to go unobserved. As addressed further in Part 5, the public interest requires that ML risks be addressed. The public interest also, however, requires that confidence in the legal profession not be sapped by accusations that are inaccurate and unfair. On balance, it

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[11] CC Outline Question 19

[12] Transcript (16 November 2020) p. 135 l. 12 - p. 137 l. 1 (Wilson); Ex. 396, p. 31. See also Dr. Schneider's annotated bibliography, which makes clear that sources focusing on money laundering "*control* (enforcement, law and legislation, compliance, etc.)" were generally not included: Ex. 8, p. 2 (italics in original)

[13] Transcript (17 November 2020) p. 176 ll. 6-17, p. 174 l. 20 - p. 175 l. 15, p. 177 ll. 1-12 (Benson); see also Ex. 218, Ch. 3; Ex. 219, pp. 111-115

[14] Transcript (17 November 2020) p. 172 l. 6 - p. 173 l. 21 (Benson)

would be fair to say that any evidence before the Commission that might suggest substantial ML among the legal profession in BC needs to be viewed with caution. This is so for several reasons.

7. First, much of the evidence put before the Commission of ML in the legal profession predates significant AML efforts, such as Law Society Rules limiting receipt of cash (**cash transaction rule**) (the first AML-specific rule, brought into effect in 2004).[15] For example, the case studies in Dr. Schneider's literature review, "Money Laundering in BC – A Review of the Literature",[16] were chiefly drawn from his 2004 review of RCMP files, "Money laundering in Canada: An Analysis of RCMP cases" (**Schneider 2004**).[17] That work in turn involved the review of cases that were concluded predominantly between 1993 and 1998, with even the lingering ones wrapped up by 2000.[18] Some events may have pre-dated 1993.[19]

8. Schneider 2004 dominates much of the discussion of ML in the legal profession, and its impact has snowballed. The study, and the cases it relies on, find their way into

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[15] Ex. 224, para. 28; Transcript (16 November 2020) p. 114 ll. 14-23 (Wilson); see also Transcript (11 January 2020) p. 47 ll. 7-16 (McGuire), noting that the data in Schneider 2004, *infra* has limited utility due to the changes in the AML regime. The dated nature of the available information about alleged lawyer involvement in ML has been a source of frustration for the FLSC: Transcript (17 November 2020) p. 71 ll. 4-11 (Wilson).

[16] Ex. 6

[17] Ex. 7. Ex. 6 is replete with references to Schneider 2004 more generally: pp. 2, 11-14, 16, 19, 24, 37, 41, 43-44, 46-47, 49-51, 53-54, 58-61, 74, 77, 79, 86-87, 89, 93-94, 96-97, 102-103, 105-107, 110, 113-114. Many of the citations that did not come from Schneider 2004 came from media sources, many of which are also dated (see Ex. 6, pp. 96-97, regarding a case from 1996; and fns. 323-325, referring to newspaper reports from 1995, 1990, and 2002)

[18] Ex. 7, p. 8 fn. 5; Transcript (25 May 25 2020) p. 56 ll. 22-42 (Schneider); Transcript (26 May 2020) p. 54 ll. 3-20, p. 58 ll. 12-40 (Schneider)

[19] Transcript (26 May 2020) p. 58 ll. 6-40 (Schneider)

Dr. German's second report (**Dirty Money 2**),[20] a 2013 Financial Action Task Force (**FATF**) report on the "Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals",[21] from there to presentation slides of the Financial Transactions and Reports Analysis Centre of Canada (**FINTRAC**) that became Exhibit 199,[22] and Dr. Sharman's report.[23] While Dirty Money 2 states that "[a] number of sources confirm that lawyers have frequently played significant roles in money laundering used to facilitate the purchase of real estate", Schneider 2004 is the main source for this conclusion. Dr. German acknowledged that most of the examples he quoted from Schneider 2004 involved the receipt of significant sums of cash by a lawyer, and that all took place before the Law Society implemented the cash transaction rule.[24] Further, even apart from its heavy reliance on Schneider 2004, the citations in Dirty Money 2 dealing with the vulnerability of lawyers and their exposure to ML typologies are dated.[25]

9. A document prepared by FINTRAC, "Review of Money Laundering Court Cases in Canada" (**FINTRAC Court Review**),[26] looked at court cases decided between 2000 and 2014. Bruce Wallace, a FINTRAC witness, acknowledged that events in those cases could have occurred earlier.[27] Indeed, of the cases cited that refer expressly to lawyers, many occurred before AML rules were put into place: the events in *Rosenfeld* occurred in 2002, *Boivin* in 1998-2002, and *Drakes* in 1996-1998.[28] FINTRAC has not

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[20] Ex. 833, pp. 125-126

[21] Ex. 4, App. R (FATF 2013); see fns. 2, 4-6; pp. 7-8, 39, 49, 110, 116, 130-131, 138, 142. Dr. Benson also noted, with respect to this FATF report, that there were issues with its methodology, so that "any conclusions [it] makes can be considered to have a weak methodological basis": Transcript (17 November 2020) p. 170 ll. 4-25, p. 171 ll. 1-20

[22] Transcript (16 November 2020) p. 68 l. 11 - p. 71 l. 5 (Wallace); Ex. 199, slides 6-7

[23] Ex. 959, p. 3, fn. 10 specifically, but also through incorporating, e.g., Exs. 6 and 833

[24] Transcript (13 April 2021) p. 4 l. 1 - p. 5 l. 21 (German)

[25] Ex. 833, fns. 168-171, with citations ranging from 1990 to 1997

[26] Ex. 194

[27] Transcript (16 November 2020) p. 7 ll. 14-20 (Wallace).

[28] *R. v. Rosenfeld*, 2009 ONCA 307 at paras. 5-8; *R. c. Boivin*, 2008 QCCQ 1182 at

conducted any further analysis on ML prosecutions since the study.[29]

10. Second, significant portions of the evidence before the Commission on ML in the legal profession came from outside BC, and even outside Canada. Of the 149 RCMP proceeds-of-crime case files that Dr. Schneider drew upon,[30] only 18 (which were not limited to lawyers) came from BC.[31] In the FINTRAC Court Review, only 5 of the 40 cases reviewed were from BC,[32] and most of those may not have involved lawyers; the lawyer-related cases identified on page 8 were from Ontario and Quebec. Dr. Benson's 20 sample cases (convictions from 2002 to 2013) came solely from the UK.[33] Dr. Sharman gave colourful testimony about a Florida lawyer who seemed open to engaging (for the right price) with a potential terrorist, but acknowledged that his 2014 book containing this anecdote attributed no quotations like this to a Canadian law firm and he was not aware of any law firm in BC that has said it would welcome terrorism-related business.[34] Indeed, many witnesses who discussed lawyers candidly disclaimed expertise specifically in relation to Canada, much less BC.[35]

11. Third, much of the commentary related to ML in the legal profession came from witnesses who do not have work experience in law firms or fields that lawyers practise in, such as real estate, or at banks that may handle aspects of the transactions in which

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para. 1; *R. v. Drakes,* 2006 CanLII 730 at paras. 8-11 (ONSC)

[29] Transcript (16 November 2020) p. 11 ll. 6-11 (Wallace)

[30] Transcript (26 May 2020) p. 55 ll. 6-23 (Schneider)

[31] Ex. 7, p. 10; Transcript (26 May 2020) p. 59 ll. 2-10 (Schneider)

[32] Transcript (16 November 2020) p. 10 ll. 20-23 (Wallace); Ex. 194, p. 3

[33] Transcript (17 November 2020) p. 107 ll. 11-14; the largest category of typology identified, the buying or selling of property, only had six cases in it: p. 134 ll. 2-4 (Benson)

[34] Transcript (6 May 2021) p. 152 l. 9 - p. 154 l. 6 (Sharman)

[35] E.g., Transcript (20 November 2020) p. 7 ll. 2-15, p. 117 ll. 3-15 (Levi); Transcript (17 November 2020) p. 159 ll. 8-19 (Benson); Transcript (3 May 2021) p. 6 ll. 7-10 (Hughes); Transcript (6 May 2021) p. 133 ll. 6-22 (Sharman); Ex. 959, p. 1

lawyers are involved; some of the witnesses also did not have law degrees.[36] This is not a criticism, but does suggest they may not appreciate whether there are practical or sector-specific regulatory rules which may already address their concerns.

12. Fourth, much of the more recent evidence from the Canadian context has gone no further than suggesting that more investigation might be of interest, rather than pointing to any conclusion of lawyer wrongdoing. Mr. Rudnicki, who acknowledged that it was not the role of his employer, British Columbia Lottery Corporation (or, by extension, his role), to investigate these matters further, or to make decisions about whether certain transactions were concerning,[37] noted that his link charts were not evidence of any wrongdoing, but instead just involved "observations" of links between individuals and transactions.[38] Some of the links he identified do not seem particularly suspect (e.g., a lawyer associated with registration of a Bank of Montreal mortgage).[39] Indeed, underlining the lack of tangible concerns of lawyer wrongdoing, Mr. Rudnicki had not, at the time of his testimony, taken steps to share his observations with the Law Society.[40]

13. Similarly, a FINTRAC study on the extent to which legal professionals were represented in its data holdings (specifically with large cash transactions and disclosures of financial intelligence) (**FINTRAC Study**), came with caveats on both the underlying data and the conclusions that might be drawn from it.[41] While FINTRAC received approximately 10 million large cash transaction reports (**LCTR**s) in the last

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[36] Transcript (2 March 2021) p. 170 ll. 6-11, 14-21; p. 172 ll. 1-22 (Rudnicki); Ex. 69 (Mr. Rudnicki's CV); Transcript (6 May 2021) p. 145 ll. 1-4, p. 147 l. 1-17 (Sharman); Ex. 958 (Dr. Sharman's CV); Transcript (27 May 2020) p. 62 ll. 18-19, 27-32 (Schneider); Ex. 6, p. 142 (Dr. Schneider's CV); Transcript (17 November 2020) p. 181 ll. 2-7 (Benson); Ex. 217 (Dr. Benson's CV); Ex. 21 (Dr. Levi's CV)

[37] Transcript (2 March 2021) p. 129 ll. 12-17, p. 135 ll. 1-8, p. 146 ll. 22-25 (Rudnicki)

[38] Transcript (2 March 2021) p. 146 ll. 17-22, p. 158 ll. 1-21 (Rudnicki)

[39] Ex. 670, p. 3

[40] Transcript (2 March 2021) p. 158 ll. 22-25 (Rudnicki)

[41] Ex. 199; Transcript (16 November 2020) p. 40 l. 3-9 (Wallace)

year, it was only able to identify 5,000 large cash transactions in a 3.5-year period that involved legal professionals.[42] Assuming a similar volume of LCTRs over the period in question, those involving legal professionals amounted to less than 0.014% of all LCTRs. Further, no work was done to determine whether any of the transactions in the LCTRs were also reported as suspicious.[43] Mr. Wallace agreed that a good number of the transactions involved may have been perfectly legitimate.[44] Similarly, for the data involving lawyer mentions in FINTRAC disclosures, no analysis was done to see if the lawyers' role was suspicious or not,[45] and Mr. Wallace did not know whether any of the disclosures ultimately resulted in charges, against lawyers or otherwise.[46]

14. Fifth, some of the evidence presented as connected to the legal profession relates to individuals who happened to be lawyers, or to have qualified as lawyers, but who were not acting in their capacity as lawyers. For the FINTRAC Study, no work was done to distinguish between the conduct of a lawyer in their personal capacity versus their professional capacity.[47] Mr. Wallace readily agreed that at least some of the LCTRs would include reports of personal transactions.[48] He also agreed that in the FINTRAC Court Review,[49] lawyers were not necessarily acting in a professional, as opposed to private, capacity when becoming involved in the cases profiled there.[50] Indeed, on reviewing the case law, it is evident that the person described as a "Toronto-based lawyer" in the FINTRAC Court Review was long unemployed, lived off the earnings of insider stock market trading and was disbarred for conduct which was not in his

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[42] Transcript (16 November 2020) p. 46 l. 21 - p. 47 l. 3, p. 71 l. 16 - p. 72 l. 12 (Wallace)

[43] Transcript (16 November 2020) p. 54 ll. 5-9 (Wallace)

[44] Transcript (16 November 2020) p. 54 ll. 15-18 (Wallace)

[45] Transcript (16 November 2020) p. 55 ll. 17-24, p. 57 ll. 20-25 (Wallace)

[46] Transcript (16 November 2020) p. 83 ll. 2-7 (Wallace)

[47] Transcript (16 November 2020) p. 53 ll. 14-17 (Wallace)

[48] Transcript (16 November 2020) p. 53 ll. 14-24, p. 78 l. 23 - p. 79 l. 23 (Wallace)

[49] Ex. 194

[50] Transcript (16 November 2020) p. 88 ll. 12-20 (Wallace)

professional capacity.[51] In the case of Mr. Rudnicki's analysis, as he candidly acknowledged, at least one of the persons identified in the link charts as a lawyer was not a lawyer at all but, rather, was exercising a "power of attorney".[52]

15. Sixth, much of the evidence presented cannot be properly tested. The raw data used for Schneider 2004 was destroyed five years after the study, and as such the case files were not provided to Commission counsel; further, some of the data was anonymized in the study itself.[53] Dr. Schneider had no personal knowledge of the truth or falsity of the content of the police files and relied on the information set out there.[54] The FINTRAC Study was an internal working document from a preliminary project and not peer reviewed.[55] It had never been made public, and the underlying LCTRs and disclosures were never provided to the FLSC or member law societies.[56] Further, while some passing reference has been made to an RCMP "audit" of financial crime cases between 2013 and 2017,[57] the audit is not in the evidence.

16. Seventh, the sources for the work that was done were limited. Sample sizes were small. Dr. Schneider drew on 149 cases. The FINTRAC Court Review is based on such a small number of cases that it would be difficult to draw any conclusions with statistical significance from it: the review drew on 40 cases, involving 62 individuals and 43 convictions.[58] While lawyers constituted the second largest demographic by occupation, in hard numbers this means convictions for 9 people over the course of 15 years. Mr.

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[51] Ex. 194, p. 22. Mr. Wallace agreed that further information could be found on CanLII: Transcript (16 November 2020) p. 89 ll. 3-16 (Wallace). See *Law Society of Upper Canada v. Stanko Jose Grmovsek*, 2011 ONLSHP 137, paras. 27-36

[52] Transcript (2 March 2021) p. 148 ll. 6-21 (Rudnicki)

[53] Transcript (26 May 2020) p. 55 l. 24 - p. 56 l. 35 (Schneider)

[54] Transcript (26 May 2020) p. 57 ll. 12-18, ll. 37-46 (Schneider)

[55] Transcript (16 November 2020) p. 48 ll. 23-25, p. 77 ll. 2-18 (Wallace)

[56] Transcript (16 November 2020) p. 75 l. 14 - p. 77 l. 6 (Wallace)

[57] Ex. 833, p. 125

[58] Transcript (16 November 2020) p. 7 ll. 14-20 (Wallace)

Wallace agreed, and the review stated, that the small sample size meant that results were not necessarily generalizable to all ML prosecutions in Canada.[59] Many materials also tended to rely heavily on media sources. This is not to disparage media articles, but they make it difficult to test the veracity of the underlying data. Not all witnesses conducted interviews as part of their work.[60]

PART 4 - A SPECIFIC SET OF ALLEGATIONS: SOLICITOR-CLIENT PRIVILEGE AND LAWYER TRUST ACCOUNTS

17. This Commission has seen various commentary positing that solicitor-client privilege, and the lawyer trust accounts that are generally subject to that privilege, may attract prospective money launderers to use the services of lawyers, and may impede law enforcement efforts in Canada.[61] There is no doubt there is a risk that trust accounts can be misused. However, many assertions as to the nature and extent of the risk, its manifestations, and its potential repercussions are overstated.

18. Lawyers who hold trust accounts[62] are prohibited from using them for purposes other than the provision of legal services, with limited exceptions. Rule 3-58.1 of the Law Society Rules, which came into effect in July 2019 but codified obligations that lawyers already had,[63] provides that, other than as permitted by the *Legal Profession Act*, S.B.C. 1998, c. 9 (**LPA**) or the Law Society Rules, "a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to

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[59] Transcript (16 November 2020) p. 90 l. 18 - p. 91 l. 4 (Wallace); Ex. 194, p. 16

[60] Transcript (2 March 2021) p. 169 ll. 13-20 (Rudnicki). Dr. Sharman conducted one, of a former Canada Revenue Agency employee: Transcript (6 May 2021) p. 14 l. 14 - p. 15 l. 1, p. 145 ll. 5-17, p. 148 ll. 15-23 (Sharman)

[61] Ex. 833, p. 159; Ex. 6, pp. 103-104

[62] Not all lawyers in BC hold trust accounts: Transcript (19 November 2020) p. 83 ll. 18-20 (McPhee)

[63] Transcript (18 November 2020) p. 105 ll. 4-7, p. 107 ll. 17-21 (Bains); *Re Gurney*, 2017 LSBC 15, paras. 79-86: Ex. 192, App. J

legal services provided by the lawyer or law firm".[64]

19. The Law Society has – and employs – the tools to monitor and enforce its AML rules robustly. It knows which law firms have trust accounts. It does not take firms' word for this: it audits a sample of those that report having no trust account.[65] During trust audits, the Law Society also reviews cash deposits. Firms must note deposits of cash greater than $7500 on their annual trust declaration. The Law Society makes inquiries to ensure reported deposits fall within exceptions to caps on accepting cash.[66]

20. The Law Society also has visibility on deposits and withdrawals made into the trust accounts of audited firms. Every law firm in British Columbia that operates a trust account is audited at least once every six years; law firms that primarily practise in the areas of wills and estates and real estate are audited once every four years; and new firms are audited within three years of inception.[67] Audits may occur more often for firms that are considered to be at a higher risk of non-compliance.[68] During an audit, a lawyer must make available various types of books and records.[69] All material in any client file that an auditor selects for audit, including retainer, fee agreements and work product, is available for review. This allows the Law Society to determine whether funds were dealt with in connection with the provision of legal services.[70]

21. When the Law Society further reviews or investigates possible transgressions, it has additional powers of compulsion, such as issuing orders for a full investigation of the books, records, and accounts of a lawyer, including all electronic records.[71] The Law Society has the powers necessary to take action very swiftly where serious issues

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[64] Ex. 191, para. 8(a); Ex. 192, App. F, p. 131

[65] Ex. 225, para. 10; Ex. 192, para. 40

[66] Transcript (18 November 2020) p. 73 ll. 10-12; p. 74 l. 7 - p. 75 l. 1 (McPhee)

[67] Ex. 225, para. 10; Ex. 191, para. 7; Ex. 192, para. 40

[68] Ex. 225, para. 10

[69] Ex. 225, para. 12; see Law Society Rules 3-85, 3-86

[70] Transcript (18 November 2020) p. 121 l. 12 - p. 122 l. 2 (McPhee)

[71] Ex. 223, paras. 24-25; see also Law Society Rules 4-55 and 3-5(7)-(11)

arise.[72]

22. Solicitor-client privilege does not in any way restrict the access of Law Society auditors or investigators to information: "[a] person who is required under [the LPA] or the rules to provide information, files or records that are confidential or subject to a solicitor client privilege must do so, despite the confidentiality or privilege".[73] As Ms. Bains testified:[74]

> Lawyers cannot refuse to produce documents to us on the basis of privilege. We have and are entitled to review everything in the lawyer's file. And I think that is a significant point because it means that we have full visibility to not only the accounting side of the practice, but to the client communication so that we can really understand what was happening on these transactions and make an assessment on the conduct issues that are before us….

The situation in the UK, for example, is different: Dr. Levi notes that "[t]here is no equivalent in the UK of the continental European and Canadian provisions whereby the Bar Association[[75]] has the mandate to investigate ML within their members, as a way of protecting legal confidentiality."[76]

23. Returning to the Canadian situation, as noted above, the Law Society may access even solicitor-client privileged information. The fact that, by contrast, material determined to be subject to a valid claim of solicitor-client privilege will not be accessible to law enforcement in Canada, unless the client (whose privilege this is[77]) waives it or an

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[72] Ex. 223, paras. 22-23

[73] LPA, s. 88 (1.1) (underlining added); *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310

[74] Transcript (19 November 2020) p. 104 ll. 1-10 (Bains)

[75] Not that the Law Society is properly characterized as a "Bar Association": see para. 31 below, regarding some witnesses' misunderstanding of law societies' role

[76] Ex. 245, p. 64

[77] Solicitor-client privilege is not, contrary to some of the coverage of legal professionals, a lawyer's privilege. It does not belong to lawyers or exist to benefit lawyers; it is not

exception such as innocence at stake applies,[78] is a matter of constitutional law in Canada that could not be changed as a result of this inquiry.[79] In fairness, the fundamental importance of solicitor-client privilege seems generally acknowledged.[80]

24. This does not mean, however, that no information can be accessed by law enforcement. Even where a trust account is involved, law enforcement officials are entitled to access information that is not privileged, which includes:

(a) communications between a lawyer and client that are themselves criminal or relate to obtaining advice with respect to facilitating a crime;[81]

(b) communications between a lawyer and client that, even if lawful, are unrelated to the giving or receiving of legal advice.[82] The boundary between what is privileged and what is not in relation to a trust account may be different in

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theirs to waive: Transcript (16 November 2020) p. 138 l. 21 - p. 139 l. 1 (Wilson); see also Ex. 192, para. 98. Although Dirty Money 2 refers to "the solicitor-client privilege which lawyers enjoy and jealously guard" (Ex. 833, p. 124), Dr. German acknowledged in testimony that solicitor-client privilege is a right the public benefits from, and that lawyers guard it not for their own purposes, but because it is a professional obligation that they have an ethical responsibility to defend: Transcript (13 April 2021) p. 8 ll. 7-16

[78] Ex. 192, para. 99, fn. 103

[79] The Attorney General noted his expectation that recommendations would be constitutionally compliant: Transcript (26 April 2021) p. 208 l. 11 - p. 209 l. 2 (Eby)

[80] Transcript (27 May 2020) p. 59 l. 44 - p. 60, l. 26, p. 61 ll. 16-27 (Schneider) acknowledging the importance of solicitor-client privilege, the *Charter* and constitutional rights, as well as the legitimate use of trust accounts; Ex. 244 (Dr. Levi), pp. 6, 8 (fn. 20); Transcript (4 June 2020) p. 16 ll. 21-27 (Gilmore)

[81] Transcript (18 November 2020) p. 46 ll. 8-12 (Avison); Ex. 241, p. 3; Transcript (17 November 2020) p. 80 ll. 2-11 (Wilson)

[82] Transcript (18 November 2020) p. 46 ll. 13-17 (Avison); Ex. 241, p. 3; Transcript (17 November 2020) p. 80 ll. 2-11 (Wilson)

Canada than discussion of the scope of privilege in other jurisdictions suggests;[83]

(c) records that a bank might keep with respect to the account,[84] although there may be an issue as to the quality of information captured in such records;[85] and

(d) information available from government registries regarding transactions on which funds from a trust account were spent, the particulars of which may become increasingly transparent through legislative reform: the Law Society and FLSC have supported legislative reform to improve transparency while giving due consideration to privacy and solicitor-client relationships.[86] Even prior to legislative amendments, the identity of lawyers and law firms involved in the registration of real estate transactions and mortgages could often be determined from public Land Title and Survey Authority records.[87]

25. If a claim to solicitor-client privilege is made over information, it will need either to be respected (while other material is accessed) or it will need to be adjudicated (if contested). Because there is the potential for some, though potentially not all, of the information to be privileged, there is unquestionably an additional element of process that law enforcement must follow before accessing any of that information.

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[83] In Canada, Ms. Wilson notes that "while it may be that not everything related to lawyers' accounting or trust accounts is privileged" (and of course, none of it may be privileged if for criminal ends or if other exceptions to privilege apply), there is longstanding case law, including from the Supreme Court of Canada, that "recognizes that there is inherently going to be privileged information in those records": Transcript (17 November 2020) p. 76 l. 23 - p. 77 l. 16 (Wilson)

[84] And, further, the Law Society has never signalled to financial institutions that they ought not to be following their proper due diligence further to those institutions' own obligations: Transcript (18 November 2020) p. 148 l. 24 - p. 149 l. 12 (Bains)

[85] Transcript (6 May 2021) p. 161 ll. 10-20 (Sharman)

[86] Ex. 191, Apps. A, N; Ex. 309, PDF pp. 168-170

[87] See, e.g. Transcript (2 March 2021) p. 144 ll. 5-9, p. 145 l. 13 - p. 146 l. 23 (Rudnicki)

26. However, while Dirty Money 2 suggests that law enforcement officials are deterred from seeking this information due to the additional process (though not, it should be noted, prevented from doing so),[88] the Law Society has worked hard to ensure the process is understandable and functional. It worked together with the Public Prosecution Service of Canada, the Ministry of Justice (Criminal Justice Branch) and the BC Association of Chiefs of Police to develop guidelines associated with the execution of warrants to search a law office, and the terms to be contained in such a warrant. In 2013, the Law Society published recommended guidelines in this regard.[89] Further, law enforcement agencies planning to conduct a search, or conducting a search, may contact the Law Society for input.[90] If law enforcement officials nonetheless choose not to attempt to obtain information they believe is valuable, this may simply be a symptom of the lack of resources and stability in law enforcement organization, a topic about which the Commission has heard considerable evidence.[91]

27. Dr. Sharman suggested that the presence of potentially solicitor-client privileged information may slow an investigation.[92] As long as the fundamental importance of solicitor-client privilege is recognized, care will indeed be required. However, the search warrant guidelines provide for a process that can be implemented swiftly, including by appointing (in the warrant itself) a referee who is to attend the law office, and even before the referee's attendance, the investigating authority may secure the premises to prevent the destruction or removal of any potential evidence from those premises.[93]

28. No witness testified to any personal knowledge of a specific investigation having been frustrated in BC by the existence of a claim of solicitor-client privilege over a trust

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[88] Ex. 833, pp. 123-124; Transcript (6 May 2020) p. 74 ll. 3-17 (Sharman)

[89] Ex. 241, pp. 2-3

[90] Ex. 241, p. 3

[91] Transcript (6 April 2021) p. 53 l. 10 - p. 54 l. 6 (Pecknold); Transcript (6 April 2021) p. 73 ll. 5-21, p. 116 ll. 15-25 (Rideout); Ex. 801, p. 1

[92] Transcript (6 May 2020) p. 74 ll. 4-17 (Sharman); see also Ex. 4, App. R, pp. 31-32

[93] Ex. 241, fn. 2

account.[94] Detective Inspector Hamilton of the New Zealand Police expressed sympathy with Canadian brethren who had "challenges" to "manage", but did not suggest any particular issue arose in this regard during the Ontario-based case with which he was involved. Further, none of his law enforcement employment had been in Canada, he had never sworn an Information to Obtain in Canada (though he had received material and supported an investigation), and he had not executed a search warrant in Canada.[95] Dr. Sharman raised a concern about potential impediments to law enforcement, but he has never worked as a police officer,[96] had not interviewed Canadian law enforcement officials,[97] and wrote "from the perspective of a foreigner, appreciating that a similarly qualified Canadian expert will know the local circumstances better", so that he did not purport to speak authoritatively about details of the Canadian or BC situation.[98] Dr. Schneider has never been a police officer.[99] Dr. German referred on a blanket basis to "investigations" being affected but provided no detail whatsoever.[100] To the best of our recollection and review, no evidence of the concerns discussed in this Part of the Closing Submissions was led from any other past or present Canadian law enforcement official.

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[94] Transcript (6 May 2021) p. 150 l. 15 - p. 151 l. 10 (Sharman, testifying that perhaps he had read of one but did not have personal knowledge of one)

[95] Transcript (12 May 2021) p. 67 l. 2 - p. 69 l. 12, p. 102 l. 7 - p. 103 l. 2 (Hamilton)

[96] Transcript (6 May 2021) p. 145 ll. 1-4, p. 147 l. 7-10 (Sharman)

[97] Transcript (6 May 2021) p. 14 l. 14 - p. 15 l. 1 (Sharman)

[98] He had also not previously published any articles dedicated specifically to ML in Canada: Transcript (6 May 2021) p. 13 ll. 14-23, p. 133 l. 12 - p. 134 l. 6 (Sharman)

[99] Ex. 6, p. 142

[100] Ex. 833, p. 159

PART 5 - HAS THE SELF-REGULATORY RESPONSE OF THE LAW SOCIETY TO ADDRESS THE RISK OF ML INVOLVING LEGAL PROFESSIONALS BEEN SUFFICIENT? SHOULD RESPONSIBILITY FALL EXCLUSIVELY TO THE LAW SOCIETY OR DOES GOVERNMENT HAVE A ROLE TO PLAY?[101]

29. The Law Society has played, and will continue to play, a strong role in addressing the risk of ML involving legal professionals. The Law Society is always exploring potential improvements, and addresses that potential further in Part 7 below. It also addresses below the role that government and other bodies may play.

A. Law Society's Role in Addressing the Risk of ML Involving Legal Professionals

30. As the Interim Report noted, the Law Society "is responsible for the regulation of lawyers in the province. It operates independently of government and is responsible for upholding the public interest in the administration of justice, including the independence, integrity, honour, and competence of lawyers practising in British Columbia."[102]

31. The Law Society is not, as some witnesses seemed to assume, a professional association.[103] It does not act to protect lawyers; it acts to protect the public interest.[104] The Benchers, the Law Society's governing body, take an oath to do so.[105] Indeed, acting in the public interest is a condition on the exercise of self-regulation.[106] As noted by Ms. Wilson, law societies in Canada "are serious public interest regulators. They have comprehensive mandates and very extensive powers. They…have shown no reluctance to use those powers and no inclination to shy away from appropriate

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[101] CC Outline Question 20

[102] Interim Report of the Cullen Commission, p. 10; see also LPA, s. 3

[103] Transcript (13 April 2021) p. 105 ll. 19-25 (German)

[104] Transcript (19 November 2020) p. 144 l. 7 - p. 146 l. 15 (Ferris/Avison/McPhee/ Bains); Ex. 222, para. 3

[105] Ex. 222, para. 5

[106] Ex. 192, para. 17; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at para. 36

regulation."[107]

32. Question 22(g) in the CC Outline is: "should LSBC have an express [AML] mandate?" Although Professor Maloney recommended adding an express AML reference to the mandates of BC regulators,[108] this is unnecessary in the Law Society's case: the Law Society, like other Canadian law societies, already considers AML to be part of its mandate. The time and effort that the Law Society has devoted over decades to AML efforts reflect its recognition that there is a material risk of lawyers becoming involved, unwittingly or otherwise, in ML, and that it has a duty to address this risk.[109]

33. As acknowledged by a number of witnesses, regulators play an important, though not exclusive, role in AML efforts. As Dr. Benson pointed out, regulators have "the specialist knowledge and expertise", "an understanding of the profession", "an access to material that [may] otherwise be not accessible by law enforcement" and "the ability to impose a broad range of sanctions".[110] Further, regulators are in a better position than governments to adapt quickly to these changing threats, as their statutory rule-making power allows them to be "more agile" in responding to new developments.[111]

34. Correspondingly, the Law Society devotes substantial resources to its AML-related efforts,[112] and its staff – including a significant number with certified AML specialist designation – have the training and experience to engage in that work.[113] Its AML-specific strategic and operational plans reflect the close and continuing attention it

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[107] Transcript (16 November 2020) p. 170 ll. 20-25 (Wilson)

[108] Ex. 330, p. 7

[109] Transcript (19 November 2020) p. 43 l. 5 - p. 46 l. 7, p. 49 l. 13 - p. 50 l. 4 (Avison/Ferris)

[110] Transcript (17 November 2020) p. 156 l. 21 - p. 157 l. 9 (Benson)

[111] Transcript (16 February 2021) p. 29 l. 3, p. 77 l. 6 (Morrison)

[112] Ex. 222, paras. 9-15; Ex. 223, para. 10; Ex. 225, paras. 3-4, Figure 1; Ex. 227; Ex. 192, para. 42

[113] Ex. 223, paras. 5-9; Ex. 225, paras. 5-7; Ex. 192, para. 41

has paid to this issue.[114]

35. The Law Society addresses possible ML vulnerabilities in a number of ways. It provides educational resources and practice advice to assist lawyers and articled students in understanding their professional obligations with respect to AML and in remaining vigilant against those who would use the legal profession to further fraudulent or dishonest ends, as detailed in Exhibit 226.[115]

36. Question 22(d) in the CC Outline asks: "should mandatory anti-money laundering education for legal professionals be implemented, either generally or in higher risk practice areas?" While it is not mandatory for lawyers to take an AML-related course,[116] lawyers must comply with AML obligations and doing so requires being aware of AML issues both generally and in relation to any higher risk areas in which they practice.[117] The Law Society offers education and resources to provide the necessary information for lawyers to understand and comply with their AML obligations and is also working with the FLSC AML Working Group to develop additional AML courses for lawyers.[118]

37. Another significant portion of the Law Society's AML efforts involves developing relevant rules, as detailed in Exhibits 222 and 224. Some of the Law Society's rules are stricter than those imposed by the *Proceeds of Crime (Money Laundering) and Terrorist*

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[114] Ex. 222, paras. 23-24; App. B (Law Society AML Strategic Plan); App. C (Law Society AML Operational Plan, Q3 2020); Transcript (18 November 2020) p. 26 l. 9 - p. 28 l. 1 (Avison)

[115] See also Ex. 237

[116] Transcript (19 November 2020) p. 44 l. 19 - p. 45 l. 4 (Avison); however, all students who go through the Professional Legal Training Course (**PLTC**) are exposed to an AML education component: Ex. 226, paras. 25-33. AML education has been part of PLTC since 2004: Ex. 191, para. 3

[117] Transcript (19 November 2020) p. 49 ll. 12-15 (Ferris); more generally see Transcript (19 November 2020) p. 44 l. 16 - p. 49 l. 10 (Avison/Ferris)

[118] See, e.g., resources discussed at Ex. 222, App. C (AML Operational Plan), pp. 9-13

Financing Act, S.C. 2000, c. 17 (**PCMLTFA**).[119]

38. Question 22(a) in the CC Outline asks: "are the LSBC's current anti-money laundering rules (*e.g.* the 'no cash' rule, consumer [client] identification and verification rules, and trust accounting rules) sufficiently robust?" The Law Society remains committed to continuing the enhancement of its rules based on information gleaned from the profession, government and other bodies. The Law Society reviews its rules and programs and issues new guidance to the profession as appropriate.[120]

39. The Law Society also maintains broad conduct and ethics rules such as rule 3.2-7 of the *Code of Professional Conduct* (**Code**), which bars lawyers from engaging in any activity "the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud".[121] Sometimes it can be more beneficial to rely on broad rules like this

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[119] The cash transaction rule, for example, limits lawyers' receipt of cash to $7500 or less, whereas the PCMLTFA only requires reporting of receipt of cash over $10,000. Further, reporting entities are entitled to continue with suspicious transactions, whereas lawyers cannot proceed unless they have satisfied themselves of the legitimacy of the transaction: see R. 3-27, Commentaries, at Ex. 192, App. E, p. 16. See also Transcript (16 November 2020) p. 124 l. 4 - p. 125 l. 15 (Wilson); Transcript (17 November 2020) p. 43 ll. 14-21 (Wilson)

[120] See, e.g., the Law Society's discipline advisory on private lending: Ex. 992, p. 16; the FLSC's risk advisories and case studies at Exs. 214-215; and new online resources described in Ex. 226, paras. 7, 16, 19

[121] Ex. 192, App. E, p. 16. Commentary on this provision includes [2]: "A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate": p. 17. See also commentary [3.1] and [3.2], regarding the obligation

than to add another more specific rule dealing with ML threats. General rules encourage people to apply judgment, not just to check boxes, and may better capture new issues than specific rules tailored for narrow typologies.[122]

40. Further, the Law Society has expertise in balancing other important factors to be taken into account before new or revised rules are adopted, such as access to justice and the right to a fair trial. Additional AML layers may unduly raise the cost of legal services, or limit those who can receive legal advice. Eliminating cash payments for legal fees, as is sometimes suggested, could prejudice prospective clients dependent on cash – e.g., a family law client with a joint bank account who may not want their spouse to see a withdrawal. As well, any limitation on the cash transaction rule must be balanced "with whether or not we're restricting people from defending themselves in criminal proceedings."[123] Further, while the cash transaction rule remains under review by both the FLSC AML Working Group and the Law Society,[124] the current approach already requires a lawyer who accepts cash in an aggregate amount greater than $7500 to make any refund out of such money in cash, and educates lawyers about red flags associated with cash payments.[125]

41. Being mindful of national consistency is important as well when considering rule revisions, though not determinative.[126] ML "is a pan-Canadian issue … not solely a BC

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to make inquiries of clients who seek to use trust accounts without requiring substantial legal services, and to make a record of the results of these inquiries

[122] Transcript (18 November 2020) p. 53 ll.13-20 (Ferris)

[123] Transcript (18 November 2020) p. 65 ll. 9-23, p. 69 ll. 7-25, p. 82 l. 5 - p. 83 l. 12 (Ferris). Similar concerns about access to justice are apparently acknowledged by s. 462.34(4) of the *Criminal Code*, which provides for an order permitting a lawyer to use cash seized under a warrant for the accused's legal expenses.

[124] Ex. 222, App. C, p. 1, noting ongoing review of cash transaction rule by FLSC AML Working Group

[125] Law Society Rule 3-59; Transcript (18 November 2020) p. 70 ll. 1-15 (Ferris)

[126] Transcript (16 November 2020) p. 109 l. 11 - p. 110 l. 6, p. 111 ll. 11 - p. 112 l. 12

issue", and as a result one factor that law societies must consider is whether one jurisdiction implementing rules ahead of the others would have the effect of shifting the problem to a different province or territory.[127] The fact that implementation of the Model Rules is substantively consistent across the country[128] is a benefit in this regard. Dr. Levi, too, emphasized that there are risks that would arise if the regimes applicable in each province were not harmonized, noting the possibility that people may forum shop for lawyers, seeking "lawyers in less regulated provinces to do their business for them."[129]

42. Question 22(b) in the CC Outline in turn asks "is LSBC's monitoring and enforcement of its anti-money laundering rules sufficiently robust?" and Question 22(c) asks "are the resources dedicated by LSBC to monitoring and enforcing compliance with its anti-money laundering rules adequate?"

43. The Law Society does rigorous monitoring for compliance, including having a robust trust assurance program.[130] In 2019, the Law Society conducted 675 trust audits, an increase from 463 in 2018.[131] The 675 audits – calculated by firm, not lawyer – amount to a large proportion of the approximately 2600 law firms that hold trust accounts.[132] By way of comparison, FINTRAC, whose primary instrument for assessing

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(Wilson); Transcript (18 November 2020) p. 20 ll. 4-25, p. 24 ll. 13-25, p. 78 ll. 4-11 (Avison); Transcript (18 November 2020) p. 25 ll. 2-8 (Ferris)

[127] Transcript (18 November 2020) p. 25 ll. 8-16 (Ferris)

[128] Transcript (16 November 2020) p. 152 ll. 1-14 (Wilson)

[129] Transcript (20 November 2020) p. 22 ll. 15-25 (Levi), although he notes that seeking an out-of-jurisdiction lawyer may raise suspicion

[130] Ex. 225

[131] Transcript (18 November 2020) p. 121 ll. 11-12 (McPhee)

[132] Transcript (19 November 2020) p. 134 ll. 14-19 (McPhee); Transcript (17 November 2020) p. 11 ll. 12-20 (Wilson); a small portion of audits are done on firms without trust accounts

compliance is compliance examinations,[133] did around 400 per year across Canada in the fiscal year ending March 2020,[134] compared to roughly 24,000[135] reporting entities overall (which is a rate of approximately 1.7%). Further, as Ms. Wilson testified, law societies have broader powers to monitor legal practitioners than FINTRAC has over reporting entities.[136]

44. Where there is potential non-compliance with the rules, the Law Society investigates.[137] As with its trust audit program, there have been significant increases to the resources, funding and staffing for the investigations and discipline groups of the Law Society in the last few years, in part due to increased focus on AML.[138] Where it finds non-compliance, the Law Society employs a range of disciplinary measures. If the Law Society's hearing panel makes an adverse determination, the hearing panel must impose one or more disciplinary measures, such as (a) a reprimand, (b) a fine up to $50,000, (c) limitations or conditions on the lawyer's practice, (d) suspension from practice or from particular fields of law, (e) disbarment, (f) remedial requirements, or (g) if the person is permitted to practise under the LPA but is not a member of the Law Society, prohibition from practising law in BC.[139] The factors the Law Society may

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[133] Transcript (16 November 2020) p. 85 ll. 5-10 (Wallace); Ex. 733, p. 22

[134] Transcript (16 November 2020) p. 85 ll. 11-19 (Wallace); Transcript (12 March 2021) p. 107 ll. 7-13 (Achimov); Ex. 733, pp. 3, 22. Understandably, given the pandemic, the total for fiscal 2020-2021 was likely to be lower: Transcript (12 March 2021) p. 107 l. 14 - p. 108 l. 15 (Achimov)

[135] Some of these 24,000 entities are extremely large. For example, a major national bank with branches across the country counts as one entity: Transcript (12 March 2021) p. 109 ll. 2-15 (Achimov)

[136] Transcript (16 November 2020) p. 172 l. 14 - p. 173 l. 15 (Wilson)

[137] Ex. 223

[138] Ex. 223, paras. 5-10; there was a 30 percent or $1.5 million increase in the trust assurance group's budget 2015-2020: Transcript (19 November 2020) p. 94 ll. 3-25 (McPhee); see also Transcript (19 November 2020) p. 88 ll. 1-16 (McPhee)

[139] Ex. 223, para. 42; the range of disciplinary measures is set by statute (LPA, s. 38)

consider in making disciplinary dispositions include the need to deter misconduct, including misconduct that increases ML risks, and the need to maintain public confidence in the profession and in the Law Society as regulator.[140]

45. Of the reports mentioned in the Commission's terms of reference, the one that engages most with the legal profession is Dr. German's Dirty Money 2. There are points on which Dr. German and the Law Society disagree, but he was and remains of the view that "[t]he [Law Society] is recognized as a best practice among Canadian law societies with respect to AML initiatives. It takes the issue seriously and is willing to work on solutions."[141] Dr. German also noted the excellent cooperation the Law Society had provided in the preparation of his report.[142]

B. Does Government Have a Role to Play In Addressing the Risk of ML Involving Legal Professionals?

46. Government and other bodies do have a role to play in addressing the risk of ML involving legal professionals, subject to continued respect for the independence and self-regulation of the legal profession. As outlined in the Law Society's proposed Recommendation #1 (Part 7), the ML risk touches a broad cross-section of the province, and cannot be adequately addressed by any one regulator, government agency or law enforcement body acting alone. All must work together, in a collaborative way, in order for AML initiatives to succeed. As outlined in various of the Law Society's proposed recommendations, it would be possible for government and other bodies to take steps that would improve the Law Society's ability to address ML risks, including by improving the flow of information to it.

47. Further, while the Law Society does and will continue to take a strong role in addressing ML risks, certain investigations and measures should rest with the police and the Crown. Lawyers should be criminally charged if they breach the *Criminal Code*,

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[140] Ex. 223, App. A, *Re Gurney*, 2017 LSBC 32, paras. 35-36

[141] Ex. 833, p. 122; see also p. 124

[142] Ex. 833, p. 124

including in respect of ML.[143]

48. Although the overwhelming number of trust and real estate transactions, for example, are completely legitimate,[144] and even where ML is suspected it is recognized that for the most part lawyer involvement is unwitting[145] – both of which bode well for the efficacy of education, rule-making and compliance measures – there may be exceptions. The Law Society encourages complainants whose complaints may involve criminal conduct on the part of a lawyer to report their concerns to the police.[146] Further, the Law Society's executive director may deliver to a law enforcement agency any information or documents that may be evidence of an offence.[147]

PART 6 - DOES THE EXCLUSION OF LEGAL PROFESSIONALS FROM THE FINTRAC REPORTING REGIME IMPEDE BC'S ABILITY TO EFFECTIVELY COMBAT ML AND, IF SO, WHAT IF ANYTHING SHOULD BE DONE TO ADDRESS THAT IMPEDIMENT?[148]

A. Whether Lawyers Are "Outside the AML System" Generally

49. Though Question 21 in the CC Outline rightly poses the question more narrowly (in relation to reporting), it has sometimes been asserted more broadly in the evidence before this Commission that there is a "gap" in relation to Canada's regulation of lawyers and that they are "outside the AML system" or subject to "light regulation".[149] These assertions are plainly wrong unless intended simply to acknowledge that the substantial

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[143] Transcript (18 November 2020) p. 90 ll. 8-21 (Bains); Transcript (17 November 2020) p. 80 ll. 11-18 (Wilson)

[144] Transcript (18 November 2020) p. 50 l. 14 - p. 51 l. 2 (Ferris)

[145] Ex. 6, p. 104

[146] Ex. 241, p. 3

[147] Ex. 241, pp. 3-4

[148] CC Outline Question 21

[149] Ex. 959, pp. 4, 11; Transcript (6 May 2021) p. 26 l. 17 - p. 27 l. 2 (Sharman); Transcript (16 November 2020) p. 13 ll. 17-23 (Ngo)

constraints on lawyers do not also include the PCMLTFA. The constraints on lawyers do include, for example, the *Criminal Code*, federal laws on anti-corruption and economic sanctions, and very substantial regulation by law societies, which tends to be overlooked by commentators. For example, Dr. Sharman, who described Canadian lawyers as "outside the AML system",[150] did not look at the website of Canadian regulators like law societies when preparing his report[151] and had not interviewed anyone from a Canadian law society in doing so.[152]

50. Reporting aside, law society regulation contains similarities to that found in the PCMLTFA, with the Law Society adopting many portions of the "know your client" rules in the PCMLTFA. In this regard, law society regulations have the "force of law" as applied to members of the legal profession, just as the PCMLTFA has force of law as applied to the entities it governs.[153] The FLSC and the federal government have generally agreed about what rules should apply; the disagreement (which resulted in litigation) was over whose rules they should be.[154] Mr. Ngo, from the federal Department of Finance, saw the AML working group involving the Department of Finance and the FLSC, established in 2019, as a forum for discussing further alignment.[155]

B. Whether a Reporting Regime Should Apply to Lawyers

(1) The Fact Lawyers Do Not Report to FINTRAC Should Not Impede BC's Ability to Combat ML

51. Much attention has been paid to the fact that lawyers are not required to report suspicious or other types of transactions to FINTRAC, as reporting entities do under the PCMLTFA. However, the exclusion of legal professionals from the FINTRAC reporting

[150] Ex. 959, pp. 4, 11

[151] Transcript (6 May 2021) p. 149 ll. 4-17 (Sharman)

[152] Transcript (6 May 2021) p. 148 ll. 20-23 (Sharman)

[153] Transcript (16 November 2020) p. 171 ll. 7-9 (Wilson)

[154] Transcript (16 November 2020) p. 124 ll. 4-20 (Wilson)

[155] Transcript (16 November 2020) p. 26 ll. 22-25, p. 34 ll. 2-12 (Ngo)

regime should not impede British Columbia's ability to combat ML.

52. First, under Law Society rules, the transactions that other sectors report to PCMLTFA should not be occurring under lawyers' watch. In this regard:

(a) "Large cash transactions" (of $10,000 or more) are to be reported under the PCMLTFA unless they fall within certain exceptions. Meanwhile, under Law Society Rule 3-59, lawyers are prohibited from receiving cash in an aggregate amount of greater than $7500 on any client matter unless the funds are in respect of professional fees, disbursements, or expenses connected to the provision of legal services. In other words, lawyers are barred from accepting a "large cash transaction" as defined by the PCMLTFA. Indeed, the Law Society's cash transaction rule was drafted to mirror the exception for professional fees, disbursements or expenses in the PCMLTFA, which until 2006 applied to lawyers.[156] The cash transaction rule was specifically introduced by the FLSC in 2004 as an alternative to large cash transaction reporting, and the federal government indicated that it believed that it was an appropriate alternative.[157] The Law Society has provided guidance to the profession as to the limits of the fees, disbursements and expenses exception; the cash that may be received in relation to the provision of legal services, for example, "has to be commensurate in relation to the legal services that are performed."[158] Where there are red flags, the Law Society has investigated the receipt of cash even where the professional fees exception is invoked.[159]

(b) "Suspicious transactions" of any amount are to be reported under the

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[156] Transcript (18 November 2020) p. 102 l. 23 - p. 103 l. 9 (Bains)

[157] Transcript (16 November 2020) p. 117 l. 6-19 (Wilson)

[158] Transcript (18 November 2020) p. 64 ll. 18-22 (Avison); Transcript (18 November 2020) p. 67 ll. 11-24 (Bains), noting that a client bringing in $50,000 in cash where the lawyer sought a $5,000 retainer would be a "clear red flag" for the lawyer

[159] Transcript (18 November 2020) p. 93 ll. 24 - p. 94 ll. 1-19 (Bains); Transcript (18 November 2020) p. 89 ll. 1-15 (Ferris)

PCMLTFA.[160] Under Law Society regulation, if the circumstances are suspicious, lawyers should be making reasonable inquiries to satisfy themselves of the legitimacy of the transaction and, if not objectively satisfied, withdrawing from a transaction rather than carrying it out. Under Law Society Rule 3-109, a lawyer must withdraw from representation where the "lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct".[161] Further, rule 3.2-7 of the Code provides that "[a] lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud", a prohibition that already captures the "wilful blindness" or "recklessness" standard being explored by the Solicitors Regulation Authority (**SRA**) in the UK.[162]

53. Though his research did not involve Canada, Dr. Levi seemed to question whether withdrawal from acting for a client would necessarily accomplish much beyond irritating money launderers.[163] However, he acknowledged that a money launderer facing repeated withdrawals by different lawyers might be deterred from trying again.[164]

54. Second, and in any event, even if there were transactions to report, reporting is unlikely to improve AML outcomes in the Canadian context. Moreover, unnecessary

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[160] Lawyers and Quebec notaries are exempted from the suspicious transaction and prescribed transaction reporting requirements in the PCMLTFA. Though *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (***Federation***) is often described as putting an end to their reporting, this is not accurate, as the PCMLTFA had already been amended in 2008 to provide for the exemption: Transcript (16 November 2020) p. 116 l. 3 - p. 117 l. 19, p. 121 l. 18 - p. 122 l. 7, p. 128 l. 20 - p. 129 l. 8 (Wilson); Transcript (17 November 2020) p. 75 l. 7 - p. 76 l. 11 (Wilson); Ex. 191, App. I, para. 9; Ex. 192, para. 110

[161] Ex. 192, App. F, p. 158

[162] Transcript (19 November 2020) p. 31 ll. 17-25 (Bains)

[163] Ex. 244, p. 48

[164] Transcript (20 November 2020) p. 49 l. 3 - p. 51 l. 12 (Levi)

reporting may simply exacerbate existing problems with the AML system. In this regard:

(a) Professionals have consistently made low numbers of reports to FINTRAC.[165] There is no reason to believe that lawyers would report more. Low reporting figures are not necessarily evidence of a breached reporting obligation; they could also point to design flaws within the FINTRAC system,[166] a lack of incidents to report, or a reporting obligation of limited breadth.[167]

(b) Alternatively, as is the case with other reporting entities, lawyers may end up filing reports on a defensive basis[168] due to the threat of fines or penalties for non-compliance with their reporting obligations.[169] Such reporting may contribute to an overabundance of irrelevant data that cannot be processed by a country's financial intelligence unit (**FIU**).[170]

(c) Even without defensive filing, any reports that lawyers may file under a reporting regime would simply add to the vast volume of reports that FINTRAC receives and already lacks resources to process; resource constraints would presumably impede potential substitutes for FINTRAC as well. In the last reporting year, FINTRAC received just over 31 million reports (including suspicious transaction, large cash transaction, and electronic funds transfer reports).[171] On a

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[165] Ex. 391, para. 91 (accountants); Transcript (26 February 2021) p. 98 l. 17 - p. 99 l. 1 (Ellis) (real estate agents); Transcript (5 March 2021) p. 94 l. 6 - p. 95 l. 22 (Mayr) (notaries)

[166] Transcript (11 January 2020) p. 89 l. 9 - p. 90 l. 12 (McGuire)

[167] Transcript (11 January 2020) p. 32 l. 21 - p. 33 l. 24, p. 40 ll. 1-18 (McGuire)

[168] Ex. 245, pp. 8, 41; Transcript (20 November 2020) p. 112 l. 20 - p. 113 l. 25 (Levi); Transcript (9 December 2020) p. 126 l. 19 - p. 128 l. 12 (Cassara), though this does not seem to have been Ms. Brooker's experience in the U.S.: Transcript (11 May 2021) p. 93 ll. 7-25

[169] Transcript (9 December 2020) p. 127 l. 21 - p. 128 l. 2 (Cassara)

[170] Transcript (14 January 2021) p. 40 ll. 14-19, p. 74 ll. 17-21 (Maxwell)

[171] Transcript (14 January 2021) p. 71 ll. 16-24 (Maxwell). In comparison, the US FIU

per capita basis, FINTRAC received 12.5 times more transaction reports than the US FIU, and 96 times more reports than the UK FIU.[172] FINTRAC has a staff of only 355.[173] Various witnesses raised concerns with the high-volume environment of reporting to FIUs. Dr. Levi opined that the "more is good" approach to suspicious activity reporting – prevalent across the globe – is the wrong approach.[174] Dr. Levi opined that FIUs are burdened when they receive too much reporting, and particularly defensive reporting,[175] stating: "it's easy for the system just to think well, … gathering more data is good in itself. And we have to say well, gathering data is good only if … a reasonable amount leads to something … even if you have a formal reporting system to the [FIU], that doesn't guarantee that they're going to do a lot with it."[176]

(d) There is little if any evidence that reporting by lawyers would in fact result in investigations, prosecutions and convictions. Nicholas Maxwell testified that less than one percent of suspicious transaction reports result in disclosure to law enforcement.[177] Indeed, in 2019-20, FINTRAC disclosed approximately 0.5% of the suspicious transaction reports it received from reporting entities.[178] Garry Clement, former National Director of the RCMP Proceeds of Crime Program and Officer in Charge of the Integrated Proceeds of Crime Unit, said he thought "FINTRAC does a great job of putting out tons of these disclosures, but unfortunately there's very

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received 21.6 million comparable reports, and the UK FIU (which requires fewer types of transactions reports) received under 600,000: Transcript (14 January 2021) p. 71 l. 24 - p. 72 l. 11 (Maxwell). See Ex. 733, p. 39, for the detailed statistics to March 2020.

[172] Transcript (14 January 2021) p. 72 ll. 17-23 (Maxwell); Ex. 1021, App. 8, p. 32

[173] Ex. 733, p. 33

[174] Transcript (5 June 2020) p. 58 ll. 42-47 (Levi)

[175] Transcript (20 November 2020) p. 83 ll. 3-11 (Levi)

[176] Transcript (20 November 2020) p. 85 ll. 5-11; p. 54 ll. 16-20 (Levi)

[177] Transcript (14 January 2021) p. 74 ll. 3-17 (Maxwell)

[178] Ex. 1021, App. 8, p. 31

few of them ever investigated."[179] Whether involving FINTRAC or not, the number of money laundering prosecutions in British Columbia is very low, particularly when compared with jurisdictions outside Canada.[180] Irrespective of FINTRAC, the Commission has heard substantial evidence of constraints on police resources, expertise and organization to investigate financial crimes.[181]

55. Third, to the extent that reporting is suggested by some commentators, such as Dr. German, to be a window into trust accounts, that issue has been addressed in Part 4 above. The Law Society has visibility into trust account activity, as may law enforcement in appropriate circumstances. The limits on law enforcement's access to lawyers' trust accounts are constitutional in nature.

56. Fourth, the fact that various other jurisdictions have some form of reporting by lawyers does not mean they would consider an AML regime that was otherwise the same as Canada's (including in respect of law society regulation) to be impeded by the absence of reporting, or that in practice reporting necessarily assists. In this regard:

(a) In certain jurisdictions, reporting may fill what would otherwise be gaps in AML efforts that in Canada are addressed other than through reporting, including through robust law society trust assurance programs, which may not be found in other jurisdictions. In other countries, the roles of lawyers may differ[182] as may the governing regulatory bodies or their relationship with the state.[183] The profession may be divided in different ways.[184] The compulsory and rigorous nature of Law

[179] Transcript (9 April 2021) p. 101 ll. 8-11 (Clement)

[180] Ex 794, p. 14; Transcript (10 May 2021) p. 55 l. 25 - p. 57 l. 7 (Cassella); Transcript (7 April 2021) p. 85 ll. 6-24 (Lepard); Ex. 1015; Ex. 959, p. 5

[181] Transcript (6 April 2021) p. 73 ll. 5-21, p. 153 l. 15 - p.154 l. 6 (Rideout); Transcript (7 April 2021) p. 85 ll. 11-24 (Lepard); Ex. 801 p. 1; Ex. 1015, paras. 4-5, 14

[182] Transcript (20 November 2020) p. 40 ll. 18-21 (Levi), noting differences between roles of lawyers in France versus Canada, the US or UK

[183] See, e.g., Ex. 245, pp. 63-64

[184] Transcript (3 May 2021) p. 105 l. 20 - p. 107 l. 12 (Hughes) (re "barristers sole")

Society requirements may be contrasted to the situation in the United States, for example. There, lawyers are to report the receipt of cash exceeding $10,000 to the US Financial Crimes Enforcement Network (although not to submit suspicious transaction reports[185]), but professional guidelines are "voluntary" and ethical guidelines are "modestly enforced".[186] Further, while the American Bar Association has issued an opinion stating that lawyers must inquire further when "facts known to the lawyer establish a *high probability* that a client seeks to use the lawyer's services for criminal or fraudulent activity",[187] lawyers in BC have an obligation to make reasonable inquiries if the circumstances *objectively* raise suspicion, and not merely when the lawyer *knows* the conduct is criminal or fraudulent. Ms. Bains gave evidence of her view that the BC standard places a higher burden on BC lawyers to inquire to avoid facilitating crime.[188]

(b) Further, the evidence is at best not clear that designating lawyers as reporting entities has been effective in the UK, about which the most evidence is available. Dr. Sharman noted that in Britain, the reporting system "is implemented and enforced so poorly" that he is "not actually sure that … the authorities get much for having corralled lawyers into the suspicious activity reports system. They don't get many reports and they tend to be very low quality."[189] Further, he notes (with apparent reference to reporting): "The idea that regulating lawyers is 'better than nothing' ignores the fact that regulation does not come for free, even or particularly where the cost is borne by the community rather than the government. In this sense, regulation may well be worse than nothing."[190] Respectfully, at the very least it is difficult to be sure enough of any positive impacts from reporting to suggest it is worth seeking to adopt. Dr. Benson acknowledged that there has been

[185] Ex. 193, App. E, p. 19

[186] Ex. 244, p. 46; Ex. 833, p. 155

[187] Ex. 244, p. 46 (italics added)

[188] Transcript (19 November 2020) p. 142 l. 13 - p. 143 l. 24

[189] Transcript (6 May 2021) p. 75 ll. 13 - p. 76 l. 16 (Sharman)

[190] Ex. 959, p. 12

no research on the effectiveness of the AML regime in general (not specifically with respect to reporting) as it applies to lawyers in the UK.[191] Dr. Levi noted that it is quite difficult to evaluate the effect of measures which have been applied to lawyers and other professionals[192] and that no one – either FATF or any of the jurisdictions with lawyer-related AML measures – has yet grappled successfully with the problem of how to judge the effectiveness of these regimes.[193]

(c) It may also be too soon to tell how reporting works in certain countries with recent changes. In New Zealand, Mr. Hughes and Detective Inspector Hamilton seemed positive about it, but most designated non-financial businesses and professions only came within the ambit of AML legislation in 2018.[194]

57. Fifth, the fact that FATF seems critical of a lack of reporting in Canada does not itself say much, including about whether it impedes AML outcomes. Not only are FATF's findings and underlying recommendations not binding,[195] but FATF "got the facts wrong about how lawyers are regulated in Canada".[196] Ms. Wilson testified that the Mutual Evaluation Report (**MER**)'s findings, as they pertained to the legal sector, were neither fair nor accurate,[197] and displayed a lack of understanding of the role of Canadian legal regulators.[198] While the MER made some mention of AML measures adopted by Canadian law societies, Ms. Bains noted "the reviewers completely ignore the code of professional conduct which sets out very important obligations as it relates to anti-money laundering, anti-fraud and lawyers not being involved in any illegal activity. And those ethical obligations, in my view, from my investigative experience on these files,

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[191] Transcript (17 November 2020) p. 185 ll. 8-23 (Benson)

[192] Transcript (5 June 2020) p. 63 ll. 23-38 (Levi)

[193] Transcript (20 November 2020) p. 55 l. 9 - p. 56 l. 4, p. 57 l. 17 - p. 58 l. 19 (Levi)

[194] Ex. 975, p. 5 (item i); see also Ex. 953, p. 32

[195] Transcript (3 June 2020) p. 28 ll. 25-46 (Gilmore)

[196] Transcript (18 November 2020) p. 57 ll. 23-25 (Ferris)

[197] Transcript (16 November 2020) p. 170 ll. 2-5 (Wilson)

[198] Transcript (16 November 2020) p. 170 l. 18 - p. 171 l. 6 (Wilson)

those are key to lawyers protecting themselves from vulnerabilities."[199] The FLSC also notes that the MER was mistaken in stating that the legal profession lacks any incentive to apply AML measures.[200] Such a statement ignores the significant AML efforts Canadian law societies have undertaken and continue to undertake,[201] and that "any actual or perceived gap in the legislative scheme as a result of the exclusion of the legal profession from the provision of the [PCMLTFA] has been filled by the actions that the law societies have taken."[202]

58. Further, as Mr. Avison noted, FATF "was profoundly unmindful of the constitutional reality in this country."[203] Given the Canadian constitutional context, clarified in the *Federation* decision, Canadian law societies have appropriately overseen the AML regulation of the legal profession. The FATF site visit followed close on the heels of the *Federation* decision[204] and it is possible also that insufficient time had elapsed for interviewees other than the FLSC to process it fully.

59. The fact that FATF got the facts and context wrong is not surprising, given how it approaches evaluations. FATF uses what is called a "peer" review process. As Dr. Gilmore writes, the decision to forego expert assessment in favour of peer evaluation yields "a considerable variation in the backgrounds and strengths of assessment teams and not all variations and weaknesses in the resulting reports can or will be addressed through the quality control mechanisms which have been put in place."[205] Evaluation teams are not comprised of particular subject matter experts; team members come from a variety of backgrounds with varying degrees of skill and experience in different

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[199] Transcript (18 November 2020) p. 59 l. 8-22 (Bains)

[200] Transcript (16 November 16 2020) p. 171 ll. 16-22 (Wilson)

[201] Transcript (16 November 2020) p. 171 l. 23 - p. 172 l. 3 (Wilson)

[202] Ex. 776, Ex. A, p. 3 (handwritten p. 35)

[203] Transcript (18 November 2020) p. 58 l. 22 - p. 59 l. 7 (Avison)

[204] Dr. Gilmore noted the timing "couldn't have been worse": Transcript (4 June 2020) p. 16 ll. 12-14

[205] Ex. 19, para. 45

areas.[206] Further, the evaluation is done by a team from *other* FATF member states;[207] teams consist of "outsiders" who are not experts in Canadian issues, including Canadian legal matters, nor are they going to analyze and assess the merits of Supreme Court of Canada cases.[208]

60. Typically, the team's on-site visit to the subject country spans a limited number of days, during which time they conduct interviews of various agencies, institutions, and other bodies across sectors.[209] In preparing the MER, the FATF team only met with FLSC representatives (in the fall of 2015) for an hour or two.[210]

61. Further, FATF has been criticized for the metrics it employs, which traditionally – though with increasing expansion beyond this – focussed on a country's technical compliance rather than its overall advancement of AML objectives.[211] At least in the 2016 MER, it seemed that FATF "approached the question with a particular perspective, which was there was only one way to regulate this."[212] As Oliver Bullough testified, FATF, "when it assesses the compliance of economies with its recommendations, invariably assesses the process, not the outcome."[213] Instead of assessing Canada's overall advancement of AML objectives in the legal profession – including through professional regulation – the MER focussed on whether legal professionals were part of the PCMLTFA regime. That lawyers report in certain situations is one of FATF's 40 recommendations[214] – developed without any specific reference to Canada – and it is to

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[206] Transcript (3 June 2020) p. 53 ll. 5-10 (Gilmore)

[207] Ex. 19, para. 17

[208] Transcript (4 June 2020) p. 18 ll. 37-47 (Gilmore); see also Ex. 4, App. N, p. 11

[209] Ex. 341, p. 3; see also Ex. 4, App. N, p. 11

[210] Transcript (16 November 2020) p. 146 ll. 9-22 (Wilson)

[211] Ex.19, para. 45, citing Levi, Reuter and Halliday, "Can the AML System be Evaluated without Better Data?" (2018) Crime Law Soc Change, Vol. 69, at pp. 307-328

[212] Transcript (18 November 2020) p. 58 ll. 1-3 (Ferris)

[213] Transcript (2 June 2020) p. 25 ll. 4-7 (Bullough)

[214] Ex. 4, App. D, p. 8; App. E, pp. 18-19

this standard that Canada is held, despite Canadian constitutional realities and the robust alternatives that regulators have adopted, many of which simply do not exist in other countries.

(2) If the Fact Lawyers Do Not Report to FINTRAC Impedes BC's Ability to Combat ML, What If Anything Should Be Done to Address that Impediment (*e.g.* Should a Constitutionally Compliant Reporting Regime Be Pursued, Possibly Outside the Framework of the PCMLTFA)?[215]

62. As noted under subheading (1), the fact lawyers do not report to FINTRAC should not impede BC's ability to combat ML. If anything further needs to be done, it should be to strengthen the alternatives to reporting that already exist.

63. Reporting by lawyers has not been a facet of the PCMLTFA since 2006, when the statute was amended to exclude it.[216] When Justice Cromwell referred to the possibility of constitutionally compliant measures in the 2015 *Federation* decision, this was in the context of client identification and verification, not reporting. Ms. Wilson noted it is difficult to imagine a constitutionally compliant regime with respect to reporting.[217] The principles and imperatives reflected in the *Federation* decision are discussed in detail at paragraphs 19-27 of the Law Society's Opening Statement in this inquiry.

64. Although the federal government appeared to give some attention post-*Federation* to whether a constitutionally compliant regime could be devised to bring lawyers within the PCMLTFA, no suggestions are before this Commission regarding how that might appear.

65. There was no clear evidence before the Commission of an approach to lawyer reporting utilized elsewhere that could be transposed to Canada in a way that would be faithful both to the way in which Canada's legal profession is organized and to Canada's

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[215] This is the second part of CC Outline Question 21

[216] See footnote 160

[217] Transcript (17 November 2020) p. 75 l. 7 - p. 76 l. 11 (Wilson)

constitutional imperatives. Across countries, to whom reporting is done differs,[218] as does what is reported[219] and the regime of lawyer regulation.[220] As Dr. Levi's comments reflect, the nuances of lawyer regulation across jurisdictions may be quite complex.[221] Indeed, there were no witnesses who testified as to foreign regimes that had the Canadian knowledge[222] even to allow an attempt to be made to reconcile the different imperatives. Constitutional imperatives diverge even as among common law countries. For example, unlike in Canada, in New Zealand there is no entrenched written constitution giving courts the ability to strike down an Act of Parliament, and correspondingly, there have been no court or constitutional challenges to that country's AML legislation.[223] Also notable is that in Canada, even apart from solicitor-client privilege, constitutional protection is given to the duty of commitment to the client's cause, precluding a lawyer from becoming an agent of the state.[224]

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[218] For example, legal professionals in France report suspicious transactions to the head of the regional bar, which is the sole entity authorized to contact the French FIU: Ex. 244, p. 9. By contrast, Swiss law requires lawyers to send suspicious activity reports directly to their FIU: Ex. 244, p. 31

[219] Reporting in New Zealand does not, for example, include matters related to litigation: Ex. 953, para. 5.5. In the Netherlands the "secrecy keepers" – lawyers and notaries – fall under the scope of the AML rules and reporting obligations but only for particular services and assistance such as assisting and advising clients in relation to the sale and purchase of businesses, shares and real estate. In those cases, the usual confidentiality obligations are superseded by the requirement to notify the FIU of unusual transactions: Transcript (13 May 2021) p. 22 ll. 10 - p. 23 l. 17 (Rense)

[220] Transcript (20 November 2020) p. 33 ll. 13-24 (Levi)

[221] Ex. 244

[222] Transcript (20 November 2020) p. 7 ll. 2-15, p. 117 ll. 3-15 (Levi); Transcript (17 November 2020) p. 159 ll. 8-19 (Benson); Transcript (3 May 2021) p. 6 ll. 7-10 (Hughes); Transcript (6 May 2021) p. 133 ll. 6-22 (Sharman)

[223] Transcript (3 May 2021) p. 89 l. 23 - p. 90 l. 25, p. 108 ll. 1-18 (Hughes)

[224] *Federation* at para. 83

66. The FLSC – having given much thought to the subject – does not see "effective options for regulating [lawyers under the PCMLTFA] that would avoid the constitutional problems that the previous efforts have encountered."[225] The Law Society shares the FLSC's position. Though of course consideration would be given to any new proposal, unless agreement were reached, new litigation might commence. This would dampen and impede the important AML collaboration among the FLSC, provincial/territorial law societies and government. It is instructive to note that following the renewal of litigation between the FLSC and the federal government over the application of the PCMLTFA in 2007, there was a period of inactivity in the development or assessment of the FLSC Model Rules and the approach of the law societies to AML; this constraint lasted until the completion of the litigation in 2015. After the *Federation* decision was released that year, the FLSC was able to begin the work of updating the Model Rules, and to begin the work of collaborating with the government on its AML measures. Currently, the federal government's priority appears to be working with the FLSC and law societies in order to strengthen the regime of law society regulation.[226] Maintaining and promoting cooperative – rather than adversarial – relationships is likely to further shared AML objectives.

67. Dr. German[227] and Professor Maloney[228] have suggested legal professionals might report not to FINTRAC, but rather to another body such as the Law Society. However, while not being as immediately intrusive, it is unclear what the benefit would be. Ms. Wilson said that she "struggled to understand what [this suggestion] would accomplish," as lawyers are required to withdraw from transactions that would qualify as suspicious; "[i]t is out of the question to imagine a scheme that would permit lawyers to facilitate something that they think is probably illegal and then get … off the record".[229] Mr. Avison agreed, noting that "the threshold expected of lawyers in relation to when

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[225] Transcript (16 November 2020) p. 188 ll. 2-14 (Wilson)

[226] Transcript (16 November 2020) p. 33 l. 25 - p. 35 l.14 (Ngo); Ex. 205, para. 8

[227] Transcript (12 April 2021) p. 40 ll. 4-12, p. 41 ll. 4-8 (German)

[228] Ex. 330, p. 6 (Recommendation 14)

[229] Transcript (17 November 2020) p. 77 l. 17 - p. 78 l. 12 (Wilson)

they would withdraw in the face of suspicious circumstances … is very low. … So it's one where I think the feasibility is challenging."[230]

PART 7 - WHAT, IF ANY, ADDITIONAL MEASURES SHOULD BE CONSIDERED TO MORE EFFECTIVELY ADDRESS THE RISKS OF ML INVOLVING LEGAL PROFESSIONALS IN BC?[231]

A. Proposed Recommendations

68. Set out below are recommendations that the Law Society considers would assist it in addressing the risk of ML by lawyers. Largely, these recommendations focus on continuing to build collaboration among AML stakeholders, and increasing information flow from government to the Law Society, further to Question 22(f) in the CC Outline.[232]

69. **Recommendation #1**: that the provincial and federal governments continue to prioritize collaboration as the preferred means to strengthen the AML regime.

70. The Commission has heard from witnesses across sectors and interests that increased collaboration and sharing of expertise and information are the best way to strengthen Canada's AML regime. The ML risk touches a broad cross-section of the province, and cannot be adequately addressed by any one regulator, government agency or law enforcement body acting alone. All must work together, in a collaborative way, in order for AML initiatives to succeed.

71. Law societies across Canada, and the FLSC, have begun to develop new and collaborative working relationships on AML matters with the Canadian government, for example through the Joint FLSC-Canada Working Group. In addition, the Law Society has participated in, and learned from, the Counter-Illicit Finance Alliance of BC (**CIFA**) (formerly Project Athena). Participation in these collaborative efforts supports the Law Society in enhancing its AML regulatory efforts, and can inform the development of

[230] Transcript (19 November 2020) p. 124 ll. 10-22 (Avison)

[231] CC Outline Question 22

[232] See also Ex. 222, App. C, pp. 14-17 in response to CC Outline Question 22(f)

enhanced Law Society rules, or assist with the identification of emerging typologies for consideration in the Law Society's audit and investigations processes. The Law Society has seen encouraging signs of AML collaboration among government bodies, law enforcement agencies, law societies and other regulators, and these activities should continue to receive support.[233]

72. **Recommendation #2:** that the provincial and federal governments ensure that relevant stakeholders are given a meaningful opportunity to comment on any government-produced AML reports or recommendations before they are finalized or used to inform government policy and decision-making.

73. No singular entity or industry possesses all of the information and expertise needed to create an effective AML regime. As evidenced by the breadth of the Commission's terms of reference, and the diversity of participants and topics canvassed during the hearing, there are many interests engaged and many areas of relevant expertise. In order to develop an appropriate, effective and feasible approach to AML, it is important to ensure that all stakeholders' interests are meaningfully addressed. The Commission has heard a number of examples of government agencies preparing AML-related reports and presenting recommendations to government without first providing an opportunity for stakeholders to see or comment on those reports.[234] Respectfully, such an approach may cause important considerations to be overlooked in the development of government AML policy and decision-making, and may hinder the development of collaborative relationships.

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[233] Transcript (19 November 2020) p. 121 l. 7 - p. 122 l. 25 (Avison)

[234] None of the reports produced by the Federal-Provincial Working Group on Real Estate were circulated to non-government entities for review or comment: Transcript (8 March 2021) p. 143 l. 12 - p. 144 l. 7 (Dawkins). Similarly, it was said to be only through the Commission that the ATM Industry Association was provided a copy of a 2008 RCMP report regarding potential money-laundering risks associated with "white label ATMs": Transcript (15 January 2021) p. 200 l. 21 - p. 204 l. 24 (Chandler)

74. **Recommendation #3:** that all law enforcement bodies, government agencies and regulators with an AML mandate identify an AML Liaison Officer who will be the primary point of contact for improved AML collaboration and information sharing.

75. AML-related relationship building and collaboration among different agencies are most effective when (a) each agency has clearly designated an individual staff member as the agency's primary representative on AML matters; (b) other agencies can be assured that the designated representative has the authority and experience to speak on behalf of their organization, and can escalate an issue as appropriate; and (c) the same representative consistently attends AML collaboration or information-sharing activities. Conversely, relationship building and collaboration are less successful if agencies have not clearly assigned an AML representative, send different representatives to each meeting, or send staff who are not authorized to act on, or escalate consideration of, an issue in a timely way. Mr. Avison recommended the identification of an "AML Liaison Officer" as the primary point of contact for improved collaboration and information sharing among agencies.[235] The Law Society has designated its Deputy Chief Legal Officer as its AML Liaison Officer, with the support of the CEO/Executive Director and CFO/Director of Trust Regulation as needed.[236]

76. **Recommendation #4:** that law enforcement bodies, government agencies, and other regulators refer any concerns they have about lawyers to the Law Society for investigation.

77. The Law Society recognizes the unique regulatory responsibility it carries by virtue of its ability to audit and investigate lawyers in a manner unhindered by client

[235] Transcript (19 November 2020) p. 122 ll. 14-18 (Avison). See Transcript (20 January 2021) p. 105 l. 7 - p. 106 l.11 (Bowman) for an example of issues that may arise without an AML Liaison Officer, as relevant communications were said to have remained with "a more junior person [at a certain bank] whose responsibilities and awareness and understanding of the broader aspects of the bank and the broader aspects of the [bank's AML] program" did not allow prompt action to be taken.

[236] Transcript (19 November 2020) p. 122 l. 18-25 (Avison)

confidentiality or privilege. As noted in the Maloney Report, "coordination mechanisms should adopt the principle that investigations be referred to the agency best able to apply its own proprietary information and investigative powers to the case, including … the Law Society of BC."[237] The Law Society has devoted significant resources to investigations and enforcement activities, and regularly encourages other agencies and the public to refer any concerns about lawyers to the Law Society. However, some agencies may not be referring their concerns to it in a timely way, or at all.

78. **Recommendation #5:** that the Attorney General request that the appropriate federal minister amend the PCMLTFA to include law societies as entities permitted to request and receive financial intelligence and reports from FINTRAC for use in strengthening their AML activities, including their investigations.

79. We understand that FINTRAC is currently restricted from disclosing certain of its financial intelligence information and reports to the Law Society. In any event, as a practical matter, FINTRAC does not provide disclosures to the Law Society when it receives reports of transactions that may involve a lawyer.[238] As Canada's FIU, FINTRAC may possess financial intelligence that, if made available to the Law Society upon request, could allow the Law Society to strengthen its AML activities.[239] Such information could include specific financial intelligence related to the conduct of a lawyer, or FINTRAC's strategic analysis products, including summary reports of ML trends and typologies prevalent in BC. Further discussions may be needed to identify what types of FINTRAC information would be most useful for the Law Society to receive.[240]

80. **Recommendation #6:** that law enforcement agencies and the Law Society continue to work together in educating Law Society staff and the legal profession about

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[237] Ex. 330, p. 8 (Recommendation 28)

[238] Transcript (16 November 2020) p. 72 ll. 20-23 (Wallace)

[239] Transcript (17 November 2020) p. 82 l. 1 - p. 83 l. 18 (Wilson)

[240] Transcript (19 November 2020) p. 118 l. 7 - p. 119 l. 9 (Avison); Ex. 330 (Maloney Report - Recommendation 16); Ex. 394, para. 95(b)

ML typologies observed in BC.

81. The Commission has heard from several witnesses in support of information-sharing initiatives involving law enforcement agencies. Law enforcement agencies operating in BC may be best placed to identify trends in predicate offences and ML typologies currently employed locally. Such information may assist the AML efforts of industry stakeholders or regulators, such as the Law Society.

82. The Law Society also recommends that law enforcement agencies in BC receive adequate resources to enable them to carry out their AML-related investigations and analysis, and to share their knowledge about ML trends and typologies with regulators such as the Law Society.

83. **Recommendation #7:** that the federal government create and maintain a registry of politically-exposed persons (**PEPs**) and heads of international organizations (**HIO**s) that is available to regulators and to lawyers, financial institutions and other professionals.

84. As observed by Dr. German, the work of FATF and the United Nations has resulted in heightened due diligence requirements related to foreign PEPs, but many industry stakeholders experience challenges in meeting these requirements due to inconsistent definitions and methods for identifying PEPs.[241] The same challenges arise with regard to identifying HIOs. A government-created and maintained registry of PEPs and HIOs that is free and easily accessible would assist regulators, industry stakeholders and professionals in carrying out more effective and consistent due diligence activities. The federal government is best placed to create and maintain such a database, which should be made broadly available, taking into consideration relevant privacy legislation.

85. **Recommendation #8:** that government agencies in possession of relevant data conduct a privacy review and, where appropriate, facilitate access to their shareable data in a searchable format for law enforcement and regulators with an AML mandate.

[241] Ex. 833, p. 58; Transcript (17 November 2020) p. 49 l. 20 - p. 52 l. 4 (Wilson)

86. As described by several witnesses during the inquiry, the identification and investigation of potential ML activities require access to data often held by many different government agencies.[242] Each government agency should conduct a thorough review of its data holdings to identify what relevant data it may possess; whether there are any privacy, confidentiality or privilege restrictions that prevent it from sharing that data; and whether there are any reasonable options for addressing those restrictions (such as the use of consents, anonymization of data, or only sharing certain datasets with specified recipients or for specified uses). To allow for the efficient use of any shareable data by government, law enforcement and regulators with an AML mandate, such data could be integrated into a database that is readily searchable.

87. It would, of course, be important to take privacy considerations into account, as the BC Civil Liberties Association has highlighted.

B. Particular Other Matters Raised in CC Outline Questions 22, 23 and 24

88. Commission counsel have raised various matters for consideration in CC Outline Questions 22, 23 and 24. Items 22(a) – (d) and (g) were addressed in Part 5 above, and Item 22(f) in Part 7. Question 23 ("What constitutional questions (for example, under the *Charter of Rights and Freedoms*) arise or may arise out of the evidence led or potential recommendations in this sector?") was addressed in Parts 4 and 6, and Question 24 ("What privacy issues arise or may arise out of the evidence led or potential recommendations in this sector?") was acknowledged under Part 7(A).

89. Question 22(e) asked: "should lawyers and firms be required to adopt UK-style anti-money laundering risk assessments, anti-money laundering polices, anti-money

[242] For example, in its report dated December 9, 2020, the Data Collection and Sharing Work Stream of the BC-Federal Working Group on Real Estate identified 160 data points for the detection of ML schemes in real estate, with the majority of data presently held by various government databases (Ex. 703, App. 1). However, such data does not appear to be readily accessible in a coordinated, easily searchable manner for use by law enforcement or regulators.

laundering compliance officers / responsible lawyers, *etc*.?" With respect to adopting an approach similar to that used by the UK's SRA, where firms have AML compliance officers, policies, and assessments, the Law Society and FLSC AML Working Group are considering aspects of such an approach.[243] Further work is still required to assess its merits and the Law Society expects a public consultation process on adopting some aspects of this approach later in 2021.

PART 8 - CONCLUSION

90. As outlined above and in the testimony and materials referred to in paragraph 1, the Law Society has a longstanding, deep commitment to AML efforts. It has appreciated the opportunity to participate in this inquiry and asks that the Commissioner give consideration to making the recommendations outlined in Part 7(A) in order to advance the ability of all stakeholders to combat ML in BC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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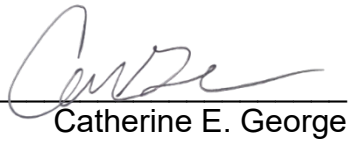

Catherine E. George

Dated: July 9, 2021

[243] Transcript (19 November 2020) p. 54 l. 9 - p. 55 l. 3 (Avison); Ex. 222, App. C, p. 2