Part VII
Lawyers and Notaries

Section 4(1)(a)(vi) of my Terms of Reference requires me to make findings of fact in relation to the "extent, growth, evolution and methods of money laundering" with respect to professional services, including the legal and accounting sectors.

This Part discusses the money laundering risks faced by legal professionals – lawyers and notaries. The first four chapters focus on lawyers and set out the legal and regulatory framework applicable to them, the money laundering risks they face, the feasibility of a reporting regime for lawyers, and anti–money laundering measures in place by the Law Society of British Columbia. The fifth chapter discusses British Columbia notaries, whose profession is related to but distinct from that of lawyers in British Columbia and notaries in other provinces.

Chapter 25
Legal and Regulatory Framework

Lawyers are often described as "gatekeepers" in money laundering schemes. They possess the necessary knowledge and skills to carry out many tasks that are useful to money launderers. These tasks include facilitating financial and real estate transactions, incorporating companies, establishing trusts and other legal entities, and providing advice on these matters. Some of the tasks that money launderers require can be carried out only by lawyers. Also appealing to money launderers are the perceived advantages that come with a lawyer-client relationship, including the overall façade of legitimacy, the secrecy provided by solicitor-client privilege, and the ability to use a lawyer's trust account in the hope of cloaking transactions with that privilege.

While it is easy to identify the benefits, in the eyes of criminals, of making use of a lawyer's services, the nature of the lawyer-client relationship leads to significant and unique challenges in crafting the appropriate regulatory and law enforcement response in this sector. Unlike other professionals, lawyers owe duties to their clients that have received constitutional protection. This protection has been afforded in recognition of the fact that lawyers are instrumental in ensuring that every person can understand their legal rights and obligations, obtain legal advice and representation that furthers their interests, and have access to the courts. Lawyers are not simply functionaries or agents who conduct transactions for others, and the courts have gone to considerable lengths to protect the confidentiality and trust that are inherent in the lawyer-client relationship.

The constitutional dimension to the lawyer-client relationship means that anti–money laundering regulation in this sector must account for the client's rights and the lawyer's duties under the Canadian Constitution. I emphasize the *Canadian* Constitution to make the point that some anti–money laundering measures in other countries may be unworkable here, given differing constitutional frameworks.

This is not to say that lawyers must not or cannot be regulated for anti–money laundering purposes. Anti–money laundering regulation in this sector *is* crucial, and it occurs already. There is, however, room for improvement. My point is that particular considerations and constraints arise when considering the regulation of lawyers that do not arise in other sectors. I elaborate on these points throughout the following chapters.

My discussion of the legal profession is structured as follows. In this chapter, I review the legal and regulatory framework applicable to lawyers in British Columbia. In particular, I consider the role of the Law Society of British Columbia (Law Society) as the regulator and the harmonizing role played by the Federation of Law Societies of Canada (Federation). I also review some key ethical duties owed by lawyers that pose challenges when considering anti–money laundering measures.

In Chapter 26, I discuss the main areas of risk inherent in lawyers' work. Given the nature of lawyers' practice, significant risks arise in this sector. It is crucial that the provincial anti–money laundering regime guard against these risks.

In Chapter 27, I consider a 2015 decision of the Supreme Court of Canada[1] (*Federation* decision) that concluded that the application of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* SC 2000, c 17 (*PCMLTFA*) (as it then stood) to lawyers was unconstitutional. Concerns relating to the *Federation* decision – and the resultant effect that lawyers are not subject to the *PCMLTFA* regime – have figured prominently in reports by the Financial Action Task Force (FATF), expert reports commissioned by the Province, and in testimony before me. I therefore dedicate a chapter to that decision, its aftermath, and the question of whether provincial measures are needed to address the exclusion of lawyers from the *PCMLTFA* framework.

As I explain further in that chapter, there are significant constitutional difficulties associated with crafting a reporting regime for lawyers. This Report is not the proper forum in which to make findings on the constitutionality of such a regime. However, given the significant challenges that would be involved in designing a reporting regime for lawyers, I am of the view that the province should not attempt to do so. Instead, the approach to the anti–money laundering regulation of lawyers in British Columbia should be focused on five points:

- continuing to revisit and expand existing anti–money laundering regulation by the Law Society, including a particular focus on limiting the circumstances in which a client's funds can enter a trust account;
- strengthening and making better use of information-sharing arrangements between the Law Society and other stakeholders;
- increasing use by the Law Society of its ability to refer matters to law enforcement when there is evidence of a potential offence;

1 *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 [*Federation*].

- encouraging law enforcement to make better use of existing mechanisms by which it can access the information it needs from lawyers during investigations; and
- increasing public awareness about these measures to counter any perception that transactions conducted through a lawyer in furtherance of an unlawful aim are immune from detection.

Finally, Chapter 28 expands on this preferred approach. I review measures currently in place by the Law Society and the Federation and recommend improvements. I also discuss information sharing and other pathways by which the Law Society, law enforcement, and other stakeholders can work together to investigate money laundering in the legal sector effectively.

Self-Regulation of Lawyers

Lawyers in Canada have a long history of self-regulation. Under our Constitution, legislative authority over the "licensing and regulation of lawyers, including reviews of alleged breaches of ethics," falls to the provinces and territories rather than the federal government.[2] Consequently, each province and territory has its own law society that is responsible, among other things, for setting standards for admission into the profession, providing education and support, auditing and monitoring the use of trust accounts, investigating complaints about its members, and disciplining members who violate standards of conduct.

As the Supreme Court of Canada has explained, the tradition of allowing lawyers to regulate themselves is meant to maintain the independence of the bar:

> An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy.[3]

In exchange for this autonomy, law societies are obliged to ensure that their members deal with the public competently and honestly.[4] Importantly, however, self-regulation is a privilege rather than a right, and the legal profession must exercise this privilege in the public interest.[5]

2 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 33.

3 *Finney v Barreau du Québec*, 2004 SCC 36 at para 1.

4 Ibid.

5 *Ryan v Law Society (New Brunswick)*, 2003 SCC 20 at para 36. In *Federation*, the Supreme Court of Canada noted that "self-regulation is certainly *the means* by which legislatures have chosen in this country to protect the independence of the bar … But we do not have to decide here whether that legislative choice is in any respect constitutionally required": para 86 [emphasis in original].

The Law Society of British Columbia

The practice of law in British Columbia is largely governed by the *Legal Profession Act*.[6] The Law Society is empowered by that statute to "uphold and protect the public interest in the administration of justice."[7] Craig Ferris, president of the Law Society, described this responsibility in his testimony:

> [T]he motto of the [Law Society] is that everything we do is about the public interest. Our section 3 jurisdiction, our mandate is all about protecting the public interest and the administration of justice and that informs every decision that we make, and the Benchers are reminded of it every time we meet. And we actually make an oath at the bencher table to uphold the public interest in what we do. And so, when you look at that strictly with respect to AML [anti–money laundering] … you sometimes read that we are here to protect lawyers or we are here to do something other than that, and that is just completely and utterly false. Our sole goal is to ensure that we have protection of the public interest in everything we do, including AML.[8]

The Law Society's board of governors, known as the Benchers, has broad statutory authority including, but not limited to:

- setting standards of practice for lawyers and permitting an investigation into a lawyer's competence to practise law;[9]
- rule making over various matters such as admission, standing of members, regulation of trust accounts, and discipline;[10] and
- establishing and maintaining legal education programs.[11]

The Law Society's funding comes mainly from annual levies on its members, as well as other fees charged to lawyers. The Law Society receives no government funding.[12] In 2020, there were approximately 13,000 practising lawyers in British Columbia, with most practising in larger urban centres such as Metro Vancouver, Greater Victoria, and Kelowna.[13]

In recent years, the Law Society has increased its spending with respect to regulation of the profession. Don Avison, the Law Society's executive director and chief executive

6 *Legal Profession Act*, SBC 1998, c 9.

7 Ibid, s 3.

8 Transcript, November 19, 2020, pp 144–45; see also Evidence of D. Avison, G. Bains, J. McPhee, Transcript, November 19, 2020, pp 145–46.

9 *Legal Profession Act*, s 27.

10 Ibid, ss 20–21, 27, 33, 36.

11 Ibid, s 28.

12 Evidence of D. Avison, Transcript, November 18, 2020, p 11; Exhibit 222, Law Society of British Columbia, *Introduction to the Law Society*, paras 10–11.

13 Exhibit 192, Overview Report on the Regulation of Legal Professionals in British Columbia, para 7.

officer, testified that some of these increases have been associated with anti–money laundering initiatives – increases in the budgets for the Law Society's investigations program and discipline group, for example, as well as for the operation of the Trust Assurance Program.[14] I return to this subject in Chapter 28.

Law Society Rules and Standards of Conduct

The Benchers are empowered to make rules governing lawyers, law firms, articled students, and applicants for membership.[15] The resulting rules are known as the *Law Society Rules* (Rules).[16] These rules are binding on legal professionals,[17] and a breach of them amounts to a discipline violation.[18]

In addition to adhering to the Rules, lawyers must also maintain the standards of conduct set out in the *Code of Professional Conduct for British Columbia* (BC Code).[19] The BC Code is not part of the Rules; rather, it is an expression of the Benchers' views on the standards of conduct lawyers must meet in fulfilling their professional obligations.[20] It contains rules, commentaries, and appendices, each of which has mandatory and advisory statements. It covers ethical questions on a range of topics, including competence, integrity, confidentiality, and conflicts of interest. In contrast to the Rules, however, a breach of the BC Code may or may not form the basis of disciplinary action.[21]

As I discuss further below, the Law Society is a member of the Federation – the overarching body that aims to foster consistency among law societies across Canada. The Federation has produced model rules of professional conduct[22] (the Model Rules) that individual law societies can use as inspiration in developing their own rules. The Law Society has been actively involved in developing these model rules and has adopted many of them. However, through committees, it also develops rules on its own, particularly those that are specific to British Columbia.[23]

In Chapter 28, I review the provisions of the Rules, the BC Code, and the Federation's Model Rules that relate specifically to anti–money laundering.

14 Evidence of D. Avison, Transcript, November 18, 2020, pp 11–12.

15 *Legal Profession Act*, s 11(1).

16 The Rules are included in full in Exhibit 192, Overview Report on the Regulation of Legal Professionals in British Columbia, Appendix F, and can be accessed online at https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/.

17 *Legal Profession Act*, s 11(3).

18 Exhibit 224, Law Society of British Columbia, Regulation of the Practice of Law, para 4.

19 The BC Code is included in full in Exhibit 192, Overview Report on the Regulation of Legal Professionals in British Columbia, Appendix E, and can be accessed online at https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/.

20 BC Code, Introduction, para 3.

21 Ibid, para 5.

22 Federation of Law Societies of Canada, *Model Code of Professional Conduct*, amended October 19, 2019, online: https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf.

23 Evidence of D. Avison, Transcript, November 18, 2020, pp 18–19.

The Law Society's Powers to Investigate and Discipline Members

The Law Society has significant powers to regulate its members. In my view, some of the critiques that have been levelled at the Canadian anti–money laundering regime with respect to lawyers (discussed in Chapter 28) have failed to fully appreciate the extent of these powers and the degree to which the Law Society engages in anti–money laundering regulation and oversight.

The Law Society can initiate investigations into its members based on complaints, referrals from internal departments, as well as on its own initiative.[24] When investigating its members, the Law Society has many powerful tools at its disposal, including the ability to:

- require production of, and review, documents and information that are otherwise confidential or privileged, without destroying solicitor-client privilege;[25]
- compel lawyers to answer questions on oath and to produce records, and suspend them if they refuse;[26]
- require lawyers to make their staff (such as paralegals, non-lawyers, and bookkeepers) available to speak to the Law Society;[27]
- attend a law office to conduct its investigation;[28]
- impose interim measures on lawyers while they are under investigation;[29] and
- require any person to produce information or answer questions that are necessary for an investigation and, if the person refuses, apply to a court to direct compliance or find the person in contempt.[30]

24 *Legal Profession Act*, s 26(1); Rule 3-2.

25 *Legal Profession Act*, s 88. In *Skogstad v Law Society of British Columbia*, 2007 BCCA 310, the Court of Appeal confirmed that, as a result of section 88 of the *Legal Profession Act*, a lawyer does not violate solicitor-client privilege by disclosing privileged documents to the Law Society.

26 *Legal Profession Act*, s 26(4); Rules 3-5, 3-6.

27 Rule 3-5.

28 Ibid.

29 These measures can include voluntary or imposed restrictions on a lawyer's practice, such as a requirement that a lawyer no longer operate a trust account or practise only under the direct supervision of another lawyer. In extreme cases, the Law Society may suspend a lawyer pending the outcome of the investigation: Exhibit 223, Law Society of British Columbia, Investigations and Discipline Programs Summary, paras 22–23. See also Evidence of G. Bains, Transcript, November 19, 2020, pp 106–8. These undertakings are posted on the Law Society website and are linked to the lawyer's profile on the directory, unless they involve medical issues: Evidence of G. Bains, Transcript, November 19, 2020, pp 107–8. If a lawyer is not prepared to give a voluntary undertaking, but the Law Society is concerned that the public is at risk, it can seek approval from a panel to impose extraordinary measures, such as a suspension or limitations on a lawyer's practice: Evidence of G. Bains, Transcript, November 19, 2020, p 108.

30 *Legal Profession Act*, ss 26(4)–(6).

It can readily be seen that the Law Society has the power to see everything in a lawyer's practice. Its ability to view otherwise privileged information is particularly significant because others, such as law enforcement, are generally unable to do so. As Gurprit Bains, the Law Society's deputy chief legal officer, explained:

> There is a requirement to produce documents that are in the lawyer's possession or control, and this extends to client files, accounting records, [and] email communications that might be relevant to the investigation. Now with text messaging and WeChat messages and all these different forms of communication, it extends to all of that. 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.[31]

In a similar vein, the Law Society has been able to obtain information from financial institutions, corporate entities, and others through its ability, under section 26 of the *Legal Profession Act,* to require any person to produce information or documents relevant to an investigation.[32] Rule 4-55 also authorizes investigators to conduct a forensic investigation of a lawyer's books, records, and accounts. It also allows the Law Society to mirror image the lawyer's hard drives and other electronic storage devices, such as tablets or cell phones.[33] Such investigations are usually done without notice to the subject lawyer, and the lawyer can be suspended for failing to co-operate.[34]

When an investigation leads to a discipline hearing, a committee can find that the lawyer committed professional misconduct,[35] conduct unbecoming to the profession,[36] a breach of the *Legal Profession Act* or the Rules, or incompetent performance of duties undertaken in the capacity of a lawyer. The committee can impose a range of disciplinary actions, including a reprimand, a fine, conditions or limitations on a lawyer's practice, a requirement to take remedial programs or steps, suspension from the practice of law or from a particular practice area, and disbarment.[37]

As I discuss further in Chapter 28, the Law Society conducts investigations into various matters, including:

31 Transcript, November 19, 2020, pp 103–4.

32 Exhibit 223, Law Society of British Columbia, Investigations and Discipline Programs Summary, para 28.

33 Evidence of G. Bains, Transcript, November 19, 2020, pp 105–6.

34 Ibid.

35 Professional misconduct refers to a "marked departure from that conduct the Law Society expects of its members": *The Law Society of British Columbia v Martin,* 2005 LSBC 16 at para 171.

36 "Conduct unbecoming the profession" is defined as conduct that is considered (a) contrary to the best interest of the public or legal profession, or (b) to harm the standing of the legal profession: *Legal Profession Act,* s 1.

37 *Legal Profession Act,* s 38(5).

- contraventions of trust accounting rules;
- engaging in activity that the lawyer knew or ought to have known assisted in or encouraged any dishonesty, crime, or fraud;
- failing to make reasonable inquiries before conducting a transaction where suspicious circumstances are present;[38] and
- failing to comply with the cash transactions rule, and client identification and verification rules.

Ethical Obligations

As officers of the court, lawyers owe legal and ethical obligations to the state, courts and tribunals, clients, and other lawyers.[39] Breaches of these ethical obligations can lead to serious consequences. A few ethical obligations are worth highlighting here.

First, lawyers owe a duty of confidentiality to their clients. Subject to limited exceptions,[40] they must hold in strict confidence, at all times, all information concerning the affairs of a client acquired during the professional relationship. This duty applies to every client without exception and indefinitely.[41]

A second key ethical principle is solicitor-client privilege.[42] It arises from "communication between a lawyer and the client where the latter seeks lawful legal advice."[43] Importantly, the privilege belongs to the *client*, not the lawyer.[44] As a result, privileged information cannot be disclosed to anyone unless the client consents (known as "waiving" the privilege) or an exception to privilege applies.

Exceptions to privilege are rare. The Supreme Court of Canada has explained that privilege must remain "as close to absolute as possible to ensure public confidence and retain relevance."[45] Accordingly, exceptions must be limited, and any disclosure must be as limited as possible.[46] Privilege will be set aside where a client communicates with a

38 "Where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an objective test that the transaction is legitimate": *The Law Society of British Columbia v Gurney*, 2017 LSBC 15 at para 79.

39 *Federation* at paras 1, 82–84, 96.

40 For example, a lawyer may disclose confidential information where there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent it: BC Code, s 3.3-3.

41 Ibid, s 3.3-1.

42 *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 [*Lavallee*] at para 49; *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 [*Chambre*] at para 28.

43 *R v McClure*, 2001 SCC 14 [*McClure*] at para 36.

44 *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [*University of Calgary*] at para 35.

45 *McClure* at para 35.

46 *Chambre* at para 82.

lawyer for the purpose of facilitating a crime (the "crime exception")[47] (discussed further in Chapter 28); where it prevents an accused person from establishing their innocence (the "innocence at stake exception");[48] and in circumstances where there is an imminent risk of serious bodily harm or death to an identifiable person or group, and disclosure of privileged information could prevent the harm (the "future harm or public safety exception").[49]

Solicitor-client privilege is a constitutionally protected right.[50] The Supreme Court of Canada has repeatedly emphasized the importance of this privilege and the need for it to be stringently protected. Solicitor-client privilege dates back at least to the reign of Elizabeth I, "stemm[ing] from the respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client."[51] It exists to facilitate the administration of justice by encouraging clients to speak freely; ensuring that lawyers know *all* the facts of a client's case means they can advise the client to the best of their ability.[52]

The stringent protections for solicitor-client privilege are often raised as a concern in the context of money laundering. Privilege also poses particular challenges when contemplating a reporting regime by lawyers. I discuss these points in Chapters 26 and 27, respectively.

Another key ethical obligation is the duty of loyalty. Lawyers and law firms owe a duty of loyalty to their clients, which has three dimensions: a duty to avoid conflicting interests, a duty of commitment to the client's cause, and a duty of candour.[53] As the Supreme Court of Canada has explained, "[u]nless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies."[54]

As I elaborate in Chapter 27, the duty of commitment to the client's cause was a key reason that the application of the *PCMLTFA* to lawyers was found to be unconstitutional in the *Federation* decision.

Paralegals and Notaries

Lawyers are not the only professionals who provide legal services in British Columbia. Paralegals and notaries are authorized to provide certain services. The Law Society

47 *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10. I discuss this exception further in Chapter 28.

48 *R v Brown*, 2002 SCC 32 at paras 1, 3.

49 *Smith v Jones*, [1999] 1 SCR 455 at para 78.

50 *Lavallee* at para 49; *Chambre* at para 28.

51 *Solosky v The Queen*, [1980] 1 SCR 821 at 834.

52 *McClure* at para 33.

53 *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 19.

54 *R v Neil*, 2002 SCC 70 at para 12.

defines "paralegal" as a "non-lawyer employee who is competent to carry out legal work that, in the paralegal's absence, would need to be done by the lawyer" and as a "non-lawyer who is a trained professional working under the supervision of a lawyer."[55]

The Law Society regulates the supervising lawyer in the event of misconduct or a breach of the *Legal Profession Act* or the Rules committed by the paralegal.[56] This approach contrasts with that taken in Ontario, where paralegals are regulated by the Law Society of Ontario.[57] As paralegals in British Columbia work under the supervision of lawyers who maintain ultimate responsibility for their work, my focus in the chapters that follow is on lawyers, and I will not discuss paralegals in any detail.

Notaries in British Columbia are a unique profession in Canada, distinct from notaries in other common law provinces and in Quebec. They handle many residential property transactions and small commercial transactions. I discuss this profession and the risks facing it in Chapter 29.

Federation of Law Societies of Canada

The Federation is an "umbrella" organization that brings together the provincial and territorial law societies across Canada.[58] While membership is voluntary, each of the provincial and territorial law societies is a member. As noted above, the Federation develops model rules and practices with the goal of ensuring a consistent level of competence and ethical standards by lawyers across Canada.

Importantly, the Federation is not a regulator. Law societies are the regulators of the professions in their respective provinces, and they remain free to implement their own rules and initiatives as they see fit.[59] That said, each law society has adopted the Model Rules in substance, resulting in significant consistency nationwide.[60]

In testimony before me, Mr. Avison emphasized the close association between the Federation and the law societies:

> I've had the benefit of working on a number of pan-Canadian initiatives in other contexts in education and healthcare. I have not seen them operating as effectively as the pan-Canadian approach that's utilized by the Federation. So I think it's important for the Commission to understand that the effectiveness of the relationship that operates between law societies

55 Exhibit 192, Overview Report on the Regulation of Legal Professionals in British Columbia, Appendix D: Report to Benchers on Delegation and Qualification of Paralegals [Paralegal Report], pp 4, 12–13; BC Code, s 6.1-2.

56 Exhibit 192, Appendix D, Paralegal Report, p 5.

57 See *Law Society Act*, RSO 1990, c L.8.

58 Evidence of F. Wilson, Transcript, November 16, 2020, p 107; Evidence of G. Ngo, Transcript, November 16, 2020, p 15.

59 Evidence of F. Wilson, Transcript, November 16, 2020, p 111.

60 Ibid, p 152.

> and the Federation is very high. In fact, they are us. The Federation – the council members – the 14 council members are selected from each of the law societies from across the country.[61]

In developing its Model Rules, the Federation generally forms working groups or committees to address specific issues through research and consultation with law societies.[62] It also commonly looks to practices in other common law jurisdictions and by international regulators.[63] I discuss the Federation's Model Rules and associated BC Rules relating to anti–money laundering in Chapter 28.

FATF Recommendations Relating to Lawyers

As I explained in Chapter 6, FATF maintains a list of 40 recommendations for member countries with respect to anti–money laundering and counter-terrorism financing initiatives. These recommendations have evolved over the years from a focus on financial institutions to one that encompasses other businesses and professionals, including lawyers. Recommendations 22 and 23 urge the imposition of customer due diligence and reporting requirements on lawyers.

Dr. Katie Benson, a professor of criminology at the University of Lancaster who specializes in the involvement of lawyers in money laundering, explains that "[t]he role of legal professionals in the laundering of criminal proceeds generated by others has become a priority concern for intergovernmental bodies, law enforcement authorities and policy makers at both the national and international level."[64]

Despite being framed as a priority, the inclusion of legal professionals in the FATF regime has not been without criticism. Early on, academics expressed concerns about what that would mean for privacy and confidentiality, the right to a legal defence and due process, and potential risks to professionals who come into contact with "dirty" money.[65] More significantly, legal professionals in several jurisdictions had serious concerns about the impact it would have on the independence of lawyers, solicitor-client privilege, and the duties of confidentiality and loyalty.[66]

It was these very concerns that led the Federation and the Law Society to challenge the *PCMLTFA* provisions that purported to apply to lawyers. I discuss that challenge, which proved to be successful, and its implications in Chapter 27.

61 Transcript, November 18, 2020, pp 23–24.

62 Evidence of F. Wilson, Transcript, November 16, 2020, pp 107–8.

63 Ibid, pp 112–13.

64 Exhibit 220, Katie Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and Its Control* (London and New York: Routledge, 2020), p 2.

65 Exhibit 219, Katie Benson, "Money Laundering, Anti–Money Laundering and the Legal Profession" in Colin King, Clive Walker, and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Cham, Switzerland: Palgrave Macmillan, 2018), p 116.

66 Ibid, pp 116–17.

Chapter 26
Money Laundering Risks in the Legal Profession

There is little doubt that lawyers, owing to the nature of their work, face an inherent risk of being used, knowingly or unwittingly, to facilitate money laundering. The evidence before me demonstrated a consensus on this point. Given the strategies employed by sophisticated money launderers, including the use of shell companies and real estate transactions, the need for such actors to involve lawyers at some level seems inevitable.

As I elaborate below, there is, unfortunately, a lack of evidence on which to draw firm conclusions about the precise nature and extent of lawyer involvement in money laundering in British Columbia. This deficiency is problematic and leaves government, regulators, and law enforcement without firm data to inform their decisions. However, this lack of data should not be equated with an absence of risk. As I discuss below, there is substantial inherent risk of lawyers in this province being used to facilitate money laundering. The provincial anti–money laundering regime must recognize this risk and put in place sufficient oversight and safeguards to protect against it.

A "Common Sense" Approach to Risk

At one level, the money laundering risks faced by lawyers seem to be common sense: if a goal of money laundering is to make criminally derived property appear legitimate, a lawyer will be needed at some point to move funds, assist in a real estate purchase, or create a corporate structure. Frederica Wilson, executive director of policy and public affairs and deputy chief executive officer of the Federation, explained in her testimony:

> I think 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, et cetera … means that there is a possibility that … the criminally minded in the public might seek to launder money through those types of services, through those types of things. The purchase of real estate, the acquisition of businesses, et cetera. And that in that sense yes, members of the legal profession are exposed to those risks.[1]

Similarly, Professor Michael Levi of Cardiff University summarizes the "utility" of lawyers in money laundering as follows:

> Lawyers' involvement arises from their utility (a) as legitimators of schemes by enhancing their credibility, (b) as the sole persons licensed to transfer property in some jurisdictions, (c) as persons able to establish corporations and other vehicles of ownership concealment and funds transfer, and (d) as assistants to launderers by introducing criminals to financial institutions as their clients and by lending their accounts to criminals for cash deposits that otherwise would be regarded as suspicious (or over the reporting threshold in those jurisdictions that have such roles).[2]

Dr. Benson explains that the fundamental difficulty in detecting lawyers' involvement in money laundering is that the transactions lawyers may do to facilitate money laundering can be identical in appearance to "normal" transactions done for clients with legitimate funds. As such, the non-legitimate transactions are mixed in with legitimate ones, making it difficult, if not impossible, to identify which is which.[3]

Underlying these views is the idea that lawyers lend an appearance of legitimacy to the services they provide. And that respectability is often exactly what criminals are looking for.

Limitations on Data

Given the inherent risk in the legal sector, it is unfortunate and somewhat surprising that there is a lack of data on the extent to which lawyers are involved in money laundering. In Dr. Benson's view, this lack of data is problematic and has led to an unquestioning acceptance of what she terms the "official discourse" or "official narrative":

> [T]he construction of professional facilitation of money laundering in official discourse and much of the academic literature – which sees professionals as playing a critical, and increasing, role in the laundering of criminal proceeds – has weak empirical foundations. Despite this, far-reaching legislative and

1 Transcript, November 16, 2020, pp 137–38.

2 Exhibit 244, Michael Levi, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting* (2020), p 2; see also Transcript, November 20, 2020, pp 15–16.

3 Exhibit 220, Katie Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and Its Control* (London and New York: Routledge, 2020), pp 71–73.

> policy measures aimed at preventing professionals becoming involved in money laundering have been implemented ...[4]

Dr. Benson's study, which I review below, seeks to address a void she saw in the literature on the involvement of professionals in money laundering. Having reviewed the existing work in the United Kingdom and elsewhere, she concludes that it largely deals with professionals' involvement in organized crime more generally or on lawyer wrongdoing in various forms, rather than with money laundering specifically. Furthermore, Dr. Benson asserts the work that does focus on money laundering – including Professor Stephen Schneider's study, reviewed below – is largely quantitative and "provide[s] little analysis of the nature of this involvement, consideration of the contexts in which it occurs, or engagement with theory."[5] She concludes that the existing literature shows "there is little understanding of the nature of the involvement of professionals in money laundering, and limited empirical evidence to support or challenge the official narrative."[6]

On a more practical level, Dr. Benson notes that data with respect to the involvement of professionals in money laundering "is not routinely collected in a systematic way by either law enforcement, the criminal justice system, or the professional or regulatory bodies" in the United Kingdom.[7] It appears that a similar situation may be happening in Canada: as I elaborate in Chapter 27, Ms. Wilson acknowledged that the Federation of Law Societies of Canada has difficulties in collecting data in a systematic way from law societies.

The scarcity of data on the involvement of lawyers and other professionals in money laundering is problematic. Given the lack of recent money laundering investigations and prosecutions in British Columbia, little meaningful insight into the involvement of lawyers can be gleaned from law enforcement or criminal justice sources. In the absence of strong evidence that accurately depicts the problem, policy makers and regulators are left in the dark and must use their best judgment in determining how to respond.

Elsewhere in this Report, I recommend the creation of an AML Commissioner whose mandate would include the ability to conduct research on issues relating to anti–money laundering. It is my hope that the creation of such an office, alongside further research by academics and others, will shed further light on the involvement of professionals in money laundering and assist government, regulators, and law enforcement in crafting the appropriate responses. Moreover, increased enforcement should provide further data sources for analysis and consideration.

4 Exhibit 219, Katie Benson, "Money Laundering, Anti–Money Laundering and the Legal Profession" in Colin King, Clive Walker, and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Cham, Switzerland: Palgrave Macmillan, 2018), p 115.

5 Exhibit 218, Katie Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals: Roles, Relationships and Response" (DPhil, University of Manchester, School of Law, 2016), [unpublished], p 48.

6 Ibid.

7 Exhibit 219, K. Benson, "Money Laundering, Anti–Money Laundering and the Legal Profession," p 124.

Differentiating Among Lawyers' Roles

When considering the risks faced by lawyers, it is important to distinguish between them acting as private citizens versus in their professional capacities. To that end, Professor Levi describes three types of risk facing lawyers:

- **lawyers as primary offenders:** lawyers can commit fraud or money laundering on their own or with co-offenders;
- **lawyers as crime facilitators:** lawyers can provide legal services that, with varying degrees of awareness of purpose, assist a criminal scheme; and
- **lawyers as victims or neutral intermediaries who are hacked:** scammers may imitate lawyers to attempt, for example, to have funds for a house purchase fraudulently directed to them.[8]

This division highlights that the capacity in which a lawyer is acting will dictate the required response. For instance, if a lawyer is a primary offender and acts unlawfully without engaging in the provision of legal services, the lawyer is acting like any other citizen, and the primary "responder" would be law enforcement (though law societies would also have an interest in addressing the unethical conduct). Meanwhile, lawyers who use aspects of the lawyer-client relationship (including solicitor-client privilege and trust accounts) to engage in or facilitate money laundering are properly subject to regulation by law societies, as well as to possible criminal sanctions. Finally, regulators can use tools such as education to help minimize the risk of lawyers being unwittingly used to facilitate money laundering, and can also use their audit and oversight functions to identify such involvement if it does occur.

Studies on the Involvement of Lawyers in Money Laundering

Having set the above caveats, I now turn to some studies on the involvement of lawyers in money laundering. I heard evidence about four studies, three of which took a quantitative approach, and one a qualitative approach. After describing the studies in general terms below, I consider their findings along with guidance documents and other evidence in a thematic discussion of money laundering risks.

Professor Schneider's 2004 Study

In 2004, Stephen Schneider, a professor of criminology at St. Mary's University in Halifax, conducted a study with the objective of "analyz[ing] how the financial

8 Exhibit 244, M. Levi, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting*, p 1; see also Transcript, November 20, 2020, pp 10–12.

proceeds of criminal activity are 'laundered' through Canada's legitimate economy."[9] In it, he examines 149 cases based on RCMP proceeds-of-crime case files. Although his research yields some interesting results, I note that the cases he examined were concluded predominantly between 1993 and 1998[10] and therefore pre-date the specific rules implemented by the Law Society relating to anti–money laundering. As such, it is important to tread carefully before applying his findings to the present day.

Professor Schneider's study concludes that an overwhelming majority (92.6%) of the cases he examined involved the use of at least one sector of the legitimate economy, thus making it inevitable that the accused came in contact with a professional, such as a lawyer, insurance broker, or real estate agent.[11] He identifies lawyers as being involved in almost half of the cases,[12] but goes on to explain:

> [T]he nature of the transactions they conducted suggest … they were not expressly sought out by offenders to facilitate money laundering. Instead, most lawyers came into contact with illegally-generated funds because the transaction conducted by the offender – most notably, the purchase or sale of real estate – commonly requires the service of a lawyer.[13]

Indeed, in most of the cases he examined, lawyers were innocently implicated; in other words, they appeared to have no knowledge of the source of funds and there were no overtly suspicious circumstances.[14] In a small number of cases, however, the transactions were clearly suspicious. For example, they involved using large amounts of cash to buy big-ticket items, purchasing bank drafts from multiple banks, having lawyers purchase assets on behalf of a client through trust accounts, or incorporating numerous companies with no legitimate businesses but significant amounts of cash.[15]

I discuss more specific findings from Professor Schneider's study below.

FINTRAC 2015 Study

I also heard evidence from Gabriel Ngo, a senior advisor on financial crimes policy at the Department of Finance, about a 2015 study conducted by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) entitled "Review of Money Laundering Court Cases in Canada."[16] This study was undertaken with the goal of "look[ing] at the extent to which [FINTRAC] could identify any patterns or trends

9 Exhibit 7, Stephen Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases* (March 2004), p 1.

10 Ibid, p 8.

11 Ibid, p 3.

12 Ibid, p 65.

13 Ibid, pp 3–4. However, see also p 67, where Professor Schneider notes that, in some cases, the lawyer was aware of the source of funds and was explicitly sought out, sometimes repeatedly. This association occurred most frequently with large-scale organized crime.

14 Ibid, p 66.

15 Ibid.

16 Exhibit 194.

in terms of the charges that have been brought forward under the *Criminal Code* with regard to money laundering."[17]

The study analyzes 40 sample cases between 2000 and 2014 relating to the *Criminal Code* provisions on money laundering. Of the 40 sample cases, 33 resulted in convictions (the "convicted cases").[18] Unfortunately, there is no evidence before me on the overall number of cases from which the samples were drawn.[19]

The study revealed that proceeds of crime in the convicted cases were generated almost entirely from drug-related and fraud offences.[20] Mr. Ngo testified that this is consistent with the general patterns and trends FINTRAC continues to see.[21] The report further identifies the most frequently used methods for money laundering as electronic funds transfers, companies, and foreign exchange transactions. Although Mr. Ngo was unable to say definitively whether these trends continue today, he said electronic funds transfers and foreign exchange transactions continue to figure prominently in the information FINTRAC receives.[22]

Of the convicted cases examined, five came from British Columbia. Those five cases appear to represent almost half of the total laundered funds, accounting for $200 million. However, the bulk of that sum came from one case related to currency exchange.[23]

The study also found that lawyers constituted the second largest demographic by occupation, accounting for 15 percent of the individuals charged.[24] The report concluded that "lawyers convicted of money laundering were willing to exploit reporting exemptions in order to launder funds."[25] In support, it cites a case from 2005 where a lawyer encouraged an undercover officer to conduct money laundering in Canada because there was "little police oversight," and also used solicitor-client privilege to enhance his money laundering services.[26] Although this case provides support for the study's broad conclusion, the report offers little insight into how widespread such cases truly are. I also note the misconduct that occurred in the case cited happened before the implementation of most of the Law Society's anti–money laundering measures.

A further limitation of this study is the fact it is based upon an examination of court cases between 2000 and 2014. Unfortunately, FINTRAC does not have statistics on the

17 Evidence of G. Ngo, Transcript, November 16, 2020, p 7.

18 Exhibit 194, FINTRAC, Review of Money Laundering Court Cases in Canada, p 2.

19 Evidence of G. Ngo, Transcript, November 16, 2020, p 8.

20 Exhibit 194, FINTRAC, Review of Money Laundering Court Cases in Canada, pp 5–6.

21 Evidence of G. Ngo, Transcript, November 16, 2020, pp 8–9.

22 Ibid, pp 9–10.

23 Ibid, pp 10–11.

24 Exhibit 194, FINTRAC, Review of Money Laundering Court Cases in Canada, pp 4–5. Approximately one-third of the individuals charged were classified as business owners or entrepreneurs who mainly used their company to launder funds.

25 Ibid, p 5.

26 Ibid, p 5.

number of money laundering prosecutions that have been commenced in British Columbia since that time.[27]

FINTRAC Study on Lawyers

FINTRAC has also conducted what Bruce Wallace, manager of strategic policy and reviews at FINTRAC, described as a "small-scale project [done] in part to assess our ability to identify financial activities associated with legal professionals and their data holdings."[28] The study was carried out around 2016 or 2017.[29] Mr. Wallace testified that it did not go beyond a draft report and was never peer reviewed; the information was gathered for the benefit of having a discussion with the Federation of Law Societies of Canada.[30]

The study had the following goals:

- to examine the financial activity associated with legal professionals in Canada;
- to assess whether legal professionals are prevalent in money laundering schemes; and
- to identify the types of legal professionals involved and how funds are moved.[31]

Given that lawyers are not reporting entities under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (*PCMLTFA*) regime, the study attempts to identify lawyer involvement through two sources of data: disclosures and large cash transaction reports (LCTRs).

Disclosures

The first set of data comprises FINTRAC disclosures to law enforcement and national security agencies from April 2013 to December 2016.[32] The study identifies 289 disclosures meeting the criteria.[33] Such disclosures are made when FINTRAC has reasonable grounds to suspect that the information may be relevant to a prosecution or investigation of money laundering or terrorist activity financing.[34] Mr. Wallace explained, however, that the fact that FINTRAC makes a disclosure does not mean it views the transaction as suspicious: it simply means the information may be "relevant" to an investigation or prosecution.[35]

27 Evidence of G. Ngo, Transcript, November 16, 2020, p 11.

28 Transcript, November 16, 2020, p 45.

29 Ibid, p 48.

30 Ibid.

31 As described in Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing* (June 26, 2019), slide 11.

32 Ibid, slide 13. Mr. Wallace explained that this period was chosen in an effort to obtain fairly recent data and to ensure the amount of data was manageable: Transcript, November 16, 2020, pp 48–49.

33 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 13.

34 Evidence of B. Wallace, Transcript, November 16, 2020, pp 48–50.

35 Ibid, p 57. He further explained that, as there is no determination of suspicion, the information disclosed may be exculpatory or inculpatory.

The study identifies 304 individual law firms and legal counsel within the 289 disclosures. Using publicly available information, it determines that the primary areas of law being practised at the subject firms are corporate (67%), real estate (64%), commercial (38%), immigration (35%), and family (32%).[36] It is important to note that the study does not examine the lawyer's role in the transaction, nor does it attempt to determine if the lawyer's involvement was in any way suspicious.[37]

In addition, the study looks at the kinds of financial instruments used by legal professionals. The highest proportion (80%) involved negotiable instruments – bank drafts, certified cheques, and personal or business cheques.[38] The next highest were electronic funds transfers and trust transactions (47% and 44%, respectively).[39] Of note, cash transactions only accounted for 6 percent of the instruments used.[40]

Large Cash Transaction Reports

The second set of data comprises LCTRs filed between April 2013 and December 2016. A reporting entity must file an LCTR when it receives an amount of $10,000 or more in cash in a single transaction (or cumulatively over a 24-hour period). Because lawyers are not reporting entities, the study uses LCTRs from other sectors, such as financial institutions and casinos.[41] Lawyers are identified when either the conductor's occupation was identified as being a lawyer or the transaction was conducted by or on behalf of a law firm.[42] Notably, the study did not differentiate between lawyers acting in their personal versus professional capacities.[43]

The data indicates there were over 5,400 LCTRs, totalling approximately $89.5 million in cash, transacted by lawyers in Canada during the relevant period.[44] Deposits into personal bank accounts feature predominantly in the transactions (58%), followed by purchase of casino chips (15%) and deposits to a business account, which includes general and trust deposits (10%).[45] Mr. Wallace explained the percentages are based on the number of LCTRs in each category, as opposed to the dollar value.[46]

36 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 15. See also Evidence of B. Wallace, Transcript, November 16, 2020, p 55, where he explains that the goal was to determine the primary scope of business, recognizing that many firms have multiple practice areas.

37 Evidence of B. Wallace, Transcript, November 16, 2020, p 55.

38 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 16; Evidence of B. Wallace, Transcript, November 16, 2020, p 56.

39 "Trust transactions" refers to transactions involving either the establishment or use of trust accounts: Evidence of B. Wallace, Transcript, November 16, 2020, p 56.

40 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 16.

41 Evidence of B. Wallace, Transcript, November 16, 2020, pp 47–48.

42 Ibid, p 50.

43 Ibid, p 53. Mr. Wallace explained that at least some of the reports would have included personal transactions made by lawyers.

44 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 14.

45 Ibid. See also Evidence of B. Wallace, Transcript, November 16, 2020, pp 51–53.

46 Evidence of B. Wallace, Transcript, November 16, 2020, p 52.

It is important to note that FINTRAC did not determine the percentage of LCTRs that were also reported as suspicious transactions.[47] Reporting entities must file suspicious transaction reports (STRs) when they have reasonable grounds to suspect a transaction is related to the commission or attempted commission of a money laundering or terrorist financing offence. Given that the study considers LCTRs only, Mr. Wallace agreed that a good number of the transactions could be perfectly legitimate.[48]

This analysis of LCTRs also has other limitations. First, by definition, it only deals with transactions over $10,000. As such, it does not consider the scope or use of cash by lawyers more generally.[49] Second, the study is based on a very small sample size compared to the overall number of reports.[50] Finally, it is worth noting the study focuses only on lawyers, not the individuals who seek to exploit them.[51]

Conclusions

Overall, Mr. Wallace characterized the study as illustrative but cautioned against drawing conclusions from it.[52] While it validates that large cash transactions associated to lawyers are being reported on and disclosed, the study provides no insight into the nature of lawyers' involvement in the transactions.[53]

Although the study provides some guidance as to which legal practices are particularly susceptible to money laundering risks and methods of lawyer involvement, given the significant limitations on the study, I am not able to draw any firm conclusions from it. In light of the value of such information to law enforcement, regulators, and policy makers, it is my hope that FINTRAC will continue to develop approaches to studying the involvement of lawyers in money laundering and share its findings with the Federation of Law Societies of Canada and the provincial law societies.

Dr. Benson's Qualitative Study

Dr. Benson's study took a qualitative approach to assessing lawyers' facilitation of money laundering[54] in an attempt to fill a research void. She decided early on not to assess the *scale* of the problem, noting that "[d]ata is not routinely collected on legal or accountancy professionals involved in money laundering in any meaningful

47 Ibid, p 54.

48 Ibid.

49 Ibid, p 47.

50 Ibid, pp 46–47. Mr. Wallace testified that in 2019, FINTRAC received approximately 10 million LCTRs, whereas the study identified only 5,000 transactions involving legal professionals in the relevant period.

51 Ibid, p 47.

52 Transcript, November 16, 2020, p 60.

53 Ibid, pp 60–62.

54 As Dr. Benson explained in her testimony, "I would conceptualise the facilitation of money laundering as a term that encompasses the various ways by which someone in a legitimate occupational position plays a role in how another person uses, moves or conceals the origins of the proceeds of crime": Transcript, November 17, 2020 (Session 1), p 132.

or analysable way ..."[55] Instead, she sought to understand the *nature* of lawyers' involvement in facilitating money laundering and its control through regulation and the criminal justice system.[56]

Dr. Benson identified 20 cases in which solicitors had been convicted of offences under the United Kingdom's proceeds of crime legislation between 2002 and 2013. To avoid subjective assessments of what might constitute money laundering in the absence of a conviction, she relies only on cases where convictions were obtained; the sample therefore does not include lawyers who went undetected, were not prosecuted, or received only a regulatory sanction.[57]

The study also focuses only on instances where lawyers acted in their professional role and facilitated the laundering of the proceeds of crimes committed by others (i.e., their clients). As Dr. Benson explains, "[t]his was because the research was interested in the role that professionals played in the facilitation of laundering by their clients, rather than the self-laundering of proceeds from criminal activity they had carried out themselves."[58] In addition to examining cases, Dr. Benson interviewed members of law enforcement and criminal justice bodies, members of supervisory bodies, and practising professionals. Despite her best efforts, she was unable to interview convicted lawyers.[59]

Before turning to the findings, it is important to note some legislative differences between the United Kingdom and Canada. In addition to similar offences to those set out in sections 354 (possession of property obtained by crime) and 462.31 (laundering proceeds of crime) of the Canadian *Criminal Code*, it is a crime in the United Kingdom to "fail to disclose." This offence obligates reporting entities, including lawyers, to report transactions in circumstances where they suspect someone may be involved in money laundering. The fact that lawyers in the United Kingdom are subject to reporting obligations is distinct from Canadian lawyers, who are exempt from the *PCMLTFA* regime. Second, the offence is very broad, as lawyers can be found guilty even if they lack actual knowledge. These differences are important to keep in mind when making comparisons between Dr. Benson's case studies and the Canadian context.

Although recognizing the difficulties in doing so,[60] Dr. Benson allocates cases into four categories: buying or selling property, misuse of trust accounts, corporate vehicles

55 Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," pp 89–90.

56 Transcript, November 17, 2020 (Session 1), pp 105–6.

57 Transcript, November 17, 2020 (Session 1), pp 109, 110; Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," pp 96–99.

58 Exhibit 219, K. Benson, "Money Laundering, Anti–Money Laundering and the Legal Profession," p 121; Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, pp 29–30; Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), pp 119–22.

59 Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," p 99; Transcript, November 17, 2020 (Session 1), p 109.

60 Among other concerns, Dr. Benson notes that boundaries between categories are blurred and that "[c]ategorising the cases in this way does not take into account the underlying purpose of the transactions – that is, what the predicate offender is trying to achieve through the transaction." See Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," pp 121–22.

and offshore companies, and other legal and/or financial services.[61] I begin by reviewing some of her general findings and return to a consideration of the categories she identifies below.

First, Dr. Benson finds considerable variation among the cases with respect to several factors:

- **The lawyer's actions and behaviours:** activities ranged from involvement in property and trust account transactions (the most common situations) to persuading a bank to unfreeze an account to paying bail for a client using proceeds of crime.[62]
- **Financial benefit:** some lawyers appeared to benefit financially from their involvement, while others appeared to acquire no direct financial gain apart from the normal fees they would have received.[63]
- **Knowingness or intent:** while lawyers in four cases seemed to be knowingly and intentionally involved in the laundering, the majority of lawyers appeared to have no intent or active involvement.[64]
- **Purpose of the transaction:** it was not always clear whether the transaction was an end point in itself or a means to an end. For example, where a predicate offender conducts a real estate transaction with a lawyer's assistance, the purpose could be to legitimately buy property to live in, or the transaction could be used as a means to launder illicit funds.[65]
- **Nature of the relationship with the predicate offender:** most lawyers in the study had a solicitor-client relationship with the predicate offender. However, some had personal relationships (e.g., family or romantic), and some situations involved "brokers" (i.e., someone trusted by the lawyer who introduced the lawyer to the predicate offender).[66]

Second, predicate offences related to the lawyers' activities mostly involve drug trafficking and various forms of fraud. Notably, only one case involves "white collar" or "corporate" crime, contrary to what Dr. Benson expected. In her view, this result likely has to do with the kinds of cases being investigated and prosecuted:

> So apart from the one case of corruption, none of the cases involved what we might classify as white collar or corporate crime. So, none of the cases, for example, involved corporate bribery or insider trading or corporate fraud or the offences by corporations or financial institutions. And this ...

61 Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, p 53.

62 Exhibit 219, K. Benson, "Money Laundering, Anti–Money Laundering and the Legal Profession," p 124.

63 Ibid.

64 Ibid, pp 124–25.

65 Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," p 122.

66 Ibid, pp 126–30.

> raises questions about what gets investigated and what gets prosecuted, what gets convicted and what doesn't. So, it seems highly unlikely that those kinds of offences don't require the involvement of professionals, especially with the amounts of money that would be involved. And so, again, does this mean that either this kind of professional enabler or this kind of predicate criminality is less likely to be investigated, prosecuted or convicted? Are they perhaps more likely to be addressed through regulatory mechanism or are they able to slip through the net completely?[67]

Third, and to similar effect, Dr. Benson finds that contrary to the "official discourse" that paints financial transactions related to money laundering as increasingly complex, the cases she reviews tend to involve relatively unsophisticated transactions.[68] This result might suggest that lawyers involved in complex cases are often not convicted (and thus not captured by the cases she reviewed), or it may be that most transactions related to money laundering are essentially the same transactions that lawyers carry out for "legitimate" clients. As Dr. Benson explains:

> Most of the transactions in the cases examined are the same transactions that legal professionals will carry out on behalf of clients, for legitimate reasons, on a regular basis, as part of their occupational role … So, this means that non-legitimate transactions (or transactions with non-legitimate funds) will be 'hidden' amongst legitimate transactions … This has implications, therefore, for the identification and prevention of transactions involving criminal funds.[69]

Based on her work, Dr. Benson concludes that facilitation of money laundering by lawyers is a complex and diverse phenomenon that defies neat categories or blanket descriptions:

> We should avoid the temptation … to see "the facilitation of money laundering" as a singular phenomenon and ask what "it" looks like, or "lump together" all the ways in which professionals are involved in the management of the proceeds of crimes committed by others. Terms such as "gatekeepers" or "professional enablers" suggest a homogeneity of actors, actions and relations that does not exist. We should also be wary of relying on simple categorisations to describe and delineate different measures of "facilitation" … While this is useful for identifying services provided by professionals that are – or can be – used by those in possession of criminal proceeds, and highlighting areas of vulnerability for certain professions, it tends to decontextualize the behaviours and decision-making involved. Many of the cases identified in this research involve individual, possibly one-off actions that emerge

67 Transcript, November 17, 2020 (Session 1), pp 144–45.

68 Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," p 123.

69 Ibid, pp 123–24; Transcript, November 17, 2020 (Session 1), pp 145–47; Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, pp 68–69.

> out of particular circumstances at a particular point in time, and cannot be easily grouped with others. We need to move beyond *descriptions* of actions and processes, therefore, to understand the *contexts* of these actions and the decisions they involve, and the factors that shape the individual lawyers' roles in the facilitation of money laundering. [Emphasis in original.][70]

I review other findings from Dr. Benson's study below. Although the study has some limitations, and certain aspects may not be applicable in the Canadian context, it is useful in demonstrating the limitations to categorization, as well as the challenges faced in identifying and preventing money laundering in the legal profession.

FATF Guidance for a Risk-Based Approach for Legal Professionals

As I note in Chapter 6, the Financial Action Task Force (FATF) makes recommendations for member countries with respect to anti–money laundering and counterterrorism financing initiatives. In *Guidance for a Risk-Based Approach: Legal Professionals*, FATF explains how they relate to lawyers:[71]

> The basic intent behind the FATF Recommendations as it relates to legal professionals is to ensure that their operations and services are not abused for facilitating criminal activities and [money laundering / terrorist financing]. This is consistent with the role of legal professionals, as guardians of justice and the rule of law[,] namely to avoid knowingly assisting criminals or facilitating criminal activity.[72]

The guidance further specifies that the FATF recommendations apply when lawyers engage in the following activities:

- buying and selling real estate;
- managing client money, securities, or other assets;
- managing bank, savings, or securities accounts;
- organizing contributions for the creation, operation, or management of companies; and
- creating, operating, or managing legal persons or arrangements, and buying and selling business entities.[73]

70 Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, p 70.

71 Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals* (June 2019).

72 Ibid, para 59.

73 Ibid, para 17; Exhibit 4, Overview Report: Financial Action Task Force, Appendix E, FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris: FATF, 2019) [*FATF Recommendations*], p 18, Recommendation 22.

Among other things, the guidance explains how to implement the risk-based approach in the legal context. The key elements are risk identification, risk management and mitigation, ongoing monitoring, and documentation. For example, it identifies measures and policies to assist in the assessment of potential risks posed by clients and transactions. It also provides guidance on completing the client due diligence and reporting outlined in the recommendations.[74]

Thematic Review of Risks Faced by Lawyers

In what follows, I set out a number of the risks facing lawyers as identified by FATF, national risk assessments, academics, and other sources. In seeking to describe the nature of these risks, I am mindful of Dr. Benson's concerns that relatively little evidence exists concerning the nature and extent of lawyers' involvements in money laundering, as well as the limitations of viewing the risks in strict categories. Nonetheless, I consider it useful conceptually to examine the key areas that give rise to risks among lawyers.

I am also mindful of the Law Society's submission that the existence of a risk is not the same as a risk actually occurring:

> The existence of a ML [money laundering] 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. With such mitigating measures, the risk may not come to fruition at all, or at least not as often as it otherwise might.[75]

This observation is sound. However, to the extent that money launderers are operating in a jurisdiction and are, as part of their schemes, using vehicles such as shell companies or real estate transactions, it would be naive not to acknowledge the inevitable involvement, even if only unwittingly, of lawyers in money laundering.

In my discussion below, I address the following risk areas: solicitor-client privilege and the lawyer-client relationship; the purchase and sale of property; misuse of trust accounts; use of corporate vehicles and offshore accounts; provision of other legal and financial services; and litigation and private lending.

Solicitor-Client Privilege and the Lawyer-Client Relationship

A frequently cited risk associated with lawyers is the concern that criminal activity goes undetected or is difficult to investigate because of solicitor-client privilege and the lawyer's duty of confidentiality.

74 Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, paras 70, 103, 104.

75 Closing submissions, Law Society of British Columbia, July 9, 2021, para 5.

As I discuss throughout these chapters, there are stringent protections for privilege in Canada. In general, privileged communications cannot be revealed to anyone unless the client consents or one of the few exceptions applies. These strict protections mean that some information will simply be beyond the reach of law enforcement. As Professor Jason Sharman from the University of Cambridge explains, they may also cause law enforcement to be overly cautious:

> [T]he idea of legal professional privilege … may create an extra layer of secrecy that makes it more difficult for law enforcement to find out what's going on and can often kind of warn off or deter law enforcement from even looking at things because law enforcement says well, there's lawyers involved; there's legal professional privilege; if we put enough time and effort, we might be able to overcome this, but we have a lot of crime to investigate and maybe we'll just leave this one alone and go on and do something easier.[76]

The FATF guidance accepts that solicitor-client privilege (and the civil law concept of professional secrecy) is "founded on the nearly universal principle of the right of access to justice and the rationale that the rule of law is protected where clients are encouraged to communicate freely with their legal advisors without fear of disclosure or retribution."[77] Accordingly, the FATF recommendations exempt lawyers from reporting privileged information.[78]

Solicitor-client privilege, as a matter of common sense, is attractive for criminals. It provides a curtain behind which certain activities and information will be sheltered from view. It is clear that, in some circumstances, the existence of privilege can impede investigations by law enforcement. However, as I discuss further in Chapter 28, law enforcement should not shy away from cases involving lawyers simply because lawyers are involved. Search warrants and production orders can be obtained for information and documents held by lawyers, and the Law Society has implemented guidelines for searching law offices in a manner that respects privilege. Further, privilege does not apply where a client seeks to use a lawyer's services to facilitate a crime. The Law Society's Rules also allow it to refer matters to law enforcement when it comes across evidence of a possible offence. It is crucial that the Law Society and law enforcement make use of these pathways, which can help narrow the gap resulting from lawyers' exclusion from the *PCMLTFA* (see Chapter 28).

Nor should the Law Society's role in regulating lawyers be underestimated. The Law Society is empowered to review all material possessed by lawyers, including privileged information. It is therefore uniquely placed to examine all aspects of a lawyer's practice, and it has powerful sanctions at its disposal. In some ways, Law Society regulation is

76 Transcript, May 6, 2021, p 74.

77 Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, para 28.

78 Exhibit 4, Appendix E, *FATF Recommendations*, p 85, Interpretive note to Recommendation 23, para 1.

able to target lawyer misconduct more effectively than the criminal justice system. Therefore, both regulation and law enforcement have a role to play in addressing the misuse of lawyers' services.

I return to these points in Chapter 28.

Purchase and Sale of Property

There is no dispute in the evidence before me that lawyers' involvement in real estate transactions presents inherent risks. In an advisory to the profession, the Federation's Anti–Money Laundering and Terrorist Financing Working Group (FLSC Anti–Money Laundering Working Group)[79] explains the risk as follows:

> Real estate is a popular vehicle for those engaged in fraud and money laundering. It is generally an appreciating asset and its sale can lend legitimacy to the appearance of funds.
>
> Consequently, the purchase of real estate is a common outlet for criminal proceeds. Fraudsters and other criminals often go to great lengths to ensure that real estate transactions used to launder funds look legitimate, masking the true intent of the transaction, which could be a purchase, sale or refinancing.[80]

In a similar vein, Dr. Benson explains that real estate offers two methods of legitimizing funds:

> The purchase of commercial or residential property provides an ideal method of laundering criminal funds, offering two points at which the funds can be legitimised: firstly, as deposits are moved through a law firm's client account and, secondly, as the funds are exchanged for the ownership of property. Furthermore … rental income or profit made by the sale of the property also provide legitimate income from initially illegitimate funds.[81]

Risks relating to real estate have likewise been identified by FATF, Canada's 2015 national risk assessment, the United Kingdom's national risk assessments, and FINTRAC.[82]

79 I discuss this working group in Chapter 27.

80 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix J, *Risk Advisories for the Legal Profession: Advisories to Address the Risks of Money Laundering and Terrorist Financing* (December 2019), p 2.

81 Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, p 73.

82 See, respectively, Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, para 46; Exhibit 192, Overview Report on the Regulation of Legal Professionals in BC, Appendix N, 2015 National Risk Assessment, p 53; Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), p 113; Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 15; Evidence of B. Wallace, Transcript, November 16, 2020, pp 41–42.

The majority of cases Dr. Benson reviews in her study involve real estate or the use of trust accounts to facilitate transactions derived from criminal activity or to move funds.[83] She testified that it is "inevitable" that some legal professionals will be involved in property transactions involving illicit funds, given the likelihood that criminals will buy or invest in property and the necessary role of lawyers in this area.[84]

Similarly, Professor Schneider's study finds that lawyers encounter proceeds of crime mainly through their role in facilitating real property transactions by individuals engaged in drug trafficking or with accomplices.[85] He describes the kinds of services that lawyers provide as follows:

> The services provided to those clients investing illegal revenues into real estate were typical of what a lawyer offers to any client in a real property transaction: conducting lien searches, obtaining property tax information, calculating property tax payments for the buyer and seller, obtaining information on insurance requirements, preparing title transfer and mortgage documents, registering the transfer of title, and receiving and disbursing funds through the law firm's bank account as part of the real estate deal (including deposits, down payments, "cash-to-close," and mortgage financing).[86]

Professor Sharman notes that banks in other jurisdictions have not been able to tackle the risk of money laundering in the real estate sector because they see only the trust account of the lawyer (or realtor) rather than the underlying customer's account. He also notes the problem of real estate purchases being made through shell companies or corporate vehicles, which can render the beneficial (or true) owner difficult to identify.[87]

There is consensus on the point that real estate transactions pose a risk to lawyers. In my view, the rules adopted by the Law Society with respect to limitations on accepting cash, customer identification and verification, and trust account regulation go a long way to mitigating those risks. I discuss these rules, along with areas where they might be improved, in Chapter 28.

Misuse of Trust Accounts

Closely related to concerns about real estate transactions are fears about the misuse of trust accounts to launder illicit proceeds. The traditional concerns in this respect are that a client could give large amounts of cash to a lawyer and later receive a

83 Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), p 133.

84 Ibid, p 135.

85 Exhibit 7, S. Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases*, p 67.

86 Exhibit 6, Stephen Schneider, *Money Laundering in British Columbia: A Review of the Literature* (May 2020), p 105; Exhibit 7, S. Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases*, p 68.

87 Transcript, May 6, 2021, pp 27–28.

refund by cheque, or that the client could allow the cash to accumulate and use it later to conduct a transaction or purchase real estate. It is important to note at the outset that regulation by the Law Society has essentially eliminated these risks. As I discuss in Chapter 28, lawyers must abide by stringent trust regulation rules and face regular audits; they are prohibited from accepting more than $7,500 in cash (with some exceptions); and when lawyers receive cash from clients, they must also make any refunds in cash. I am satisfied that these measures have addressed the traditional money laundering risks associated with trust accounts.

In this regard, it is interesting to note that FINTRAC's study on legal professionals found that cash deposits to trust accounts (as opposed to personal accounts) were "of minimal representation in FINTRAC reporting."[88] Mr. Wallace testified that this finding was significant, given that many typologies and methodologies, particularly historical ones, contain "assertions that trust accounts are frequently used" for large cash transactions.[89] However, it is important to recall that trusts transactions were used by legal professionals in almost half of the disclosures.[90] Mr. Wallace acknowledged that "because of the limitations of the study and by virtue of the fact we don't get reports from legal professional[s], it's really hard to say what's going on with trust accounts."[91] For these reasons, the FINTRAC study must not be taken as suggesting there is no risk associated with trust accounts. I am satisfied that, given their very nature, they continue to pose significant concerns.

One particular concern is the potential for solicitor-client privilege to attach to transactions that go through trust accounts. As privileged information cannot be disclosed unless the client consents or an exception applies, the potential for transactions going through trust accounts to elude law enforcement is considerable. In *Dirty Money 2*, Dr. Peter German went so far as to describe lawyers as the "'black hole' of real estate and of money movement generally," noting that law enforcement's inability to know what enters and leaves a lawyer's trust account stymies investigations.[92]

As I discuss in Chapter 27, recent case law from the Supreme Court of Canada suggests that trust account records may be considered presumptively privileged. However, this is only a presumption – not an across-the-board rule. Such records will not always be privileged, and it may be possible to obtain redacted records that omit the privileged information. For this reason, as I discuss further in Chapter 28, law enforcement should not take the view that everything related to a trust account will necessarily be privileged. It must use the tools at its disposal (including warrants, production orders, and the crime exception to privilege) to follow leads that involve trust accounts and attempt to gain access to the information it needs.

88 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 18.

89 Transcript, November 16, 2020, pp 58–59.

90 Ibid, p 60; Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*, slide 16.

91 Transcript, November 16, 2020, p 59.

92 Peter M. German, *Dirty Money, Part 2: Turning the Tide – An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing*, March 31, 2019 [*Dirty Money 2*], p 121.

A related concern with respect to trust accounts is that the involvement of lawyers may provide an appearance of legitimacy, causing law enforcement, financial institutions, and others to ask fewer questions. Dr. Benson articulates this concern as follows:

> Law firms' [trust accounts] can play an important role for those wanting to launder criminal proceeds. They provide a "façade of legitimacy" to funds that pass through them, and transactions that originate from them. As well as funds being used as the deposit in a property purchase, this includes money that is being transferred to other bank accounts or being used to make large-scale purchases … Furthermore, because of the principle of lawyer-client confidentiality, banks are unaware of the identity of the client whose funds are being moved through the client account, and so their use can help to circumvent banks' anti–money laundering procedures.[93]

FATF's guidance and other commentators share the concern that banks do not or cannot ask probing questions about the underlying customer when funds are in a lawyer's trust account.[94]

It is apparent that trust accounts cause significant concern among commentators and are frequently cited as a money laundering risk. In seven of the 20 cases analyzed by Dr. Benson, passing criminal proceeds through a trust account was identified as the primary means of facilitating money laundering.[95] Similarly, Professor Schneider concludes that trust accounts are "regularly used and abused for [money laundering] purposes."[96] On the evidence before me, I am unable to make any findings about the extent of misuse of trust accounts by lawyers in British Columbia. I accept, however, that there is a very real risk of them being misused. Indeed, there are several examples of misuse in Law Society discipline cases.[97]

Two discipline cases are illustrative. I emphasize that my discussion of these cases is entirely reliant on the Law Society's public decisions, and I make no findings of my own with respect to the lawyers' conduct.

The first case is the well-known one of *Re Gurney*. It is broken up into two parts – the first dealing with the basis of the misconduct and the second with the appropriate sanctions and penalties.[98] The hearing panel found that Mr. Gurney had used his trust

93 Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, p 74.

94 See Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, para 45; Evidence of J. Sharman, Transcript, May 6, 2021, p 28; Exhibit 959, Jason Sharman, *Money Laundering and Foreign Corruption Proceeds in British Columbia: A Comparative International Policy Assessment*, pp 3–4; Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), p 113.

95 Exhibit 218, K. Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals," p 114.

96 Exhibit 6, S. Schneider, *Money Laundering in British Columbia: A Review of the Literature*, p 106; Exhibit 7, S. Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases*, p 70.

97 In addition to the cases I review below, see also *Law Society of British Columbia v Hsu*, 2019 LSBC 29; *Law Society of British Columbia v Daignault*, 2020 LSBC 18; and *Law Society of British Columbia v Hammond*, 2020 LSBC 30.

98 See *Re Gurney*, 2017 LSBC 15, and *Re Gurney*, 2017 LSBC 32.

account to receive and disburse approximately $25.8 million on behalf of a client without making reasonable inquiries about the circumstances, and without providing substantial legal services in connection with the matters. It held that he had committed professional misconduct, but made no finding of fraud or money laundering in relation to the funds. He received a six-month suspension from the practice of law, was ordered to disgorge his fees, and was subject to additional conditions on the use of a trust account. The panel noted:

> [A] lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but *the lawyer must also play a role as a legal advisor with regard to the transaction*. This is the requirement to provide legal services. [Emphasis added.][99]

As I discuss further in Chapter 28, this statement led to a formal codification in the Rules that trust accounts can be used only in direct connection with legal services.[100]

A more recent case of interest is *The Law Society of British Columbia v Yen*.[101] The hearing panel found that over a two-year period, Ms. Yen received over $10 million in trust from a variety of sources, including Panama, Singapore, and Luxembourg. In that same time period, Ms. Yen paid the equivalent amount out of her trust account in 45 transactions. The panel further found that only about $1.5 million of the funds were directly related to legal services.

Ms. Yen was found to have committed professional misconduct by depositing and disbursing significant amounts of money through her trust account without making sufficient inquiries or providing legal services in relation to most of the funds. As the panel explained:

> [I]t is not enough that a lawyer does legal work, even substantial legal work, for a client who deposits money into the lawyer's trust account. These legal services must be "in connection with the trust matter."[102]

The hearing panel on disciplinary action notably considered that Ms. Yen's actions may have contributed to money laundering:

> [Ms. Yen] was at best wilfully blind in allowing her firm's trust accounts to be used and manipulated in this manner. This Panel cannot definitively conclude that money laundering occurred, but it is not our role to make that determination.
>
> Nevertheless, if money laundering did in fact occur, it could not have happened without the participation and assistance of [Ms. Yen], however inadvertent such assistance may have been.[103]

99 2017 LSBC 15 at para 79.

100 See Rule 3-58.1.

101 *The Law Society of British Columbia v Yen*, 2020 LSBC 45.

102 Ibid, para 40.

103 *Re Yen*, 2021 LSBC 30 at paras 24–25.

The panel also reiterated the principle from *Re Gurney* that trust accounts must only be used for purposes directly related to legal services:

> It is well established that lawyers are gatekeepers of their trust accounts. In *Law Society of BC v. Gurney*, 2017 LSBC 15, the panel explained that lawyers' trust accounts are not to be used as a conduit; rather, they are only to be used for legitimate purposes and transactions. The reason for this is that lawyers are granted the privilege of operating trust accounts without scrutiny or interference by government authorities such as FINTRAC. This exemption from government scrutiny arises from the principle that trust funds are protected by solicitor-client privilege. This privilege carries with it the weighty obligation of ensuring that trust accounts are not misused or that rules governing their use skirted or outright circumvented.[104]

Ms. Yen was suspended from legal practice for three months.[105]

As I discuss in Chapter 28, the Law Society and the Federation are aware of the risks posed by trust accounts. The Law Society has a robust trust audit program and has increased the number of audits it conducts for high-risk practice areas. Audits are not a perfect solution; they will not catch every wrongful use of a trust account. Nonetheless, I find that they are a strong deterrent. Indeed, as Jeanette McPhee, chief financial officer and director of trust regulation at the Law Society, noted in her testimony, Mr. Gurney's case was detected through a compliance audit.[106]

Even so, given the inherent risks associated with the use of a trust account and the fact that lawyers in Canada are currently exempt from a reporting regime, it is crucial that funds enter a lawyer's trust account only when necessary. This restriction avoids having solicitor-client privilege apply too broadly, covering transactions that would not be privileged if conducted by another professional. As I expand in Chapter 28, further limitations are warranted in this regard.

Use of Corporate Vehicles and Offshore Accounts

Another commonly cited risk in relation to lawyers is their role in creating corporate structures and trusts, and the use of offshore bank accounts. As Dr. Benson explains:

> Concern about the role of legal professionals in the facilitation of money laundering often focuses on the assistance they can provide through the creation and management of companies and other corporate vehicles, such as trusts and foundations, and the use of bank accounts in off-shore locations. Corporate vehicles can be used as a means of confusing or disguising the links between offenders and the proceeds of their crimes,

104 Ibid at para 26.

105 Ibid at para 60.

106 Transcript, November 18, 2020, p 122.

> and off-shore bank accounts provide a level of secrecy that can be used to hide illicit funds (i.e. the proceeds of crime, money on which tax is being evaded, or funds being used in the commission of crime). Of course, such financial constructions are not illegal in themselves and are used for legitimate reasons; for example, for the purposes of privacy, security and financial planning. However, there are increasing concerns over the use of corporate vehicles such as 'shell companies' to hide their 'beneficial owners' (i.e. the person[s] who ultimately owns, controls or benefits from the company or other asset) for illegitimate reasons.[107]

The FLSC Anti–Money Laundering Working Group similarly notes that criminals are increasingly turning to shell companies and trusts to facilitate money laundering because these vehicles make it possible to conceal the true ownership of funds.[108] These concerns are repeated in the FATF guidance, a presentation given by FINTRAC to the FLSC Anti–Money Laundering Working Group, and the United Kingdom's national risk assessments.[109]

In Dr. Benson's study, two cases fall into this category. One of them involves proceeds of corruption being transferred by a solicitor into offshore trusts and shell companies, and the other involves a solicitor transferring ownership of hotels while the owner was under a criminal investigation.[110] Dr. Benson testified that this low number of cases did not reflect the concerns about the use of corporate vehicles she expected. She suspects this is owing to difficulties with investigation and prosecution:

> [T]hat might be because it doesn't happen, but I think it's more likely that it reflects the nature of the cases that are investigated and prosecuted and convicted. So, I think that raises a number of questions that need to be considered further, for example [whether] more complex cases involving corporate vehicles and offshore accounts and complex transactions are less likely to result in prosecution or in conviction and if so, is this due to their complexity and the challenges of investigating transactions hidden behind financial constructions whose purpose is to provide secrecy and conceal ownership. So, I think the risk of money laundering through corporate vehicles should be taken seriously and the lack of convictions that I saw in the sample … gives us a lot of questions to think about.[111]

107 Exhibit 220, K. Benson, *Lawyers and the Proceeds of Crime*, pp 60–61.

108 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix J, *Risk Advisories for the Legal Profession: Advisories to Address the Risks of Money Laundering and Terrorist Financing*, pp 5, 10.

109 See, respectively, Exhibit 193, FATF, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, paras 49–51; Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*; and Evidence of B. Wallace, Transcript, November 16, 2020, p 43; Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), p 140.

110 Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), pp 140–41.

111 Ibid, pp 141–42.

Professor Schneider notes in his review that "truly sophisticated" money laundering operations are "often characterized by the international movement of funds, including the use of financial haven countries, which often necessitate the use of legal professionals."[112] He explains that lawyers are retained to incorporate companies, set up bank accounts, establish trusteeship, and sometimes help funnel illicit money to laundering vehicles.[113]

Clearly, lawyers' involvement in creating corporations, trusts, and other legal entities brings associated risks. Law Society oversight of lawyers' anti–money laundering obligations, such as source-of-funds inquiries and client identification requirements, can assist in combatting this risk. So, too, can limiting the use of a lawyer's trust account to those circumstances where it is necessary. A beneficial ownership registry would also go some way toward addressing this risk. I return to these topics in Chapters 24 and 28.

Other Legal and Financial Services

FATF's guidance notes that legal professionals may sometimes undertake "management" activities for clients pursuant to a court order or power of attorney. Although such services are generally legitimate, it warns criminals might seek to use them "to minimize the number of advisors and third parties who have access to the client's financial and organizational details."[114] The guidance recommends that lawyers carefully scrutinize requests for assistance beyond their primary services.

The guidance highlights additional specialized legal skills that may be used to transfer illicit proceeds and obscure ownership, namely, creating financial instruments and arrangements, drafting contractual arrangements, creating powers of attorney, and being involved in probate, insolvency, or bankruptcy.[115]

FINTRAC's presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing (FSLC–Canada Working Group)[116] similarly noted that lawyers can be called on to manage client money, securities, or other assets; manage bank, savings, and securities accounts; buy and sell business entities; and set up and manage charities.[117]

Professor Schneider repeats many of these concerns.[118] He adds that lawyers may be asked to act as directors, officers, trustees, or even as owners or shareholders of a company, and that law offices may be used as the corporate addresses for companies controlled by criminal entrepreneurs.[119]

112 Exhibit 6, S. Schneider, *Money Laundering in British Columbia: A Review of the Literature,* pp 107–8.

113 Ibid.

114 Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals,* para 52.

115 Ibid, para 53.

116 I discuss this working group further in Chapter 27.

117 Exhibit 199, FINTRAC, *Presentation to the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing*.

118 Exhibit 6, S. Schneider, *Money Laundering in British Columbia: A Review of the Literature,* pp 104–5.

119 Exhibit 7, S. Schneider, *Money Laundering in Canada: An Analysis of RCMP Cases,* p 69.

Private Lending and Litigation

I discuss the risks associated with private lending in more detail in Chapter 17. Briefly, there are two main ways in which lawyers can be exposed to these risks. First, they may be involved in structuring private lending (e.g., drafting and reviewing loan documents). Second, they may be involved in enforcing private lending arrangements through litigation or otherwise.

The Law Society has issued a discipline advisory on private lending.[120] It cautions that lawyers "who are retained to draft loan or security documents, to register the same, or to assist with the advance or recovery of funds should take additional steps to protect themselves and maintain public trust in the profession." Those steps include asking additional questions and ensuring they know their clients and the subject matter of their retainers. It notes that, although most private loans are legitimate, "there is an increased risk of illegal activity with them." The advisory lists a number of red flags of which lawyers should be mindful:

- there is no clear or plausible reason why the borrower is not borrowing from a commercial lender;
- the amount or fact of the loan seems inconsistent with the client's circumstances;
- third parties are involved without apparent good reason;
- the funds advanced are in cash, and the parties are unwilling or unable to provide basic details or documentation concerning the loan, including its source;
- the funds come from, go to, or are to be repaid offshore or to a jurisdiction that is known to be secretive or restrictive;
- there is no security for a large loan or the security is a subsequent mortgage or charge on a fully or near-fully encumbered property;
- the actual or agreed-to repayment period is unusually short;
- the interest rate exceeds the criminal rate or is above market;
- the lawyer is retained after the funds have been advanced;
- the lawyer is not experienced in the relevant area of law, or the client has been refused counsel or changed counsel recently or several times without apparent good reason;
- any party to the transaction has an alleged or known history of drug trafficking, money laundering, civil forfeiture, loan-sharking, fraud, high-stakes gambling or similar activity; and
- the client is unusually familiar with or resistant to client identification and verification requirements.

120 https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/april-2,-2019/.

The FLSC Anti–Money Laundering Working Group has issued a similar risk advisory on private lending.[121]

It has also issued risk advisories addressing money laundering risks in litigation.[122] I agree that lawyers must also be cognizant of this risk in connection with litigation, and I endorse the extension of its risk advisory to that activity.[123]

The FSLC risk advisory notes that some forms of litigation, particularly debt recovery actions, may pose risks:

> Criminals may attempt to launder proceeds of crime by filing and recovering on civil claims. This could, for example, involve using fabricated documents to misrepresent transactions or claim an interest in property. A lawyer should not assist a client in enforcing a contract that may be based on criminal activity.[124]

The advisory explains that lawyers should be alert to risks when retained to assist with private loan recovery, builders' lien claims, claims for recovery of capital investment, as well as claims for defective goods and unpaid commercial invoices.[125] It sets out a number of risk factors in line with those identified in the preceding advisories.

Conclusion

In this chapter, I have reviewed some of the key risk areas in which lawyers may be used to facilitate money laundering. In doing so, I do not purport to identify all the risks that arise in the legal profession. I have also noted a lack of data generally when it comes to the extent and nature of lawyers' involvement in money laundering. My hope is that research by the proposed AML Commissioner, academics, and others will shed further light on this issue. I also expect that the enhanced investigation and prosecution of money laundering will supply further insight into the nature and extent of lawyers' involvement in these schemes. Given the inherent risks associated with the activities in which lawyers engage for clients, it is crucial that regulators, law enforcement, and policy makers stay alert to these risks and to new forms of money laundering that continue to develop.

121 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix J, *Risk Advisories for the Legal Profession: Advisories to Address the Risks of Money Laundering and Terrorist Financing*, pp 8–9.

122 Ibid, pp 12–13.

123 I mention this because the recommendations set out in the FATF guidance do not apply to lawyers representing clients in litigation unless they also engage in a specified activity: Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A, FATF, *Guidance for a Risk-Based Approach for Legal Professionals*, para 17.

124 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix J, *Risk Advisories for the Legal Profession: Advisories to Address the Risks of Money Laundering and Terrorist Financing*, p 12.

125 Ibid.

Chapter 27
The *Federation* Decision and the Feasibility of a Reporting Regime for Lawyers

Unlike a variety of other professionals in Canada, lawyers are currently not subject to the requirements of the *PCMLTFA* and its regulations. The exclusion of lawyers from the federal regime has a complicated history that culminated in the 2015 *Federation* decision,[1] which held that the application of the regime to lawyers as it then stood was unconstitutional.

Following the *Federation* decision, there have been strong critiques levelled at Canada for its failure to bring lawyers into the *PCMLTFA* regime in a constitutionally compliant way. Critics have called the exclusion of lawyers from the regime a gap in Canada's anti–money laundering framework, maintaining the view that lawyers are not subject to anti–money laundering regulation in this country.

As I explain below, it is too simplistic to say that lawyers are not subject to anti–money laundering oversight. It is certainly true that FINTRAC does not receive reports from lawyers and thus does not have the same lens into lawyers' and their clients' activities as it does into other professions subject to the *PCMLTFA*. This fact is significant and does constitute a gap in terms of intelligence gathering. Further, there are certainly unique and important challenges for law enforcement when it comes to investigating money laundering activity when lawyers are involved.

However, it is inaccurate to say lawyers in British Columbia[2] are not regulated for anti–money laundering purposes: they are, in fact, subject to extensive anti–money

1 *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 [*Federation*].

2 As my mandate is limited to considering British Columbia, I have not arrived at conclusions about the regimes in other provinces. However, there are sound reasons to believe that the regimes in other provinces are similar to that in British Columbia, given the harmonizing role played by the Federation of Law Societies of Canada.

laundering regulation by the Law Society of British Columbia. In my opinion, this regulation has gone a long way to addressing many of the money laundering risks in this sector, and critics have given it too short shrift.

Law Society regulation does not duplicate the *PCMLTFA* measures. In some ways – particularly the fact that FINTRAC does not receive reports on suspicious activity from lawyers – this is a disadvantage and prevents FINTRAC and law enforcement from obtaining important intelligence. Significantly, however, there are also benefits to be gained from dealing with anti–money laundering issues from a regulatory perspective. One such advantage is that the Law Society is entitled to see *all* aspects of a lawyer's practice, including confidential and privileged information. On the whole, the issue of anti–money laundering regulation of lawyers in British Columbia is much more nuanced than some critiques have appreciated.

In this chapter, I describe the scheme that Parliament attempted to apply to lawyers. I then discuss the successful constitutional challenge to that regime; actions taken by the Law Society and the Federation of Law Societies of Canada following the *Federation* decision; and the critiques that have been levelled at Canada for failing to bring lawyers into the *PCMLTFA* regime.

At the end of this chapter, I consider the possibility of a provincial reporting regime for lawyers. Although such a regime would likely be beneficial in the fight against money laundering, there are significant constitutional difficulties inherent in crafting such a regime. In my view, these challenges are so considerable that the Province of British Columbia should not attempt to legislate a reporting regime for lawyers. Instead, as I set out below and in Chapter 28, the Law Society must continue to strengthen its anti–money laundering regulation, particularly with respect to trust accounts, and it must prioritize information sharing and other collaborative measures with law enforcement and other stakeholders. While pathways already exist for information sharing and collaboration, it is crucial that the Law Society, law enforcement, and other bodies make better use of them.

Lead-up to the Constitutional Challenge

The *PCMLTFA* was enacted in 2000. I explain the regime in detail in Chapter 7. Essentially, it requires specified entities (including, but not limited to, financial institutions, accountants, insurance brokers, casinos, and BC notaries[3]) to collect information about the identities of their clients; keep records of transactions; report suspicious, large cash, and large virtual currency transactions to FINTRAC; and establish internal programs to ensure compliance with the scheme.

3 See Chapter 29 for a discussion of the notarial profession in British Columbia and the risks specific to it. Given the differences between the BC notarial profession and that in other common law provinces and in Quebec, BC notaries are the only legal professionals in Canada who are subject to the *PCMLTFA*. Notably, solicitor-client privilege does not attach to their dealings with clients.

Lawyers became subject to the *PCMLTFA* in 2001, when they were required to report suspicious transactions involving their clients to FINTRAC. The Federation and several provincial law societies promptly launched constitutional challenges and obtained injunctions relieving legal counsel of the reporting requirements.[4] The litigation was adjourned, and the parties entered into an agreement precluding the federal government from applying new regulations to lawyers and Quebec notaries[5] without the Federation's consent.

In 2004, the Federation (and, shortly afterward, the Law Society) adopted a Model Rule on cash transactions preventing lawyers from accepting more than $7,500 in cash (with some exceptions). Ms. Wilson testified that the federal government at the time viewed this rule as an appropriate alternative to the large cash–transaction reporting requirement under the *PCMLTFA*.[6] I discuss the cash transactions rule in Chapter 28.

In 2006, the *PCMLTFA* was amended to exempt lawyers and Quebec notaries from the reporting requirements.[7] Significantly, lawyers have not been subject to reporting requirements under the *PCMLTFA* since this amendment – well before the *Federation* decision in 2015.

In 2007, the federal government pre-published regulations that would make the legal profession subject to the client identification and verification (CIV) requirements under the *PCMLTFA*. This led to discussions between the Federation, the federal Department of Finance, and FINTRAC.[8]

Key aspects of the proposed scheme included:

- **Identification and verification:**
    - Lawyers would be required to *identify* the persons and entities on whose behalf they acted as financial intermediaries.
    - Lawyers would be required to *verify* the identity of persons or entities on whose behalf the lawyer receives or pays funds, with some exceptions.
    - Lawyers would be required to collect information on the client such as the names of directors and shareholders of corporations and information about trustees and beneficiaries.

4 *Law Society of British Columbia v Canada (Attorney General)*, 2001 BCSC 1593, aff'd 2002 BCCA 49, leave to appeal to the Supreme Court of Canada discontinued, SCC file number 29048.

5 The Quebec notarial profession is distinct from both the British Columbia profession and that in other provinces. The Supreme Court of Canada has explained that Quebec notaries play a similar role to solicitors in common law provinces, and their work is notably covered by professional secrecy (the civil law equivalent to solicitor-client privilege): see *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 [*Chambre*] at para 42; and *Notaries Act*, CQLR, c N-3, ss 10, 14.1.

6 Transcript, November 16, 2020, pp 116–17.

7 *PCMLTFA*, s 10.1.

8 Evidence of F. Wilson, Transcript, November 16, 2020, pp 123–24.

- **Record keeping:**
  - Lawyers would be required to create a "receipt of funds record" when they received $3,000 or more in a transaction, which would document the personal details of the individual from whom the funds were received, account information, details about the transaction, and more.
  - The records had to be kept for at least five years following the completion of the transaction and produced to FINTRAC on request.

- **Search and seizure:**
  - FINTRAC was authorized to "examine the records and inquire into the business and affairs" of any lawyer. This authorization included the power to search through computers and to print or copy records. Lawyers were required to comply with FINTRAC's requests for information.
  - FINTRAC had the ability to disclose to law enforcement certain information it came across during a search and equivalent foreign state agencies.
  - There were some protections for solicitor-client privilege, principally a specification that lawyers were not required to disclose privileged information and a procedure for protecting privileged information during a search.[9]

The Federation considered the new provisions but ultimately refused consent. Litigation restarted in 2007.[10]

In 2008, the Federation adopted model rules for client identification and verification (discussed in Chapter 28) that closely tracked the provisions the federal government sought to impose on lawyers through the *PCMLTFA*.[11] The model rules were adopted by all Federation members.[12] In explaining why the Federation adopted the CIV Model Rules at that time, Ms. Wilson testified that the law societies, while taking the view that the federal regulations were unconstitutional, believed that regulation of lawyers to reduce the risk of money laundering and terrorist financing was undoubtedly part of their public interest mandate.[13]

In 2013, when the BC Code came into effect, it reiterated an existing rule 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."[14] As I discuss further in Chapter 28, this broad rule – in combination with specific anti–money laundering rules – is an important part of the Law Society's anti–money laundering regulation.

9 *Federation* at paras 14–19.

10 Evidence of F. Wilson, Transcript, November 16, 2020, pp 123–24.

11 Ibid, pp 124–127.

12 The Law Society adopted these Rules in 2008: Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, para 5.

13 Transcript, November 16, 2020, p 126.

14 *Code of Professional Conduct for British Columbia* [BC Code], Rule 3.2-7.

The litigation regarding the *PCMLTFA*'s provisions for lawyers lasted from 2009 to 2015. Ms. Wilson and Mr. Avison testified that, during that time, there was virtually no engagement between the federal government, the Federation, and individual law societies on anti–money laundering issues. Nor were any significant new anti–money laundering initiatives or model rules implemented by the Federation.[15] Mr. Avison described this as "lost time when the parties could have been working effectively together to develop collective approaches around how they could engage the issues more directly and more effectively."[16]

A Successful Constitutional Challenge

In a constitutional challenge that made its way to the Supreme Court of Canada, the Federation – along with the Law Society and other legal advocates – argued that the federal scheme violated solicitor-client privilege and threatened fundamental constitutional principles related to lawyers' duties to their clients. All three levels of court agreed that the scheme was unconstitutional.

It is important to keep in mind that, at the time of this constitutional challenge, the provisions relating to suspicious transaction and other reporting requirements no longer applied to lawyers, owing to the amendment to the *PCMLTFA* in 2006 (as noted above). The challenge therefore focused solely on the client identification and verification and search and seizure provisions.

Unreasonable Searches and Seizures

The Supreme Court of Canada held that parts of the proposed legislation authorizing FINTRAC to conduct searches of lawyers' offices and copy records violated section 8 of the *Canadian Charter of Rights and Freedoms*[17] (*Charter*) – the right to be free from unreasonable search and seizure.

The Court held that the "regime authorizes sweeping law office searches which inherently risk breaching solicitor-client privilege."[18] It emphasized that searches of law offices will be unreasonable unless they provide a "high level of protection for material subject to solicitor-client privilege."[19] The Court reiterated that this privilege "must remain as close to absolute as possible if it is to retain relevance."[20] On the whole, there was insufficient protection for solicitor-client privilege and a substantial risk that privilege would be lost.[21]

15 Evidence of F. Wilson, Transcript, November 16, 2020, p 127; Evidence of D. Avison, Transcript, November 18, 2020, p 31.

16 Transcript, November 18, 2020, pp 33–34.

17 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

18 *Federation* at para 35.

19 Ibid at para 36.

20 Ibid at para 44.

21 Ibid at paras 40, 48–52.

Despite the importance of the objectives of combatting money laundering and terrorist financing, the Court concluded that there were less drastic means of pursuing the same objectives. Therefore, the provisions applying to lawyers were found to be unconstitutional.[22]

Significantly, the Court did not firmly close the door on a scheme that included searches of lawyers' offices; it left open the possibility that Parliament could craft a constitutionally compliant scheme without the requirement of a warrant.[23] The Court added that different considerations would apply to professional regulatory schemes:

> The issues that would arise in the event of a challenge to professional regulatory schemes are not before us in this case. Different considerations would come into play in relation to regulatory audits of lawyers conducted on behalf of lawyers' professional governing bodies. The regulatory schemes in which the professional governing bodies operate in Canada serve a different purpose from the Act and Regulations and generally contain much stricter measures to protect solicitor-client privilege.[24]

Breach of Lawyers' Right to Liberty

In addition to authorizing unreasonable searches and seizures, the federal scheme was held to breach lawyers' right to liberty under section 7 of the *Charter*. This right was engaged because lawyers were liable to prosecution and imprisonment if they failed to comply with the scheme.[25]

The Court went so far as to recognize as a principle of fundamental justice that "the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes."[26] I pause here to note the significance of this holding. Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice* [emphasis added]." A "principle of fundamental justice" is therefore a constitutional concept. Principles of fundamental justice do not exist in the ether; to achieve constitutional status, they must be recognized by the courts. Once this recognition happens, the effect is significant: if a law affects someone's life, liberty, or security of the person and is inconsistent with a principle of fundamental justice, it will almost certainly be unconstitutional. The Supreme Court's holding therefore lends constitutional protection to the lawyer's duty of commitment to the client's cause.

The Court also noted that it was significant, though not determinative, that the federal scheme went beyond what the Federation and provincial law societies

22 Ibid at paras 59–63.

23 Ibid at para 56.

24 Ibid at para 68.

25 Ibid at paras 71, 110.

26 Ibid at para 84.

considered necessary for effective and ethical representation of clients.[27] Moreover, it concluded that clients would reasonably consider that lawyers were acting on behalf of the state in complying with the scheme and that privileged information could be disclosed without their consent.[28] The Court found this "would reduce confidence to an unacceptable degree in the lawyer's ability to provide committed representation."[29] The Court emphasized, however, that the duty of commitment "must not be confused with being the client's dupe or accomplice … [and] does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities."[30]

The Court concluded by noting that Parliament might be able to design a constitutionally compliant scheme, provided there were sufficient protections for solicitor-client privilege and meaningful immunity for clients if they were later prosecuted:

> [T]he scheme requires significant modification in order to comply with the requirements of the right to be free from unreasonable searches and seizures. Given that there are a number of ways in which the scheme could be made compliant with s. 8, I do not want to venture into speculation about how a modified scheme could appropriately respond to the requirements of s. 7. However, it seems to me that if, for example, the scheme were to provide the required constitutional protections for solicitor-client privilege as well as meaningful derivative use immunity of the required records for the purposes of prosecuting clients, it would be much harder to see how it would interfere with the lawyer's duty of commitment to the client's cause.
>
> The information gathering and record retention provisions of this scheme serve important public purposes. They help to ensure that lawyers take significant steps so that when they act as financial intermediaries, they are not assisting money laundering or terrorist financing. The scheme also serves the purpose of requiring lawyers to be able to demonstrate to the competent authorities that this is the case. *In order to pursue these objectives, Parliament is entitled, within proper limits which I have outlined, to impose obligations beyond those which the legal profession considers essential to effective and ethical representation*. Lawyers have a duty to give and clients are entitled to receive committed legal representation as well as to have their privileged communications with their lawyer protected. Clients are not, however, entitled to make unwitting accomplices of their lawyers let alone enlist them in the service of their unlawful ends. [Emphasis added.][31]

27 Ibid at paras 107–8. The Court recognized that professional ethical standards "cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation. But these ethical standards do provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires."

28 Ibid at para 109.

29 Ibid.

30 Ibid at para 93.

31 Ibid at paras 112–13.

Unfortunately, in the years following this invitation by the Supreme Court to revisit the *PCMLTFA*, many remained focused on how lawyers could be brought into that regime in a constitutionally compliant way to the exclusion of considering whether alternative measures, including law society regulation, could fill the gap resulting from lawyers' exclusion. This is not to say that revisiting the federal legislation is not desirable; my point is that there was insufficient focus during this period on what law societies were doing to address the fact that lawyers were not subject to the *PCMLTFA* regime.

Aftermath of the Decision

For some time following the *Federation* decision, it appeared that the federal government would attempt to legislate lawyers back into the *PCMLTFA* regime in a constitutionally compliant way.[32] By 2018, however, the Federation understood the government was abandoning this idea.[33] Since then, the Federation has not heard any indication of an intention to legislate lawyers back into the *PCMLTFA* regime. Ms. Wilson testified that she believes that the federal government "is not currently looking at regulating the legal profession" and has "embraced the opportunity to work with [the Federation] collaboratively."[34]

To understand this shift in the federal government's thinking, it is necessary to review some of the immediate aftermath of the Supreme Court's decision, in particular the measures taken by the Law Society and the Federation and the criticism levelled at Canada for its failure to bring lawyers into the *PCMLTFA* regime.

Actions by the Law Society and the Federation Following the *Federation* Decision

Following the *Federation* decision, three working groups focused on anti–money laundering were established involving the Federation, the Law Society, and the federal government. I review each in turn.

32 The 2015 national risk assessment noted that the federal government was "revisiting" the *PCMLTFA* provisions and "intends to bring forward new provisions for the legal profession that would be constitutionally compliant"; see Exhibit 192: Overview Report on the Regulation of Legal Professionals in British Columbia, Appendix N, Department of Finance, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada, 2015* (Ottawa: Department of Finance, 2015), p 32, footnote 31. This was also alluded to at a June 2016 meeting between federal officials and the FLSC: Exhibit 204, Federation of Law Societies of Canada – Memorandum from Frederica Wilson to CEO, Re FATF Mutual Evaluation Report – September 21, 2016, para 11; Evidence of F. Wilson, Transcript, November 16, 2020, pp 174–75.

33 See Exhibit 205, FLSC – Memorandum from Richard Scott to Federation Council Law Society Presidents and CEOs, Re Anti–Money Laundering and Terrorist Financing – Engagement with the Department of Finance, July 30, 2018, paras 6–8.

34 Transcript, November 16, 2020, pp 185–86.

The FLSC Anti–Money Laundering Working Group

A key step by the Federation following the *Federation* decision was the creation of the FLSC Anti–Money Laundering and Terrorist Financing Working Group. The working group is made up of senior staff from law societies across Canada, including two from British Columbia. It was created with a mandate to "undertake a review of the Model No Cash and Client Identification and Verification Rules and to consider issues related to their enforcement."[35] It was approved by the Federation's Council in 2016 and formed in 2017.[36]

From October 2017 to March 2018, the working group held consultation on several proposed amendments to the Federation's Model Rules – namely, the cash transaction and client identification and verification rules – and the introduction of a trust account model rule. This review of the Rules led to updates to the Model Rules for cash transactions, client identification and verification, and trust regulation in 2018.[37] Corresponding updates to the Law Society's Rules were made between July 2019 and January 2020.[38] I discuss specific results from this review in Chapter 28.

To complete this review, the working group divided into two subgroups: one focused on the review of the Rules, and the other focused on compliance and enforcement.[39]

The rules subgroup discussed experiences with the Rules; examined federal regulations and amendments; looked at the Financial Action Task Force's mutual evaluation report;[40] and considered guidance from the task force, the International Bar Association, and others. Ms. Wilson described the working group's approach to the Rules review as follows:

> The other thing to note is that we took the position at the outset that the goal was to assess whether or not the rules were as effective and robust as they should be to manage the risks that they were intended to address. So nothing was off the table … [S]ometimes when you are looking at regulations you're really only looking at has anything changed, do we need to tweak here and there. We stood right back from both rules, and we had an early conversation in that regard about risk-based approaches and whether we should be stepping completely back and looking at a different approach. There were lots of reasons why we didn't do that at the time, but that's still very much on the table.[41]

35 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix D, FLSC Anti–Money Laundering Working Group, Terms of Reference, para 1. See also Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), pp 5–6.

36 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 5.

37 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, paras 16–19.

38 Ibid, para 8.

39 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), pp 6–7.

40 See **Chapter 6** for an explanation of the mutual evaluation regime.

41 Transcript, November 17, 2020 (Session 1), p 13.

Meanwhile, the enforcement subgroup conducted a survey of law societies to understand the tools they had for monitoring compliance and enforcing the rules.[42] This survey was in response to an issue that arose during the 2016 mutual evaluation conducted by the Financial Action Task Force,[43] when the Federation did not have statistics available to address some of the evaluators' questions.[44] I suspect this lack of data may have contributed to the evaluators' failure to fully appreciate the efforts already being undertaken by law societies and to their perception that lawyers are not regulated for anti–money laundering purposes. As a contemporary internal memo explained:

> The Federation representatives provided the assessors with information on the law society rules and regulations in place across Canada. Using the material put before the courts in the Federation's case against the federal government, they also gave a general outline of the range of methods used by law societies to monitor compliance by members of the legal profession. The FATF assessors asked a number of questions about enforcement, including whether law societies take account of the relative risks that may be posed in different contexts. *The assessors also enquired about statistics on enforcement, prosecutions and sanctions. They were informed that we do not currently collect such statistics*. [Emphasis added.][45]

Ms. Wilson explained that the difficulty in collecting specific anti–money laundering statistics as follows:

> One of the challenges in terms of getting information on enforcement and it remains a challenge today and something that we're quite focused on at the moment is that [the Model] Rules find their expression in law society rules in different ways. Some of them are part of the accounting rules. Some are part of the general rules and regulations of [the] law society. And how a particular matter is referred for investigation or how it's referred to prosecution does not necessarily reference anything to do with anti–money laundering rules.
>
> So you may find, for example, that somebody is cited for a breach of the trust accounting rules. It doesn't tell you, without digging further, exactly what was behind it. That's something that existed at the time of this evaluation, something that we are still working … with the law societies to get to a place where we can produce more specific data that looks more specifically at … this suite of rules that are relevant to the anti–money laundering efforts.[46]

42 Ibid, p 7.

43 Exhibit 4, Overview Report: Financial Action Task Force, Appendix N, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures – Canada, Fourth Round Mutual Evaluation Report* (Paris: FATF, 2016).

44 Evidence of F. Wilson, Transcript, November 16, 2020, p 157.

45 Exhibit 203, Memorandum from Federation Executive to Council of the Federation & Law Society Presidents & CEOs Re Anti–Money Laundering and Terrorist Financing Issues, December 3, 2015, para 5.

46 Transcript, November 16, 2020, pp 153–54.

The enforcement subgroup's study showed that all law societies except one had comprehensive spot audit programs in place, which were supplemented by risk-based audits. It also showed that some law societies were starting to use data analytics, which is now a more entrenched practice.[47]

The survey also revealed discrepancies in the treatment of breaches of the cash transaction rule. For example, some law societies would refer all breaches for investigation, while others exercised some discretion as to whether to refer the matter for investigation or adopt a remedial approach.[48]

Ms. Wilson described the study as an illustration of the "difficulty in extracting consistent and comparable data across the law societies because of the way that they classify investigations and disciplinary matters."[49] Moreover, because of similar challenges, the study did not collect statistical data about the numbers of investigations, breaches, and the like. Ms. Wilson testified that the Federation is working with law societies to develop more consistent ways of recording data.[50]

This study is a good first step toward gathering consistent and useful data about law society practices across Canada. I consider it very important for the law societies and the Federation to strive for more consistent and effective data collection, particularly given the lack of evidence on the involvement of lawyers in money laundering (see Chapter 26).

Recommendation 53: I recommend that the Law Society of British Columbia work with the Federation of Law Societies of Canada to develop uniform metrics to track, at a minimum:

- the nature and frequency of breaches of rules that are relevant to anti–money laundering regulation;
- the number of breaches that are referred for investigation or into a remedial stream;
- the outcome of the referrals, including the nature and frequency of sanctions that are imposed;
- the rules, policies, and processes law societies have regarding information sharing with and referrals to law enforcement;
- the frequency, nature, and circumstances of the information sharing or referrals, including whether this includes sharing of non-public or compelled information and the stage of a proceeding or investigation at which occurs; and
- the use of data analytics by law societies.

47 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), pp 6–7.

48 Ibid, pp 7–8.

49 Ibid, p 8.

50 Ibid, pp 9–11.

The working group is currently undergoing a second review of the Model Rules. I discuss that review in Chapter 28.

Aside from this review, the working group also conducts other anti–money laundering-related activities, such as issuing "risk advisories" to the profession.[51] I review one of these risk advisories relating to private lending and litigation in Chapter 26. In my view, these risk advisories are very useful, particularly as they can address new and evolving money laundering risks. I encourage the working group and the Law Society to continue issuing such advisories to their members.

The Law Society's Anti–Money Laundering Working Group

The Law Society has also developed an anti–money laundering working group that "monitors and advises the Benchers on key matters relating to the state of anti–money laundering strategies and initiatives in British Columbia."[52] The working group also ensures continuing liaison between the Benchers and the provincial government on money laundering; monitors and advises the Benchers on the Federation's work on anti–money laundering issues; liaises with various committees at the Law Society; develops and recommends model anti–money laundering policies; and works with the Law Society's Communications Department.[53]

The Law Society also provided the Commission with its strategic and operational anti–money laundering plans.[54] The strategic plan highlights areas of priority where the society should direct its anti–money laundering efforts.[55] The operational plan "provides details of specific anti–money laundering initiatives, status, timelines and next steps."[56]

The FLSC–Canada Working Group

A third development following the *Federation* decision was the creation of the FLSC–Government of Canada Working Group on Money Laundering and Terrorist Financing. The working group's mandate is "to explore issues related to money laundering and terrorist financing in the legal profession and to strengthen information sharing between the law societies and the Government of Canada."[57]

51 See, e.g., Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix J, FLSC Anti–Money Laundering Working Group, *Risk Advisories for the Legal Profession: Advisories to Address the Risks of Money Laundering and Terrorist Financing*.

52 Exhibit 222, Law Society of British Columbia, *Introduction to the Law Society*, para 22. For example, it advises the Benchers on actions the Law Society is taking in terms of anti–money laundering initiatives, money laundering trends in British Columbia and other provinces, the progress of this Commission, and the nature and adequacy of Law Society resources being dedicated to anti–money laundering.

53 Ibid.

54 Ibid, Appendices B and C.

55 Ibid, para 23.

56 Ibid. See also Evidence of D. Avison, Transcript, November 18, 2020, pp 27–28.

57 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix L, FLSC–Canada Working Group, Terms of Reference.

A presentation prepared for the Commission by the federal Department of Finance explains the rationale for the working group's creation:

- The legal profession presents a high money laundering and terrorist financing risk.
- The *Federation* decision left the regulation of lawyers' conduct to law societies, which can play an important role in mitigating those risks.
- The group aims to share information and explore ways of addressing the inherent risks of money laundering and other illicit activity that can arise in the practice of law.[58]

The working group has various objectives set out in its terms of reference. These relate in broad strokes to strengthening communication between law societies and the federal government; sharing information about money laundering risks; discussing improvements to existing systems; and developing new practices.[59]

The working group is co-chaired by the Federation and the Department of Finance. Its standing members include representatives from Justice Canada, the Department of Finance, and law societies. It also invites representatives from other departments (such as the RCMP, FINTRAC, and the Canada Revenue Agency) to attend on an ad hoc basis.[60]

The working group was created in June 2019 following a special ministerial meeting on money laundering in Vancouver and had met three times as of the Commission's hearings.[61] Mr. Ngo testified that these meetings focused on information sharing and best practices, with FINTRAC, various law societies, and the Department of Finance making presentations.[62] He stated that a key takeaway from the Law Society's presentation centred on its significant regulatory powers and ability to refer cases to law enforcement.[63]

Ms. Wilson testified that the Federation has plans for subsequent meetings of the working group. For example, it plans to update the group on its continued review of the Model Rules and to introduce some new guidance documents. It also aims to present a new online educational tool about the risks of money laundering in the practice of law.[64]

Although it took several years for this working group to be established following the *Federation* decision, I consider it an important step. I encourage the Law Society, the Federation, and the federal government to make full use of this forum to share best practices, engage in meaningful information sharing, and assist one another in identifying evolving money laundering risks in the legal sector.

58 Exhibit 198, Overview of the Federation of Law Societies of Canada and the Government of Canada Working Group on Money Laundering and Terrorist Financing: Presentation by the Department of Finance Canada, October 2020, slide 3.

59 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix L, FLSC–Canada Working Group, Terms of Reference, p 1.

60 Evidence of G. Ngo, November 16, 2020, pp 16–17.

61 Ibid, pp 17–18.

62 Ibid, pp 18–19.

63 Ibid, pp 25–26.

64 Transcript, November 17, 2020 (Session 1), pp 70–73.

Critiques of Canada's Anti–Money Laundering Regime

In Chapter 6, I describe Canada's fourth mutual evaluation[65] conducted by the Financial Action Task Force in 2016, about a year after the *Federation* decision. The report was highly critical of a perceived gap in the anti–money laundering framework with respect to lawyers. It concluded:

> The legal profession is not currently subject to AML/CFT [anti–money laundering / combatting the financing of terrorism] supervision due to a successful constitutional challenge that makes the PCMLTFA inoperative in respect of legal counsels, legal firms, and Quebec notaries. There is therefore no incentive for the profession to apply AML/CFT measures and participate in the detection of potential [money laundering / terrorist financing] activities. The exclusion of the legal profession from AML/CFT supervision is a significant concern considering the high-risk rating of the sector and its involvement in other high-risk areas such as the real estate transactions as well as company and trust formation. This exclusion also has a negative impact on the effectiveness of the supervisory regime as a whole because it creates an imbalance amongst the various sectors, especially for [reporting entities] that perform similar functions to lawyers.[66]

Elsewhere, the report described the fact that lawyers are not subject to the *PCMLTFA* regime as a "significant loophole" in Canada's anti–money laundering framework,[67] a "significant concern,"[68] and a "serious impediment" to Canada's efforts to fight money laundering.[69] A "priority action" was to "[e]nsure that legal counsels, legal firms, and Quebec notaries engaged in the activities listed in the standard are subject to AML/CFT obligations and supervision."[70] The report was also critical of the Federation, which had participated in the evaluation process on behalf of Canadian law societies:[71]

> [T]he Federation of Law Societies, although aware of the findings of the [2015 national risk assessment], did not demonstrate a proper understanding of [money laundering / terrorist financing] risks of the legal profession. In particular, they appeared overly confident that the mitigation measures adopted by provincial and territorial law societies (i.e. the prohibition of conducting large cash transactions and the identification and record-keeping requirements for certain financial transactions performed on behalf of the clients) mitigate the risks. While monitoring measures are applied by the provincial and territorial law societies, they are limited in

65 Exhibit 4, Overview Report: Financial Action Task Force, Appendix N, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures – Canada, Fourth Round Mutual Evaluation Report* (Paris: FATF, 2016).

66 Ibid, p 95.

67 Ibid, p 3.

68 Ibid, p 4.

69 Ibid, p 7.

70 Ibid, p 9.

71 Evidence of F. Wilson, Transcript, November 16, 2020, pp 146–47.

> scope and vary from one province to the other. The on-site visit interviews suggested that the fact that [anti–money laundering / counter-terrorist financing] requirements do not extend to legal counsels, legal firms and Quebec notaries also undermines, to some extent, the commitment of [reporting entities] performing related functions (i.e. real estate agents and accountants).[72]

In October 2021, the Financial Action Task Force conducted its first regular follow-up report and technical compliance re-rating of Canada since the 2016 mutual evaluation.[73] Although Canada's ratings improved in several categories, the follow-up report indicates that the continued non-inclusion of legal professionals "affects the overall outcome."[74]

While the 2016 mutual evaluation is arguably the most significant critique of Canada's regime following the Supreme Court's decision, other commentators have shared the concern that a gap exists in Canada's anti–money laundering framework.

In *Dirty Money 2*, Dr. Peter German notes that lawyers are "at high risk of being targeted by money launderers" given their exemption from reporting and the inherent risks in their work.[75] In Dr. German's view, the lack of financial reporting by lawyers makes Canada an "outlier" compared to other common law jurisdictions that have found workarounds to address issues such as privilege.[76] Professors Maureen Maloney, Tsur Somerville, and Brigitte Unger similarly note that, despite the Law Society's regulation of lawyers, "legal professionals will still not have a positive obligation to report suspicious transactions to anyone."[77]

Finally, in testimony before me, Mr. Wallace expressed the view that non-reporting by lawyers constitutes a gap in the intelligence FINTRAC receives.[78] He described this gap as an advantage for someone looking to launder funds in the sense that, unlike countries where lawyers are required to report suspicious transactions, FINTRAC does not have "a line of sight into transactions conducted by lawyers on behalf of clients."[79]

In my view, the above critiques blend two related, but distinct, issues. The first is the perception that lawyers are not subject to anti–money laundering regulation and that there is therefore no incentive for lawyers and law firms to adopt anti–money

72 Exhibit 192, Overview Report on the Regulation of Legal Professionals in British Columbia, Appendix M, *FATF Canada Report 2016*, p 81.

73 Exhibit 1061, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Canada, 1st Regular Follow-up Report & Technical Compliance Re-Rating* (October 2021).

74 Ibid, p 3.

75 Peter M. German and Peter German & Associates Inc., *Dirty Money, Part 2: Turning the Tide – An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing*, March 31, 2019 [*Dirty Money 2*], p 121.

76 Ibid, p 124.

77 Maureen Maloney, Tsur Somerville, and Brigitte Unger, "Combatting Money Laundering in BC Real Estate," Expert Panel, March 31, 2019 [Maloney Report], p 84.

78 Transcript, November 16, 2020, p 13.

79 Ibid, p 14.

laundering measures. I respectfully disagree with these views, given the significant anti–money laundering regulation undertaken by the Law Society. The second is the concern that non-reporting by lawyers to FINTRAC or another body creates an intelligence gap. I share this concern. I deal with these two issues in turn.

First, critiques to the effect that lawyers are not subject to anti–money laundering regulation and have no incentive to adopt preventive measures are not accurate. These criticisms appear to assume that, because lawyers are not subject to the *PCMLTFA* regime, they are not regulated for anti–money laundering purposes. This is simply not the case.

As I elaborate in Chapter 28, the Law Society has implemented a number of anti–money laundering rules aimed at preventing lawyers from being involved in money laundering. These include the cash transactions rule and client identification and verification rules, which parallel, and in some ways go further than, similar rules under the *PCMLTFA*. They also include extensive trust-accounting rules intended to prevent and detect the misuse of trust accounts. This trust regulation includes periodic, mandatory audits of law firm trust accounts. The Law Society's ability to investigate lawyers, to view all aspects of a lawyer's practice (including confidential and privileged information), and to impose sanctions – up to and including disbarment – provide a strong incentive to comply with these rules. For these reasons, I disagree with the argument that lawyers are not subject to anti–money laundering regulation and have no incentive to comply.

Relatedly, I find that the criticism of the Federation (and, by implication, the Law Society) to the effect it does not understand the money laundering risks facing the legal profession unfair. The evidence before me demonstrates that the Law Society and the Federation have worked to gain a strong understanding of the money laundering risks in this sector and have implemented measures focused on anti–money laundering since at least 2004. They also continue to revisit their anti–money laundering rules to address new and evolving risks. While there is always room for improvement in every sector – including the legal profession – it is not accurate to say the Federation and the Law Society do not understand the risks faced by their members. I return to the measures in place by the Law Society and the Federation in Chapter 28.

The analysis and critiques in the Financial Action Task Force's 2016 mutual evaluation seem to employ a standard that adheres rigidly to the model of reporting to a country's financial intelligence unit (in this country, FINTRAC). Such reporting is indeed an important part of anti–money laundering efforts; however, it is by no means the only solution that can be effective. (And, indeed, to the extent that reporting to FINTRAC has proven ineffective at addressing money laundering activity, there may be sound reasons that it should not be seen as a silver bullet solution.) A regime in which lawyers reported to FINTRAC would, if properly and constitutionally implemented, resolve an inequity in relation to other sectors of activity. But such reporting on its own would not seem to offer a comprehensive solution. In my view, the existence of a robust regulatory model seems to be a more important and effective aspect of anti–money laundering regulation in the legal sector.

I turn now to the second criticism: the concern that FINTRAC lacks a lens into the suspicious activities of lawyers and their clients. I agree that such a gap exists. In Chapter 26, I discuss a study conducted by FINTRAC that attempted to analyze lawyer involvement in money laundering based on reports from other reporting entities and disclosures from FINTRAC to law enforcement. Mr. Wallace testified that, in the absence of reporting by lawyers themselves, the study was unable to come to any conclusions about the nature of lawyer involvement in money laundering. He further testified that FINTRAC generally lacks a lens into activities in the legal sector.[80] The absence of lawyers from the regime means that Canada's financial intelligence unit lacks information about the legal sector. Further, law enforcement will, in some cases, be compromised in its ability to trace funds or "follow the money" when it passes through a lawyer's trust account.

The lack of lawyer reporting also means that lawyers may unwittingly be involved in illegitimate transactions. Whereas a single transaction may, in the absence of further context, appear legitimate to a lawyer, law enforcement or an entity such as FINTRAC may be able to piece together that transaction with other intelligence to determine that it is part of a series of transactions that are, collectively, suspicious (or that the context and intelligence surrounding a transaction change its character).

I am also concerned that the lack of reporting to FINTRAC by lawyers and the very public criticisms of this gap may lead prospective money launderers to perceive this jurisdiction as a "safer" one in which to move or hold their illicit proceeds. As I discuss further in Chapter 28, lawyers in British Columbia are subject to significant anti–money laundering regulation, and there are methods by which information about suspicious transactions can be communicated to or pursued by law enforcement. To dispel the myth that the lack of reporting by lawyers to FINTRAC has created a safe haven for money launderers, it is important that information about regulation, detection, and enforcement avenues be communicated publicly.

Whether lawyers should be required to report suspicious activity to FINTRAC, the Law Society, or some other body is, however, a highly complex issue. As I discuss further below, lawyers have constitutional duties to protect privileged information and to be committed to their clients' causes. Unfortunately, these important duties pose significant difficulties when contemplating a reporting regime by lawyers.

I do not express an opinion as to whether the federal government could bring lawyers into the *PCMLTFA* regime in a constitutionally compliant way. This Report is not the proper forum to do so, since any proposed legislation would need to be put before a court, with submissions from affected parties and a ruling by the judge. However, it has been suggested that the Province of British Columbia should design its own reporting regime for lawyers, which is a policy question properly before me. In my opinion, the difficulties that would be involved in designing such a regime are so great that the Province should not attempt to do so. Indeed, it is apparent that, despite the Supreme Court of Canada leaving open the possibility of some incorporation of lawyers into

80 Transcript, November 16, 2020, pp 61–63.

the *PCMLTFA* regime, the federal government has not found a way to do so and does not appear to have any plans to attempt to do so in the foreseeable future. Further, for British Columbia to legislate a reporting regime for lawyers without parallel regimes in other provinces would lead to inequality of reporting among provinces and would clearly be less desirable than a reporting regime that applied across Canada.

In what follows, I expand on the difficulties inherent in designing a provincial reporting regime for lawyers. Then, in Chapter 28, I outline what I consider to be a more attainable and effective method of regulating lawyers in British Columbia for anti–money laundering purposes.

Calls for a Provincial Reporting Regime for Lawyers

The concept of a provincial reporting regime for lawyers was suggested in the reports of both Dr. German and Professors Maloney, Somerville, and Unger.

In *Dirty Money 2*, Dr. German suggested that lawyers might report to a separate body administered by law societies or the Federation, or that a "blind" could be established that would allow for transmitting financial data without violating solicitor-client privilege.[81] This recommendation was grounded in his conclusion that there is "no blanket privilege that shields all such records from disclosure" and that British Columbia case law "recognizes that information relating to financial transactions in trust account records will in general not be privileged."[82]

Professors Maloney, Somerville, and Unger similarly recommended that lawyers be required to report suspicious activity to their law societies. They suggest that limitations could be placed on the Law Society's ability to use that information in investigations:

> Where a lawyer properly reports a suspicious transaction and withdraws from representing the client, as required by law society rules, the law society would not be able to take action or share the information. But where the suspicious transaction report (STR) provides reasonable grounds to investigate another lawyer who did not report or withdraw, it could become clear that solicitor-client privilege does not apply, in which case there could be further investigation and information sharing by the law society. If implemented, law societies should be required to report statistical information about STRs to FINTRAC, to combine with information about STRs submitted by reporting entities.[83]

The French model of lawyer reporting arguably provides support for these proposals. As Professor Levi explained, the French system involves reporting to a third party called the *bâtonnier*, who assesses issues of privilege before forwarding reports to the financial intelligence unit.[84]

81 *Dirty Money 2*, pp 160–61.

82 Ibid, pp 141–44.

83 Maloney Report, p 84.

84 Transcript, November 20, 2020, pp 38–40.

With respect, I am not persuaded by the proposal by Professors Maloney, Somerville, and Unger. As I understand it, the aim would be to potentially identify situations in which a lawyer or an individual (other than the reporting lawyer or the lawyer's client) was engaged in suspicious activity in situations where no solicitor-client privilege attached. It is not clear to me how often such reporting would produce intelligence that the Law Society could use, nor am I confident that the lawyer would be able to report such information in a way that does not breach solicitor-client privilege or the duty of confidentiality. Further, the proposal may be seen as countenancing the lawyer's ability to engage in a suspicious transaction so long as the suspicions are reported, contrary to ethical and professional obligations. In this regard, I agree with the concerns raised by Ms. Wilson:

> I'm going to be candid and tell you that I have really struggled to understand what [this proposal] would accomplish. So, as I understand the proposal … lawyers would, if there was a suspicious transaction, report that suspicious transaction to the law society and then withdraw. So what is not clear is whether the lawyer is going to conduct the transaction or not under that proposal, and if the idea is that they could conduct the transaction, we say that is absolutely antithetical to the role of lawyers in our society and to the duty they owe to the administration of justice. It 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. So perhaps that is not what is suggested. Perhaps upon further examination we would see the idea is … they wouldn't engage in the transaction, so the transaction doesn't happen as far as that lawyer is concerned. They report their suspicions to the law society, which, according to the recommendation, the law society then does nothing with. They don't do anything with it with regards to that lawyer … But perhaps if there is information about another lawyer they could … investigate and go to the law enforcement. There are a lot of things that are assumed in that recommendation. The assumption is that there is another lawyer and they haven't reported and they haven't got off the record, [and so] they are inevitably as a result involved in the commission of assistance with or facilitation of a criminal act or something illegal. That's not evident … We don't know that without investigation. It may very well be that upon further investigation we discover that that lawyer just isn't as far along in the process. They are perhaps further down the chain in the transaction. They haven't done anything yet and they are still trying to figure out what is going on trying to do their risk assessment.[85]

Meanwhile, Dr. German's proposal focuses on reporting of purely financial data, which he concludes is not covered by a blanket privilege. On its face, this proposal has a certain appeal. However, with respect, it seems me that the issue of trust accounts and privilege is not as straightforward as Dr. German sets out. Further, the duty of commitment to the client's cause would seem to pose significant difficulties in this regard, whether or not the privilege issues could be resolved.

85 Transcript, November 17, 2020 (Session 1), pp 77–79.

Solicitor-Client Privilege

There is extensive Supreme Court of Canada case law on solicitor-client privilege, which is itself a principle of fundamental justice.[86] There are various rationales for it, including that the law is complicated and cannot be realistically navigated without a lawyer's expert advice; that lawyers must know all the facts of their client's case to give accurate and useful advice; and that clients will not divulge everything without an assurance of confidentiality.[87] The Supreme Court has stated that, as a general rule, all privileged information is immune from disclosure, and all communications between a lawyer and client are presumed to be confidential.[88]

Clients reasonably expect that all documents held by their lawyer will remain private, an expectation that is "invariably high" when the information is privileged, regardless of the circumstances of the legal advice.[89] Importantly, privilege belongs to the client, not the lawyer. This means that only the client may waive it; the lawyer is the "gatekeeper, ethically bound to protect the privileged information."[90]

As I outline in Chapter 25, some narrow exceptions to privilege have been recognized, namely the crime exception, the innocence at stake exception, and the future harm / public safety exception. However, in recognition of the principle that privilege must remain "as close to absolute as possible to ensure public confidence and retain relevance," these exceptions have been strictly defined.[91]

If the state seeks to narrow the scope of privilege, a court will consider whether the limitation is "absolutely necessary." This test is "as restrictive a test as may be formulated short of an absolute prohibition in every case."[92] It has led to stringent requirements when law enforcement seeks to search a lawyer's office.[93] Legislation has also been found unconstitutional where the information sought could have been obtained from another source, showing that resort to the lawyer was not "absolutely necessary."[94]

In a series of cases in which the Supreme Court has found legislation unconstitutional for interfering with privilege, some common constitutional defects have emerged. In general, notice must be given to the client that privilege may be

86 *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61 [*Lavallee*] at para 49; *Chambre* at para 28.

87 *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*] at para 9; *R v McClure*, 2001 SCC 14 [*McClure*] at para 2.

88 *Chambre* at para 32; *Blood Tribe* at para 16; *Foster Wheeler Power Co v SIGED*, 2004 SCC 18 [*Foster Wheeler*] at para 42.

89 *Federation* at para 38; *Lavallee* at para 35.

90 *Lavallee* at para 24. See also *Chambre* at para 45; *Blood Tribe* at para 9; *Federation* at para 48.

91 *McClure* at para 35; *Blood Tribe* at para 10; *Smith v Jones*, [1999] 1 SCR 455 at para 86; *Chambre* at para 38.

92 *Chambre* at paras 38, 82; *Lavallee* at paras 36–37; *McClure* at para 35; *R v Brown*, 2002 SCC 32 at para 27; *Goodis v Ontario (Correctional Services)*, 2006 SCC 31 [*Goodis*] at paras 15, 20.

93 *Lavallee* at para 49; *Federation* at para 53. Principles with respect to searches include that no warrant can be issued with respect to documents known to be privileged; there must be no reasonable alternative to a search; and documents must be immediately sealed and an opportunity given for privilege to be claimed.

94 See, e.g., *Blood Tribe* at paras 17, 32–34; *Chambre* at para 59.

threatened. Since privilege belongs to the client, it is insufficient to notify the lawyer and assume the lawyer will protect it.[95] Similarly, legislation that does not allow a judge to determine privilege issues in the absence of a specific assertion of privilege has also been found unconstitutional.[96] Finally, a failure to limit the future use of privileged information can lead to an unacceptable risk that it could be used in other circumstances that are not absolutely necessary.[97]

It can readily be seen that protections for solicitor-client privilege in Canadian law are very strong. Again, the Supreme Court has repeatedly affirmed that solicitor-client privilege must remain "as close to absolute as possible." In the context of the *PCMLTFA* specifically, the Supreme Court held that the *risk* of privileged information being disclosed during a search by FINTRAC was unacceptable:

> The *Lavallee* analysis does not assume, of course, that all records found in the possession of a lawyer are subject to privilege and I do not approach this case on the basis that all the materials that lawyers are required to obtain and retain by the Act are privileged. The *Lavallee* standard aims to prevent the significant risk that some privileged material will be among the records in a lawyer's office examined and seized pursuant to a search warrant. Similarly, in this case, *there is a significant risk that at least some privileged material will be found among the documents* that are the subject of the search powers in the Act. [Emphasis added.][98]

Any reporting obligation would therefore need to be very narrowly tailored to avoid even the risk of privileged information being disclosed or, at least, would require an arbiter to determine privilege issues before information gets passed on to law enforcement. This point brings me to Dr. German's proposal to require reporting of non-privileged financial data to the Law Society, the Federation, or some other body. He arrived at this proposal following an analysis of British Columbia case law that he interpreted as establishing that trust account records are generally not privileged. This conclusion is worth exploring in some detail.

Trust Accounts and Privilege

Dr. German's analysis relies on various BC cases. I focus my analysis on *Donell* and *Luu*,[99] two leading decisions of this province's Court of Appeal.

In *Donell*, the British Columbia Court of Appeal considered whether solicitor-client privilege attached to a lawyer's trust account ledgers. The court stated that the "general rule" is that privilege attaches to "communications for the purpose of obtaining legal

95 *Lavallee* at paras 39–42; *Federation* at paras 48–50; *Chambre* at paras 6, 46, 51–54.

96 *Lavallee* at para 43; *Federation* at paras 47, 51–52; *Chambre* at paras 78–79.

97 *Chambre* at para 87.

98 *Federation* at para 42.

99 *Donell v GJB Enterprises*, 2012 BCCA 135 [*Donell*]; *Wong v Luu*, 2015 BCCA 159 [*Luu*].

advice." It then referred to the "distinction between communications, which are privileged, and facts, which are not."[100] In this regard, it referred to a 1983 decision of the Ontario Divisional Court, *Greymac*,[101] which held:

> *Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications*. Oral evidence regarding such matters, and the solicitor's books of account and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material. [Emphasis added.]

The British Columbia Court of Appeal noted that *Greymac* had been cited with approval by the Supreme Court of Canada in its 2003 *Maranda* decision.[102] The latter case held that a lawyer's legal bills are presumed to be privileged.

Although *Maranda* had rejected a firm fact / communication distinction when considering whether privilege attached to a lawyer's bill,[103] the Court of Appeal concluded that *Maranda* had not abolished the distinction between facts and communications in general.[104] The Court of Appeal held that a lawyer's trust account ledgers were not presumptively privileged in the same way as a lawyer's bill of account. In the court's view, trust ledgers "[g]enerally … record facts, not communications, and are not subject to solicitor-client privilege."[105] However, such records should not automatically be produced; a court would have to "ensure that entries on a trust ledger do not contain information that is ancillary to the provision of legal advice."[106]

A few years later, in *Luu*, the British Columbia Court of Appeal affirmed *Donell*, noting that, whereas a lawyer's *bills* are ordinarily descriptive and may divulge a client's instructions, this is not the case with trust account ledgers:

> The privilege extends to administrative facts tending to reveal the nature or extent of legal assistance sought and received. However, there is good reason not to extend the presumed privilege to the trust ledger. The entries in a trust account record the possession of and movement of funds which the client may be compelled to disclose. Insofar as the entries record the payment of funds to parties who do not owe a duty of confidence to the client, the client cannot have expected the fact of payment to remain confidential as between himself and his counsel.[107]

100 *Donell* at para 35.

101 *Ontario Securities Commission and Greymac Credit Corp*, 1983 CanLII 1894 (Ont Div Ct) [*Greymac*].

102 *Maranda v Richer*, 2003 SCC 67 [*Maranda*].

103 Ibid at paras 30–33.

104 *Donell* at para 49.

105 Ibid at para 51.

106 Ibid.

107 *Luu* at paras 38–39.

The above cases lend some support to Dr. German's conclusion that trust account records are not presumptively privileged. However, it is not clear whether they continue to be valid in light of two 2016 decisions of the Supreme Court of Canada: *Chambre* and *Thompson*.[108]

Chambre and *Thompson* dealt with provisions of the *Income Tax Act* that allowed the Canada Revenue Agency to obtain "accounting records" of lawyers and Quebec notaries. The *Income Tax Act* defined solicitor-client privilege to specifically exclude "accounting records of a lawyer" from its ambit but did not define an "accounting record."

The Supreme Court held that the scheme was unconstitutional for several reasons relating to the process of obtaining "accounting records" from lawyers and Quebec notaries. It further held that the definition of solicitor-client privilege was itself unconstitutional.

In *Chambre*, the Court addressed the fact / communication distinction as follows:

> [I]t is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy[109] and facts that are not so protected … The line between facts and communications may be difficult to draw … The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication"
>
> …
>
> It follows that we must reject the argument … that some information, particularly information found in accounting records, constitutes facts rather than communications and is therefore always excluded from the protection of solicitor-client privilege as defined in s. 232(1) of the [*Income Tax Act*].[110]

In *Thompson*, it appeared to reject the distinction in even stronger terms:

> [T]his Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege … While it is true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary.[111]

The Court further explained that "even where accounting information includes no description of work, it may in itself, if disclosed, reveal confidential and privileged information."[112] The focus should not be on the *type* of document but, rather, its content:

108 *Chambre; Canada (National Revenue) v Thompson*, 2016 SCC 21 [*Thompson*].

109 Professional secrecy is the civil law equivalent of solicitor-client privilege. In *Chambre*, the Supreme Court explained that there are "strong similarities" between the two concepts and that cases nationwide with respect to these duties have been consistent: *Chambre* at para 42.

110 *Chambre* at paras 40, 42.

111 *Thompson* at para 19.

112 *Chambre* at para 72.

> Whether a document or the information it contains is privileged depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her notary or lawyer. If lawyers' fees can reveal privileged information, it is difficult to see why this could not also be the case for accounting records. Such records will not always contain privileged information, of course, but the fact remains that they may contain some, so their disclosure could involve a breach of professional secrecy. This is sufficient for the purpose of our analysis.[113]

The Court also noted that accounting records could contain clients' names (which can in themselves be privileged in some situations[114]), as well as a description of the mandate, particulars about work performed, and other information that could reveal aspects of litigation strategy.[115] On the whole, the "outright exclusion" of accounting records from the definition of privilege was problematic, particularly because the term "accounting record" was not defined and could be open to multiple interpretations.[116] The Court also found that the term could prove to be overly broad and allow the Canada Revenue Agency to obtain a far wider range of documents than was absolutely necessary to achieve its objectives.[117]

As the above discussion demonstrates, the law with respect to trust account records and privilege is complex, and it is not clear how the approaches by the British Columbia Court of Appeal and the Supreme Court of Canada intersect. Given these uncertainties, it would, in my view, be risky to develop a reporting regime for lawyers based on the law articulated in the decisions of the Court of Appeal. It seems to me that a reporting regime in which lawyers were required to report trust account transactions as a matter of course would likely require, at the very least, some kind of arbiter to determine whether a given record includes privileged information. Dr. German suggests that the Law Society, the Federation, or some other body could play that role. Although this proposal is certainly a possibility, it raises a number of significant difficulties.

First, the determination of whether a record contains privileged information will not always be straightforward. As the above cases reveal, the question of whether a particular record is privileged may, in some cases, require resolution by a court. This means that any privilege arbiter other than a court may not be able to resolve the issue personally. This raises the question of whether recourse to a court would need to be available, thereby unduly complicating the reporting scheme.

Second, as noted above, the Supreme Court has held that it is not sufficient to rely on a lawyer to protect a client's privileged information.[118] Legislative schemes have been

113 Ibid at para 73.

114 *Federation* at para 55.

115 *Chambre* at para 74.

116 Ibid at paras 75–76.

117 Ibid at para 84.

118 *Chambre* at paras 6, 48–57; *Lavallee* at paras 39–40.

struck down where there was no mechanism by which the client could be informed of a potential loss of privilege.[119] Informing the client about suspicions would likely defeat the purpose of a reporting regime. Although the Supreme Court has noted that it might be sufficient to inform a member of the Law Society rather than the client of a potential loss of privilege "where it would not be feasible to notify the potential privilege holders,"[120] it is not obvious to me that an automatic reporting obligation where the client was not informed would survive constitutional scrutiny.

Third, if the reporting obligation were based on a threshold amount of money, the arbiter could be inundated with trust-accounting reports, most of which might be perfectly legitimate. While I did not have direct evidence on this point, it seems to me unlikely that the Law Society or the Federation would be equipped to deal with such a volume of reporting. Further, the cost would no doubt be significant, whether handled by one of these entities or another body established to deal with such reports. Moreover, given the privilege issues, the reports could not go directly to law enforcement or a financial intelligence unit, resulting in an extra layer of cost and complexity.

Finally, if reporting were based on suspicion by the lawyer, there is a substantial likelihood that it would implicate the constitutionally protected duty of the lawyer's commitment to the client's cause. This issue is perhaps the most significant: even assuming privilege issues could be accommodated, it is not obvious to me that barriers stemming from the lawyer's duty of commitment could be overcome. I turn to this issue now.

The Duty of Commitment to the Client's Cause

Lawyers owe a duty of loyalty to their clients, which has three dimensions: a duty to avoid conflicting interests; a duty of commitment to the client's cause; and a duty of candour.[121] As I note above, the Supreme Court of Canada gave constitutional protection to the second of these duties – the duty of commitment to the client's cause – in the *Federation* case. It is now a principle of fundamental justice that "the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes."[122]

Lawyers must be "zealous advocate[s] for the interests of [their] client[s]."[123] A client "must be able to place 'unrestricted and unbounded confidence' in his or her lawyer"; this confidence is "at the core of the solicitor-client relationship."[124] The duty of commitment is "fundamental to how the state and the citizen interact in legal matters."[125] In giving constitutional protection to this duty in the *Federation* case, the Supreme Court explained:

119 *Chambre* at para 51; *Federation* at para 48; *Lavallee* at para 40.

120 *Lavallee* at para 41.

121 *Canadian National Railway v McKercher*, 2013 SCC 39 [*McKercher*] at para 19.

122 *Federation* at para 84.

123 *McKercher* at para 25.

124 *Federation* at para 83.

125 Ibid at para 95.

> Clients – and the broader public – must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice.[126]

It appears from the *Federation* case that reporting on one's client would implicate the duty of commitment. A lawyer who reports suspicions about a client's activities would seem to be in an inherent conflict of interest: on the one hand, potentially assisting law enforcement with an investigation of the client, and on the other, seeking to give the client the best possible legal advice and represent the client's interests zealously.

In the *Federation* case, the Supreme Court stated that the duty of commitment "does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities."[127] The Court continued:

> Committed representation does not … permit let alone require a lawyer to assert claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client to commit a crime. The duty is perfectly consistent with the lawyer taking appropriate steps with a view to ensuring that his or her services are not being used for improper ends.[128]

This point raises the question of whether reporting would be an "appropriate step" to ensure that legal services are not being misused.

In related contexts, lawyers who come across potentially unlawful activity by their clients are required to withdraw, but not report the client or disclose the reason for withdrawal. For example, if a client persists in instructing a lawyer to act contrary to professional ethics, the lawyer must withdraw.[129] The lawyer cannot, however, disclose the reasons behind the withdrawal if it results from confidential communications between the lawyer and client.[130] Indeed, the Supreme Court of Canada has said that if a lawyer seeks to withdraw based on "ethical reasons" – which include situations where a client requests a lawyer to act contrary to professional obligations – a court must "accept counsel's answer [that the withdrawal is for ethical reasons] at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege."[131]

Similarly, complex ethical issues arise where a lawyer knows or suspects a client may commit perjury (a criminal offence) on the stand. The lawyer is confronted by

126 Ibid at para 96.

127 Ibid at para 93.

128 Ibid.

129 BC Code, s 3.7-7.

130 Ibid, s 3.7-9.1.

131 *R v Cunningham*, 2010 SCC 10 [*Cunningham*] at para 48.

the duty of loyalty on the one hand, which militates against exposing secrets that may undermine the client's defence, and, on the other, his or her duties not to mislead the court or be involved in criminal activity. The lawyer is also bound not to disclose privileged information.[132] Accordingly, most codes of conduct require the lawyer to withdraw (assuming the lawyer cannot persuade the client against perjury).[133] Again, there is no requirement to report the potential criminal activity.[134] On the contrary, the lawyer would likely be duty bound to not report.

Withdrawal as a response in the anti–money laundering context is certainly not a perfect solution, and it has been the subject of some criticism. The client could, after all, simply move from lawyer to lawyer in the hope that one will eventually assist in the illegal activity. Yet, it is notable that law society codes of conduct are largely consistent in mandating withdrawal in the face of illegal activity, rather than going further and, for example, requiring a lawyer to report illegal conduct to the police. The Supreme Court has made clear that although law society codes are not binding on legislators, they nonetheless demonstrate consensus in the profession as to what ethical practice requires and are an important statement of public policy.[135] The consistency of Canadian law societies on this point suggests that those charged with regulating the profession consider it to be the best way (even if imperfect) of balancing a lawyer's duties to a client with duties to the court and the administration of justice.

132 David Layton and Michel Proulx, *Ethics and Criminal Law*, 2nd ed (Toronto: Irwin Law, 2015), pp 330–32.

133 Ibid, pp 332–34, 339–40, 343–44. In British Columbia, several rules in the BC Code are relevant to perjury, including:

- Rule 5.1-1, which requires a lawyer to "represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect" and specifies in the commentary the limits on a lawyer's ability to raise certain defences in the face of admissions by the client;
- Rule 5.1-2, which prohibits the lawyer from, among other things, knowingly assisting or permitting a client to do anything dishonest or dishonourable, as well as from knowingly attempting to "deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct";
- Rule 5.1-4, which requires a lawyer to disclose and attempt to correct errors or omissions, subject to the duty of confidentiality, and withdraw if the client persists in instructing the lawyer to breach that rule; and
- Rule 3.2-7, which forbids a lawyer from "engag[ing] in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud."

If a client persistently instructs a lawyer to act contrary to those rules, the lawyer must withdraw: Rule 3.3-7.

134 Some codes do provide an *option* to go further, but still appear to struggle with balancing an obligation to take action in the face of illegal activity with the duties of loyalty and confidentiality. For example, the Manitoba and Saskatchewan law societies permit (but do not require) lawyers to disclose confidential information "if the lawyer has reasonable grounds for believing that a crime is likely to be committed and believes that disclosure could prevent the crime": see Rule 3.3-3B of the Manitoba and Saskatchewan codes. Even then, however, the provisions set out a number of factors for the lawyer to balance, including the effect on the client, thereby leaving the ultimate ethical decision to the lawyer.

135 *Federation* at paras 107, 108; *Cunningham* at para 38.

In view of the above, obliging a lawyer to report on a client's suspicious activity would be a dramatic departure from the long-standing practice of requiring lawyers to withdraw when faced with illegal or unethical conduct by a client. It would also raise serious questions about whether such mandated reporting would impermissibly undermine the lawyer's commitment to his or her client's cause and to the lawyer-client relationship generally.

The ethical and constitutional issues associated with reporting would not appear to be lessened if reports were made to a law society or another entity. Having such an intermediary may assist in determining privilege issues (as discussed above), but it is not obvious that the solution would avoid contravening the duty of commitment. Although the reports would not be passed directly to a financial intelligence unit or law enforcement, the lawyer would nonetheless be starting a process in which information that is harmful to the client could ultimately be disclosed to law enforcement.

Should Lawyers Have a Reporting Obligation of Some Kind?

The above discussion reveals significant difficulties in crafting a reporting obligation for lawyers. First, given the stringent protections for solicitor-client privilege, the obligation would need to be so narrowly tailored to avoid the risk of catching potentially privileged information that it would likely be of minimal utility to the recipient. Second, the state of the law on privilege and trust accounts casts doubt on whether even a narrowly tailored approach that involved reporting only "purely" financial information would avoid trenching on privilege. Finally, even assuming the privilege issues are addressed, the lawyer's duty of commitment poses particular difficulties that would seem to arise even if there were a privilege arbiter.

In light of these difficulties, it is worth taking a critical look at reporting and its potential use in the context of the legal profession. As I comment on in other parts of this Report, some critics maintain that FINTRAC receives a high volume of low-quality reports and say that FINTRAC is a "black box" that collects this information and is unable, largely because of its enabling legislation, to share it with the agencies that need it. To the extent such criticisms hold water, it should not be assumed that more reporting will lead to better outcomes.

Indeed, Professor Levi noted that the Financial Action Task Force has not been able to successfully determine how effective lawyer performance in reporting has been in jurisdictions where it occurs, or how many reports are "enough":

> [E]ven if you are making a lot of reports, are you making reports on trivial stuff but not on big stuff that is more socially important? Are you reporting on local drug dealers buying small houses but not on kleptocrats buying large mansions?
>
> So, for that we need some qualitative insight into the process, and the data don't speak for themselves in terms of numbers. We need to look

> qualitatively at the kind of reports that are made, if we're legally allowed to, and assess whether that indicates that people are doing their job in all the spheres that they should be doing their job.[136]

Similarly, based on his knowledge of the experience in the United Kingdom, where lawyers *are* required to report suspicious transactions to the financial intelligence unit, Professor Sharman noted that the "conventional wisdom" that more reporting by lawyers will result in substantially less money laundering vulnerability "actually has very little evidence to support it."[137] He explained that the prevailing view in the United Kingdom is, in fact, that lawyer reporting is ineffective:

> Both those who submit and those who receive lawyers' Suspicious Activity Reports in the UK regard a large majority of these reports as a waste of everyone's time. The most commonly mentioned offences are asbestos in clients' buildings and failure to preserve trees. 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.[138]

In a similar vein, Nicholas Maxwell, head of the Future of Financial Intelligence Sharing Programme of the United Kingdom's Royal United Services Institute Centre for Financial Crime and Security Studies, testified that the "most tragic element of the Canadian regime" is that FINTRAC, despite receiving far more reports than equivalent agencies in the United States and the United Kingdom, is constrained by various limitations in the *PCMLTFA* that were motivated by concerns about privacy and information sharing. As a result, less than 1 percent of suspicious transaction reports are disclosed to law enforcement.[139]

It is also significant that Canada is not alone in excluding lawyers from reporting obligations.

In a report prepared for the Commission that examines lawyer regulation regimes around the world, Professor Levi explained that there is currently no requirement in Australia for lawyers to report suspicious transactions to the country's financial intelligence unit (AUSTRAC) or any other body, and the Law Council considers its professional standards to be adequate. Moreover, lawyers are largely not subject to Australia's *Anti–Money Laundering and Counter-Terrorism Financing Act 2006*.[140]

136 Transcript, November 20, 2020, pp 55–58. See also Exhibit 244, Michael Levi, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting* (2020), p 48.

137 Exhibit 959, Jason Sharman, *Money Laundering and Foreign Corruption Proceeds in British Columbia: A Comparative International Policy Assessment*, pp 11–12.

138 Ibid, p 12; see also Transcript, May 6, 2021, pp 74–76.

139 Transcript, January 14, 2021, pp 70–75.

140 However, changes have been "long promised," and lawyers in Australia must report transactions involving AUD$10,000 or more in cash. Moreover, this apparent exclusion has been criticized. See Exhibit 244, M. Levi, *Lawyers, Their AML Regulation and Suspicious Transaction Reporting*, pp 44–45.

US lawyers are also not subject to the general anti–money laundering responsibilities, including suspicious activity reporting, customer due diligence, or record keeping.[141] The approach to lawyer regulation in the United States appears similar to Canada's in that the 50 state bars work with the American Bar Association, which, in turn, produces benchmark standards of professional conduct.[142] The association has issued an opinion stating that lawyers in the United States are required to inquire into suspicious requests by clients and withdraw if necessary,[143] which parallels Canadian rules.

Although not determinative, it is significant that similarly situated countries with a strong emphasis on the sanctity of the lawyer-client relationship have struck balances comparable to Canada's and have not obliged lawyers to report to their financial intelligence unit.

In a context where designing a constitutionally compliant reporting regime for lawyers is highly complex and subject to substantial constitutional constraints and risks, it is important to think critically about whether reporting by lawyers will be of sufficient utility to justify the accompanying cost and legal risk. As I develop in the next chapter, I believe it is ultimately more efficient and effective to focus on other anti–money laundering efforts, rather than devoting great efforts to pursuing a constitutionally compliant reporting regime. Specifically, I see five overarching ways in which to address anti–money laundering risks in the legal sector:

- continuing to revisit and expand existing anti–money laundering regulation by the Law Society, including limiting the circumstances in which a client's funds can enter a trust account;
- strengthening and making better use of information-sharing arrangements between the Law Society and other stakeholders;
- increasing use by the Law Society of its ability to refer matters to law enforcement when there is evidence of a potential offence;
- encouraging law enforcement to make better use of existing mechanisms by which it can access the information it needs from lawyers during investigations; and
- increasing public awareness about these measures to counter any perception that transactions conducted through a lawyer in furtherance of an unlawful aim are immune from detection.

141 However, US lawyers, must not retain a fee received from illicit funds; receive currency of USD$10,000 or more unless they file a currency transaction report; or transact, facilitate, or advise with respect to a transaction with "Specially Designated" or "blocked persons." See Exhibit 244, p 45.

142 Exhibit 244, M. Levi, Lawyers, *Their AML Regulation and Suspicious Transaction Reporting*, pp 45–46.

143 Ibid, p 46.

Conclusion

In this chapter, I reviewed the *Federation* decision and its implications on anti–money laundering regulation of lawyers in British Columbia. As I have explained, because of constitutional aspects of the lawyer-client relationship, this sector poses unique problems in the fight against money laundering. These problems do not mean that robust anti–money laundering regulation of lawyers is not possible or should not be pursued. It is crucial that such regulation be in place and that alternative pathways are used to ensure that criminals cannot make use of lawyers' services with impunity. In my final chapter on lawyers, I discuss the regulation that is in place, areas of improvement, and ways in which the Law Society, law enforcement, and others can ensure that anti–money laundering activity involving lawyers is properly scrutinized and investigated while also respecting constitutional principles.

Chapter 28
Law Society Regulation and Information Sharing

As I have noted throughout these chapters, lawyers in British Columbia are subject to extensive regulation by the province's Law Society. The Law Society has long taken the view that regulation for money laundering is part of its public interest mandate. It also works closely with the Federation of Law Societies of Canada (Federation) to try to harmonize standards across Canada.

In this chapter, I review the various measures put in place by the Law Society and the Federation's Model Rules. This review demonstrates that British Columbia has a relatively strong anti–money laundering regime in place with respect to lawyers. As is the case in any sector of the economy, there can never be a "perfect" regime, in the sense that money laundering is a constantly moving target. I accordingly include in my discussion potential areas of improvement. I find that the Law Society and the Federation are committed to regularly reviewing measures in place and to identifying and addressing deficiencies. I trust they will consider my recommendations seriously.

At the end of this chapter, I discuss the Law Society's information-sharing arrangements with law enforcement and others, the Law Society's power to refer matters to law enforcement, and the pathways that law enforcement can use when investigating lawyers. Although not a perfect substitute for subjecting lawyers to the *PCMLTFA* or another reporting regime, it is my view that robust regulation combined with increased reliance on these avenues is a reasonable alternative that respects constitutional limitations.

A Preference for a Pan-Canadian Approach to Money Laundering

Law Society witnesses testified that their preference is to ensure a pan-Canadian approach to anti–money laundering regulation whenever possible. As Mr. Avison explained:

> The work that we do with the Federation is much more focused in relation to those areas where we would look to have consistency across the country. [Anti–money laundering] is a perfect example of that.
>
> ...
>
> I think there is a high degree of collaboration and cooperation across the country, and the benefit that we get from that is the pooling of the intellectual resources, if I can put it that way, from all the law societies to ensure that those resources are harnessed as effectively as possible in developing the most appropriate rules to deal with current and emerging situations.
>
> I'll reference the benefit that we get in British Columbia of the work not only of the Federation but colleagues like Jim Varro from the Law Society of Ontario. And I think for a number of the smaller jurisdictions the benefit of having that work that is done collectively with the Federation is extremely helpful in relation to matters where they might not have the resources to be able to deal with that independently.[1]

Mr. Ferris added that a pan-Canadian approach is "sensible because it recognizes the flow of funds and flow of capital and flow of ideas and thoughts of how to do these things is a national issue and an international issue"[2] and makes particular sense when dealing with lawyers who practise in multiple jurisdictions.[3] He further explained that the Federation plays a key role in communicating with the federal government, describing it as "really our branch office in Ottawa."[4]

Law Society witnesses did, however, emphasize that the Benchers ultimately determine what rules are appropriate for British Columbia. As Mr. Ferris put it, while they greatly value collaboration with the Federation,

> we don't just sort of take what the Federation gives us and rubber stamp it ... [T]he Federation will take a look at rules, will send them to our ethics committee, we'll send comments back and ultimately there's a recommendation that comes from the Federation which we may take to the benchers as is or we may revise or the benchers may revise. So it's a very

1 Transcript, November 18, 2020, pp 19–21. See also Evidence of C. Ferris, Transcript, November 18, 2020, pp 21–22.

2 Transcript, November 19, 2020, p 81.

3 Transcript, November 18, 2020, p 21.

4 Ibid, p 32.

> iterative process, and so even where we're adopting Federation common rules, it's hard to say that those are Federation rules because there's been an independent review of those by the benchers in BC.[5]

Although it is clear that the Law Society and the Federation prefer to develop pan-Canadian approaches to anti–money laundering *regulation*, it is not clear to me that the kind of collaboration described by Mr. Avison – one that recognizes the flow of funds, capital, and ideas across boundaries, particularly where lawyers work in multiple jurisdictions – is occurring. In other words, it appears that the law societies and Federation share strategic, but not tactical, information[6] that would facilitate investigations across jurisdictions. I have recommended in Chapter 27 that the Law Society and the Federation work to develop uniform metrics to track anti–money laundering breaches and disciplinary responses. I further recommend that they develop systems to facilitate the more effective sharing of tactical information and coordination on investigations that involve other jurisdictions.

Recommendation 54: I recommend that the Law Society of British Columbia and the Federation of Law Societies of Canada develop systems to facilitate the more effective sharing of tactical information and coordination on investigations that affect multiple jurisdictions or involve lawyers who practise in multiple jurisdictions.

A Risk-Based Approach

In their testimony, Law Society and Federation witnesses emphasized their support for a risk-based approach. Ms. Wilson testified that this approach focuses "the greatest regulatory efforts in areas of greatest risk" rather than recommending strict rules that apply across the board.[7] With respect to lawyers specifically, she gave the example of a labour lawyer who does purely arbitration with little or no engagement with individuals (rather than organizations) as clients, compared with a lawyer involved in real estate or corporate practice. The former would likely be lower risk than the latter, where more regulatory efforts would be focused.[8]

Ms. Wilson does not consider that either the law societies or the federal government currently take a fully risk-based approach to anti–money laundering regulation.[9] However, the Federation is actively considering how best to make the framework risk-

5 Ibid, p 22.

6 Tactical information sharing relates to specific individuals or entities, whereas strategic information focuses on typologies and general indicators of suspicion: Evidence of N. Maxwell, Transcript, January 14, 2021, pp 7–10.

7 Transcript, November 17, 2020 (Session 1), p 14.

8 Ibid, p 15.

9 Ibid, p 16. Ms. Wilson highlighted, however, that the risk-based approach is part of their approach on the educational side, as well as within the customer identification and verification rules. Her point is that both the law society and federal government frameworks as a whole are not risk based: see ibid, pp 15–16.

based. Ms. Wilson explained that moving to a completely different form of regulation is a "big project and … would involve a much more comprehensive overhaul of the approach." As such, law societies have begun to implement it by focusing on educational materials.[10]

The Prohibition Against Facilitating Illegal Conduct

Although some law society rules were designed specifically for anti–money laundering purposes, Law Society witnesses emphasized that a lot of activity that could facilitate or assist money laundering is captured by the overarching rule that lawyers must not participate in dishonest transactions or facilitate illegal activity. In British Columbia, this rule has existed in various forms since 1921.[11] It can currently be found in the BC Code at Canon 2.1-1(a)[12] and in Rule 3.2-7, which states:

> 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.

Rule 3.2-7 contains various commentaries, of which I highlight a few:

- Commentaries 1 and 2 explain that lawyers must be "on guard against becoming the tool or dupe of an unscrupulous client or others" and must be especially careful about becoming unwittingly involved in criminal activities like mortgage fraud and money laundering.
- Commentary 2 calls for particular vigilance in activities such as establishing, buying, or selling business entities; financing such transactions; and purchasing and selling real estate.
- Commentary 3 states that lawyers must make reasonable inquiries of clients when they have suspicions or doubts that they could be assisting in dishonest or illegal conduct.[13]

A number of other provisions relating to the general rule in 3.2-7 demonstrate its breadth. For example, Rule 3-109 of the Law Society Rules states that if a lawyer becomes aware, while complying with the client identification and verification rules or at any other time while retained, that they would be assisting a client in fraud or illegal conduct, the lawyer must withdraw. Similarly, Rule 3.7-7(b) of the BC Code requires a lawyer to withdraw where "a client persists in instructing the lawyer to act contrary to professional ethics."

10 Ibid, pp 16–17.

11 Exhibit 224, Law Society of British Columbia, Regulation of the Practice of Law, para 7 [Regulation of the Practice of Law].

12 "Lawyers owe a duty to the state … and should not aid, counsel or assist any person to act in any way contrary to the law."

13 Interestingly, this may be a higher standard than the counterpart model rule from the American Bar Association. A recent opinion seems to suggest that a lawyer cannot counsel a client to engage in or assist a client in conduct that the lawyer *knows* is criminal or fraudulent, whereas the BC equivalent focuses on circumstances that objectively raise suspicion: Evidence of G. Bains, Transcript, November 19, 2020, pp 142–43.

Professor Levi offered his perspective that a requirement to withdraw is insufficient to address money laundering, as criminals will simply go elsewhere.[14] I agree with him that withdrawal, without more, leaves open the very real possibility that the unscrupulous client will simply look elsewhere for a less diligent lawyer to do his or her bidding. I also acknowledge that withdrawal, absent any reporting, leaves law enforcement and regulators no further ahead in addressing the illegal conduct. However, as I discussed in Chapter 27, in Canada we have decided that protecting the sanctity of the lawyer-client relationship is of the utmost importance. In this context, the balance that has been struck and long applied in this country is an obligation for the lawyer to withdraw, but not report. This avoids the potential of lawyers being involved in criminality, while maintaining solicitor-client privilege.

I would encourage the Law Society to continue to carefully monitor the activities of its members and to ensure strict adherence to the lawyer's requirement to scrutinize and withdraw in the face of indicators of criminality. The more uniform this diligence and commitment to ethics is applied by the BC bar, the more difficult it will be for bad actors to find lawyers in this province to do their unscrupulous bidding.

Law Society witnesses stressed that, in their view, rules like 3.2-7 are crucial to the anti–money laundering effort and can even be more effective than a prescriptive "checklist" rule. For example, Mr. Ferris explained:

> [Y]our question really highlights why the rule, and I know you said it's an old rule, about lawyers not participating in dishonest transactions with their client, but why that rule is so important and why it's so fundamental is because of exactly this issue, which is the typologies change. And if you create prescriptive rules which are sort of checklists, you don't really get lawyers engaged as well with respect to ensuring that what they're doing is correct. And as soon as you create a rule, there's something new and some new other area.
>
> So that's why that overarching rule about lawyers not participating in something that's dishonest with their clients, it really focuses the lawyer's mind on identifying risks, … whether they should be taking on this transaction and making sure they're complying with their ethical duties.[15]

Ms. Bains similarly described the rule as "the foundation to practising ethically and complying with all these other obligations."[16] She and Mr. Avison added that lawyers must take the barrister's oath "right out of the gate," which includes a commitment to practise honourably and to discharge all one's professional obligations with honour and integrity. Even before the oath, significant parts of the professional legal training program in British Columbia and some law school courses focus on the obligation to act ethically.[17]

14 Transcript, November 20, 2020, pp 49–51.

15 Transcript, November 18, 2020, p 56.

16 Transcript, November 19, 2020, p 25.

17 Evidence of G. Bains, Transcript, November 19, 2020, p 26; Evidence of D. Avison, Transcript, November 19, 2020, pp 27–28.

I agree that these overarching rules are a key component of Law Society regulation for money laundering, particularly when combined with diligent oversight on the part of the Law Society and the more specific anti–money laundering rules that I review next.

The Cash Transactions Rule

As I noted in Chapter 25, the Federation introduced a model cash transactions rule[18] in September 2004. The Law Society of British Columbia was the first law society to adopt this model rule in 2004.[19] In British Columbia, Rule 3-59 of the Law Society Rules states in part:

> **3-59(3)** While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter.

Ms. Wilson explained the purpose of the rule as follows:

> [T]he purpose of the rule is to restrict the amount of cash that lawyers can accept from clients. The goal of that is to mitigate the possibility of criminally minded clients trying to place large amounts of cash with lawyers for the purposes of laundering money or financing terrorism. It was a direct response to the suspicious transaction reporting requirements, which ... we believed and we were in fact found to be correct that they were unconstitutional.
>
> And it's a different approach. We took a different approach to this by restricting the amount of cash ... lawyers could accept. When we refer to it being on a client matter, of course it's an aggregate; it doesn't matter whether ... the matter stretches over a week or four years. If it's a single client matter, the total cash that can be accepted, subject to certain exceptions in the rule, is $7,500.[20]

Subrule 3-59(1) specifies that the rule applies when a lawyer or firm (a) receives or pays funds; (b) purchases or sells securities, real property, or business assets or entities; or (c) transfers funds or securities by any means.[21]

The rule therefore covers all cash that flows through a lawyer's trust account that relates to client work.[22] Moreover, as Ms. Wilson noted, it is an *aggregate*: it applies to a single client matter, however long the work lasts. The rule contains some exceptions

18 This rule is often referred to colloquially as the "no-cash" rule. However, Ms. Wilson highlighted that this is not entirely accurate, as the rule limits the amount of cash that can be accepted rather than prohibiting acceptance of any cash. She accordingly prefers to call it the "cash transactions rule": Transcript, November 16, 2020, p 114. I agree that the "cash transactions rule" is a more accurate descriptor.

19 Evidence of D. Avison, November 18, 2020, pp 28–30.

20 Transcript, November 16, 2020, pp 116–17.

21 The rule equally applies when the lawyer or law firm gives instructions on behalf of a client in respect of these activities.

22 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 86.

whereby lawyers are permitted to accept more than $7,500 in cash. The most controversial is Subrule 3-59(4):

> [A] lawyer or law firm may receive or accept cash in an aggregate amount greater than $7,500 in respect of a client matter for professional fees, disbursements or expenses in connection with the provision of legal services by the lawyer or law firm.

The rule likewise does not apply when a lawyer or law firm receives or accepts cash in the following situations:

- from a peace officer, law enforcement agency, or other agent of the Crown acting in an official capacity (Rule 3-59(2)(b));
- pursuant to a court or tribunal order for the release of client funds that have been seized by a peace officer, law enforcement agency, or other agent of the Crown acting in an official capacity (Rule 3-59(2)(c));
- to pay a fine, penalty, or bail (Rule 3-59(2(d)); or
- from a financial institution or public body (Rule 3-59(2)(e)).

These exceptions all contain the condition that the cash accepted must be "in connection with the provision of legal services by the lawyer or law firm." I return to this qualifier below.

Rule 3-59(5) specifies that a lawyer or law firm that accepts cash of over $7,500 in any of the permissible circumstances must make any refund of such money in cash. Rule 3-70 further requires lawyers to maintain a cash receipt book for receiving and refunding cash and to document specified information.[23]

Finally, unless permitted under the cash transactions rule, a lawyer or law firm that receives cash must:

1. Make no use of the cash;
2. Return the cash, or if that is not possible, the same amount in cash, to the payer immediately;
3. Make a written report of the details of the transaction to the Executive Director [of the Law Society] within seven days of the receipt of the cash; and
4. Comply with all other rules pertaining to the receipt of trust funds.[24]

23 Lawyers must record the date, amount of cash, file number, client's name, payer's name, payer's and lawyer's signatures, and any dates on which the receipt was modified.

24 Rule 3-59(6).

The model cash transactions rule was reviewed in detail by the Federation of Law Societies of Canada Anti–Money Laundering and Terrorist Financing Working Group (FLSC Anti–Money Laundering Working Group) during its 2018 review. In what follows, I examine some key discussion points that arose during that process.

Whether to Remove or Alter Exceptions to the Cash Transactions Rule

An important part of the review consisted in looking at the exceptions to the cash transactions rule to determine if they were still appropriate. Ms. Wilson testified that the group analyzed each exception in detail and did a risk / utility assessment to determine if it should stay in.[25]

Exception for Professional Fees, Disbursements, and Expenses

The working group began by considering whether the exception for professional fees, disbursements, and expenses continued to be justified in an increasingly cashless society. It consulted target groups of lawyers, mainly criminal defence lawyers. This consultation revealed that cash payments remained an "important, though not necessarily common" method of payment used by certain types of clients, for example, those in rural communities. The group was surprised to discover, however, that the practice among criminal defence lawyers varies, with some accepting cash for fees and others refusing it.[26]

Mr. Ferris explained that a key concern in removing the exception is the balance between a person's fundamental right to have a defence lawyer and concerns about the source of funds:

> So just from an overall perspective when we're looking at rules, while we do have a very high anti–money laundering focus, we also have to balance in other factors as well, which is access to justice, and in this particular concern most of the cash retainers, as I understand, are received by criminal lawyers. And so the right to a full answer and defence of people is a fundamental right in the country.
>
> And so if you were to restrict that exemption or to force somebody to go open a bank account before they can retain a lawyer, you're starting to put up impediments in the way of people getting that defence and retaining that lawyer. And so there's many circumstances where people don't have proper ID, where they – you know, they're disadvantaged people, homeless people, don't have ID, may have some cash, and other circumstances.[27]

In his view, the best way to balance these issues is to ensure that the exemption is not abused. Lawyers must be aware of red flags and ensure that there is no conversion of

25 Transcript, November 17, 2020 (Session 1), p 23.

26 Ibid, pp 28–29.

27 Transcript, November 18, 2020, p 69.

the money in the trust account. This result can be achieved in part by requiring excess cash to be returned in the same form.[28]

Relatedly, Ms. Bains underscored that lawyers are not exempt from the *Criminal Code* provisions on money laundering. For example, if a client came in with $10,000 in $20 bills to pay legal fees, the lawyer would have to ensure that accepting the cash would not facilitate the laundering of proceeds of crime.[29] Otherwise, they could be charged with a criminal offence.

Interestingly, the cash exception for legal fees and disbursements has its origins in the initial provisions of the *PCMLTFA* that targeted lawyers.[30] While not determinative of the question of whether the exception should remain or be modified, its inclusion in the *PCMLTFA* suggests the federal government also considered it problematic to adopt a blanket ban on lawyers accepting large amounts of cash. It is also notable that the limit chosen by the Law Society ($7,500) is less than the requirement for reporting large cash transactions under the *PCMLTFA* ($10,000).

The working group also considered whether a cap could be imposed on the amount of cash that can be accepted under the professional fees exception. It determined, however, that more consultation with the bar was needed to understand what lawyers were charging in fees, what kinds of disbursements they were incurring, and the like.[31] As Ms. Wilson explained, although a cap may be desirable, determining the right figure presents challenges:

> [I]t's really just a matter of trying to identify a number that is meaningful that isn't simply arbitrary. One could say well, let's say it's $10,000. Let's just say it's $5,000. Let's just say it's $25,000. It will or will not be a meaningful amount depending on the nature of the legal services being sought. If you are undertaking a trial in a superior court in the country, $25,000 is nothing. If on the other hand you're asking somebody to review an agreement of purchase and sale, it's excessive. So that is why in our current considerations we are looking at whether the exemption should exist at all. It's difficult … for two reasons. One is that the assessment of whether it serves a useful function [and] that it does not interfere with the purpose of the rule, with the goal of the rule, and of course that is partly an examination of whether it's used and who uses it and so forth. But it's also an examination of a potential risk that the exemption creates. In this case in the absence of a limit, I think we would say there are some risks associated with it which might not be justifiable in light of the goal of the

28 Ibid, p 70.

29 Transcript, November 18, 2020, p 90.

30 Evidence of G. Bains, Transcript, November 18, 2020, pp 102–3.

31 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 22; Exhibit 207, Federation of Law Societies of Canada – Memorandum from No Cash Model Rule Sub-group to Anti–Money Laundering and Terrorist Financing Working Group, Re Review of No Cash Rule – April 9, 2017 [Federation 'No Cash Rule' Memorandum], paras 8–9.

> rule, and the options are place a cap or do away with it really, maintain it, place a cap or do away with it. And the difficulty with the cap is, as I said, finding a meaningful dollar figure and we haven't landed anywhere yet but that makes the notion of doing away with it a more straightforward alternative that's consistent with the goal of the rule and doesn't get us into sort of mental gymnastics of trying to ascertain, you know, is it $2,000, $5,000, $25,000, what's an appropriate cap in the circumstances.[32]

Ms. Bains testified that the Law Society has investigated lawyers who received large amounts of cash even when an exception is invoked. She gave the example of a 2017 case in which a lawyer was found to have deliberately breached the part of the rule requiring refunds to be made in cash.[33] However, in her experience, the vast majority of cases in which a lawyer is alleged to have contravened the rule have been because of inadvertent errors, such as not appreciating that the limit applied throughout the duration of the retainer or failing to refund amounts in cash. Regardless of whether an error is inadvertent or deliberate, all such cases are referred to a discipline committee.[34]

The Law Society can become aware of breaches of the cash transactions rule through the compliance audit process and annual self-reports. The normal compliance audit process requires looking at all books, records, and accounts, which can reveal breaches of the rule.[35] Meanwhile, lawyers must also self-report when they receive over $7,500 in cash outside the exceptions[36] or inadvertently breach the Rules.[37] These reports are referred to the Law Society's investigations department.[38] As a result of these processes, therefore, the Law Society does have data on how often cash over $7,500 is accepted.[39]

Other Exceptions

The FLSC Anti–Money Laundering Working Group also considered whether the other exceptions under which lawyers may receive over $7,500 in cash remained appropriate. It determined that one exception – for moneys paid or received pursuant to a court order – was no longer needed. In its view, this exception could result in "sham litigation," meaning that a person could bring a claim that is deliberately uncontested, with the result that a court order for repayment is made on fraudulent pretenses – all without the lawyer knowing.[40] The exception was accordingly removed in 2018.

32 Transcript, November 17, 2020 (Session 1), pp 31–33.

33 Transcript, November 18, 2020, pp 92–93.

34 Ibid, pp 90–92.

35 Evidence of J. McPhee, Transcript, November 18, 2020, pp 72–73.

36 See Rule 3-59(c), which requires a lawyer who receives cash when not permitted by the rule or exceptions to submit a mandatory report to the Law Society's executive director.

37 Evidence of J. McPhee, Transcript, November 18, 2020, pp 71–72.

38 Evidence of G. Bains, Transcript, November 18, 2020, p 86.

39 Evidence of J. McPhee, Transcript, November 18, 2020, p 95.

40 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), pp 23–24.

The working group initially recommended removing the exception for money received by a peace officer.[41] Upon consulting with stakeholders, however, it determined that the exception was sometimes useful and posed a low risk. Accordingly, it was left in.[42]

Cash Must Be "In Connection with the Provision of Legal Services"

As noted above, the cash transactions rule specifies that all cash received pursuant to an exception must be "in connection with the provision of legal services." This qualifier was added as a result of the 2018 review. This change was recommended because it was revealed "that lawyers sometimes rely on the exceptions to justify accepting large amounts of cash even though it is not related to the provision of legal services." This was, in the working group's view, "inconsistent with the letter and spirit of the rule."[43]

The Requirement to Refund in Cash

A lawyer who receives cash over $7,500 under the professional fees exception must make any refunds with respect to those funds in cash.[44] As Ms. McPhee testified, this requirement is meant to ensure that cash received is commensurate with the fees.[45] Ms. Bains added that the Law Society has issued various publications to the profession explaining that cash received must be commensurate with the amount required for a retainer or fees. She explained:

> If a lawyer asks a client for a $5,000 retainer, and the client brings the lawyer $50,000 in cash, in my view, that's a clear red flag and that is a suspicious circumstance and that lawyer ought to be stopping, making inquiries, and satisfying themselves of the appropriateness of continuing.[46]

The requirement that cash received must be commensurate with the amount required for the retainer or fees strikes me as a sound rule. Although the Law Society has included this guidance in publications to the profession, it would be preferable, in my view, that it be made explicit in the rule itself.

Recommendation 55: I recommend that the Law Society of British Columbia amend Rule 3-59 of the *Law Society Rules* to make explicit that any cash received under the professional fees exception to the cash transactions rule must be commensurate with the amount required for a retainer or reasonably anticipated fees.

41 Exhibit 207, Federation 'No Cash Rule' Memorandum, para 7.

42 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 23.

43 Exhibit 208, Federation of Law Societies of Canada, Consultation Report – Anti–Money Laundering and Terrorist Financing Working Group (October 2, 2017), para 12. Ms. Wilson testified that the purpose of including exceptions is to provide exceptions that are useful and not unduly risky, in the sense of providing a backdoor way for people to use a lawyer's trust account for improper purposes: Transcript, November 17, 2020 (Session 1), p 36.

44 Rule 3-59(5).

45 Transcript, November 18, 2020, pp 66–67.

46 Ibid, pp 67–68.

Importantly, a refund to a client who has paid a cash retainer must actually be in cash. The use of a trust cheque payable to cash is not acceptable; the lawyer must physically make a cash withdrawal, issue a cash receipt for the refund, and have the client sign for receipt.[47] In this fashion, the process prevents an unscrupulous client from turning cash into a cheque and thereby legitimizing and/or laundering cash.

In my view, the requirement that refunds be in cash is a crucial part of the cash transactions rule, and the Law Society must diligently monitor its members' adherence to it. This rule is central to addressing the risk of lawyers being used to directly launder cash, as it prevents cash from entering a lawyer's trust account and being converted into another form.

Conclusions on the Cash Transactions Rule

In my view, the cash transactions rule is a crucial part of anti–money laundering regulation of lawyers. In some ways, it is more restrictive than the rules under the *PCMLTFA*, which require those subject to the regime to report – but not necessarily to refuse – cash transactions of more than $10,000.

The issue of whether an exception to the cash transactions rule should exist for professional fees, disbursements, or expenses is complex. Clearly, the current exception without a cap means that lawyers could potentially be receiving large amounts of cash of unknown origin. This possibility raises ethical issues that are worth exploring, as the Federation and the Law Society are doing. Whether the exception raises a *money laundering* risk, however, is a different matter.

It is not obvious to me that the exception poses a money laundering risk. To the extent that funds are retained by the lawyer to pay fees and disbursements, there has not been a conversion. The requirement that a lawyer make any refund in cash when a client pays for legal fees in cash would seem to adequately address the money laundering risk. An explicit requirement that any cash received be commensurate with the legal fees and disbursements would help ensure that lawyers do not receive excessive amounts of cash in the first place. There may well be sound reasons for the Law Society to continue to review and consider the professional fees exception to the cash transactions rule,[48] but I am not persuaded that money laundering considerations support my making a recommendation respecting the rule.

47 Exhibit 224, Regulation of the Practice of Law, para 32.

48 I also note that the Federation is studying a rule adopted by the Barreau du Québec that requires members who accept more than $7,500 in cash pursuant to an exception to submit a copy of the cash transaction record within 30 days of the receipt of cash with a notation indicating the exception under which it is received: Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 26. Mr. Avison testified that the Quebec rule is "one of the elements that I think [the Law Society is] going to want to discuss as part of the working group with the Federation": Transcript, November 18, 2020, p 76.

Client Identification and Verification Rules

As I noted in Chapter 27, the Federation adopted model client identification and verification rules in 2008, with the Law Society adopting the model rules shortly after.[49] These rules parallel in many ways the requirements under the *PCMLTFA*. Given that lawyers in British Columbia are not reporting entities under this Act, I applaud the Law Society for filling this void by requiring lawyers to comply with the strict client identification and verification rules it has put in place. While not a complete substitute for *PCMLTFA* reporting (which would have the information available to FINTRAC), given the current landscape within which the Law Society operates, the client identification and verification rules are a reasonable substitute and go some way to filling the void.

In British Columbia, these rules are found in Part 3, Division 11, of the Law Society Rules. Lawyers must fulfill six main requirements:

- identify the client[50] and record basic identification about the client upon being retained (Rule 3-100);
- verify the client's identity[51] if there is a financial transaction[52] (Rules 3-102 to 3-106);
- obtain from the client and record information about the source of money if there is a financial transaction (Rules 3-102(1)(a), 3-103(4)(b)(ii), 3-110(1)(a)(ii));
- maintain and retain records of documents and information used in identification, verification, and monitoring (Rule 3-107);
- withdraw if the lawyer knows or ought to know that they are assisting in fraud or other illegal conduct (Rule 3-109); and
- monitor the lawyer-client professional business relationship to ensure consistency between the client's activities, source of money and instructions (Rule 3-110).

Ms. Bains explained the purpose of the client identification and verification rules as follows:

49 Evidence of D. Avison, Transcript, November 18, 2020, p 30.

50 Distinct rules apply when identifying and verifying the identity of individuals compared to organizations, corporations, trusts, and the like.

51 There are three methods of verifying an individual client's identity: using government-issued identification; using a credit file in existence in Canada for at least three years; or a dual-process method involving two different and reliable sources. For a client that is an organization, trust, partnership, or the like, the identity can be verified in several ways, including a certificate of corporate status, articles of incorporation, or a trust or partnership agreement. See Exhibit 224, para 43; Rule 3-102(2)–(4).

52 Rule 3-98 defines "financial transaction" as meaning the receipt, payment, or transfer of money on behalf of a client, or giving instructions for these things on behalf of a client. That rule further defines "money" as including "cash, currency, securities, negotiable instruments or other financial instruments, in any form, that indicate a person's title or right to or interest in them, and electronic transfer of deposits at financial institutions."

> The purpose of these rules is … the very important obligations to know your client, to verify that your client is who the client says they are, with "client" having quite a broad definition including the instructing individual and what I'll call the beneficial client for whose benefit the work is being done, understanding the purpose of your retainer, understanding the source of money that is involved in the legal services that you are providing. It's all a part of that, which really goes to understanding the risks in providing those legal services and being able to mitigate against those risks so that you're not furthering any inappropriate illegal, dishonest fraudulent conduct.[53]

The client identification and verification rules can be triggered even if no funds flow through the lawyer's trust account.[54] However, there are some instances in which a lawyer must identify the client but not verify their identity, including (a) when the client is a financial institution, public body, or reporting issuer, and (b) when the lawyer pays or receives money to pay a fine, penalty, or bail, or for professional fees, disbursements, or expenses.[55]

Mr. Avison expressed the view that much of the value of the client identification and verification rules comes from identifying red flags rather than the recording of information itself.[56] Ms. Bains agreed but noted that recording is also important on a number of levels: it allows many lawyers at the firm to understand what has happened in a file, assists with the obligation to monitor the relationship periodically, and is useful for after-the-fact investigations and audits.[57]

As I expand on below, compliance with the client identification and verification rules is assessed as part of compliance audits. Any breaches are referred to investigations. Further, the annual trust report asks about the client identification and verification systems in place.[58]

2018 Review of the Client Identification and Verification Rules

The FLSC Anti–Money Laundering Working Group did a comprehensive review of the client identification and verification rules in 2018, which resulted in several amendments. The Law Society implemented these amendments in January 2020.

First, the amendments made verification requirements ongoing. Under Rule 3-110, a lawyer must, while retained for a financial transaction, periodically assess whether

53 Transcript, November 19, 2020, pp 3–4. See also *The Law Society of British Columbia v Christopher James Wilson*, 2019 LSBC 25 at para 21: "The Law Society rules about client identification and verification are complex and important. The goal is to ensure that the legal profession does not become an inadvertent participant in the improper processing of laundered money and that the fraud of identity theft is not aided and abetted by lawyers."

54 Evidence of G. Bains, Transcript, November 19, 2020, p 5.

55 Rule 3-101.

56 Transcript, November 19, 2020, p 29.

57 Transcript, November 19, 2020, pp 29–30.

58 Evidence of J. McPhee, Transcript, November 19, 2020, p 24.

(a) the client's information about their activities, source of money, and instructions are consistent with the purpose of the retainer, and (b) there is a risk that the lawyer may be assisting in or encouraging dishonesty, fraud, crime, or other illegal conduct. Ms. Wilson testified that this was one of the most significant changes to the client identification and verification rules:

> That is significant for us because this was a sort of tie-in to, a sort of reminder that complying with the rules isn't only a matter of complying with the specific requirements of this rule. This rule exists in the context of a broad suite of rules which are already in place such as the rules of professional conduct that speak in quite a lot of detail to ethical obligations that include … the obligation not to facilitate or assist with the commission of any illegal act.[59]

Second, in line with the amendments to the cash transactions rule, the exception to the client identification and verification rules for money received pursuant to a court order was removed. Further, the rules previously contained an exception for moneys received in settlement of any legal or administrative proceeding, which was also removed.[60]

Third, the obligation to "take reasonable steps to verify" a client's identity was changed to a more stringent requirement "to verify." Ms. Wilson noted that the Federation and the provincial law societies adopted this change despite negative feedback from the profession.[61]

In the case of beneficial ownership, amendments were made to impose a "reasonable efforts to verify" requirement. Ms. Wilson explained that in the absence of a beneficial ownership registry – which both the Federation and the Law Society support[62] – it would be unrealistic to require lawyers "to verify" beneficial ownership. She emphasized, however, that the Federation is "ready and willing to move to a mandatory requirement when there is a comprehensive way across the country to verify beneficial ownership information."[63]

As I discuss further in Chapters 23 and 24, I am of the view that a beneficial ownership registry is desirable for many reasons. One of these reasons, which is demonstrated here, is the fact that a beneficial ownership registry would simplify the client identification and verification obligations of gatekeepers – including both reporting entities under the *PCMLTFA* and lawyers under their professional rules.

Fourth, other changes were made to track amendments to the federal client identification and verification obligations. These notably include a requirement to

59 Transcript, November 17, 2020 (Session 1), pp 39–40.

60 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 40.

61 Ibid, pp 40–41.

62 Ibid, pp 52–53; Evidence of D. Avison, Transcript, November 19, 2020, p 9.

63 Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), pp 41, 42.

inquire into the client's "source of money."[64] The Law Society is aware that there is ambiguity about this requirement. For example, an internal memo noted that lawyers do not always consider the economic origin of the funds and instead refer to the "form of funds" (e.g., cheque, bank draft), the person who provided the funds (e.g., client, John Doe), or the financial institution that issued the cheque or electronic funds transfer.[65] The memo notes that a Law Society *Benchers' Bulletin* in fall 2019 explained that lawyers should, at a minimum, record:

- information obtained from the client about the activity or action that generated the client's money (e.g., salary, bank loan, inheritance, court order, sale agreement, settlement funds);
- the economic origin of the money (e.g., credit union account, bank account, Canada Post money order, credit card charge, cash);
- the date the money was received; and
- the source from whom the money was received (i.e., the payer: the client or name and relationship of the source to the client).[66]

The memo further states that some have interpreted the requirement to "obtain and record the source of money" literally and have done only that, without considering whether the source of money is reasonable and proportionate to the client's profile.[67] It also suggests there should be clarification of the various terms that can be used, given that "source of funds" is sometimes used interchangeably with "source of money" and "source of wealth."[68]

Ms. Bains testified that, although there are guidance documents and other materials[69] on these issues, the Law Society recognizes that including this information in the Rules themselves would be ideal. She noted that the FLSC Anti–Money Laundering Working Group is considering whether the Rules should be amended.[70] Ms. Bains further explained that, even without these requirements being spelled out in the Rules, hearing panels ultimately ask whether conduct is a "marked departure" from what the Law Society expects. To that end, the Law Society expects lawyers to look at the Rules, BC Code, guidance documents, *Benchers' Bulletins*, FAQs, discipline advisories, risk advisories, and the like.[71]

64 Ibid, p 41; Rule 3-102.

65 Exhibit 235, Law Society of British Columbia – Memorandum from Jeanette McPhee to Federation of Law Societies of Canada Working Group, Re Source of Funds (or Money) and Wealth – October 25, 2019, p 2.

66 Ibid, p 4; The Law Society of British Columbia, *Benchers' Bulletin, Fall 2019*, Vol 2019, No 3, p 15, available online: https://www.lawsociety.bc.ca/getattachment/7f3444a3-153f-4715-a338-6a58d512eec6/BB_2019-03-Fall.pdf.aspx.

67 Ibid, p 2.

68 Ibid, p 2.

69 Mr. Avison added that practice advisors are also available to address questions by members in this regard: Transcript, November 19, 2020, p 17.

70 Transcript, November 19, 2020, pp 15–16.

71 Evidence of G. Bains, Transcript, November 19, 2020, pp 20–21.

Although there is guidance for lawyers with respect to the "source of money" requirement, it would be preferable, in my view, that the Rules themselves explain what is needed in more detail. The internal memo referenced above indicates there is ambiguity in the Rules and that the profession is not clear on the requirements.

Recommendation 56: I recommend that the Law Society of British Columbia amend its client identification and verification rules to explain what is required when inquiring into a client's source of money. The rules should make clear, at a minimum:

- that the client identification and verification rules require the lawyer to record the information specified in the fall 2019 *Benchers' Bulletin*;
- the meaning of the term "source of money"; and
- that lawyers must consider whether the source of money is reasonable and proportionate to the client's profile.

The Limitation of a "Financial Transaction"

Currently, verification requirements are triggered only when lawyers are involved in a "financial transaction." Ms. Wilson testified that there was no discussion of expanding the ambit of the rule during the 2018 review; however, if the Federation moves to a more truly risk-based approach, this might be revisited.[72]

On the issue of non-financial transactions, Ms. Bains pointed to the more general rules against being involved in illegality:

> So when lawyers are providing other services that may not get captured by a financial transaction, they still have to comply with the code provisions. And so in particular rule 3.2-7 and its commentary, they have to be alive to the risks, so for example, if they are incorporating a company or establishing a trust, they need to be aware of those risks and if there are suspicious, objectively suspicious circumstances they have a duty to make reasonable inquiries, very similar to the type of inquiries that the monitoring and these client identification and verification rules require.[73]

She also expressed the view that part of practising competently is understanding how a company that a lawyer incorporates will be used.[74]

72 Transcript, November 17, 2020 (Session 1), p 43.

73 Transcript, November 19, 2020, pp 6–7.

74 Ibid, pp 7–8.

Again, although lawyers may be obligated to make these inquiries by virtue of other rules, I am of the view that the anti–money laundering rules should be explicit to ensure that members are aware of their obligations.

Recommendation 57: I recommend that the Law Society of British Columbia extend the ambit of its client identification and verification rules to include the situations in which a lawyer is truly acting as a gatekeeper. The rules should be extended to include, at a minimum:

- the formation of corporations, trusts, and other legal entities;
- real estate transactions that may not involve the transfer of funds, such as assisting with the transfer of title; and
- litigation involving enforcement of private loans.

Fiduciary Property

Fiduciary property refers to "funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship."[75] I discuss the rules pertaining to fiduciary property, in particular the use of trust accounts to hold such property, below. For present purposes, however, I note that lawyers who hold such property must identify but not necessarily verify the identity of the client. As Ms. Bains explained:

> So if a lawyer is holding fiduciary property, it has to arise from a solicitor / client relationship, and so the triggering event for identification under the client identification and verification rules is that a lawyer is providing legal services to a client. And so there would have been an obligation to identify the client at the time that those legal services were provided that makes the thing fiduciary property. So that part of the rule certainly would apply.
>
> Whether the verification part of the rule and the other portions of the client identification and verification rules apply would depend on whether there was a financial transaction at that time prior to the lawyer accepting fiduciary property, and that would vary from matter to matter. So … it all hinges on fiduciary – the holding of fiduciary property is not the provision of legal services.[76]

In my view, the client identification and verification rules should apply when lawyers are handling fiduciary property, regardless of whether there is a financial transaction.

75 *Law Society Rules,* Rule 1, "fiduciary property."

76 Transcript, November 18, 2020, p 168.

There would seem to be no downside in requiring the lawyer to verify a client's identity in these circumstances, and such a requirement would prevent the lawyer from holding a client's property that may have links to criminality. I accordingly recommend that the Law Society amend its Rules to require lawyers to verify their clients' identity when handling fiduciary property.

Recommendation 58: I recommend that the Law Society of British Columbia amend the *Law Society Rules* to require lawyers to verify a client's identity when holding fiduciary property on the client's behalf.

Trust Regulation

The evidence before me revealed concerns about the potential misuse of trust accounts for money laundering purposes. These concerns are echoed in the literature. It is clear that the use of trust accounts, coupled with the strong protection of solicitor-client privilege in Canada, presents an inherent risk that such accounts could be used to facilitate money laundering in a manner that might be difficult to detect. However, in my view, the Law Society's extensive trust regulation and auditing powers, and its diligent application of those powers, significantly mitigate that risk in British Columbia.

Trust Funds Must Be "Directly Related to Legal Services"

The overarching obligation with respect to trusts, which was made explicit in the Rules in July 2019 but existed beforehand,[77] states:

> **3-58.1**(1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be deposited to or withdrawn from a trust account unless the funds are *directly related to legal services provided by the lawyer or law firm.* [Emphasis added.]

On completion of the legal services to which the funds relate, the lawyer or law firm must take reasonable steps to obtain instructions to pay out the funds as soon as practicable.[78]

Ms. Bains explained the rationale behind the rule as follows:

> [T]he impetus and rationale for the rule is to preserve the importance of a trust account being used truly for funds that are trust funds that are directly related to legal services so that the trust account is not used as

77 Transcript, November 18, 2020, pp 105, 107–8, 119–20. This rule codifies a principle expressed in *The Law Society of British Columbia v Gurney*, 2017 LSBC 15 at para 79: "[T]rust accounts are to be used for legitimate commercial purposes for which they are established, the completion of a transaction, where the lawyer plays the role of legal advisor *and* facilitator. They are not to be used as a convenient conduit [emphasis in original]."

78 Rule 3-58.1(2).

> a flow through account, as a bank account. Lawyers ought not [to] be providing banking services for clients. Those aren't proper legal services and that's not a proper use of a trust account.
>
> So it's in recognition that there is vulnerability in non-trust funds being placed into a trust account because of the potential privilege that may apply to those transactions. So in order to ensure that it's very tight and that only matters that properly ought to be in the trust account are placed in the trust account, this rule was put into place.[79]

Although the rule does not explicitly say that the funds must be *necessary* for legal services, Ms. McPhee testified that "directly related" effectively says as much. She further noted that this is set out in guidance and educational materials.[80]

Although the amendment stating that funds must be "directly related to legal services provided by the lawyer or law firm" is a good step, I am not persuaded it is sufficient. As I discussed in Chapter 27, the Supreme Court of Canada's recent case law suggests that trust account records may be presumed to be privileged unless evidence is introduced to show otherwise. Given that funds entering a trust account may well be shielded by privilege, it is crucial that limits be placed on what can enter a trust account in the first place.

Ms. McPhee's testimony suggests the Law Society is of the view that funds must be *necessary* for legal services before they enter a trust account. Although that may be the Law Society's view, it is not explicitly stated in the Rules. Rather, the official rule requires only that funds be "directly related to legal services." It is not obvious what this somewhat vague phrase means, and it strikes me that it could be invoked to justify any number of transactions moving through a trust account, so long as there is some connection or relationship to legal services.

Because this issue was not canvassed before me in detail, I am not prepared to recommend particular wording for the Law Society to adopt. However, it strikes me that, if a transaction is one that can occur without the use of a lawyer's trust account (for example, if it could occur through ordinary banking channels), the lawyer's trust account should not be used. There is no principled reason why a transaction that need not go through a lawyer's trust account nonetheless does so and thereby potentially acquires the protections of solicitor-client privilege.

I accept that there will be situations in which a trust account is necessary for a transaction. I am not suggesting, for example, that lawyers cannot use their trust accounts for payment of their fees and disbursements. There may also be certain kinds of transactions that require undertakings for which the lawyer's trust account may be necessary. However, to the extent trust accounts are being used for transactions that do not truly require their use, this must be avoided.

79 Transcript, November 18, 2020, p 104.

80 Evidence of J. McPhee, Transcript, November 18, 2020, p 123.

The possible application of privilege to trust accounts has great potential to attract those who do not seek a lawyer's services for legitimate ends and instead wish to keep illicit transactions or funds out of the reach of law enforcement. While the Law Society has taken steps to fill the gap left by lawyers not being subject to the *PCMLTFA*, the trust regulation rules are not a perfect substitute. Limiting the kinds of funds that can enter a lawyer's trust account to begin with is a way of further mitigating the risk that criminals will seek to misuse such accounts.

Recommendation 59: I recommend that the Law Society of British Columbia amend Rule 3-58.1 of the *Law Society Rules* to clarify, at a minimum, what is meant by "directly related to legal services" and to consider how to further limit the use of trust accounts so that they are used only when necessary.

Notably, the BC Code specifies in Rule 3.2-7, Commentary [3.1](a), that a lawyer "should" also "make inquiries" of a client who "may be seeking … the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter." Mr. Ferris explained that this is likely a remnant of earlier times where such conduct was sometimes acceptable but is now clearly prohibited in view of Rule 3-58.1.[81] Ms. Bains added that there was some disagreement among members of the Law Society as to what the commentary meant, but in any event they have decided to raise the matter with the policy group and clarify it.[82] I find Commentary [3.1](a) to be confusing and to have the potential to mislead lawyers about the permissible uses of their trust account. I recommend that the Law Society remove this paragraph promptly.

Recommendation 60: I recommend that the Law Society of British Columbia promptly remove Commentary [3.1](a) from the *Code of Professional Conduct for British Columbia*.

Trust Accounting Rules

Division 7 of the Law Society Rules sets out extensive requirements with respect to the use of trust accounts. Some key requirements that lawyers must follow are:

- They must keep detailed records of their trust and general accounts (Rules 3-54, 3-55, 3-68, 3-69).
- They must adhere to the detailed rules regarding opening and managing a pooled or separate trust account (Rules 3-60, 3-61).

81 Transcript, November 18, 2020, pp 108–14.

82 Ibid, pp 114–15.

- They must follow the detailed rules governing when and how funds may be withdrawn from a trust account (Rule 3-64).
- They must maintain a cash transactions record for every transaction made in cash (Rule 3-70).
- They must keep detailed records of bills and trust transactions (Rules 3-71, 3-72).
- They must prepare monthly trust reconciliations (Rule 3-73).
- They must immediately rectify trust shortages and report same to the executive director of the Law Society (Rule 3-74).
- They must deliver annual trust reports to the Law Society (Rule 3-79).

It can readily be seen that the operation of a trust account is a highly regulated endeavour. As I explain next, lawyers who operate trust accounts are also subject to regular compliance audits.

The Trust Assurance Program

The Law Society describes the Trust Assurance Program as a program "designed to support high standards of professionalism and responsibility among lawyers, and to allow the public, clients and lawyers to have confidence that lawyers are handling client trust funds and trust accounts in a careful and appropriate manner."[83] It has four main objectives:

> **Compliance**: encourage, educate and assist lawyers in complying with trust accounting standards and the *Code of Professional Conduct for British Columbia*
>
> **Deterrence**: help deter mishandling of trust funds and trust accounts
>
> **Detection:** help detect serious trust breaches as early as possible
>
> **Credibility:** protect the public interest, and increase the confidence of clients, lawyers and the public[84]

The program has four "pillars": trust reports, lawyer self-reports, compliance audits, and education.[85] I review each in turn.

The program is funded through the collection of a trust administration fee.[86] Its operating expenses increased from approximately $2.1 million in 2015 to $3.6 million in

83 Exhibit 225, Law Society of British Columbia – Trust Assurance Program Summary, para 1 [Trust Assurance Program Summary].

84 Ibid.

85 Ibid, para 2.

86 Ibid, para 3.

2020, which includes an increase of over 30 percent in its staffing budget.[87] Ms. McPhee testified that the program has increased the scope of its audits, added additional audit procedures, changed some audit cycles to focus on higher risk practice areas, and overall enhanced the coverage of the program.[88]

The program consists of 22 staff, including 14 auditors.[89] The director, deputy director, both team leaders, and all auditors are chartered professional accountants. The management team obtained their certified anti–money laundering specialist certification in 2017, and, since then, it has effectively become mandatory. At the time of the Commission's hearings, there were seven certified specialists and nine in the process of obtaining the certification.[90] Mr. Avison also noted that retention rates at the Law Society are very high, such that there is a high degree of institutional knowledge and an environment where information is shared effectively.[91] The program's staff members regularly participate in programs offered by the Association of Certified Anti–Money Laundering Specialists, the Association of Certified Fraud Examiners, the Canadian Anti–Money Laundering Institute, the Chartered Professional Accountants of British Columbia and of Canada, FINTRAC, and various other entities.[92]

Trust Reports

Every practising lawyer in British Columbia must file an annual trust report, either individually or as part of a law firm, with limited exceptions.[93] The Trust Assurance Program receives and reviews approximately 3,600 trust reports every year.[94] For firms that have a trust account, the report includes information such as a description of the firm's financial profile, the volume of its trust deposits, areas of law practised, information on internal controls, the receipt of cash in an amount greater than $7,500, and the firm's accounting procedures and activities.[95]

Trust reports take the form of either a "self-report" completed by the law firm or an "accountant's report" completed in part by the law firm and in part by an external, independent chartered professional accountant. The external report is required for the first two years of a new law firm's practice, when a lawyer begins using a trust account, when a law practice is terminated, or when a previous audit has identified areas of low compliance.[96]

87 Ibid, para 4.

88 Transcript, November 19, 2020, pp 94–95. Law Society witnesses testified that the Trust Assurance Program has always been given the budget it requires, as has the professional conduct group: Transcript, November 19, 2020, pp 95–97.

89 Exhibit 225, Trust Assurance Program Summary, para 5; Evidence of J. McPhee, Transcript, November 19, 2020, p 85.

90 Evidence of J. McPhee, Transcript, November 19, 2020, pp 85–86; Exhibit 225, Trust Assurance Program Summary, para 6.

91 Transcript, November 19, 2020, p 147.

92 Exhibit 225, Trust Assurance Program Summary, para 7.

93 Rule 3-79.

94 Exhibit 225, Trust Assurance Program Summary, para 25.

95 Ibid, para 26.

96 Ibid, para 27.

Failure to file a completed trust report on time can lead to suspension and fines.[97] Further, an unsatisfactory report may result in a referral to the Investigations Group or an elevated risk rating for the law firm, which in turn results in an earlier compliance audit or a future requirement to file an accountant's report.[98] The accuracy and completeness of the trust reports are audited as part of the compliance audit program discussed above.

Lawyer Self-Reports

Lawyers must report certain breaches of the Rules to the executive director of the Law Society. These breaches include discovering a trust shortage greater than $2,500 or being unable to deliver trust funds when due, as well as receiving cash outside the permitted circumstances.[99] Such a self-report may result in a referral to the Investigations Group, an earlier compliance audit, or a future requirement to file an accountant's report.[100]

Compliance Audit Program

The compliance audit program is "a proactive process designed to support compliance with the trust accounting rules."[101] A "compliance audit" is defined in Rule 3-53 as an examination of a lawyer's books, records, and accounts, as well as the answering of questions by the lawyer being audited. The goal of a compliance audit is to:

- help law firms recognize and correct minor problems with their trust accounting and recordkeeping before they lead to serious issues of non-compliance and possible professional conduct issues;
- answer questions the lawyer and law firm staff may have and to develop or improve proper accounting systems, record-keeping practises and trust fund handling procedures; and
- conduct a review of the lawyer's existing accounting records and perform a sample check of transactions and client files to review whether trust funds have been handled properly.[102]

Ms. McPhee testified that compliance audits are the primary way of detecting breaches of the trust accounting rules.[103] She explained the process in the following terms:

> And so … we get all the books, records and accounts for the law firm for trust accounts. And during the audit the auditor will select certain client

97 Rules 3-80, 3-81.

98 Exhibit 225, Trust Assurance Program Summary, para 29.

99 Ibid, para 30, and Rules cited therein.

100 Ibid, para 31.

101 Ibid, para 8.

102 Ibid.

103 Transcript, November 18, 2020, p 121.

> files to look at, and through the review of the client file they will look at the retainer agreement, the legal services provided, any of the information in the client file as we have the entire client file. Deposits, withdrawals, anything associated with the file.
>
> So … the primary purpose of reviewing the client file is to look at that rule and ensure that legal services were provided and also that the funds have been paid out as soon as possible out of the trust account at the end of the legal retainer.[104]

The Law Society has instituted a system in which every law firm in the province that operates a trust account will be audited once every six years. Some will be audited more often depending on the firm's size, primary practice areas, compliance history, and risk rating.[105] The Law Society also audits a sample of firms that report having no trust account to ensure this is the case.[106] The executive director can also order a compliance audit of a lawyer or firm at any time.[107]

Law firms are selected for audits at random. However, audits can also be prompted by an indicator such as failure to file a trust report, information on a trust report that indicates non-compliance with the rules and procedures, referrals from other departments at the Law Society (e.g., the Investigations Group), inadequacies identified in a previous compliance audit, or a compliance level that raises concerns about the lawyer's trust accounting practices.[108]

A variety of documents need to be produced to auditors, including a listing of accounts, signatories, and sample signatures; bank statements; deposit receipts; bank reconciliations; client ledgers; cash receipt books; and billing records.[109] Lawyers are required to comply with audits and to produce all books, records, accounts, and any other information, even if privileged or confidential.[110] Failure to comply can result in suspension or other consequences.[111]

Between 2016 and 2019, the number of compliance audits increased from 457 to 675 per year.[112] Ms. McPhee testified that the Law Society's goal is to do over 600 audits per year.[113]

104 Ibid, pp 121–22.

105 Exhibit 225, Trust Assurance Program Summary, para 10. For example, firms that practise primarily (over 50 percent) in the areas of wills and estates and real estate will be audited once every four years, and new firms will be audited within three years.

106 Ibid.

107 Ibid, para 10.

108 Exhibit 225, para 11.

109 Ibid, para 12.

110 Evidence of J. McPhee, Transcript, November 19, 2020, p 89.

111 Ibid, pp 89–90; Rule 3-86.

112 Exhibit 225, Trust Assurance Program Summary, para 11.

113 Transcript, November 19, 2020, p 84.

As the foregoing demonstrates, the Law Society has developed, implemented, and maintained a robust compliance audit program. I applaud its commitment to ensuring that the auditors administering the program have specific anti–money laundering training and that the number and frequency of audits has increased. Although the audits allow the Law Society to identify non-compliance, even the prospect of an audit is itself a deterrent.[114] The Law Society's Trust Assurance Program, while not foolproof, has significant potential to deter the use of trust accounts in connection with money laundering and to identify such a transgression should it occur. I encourage the Law Society to continue its diligent oversight in this regard.

Education and Outreach

The final component of the Trust Assurance Program consists of educational programs, materials, and advice given to lawyers. The Law Society has produced various resources for lawyers explaining the trust accounting rules and procedures. It also offers free online programs covering the basics of trust accounting, the self-reporting and compliance audit process, and a webinar on anti–money laundering.[115]

Lawyers' General Accounts

As a final note with respect to lawyers' trust accounts, it is important not to confuse them with general accounts. A general account is a "non-trust account and one from which payments for the day to day operating expenses of the practice are made."[116] Like trust accounts, general accounts are subject to compliance audits.[117]

Mr. Ferris testified that the only funds that are exempt from FINTRAC reporting are "[t]rue trust accounts," noting that when funds enter a general account, they should be treated the same as any other account.[118] As such, a financial institution's due diligence obligations notably apply with respect to lawyers' general accounts.

Referrals to the Investigations Group

Throughout this part of the Report, I have mentioned at various points that breaches of the Rules and other circumstances can be referred to the Law Society's Investigations Group. Referrals are made concerning suspected breaches of the cash transactions rule; misuse of a trust account; failure to make reasonable inquiries in suspicious circumstances; conduct that appears to have facilitated any dishonesty, fraud, or crime; and breaches of client identification and verification rules.[119]

114 Evidence of J. McPhee, Transcript, November 19, 2020, p 92.

115 Exhibit 225, Trust Assurance Program Summary, paras 33–34.

116 Law Society Trust Accounting Handbook, 44.

117 Evidence of J. McPhee, Transcript, November 18, 2020, p 143.

118 Transcript, November 18, 2020, pp 141–42.

119 Ibid, para 39.

The Law Society helpfully provided the Commission with tables detailing trends in referrals to the Investigations Group.[120] Ms. McPhee explained that a significant rise in referrals in 2017 was because of an increased focus on the client identification and verification rules and related initiatives.[121]

The Law Society also provided the Commission with information identifying which referrals to the Investigations Group related to specific anti–money laundering rules (the cash transactions rule, client identification and verification rules, and trust accounting rules).[122] Of the 109 referrals made to the Investigations Group in 2019, over half (67) related to the possible transgression of the Law Society's anti–money laundering rules. Ms. McPhee attributed this pattern to the audit program's increased focus on anti–money laundering.[123]

Mr. Avison testified that Law Society investigations in matters related to anti–money laundering are "inherently more complex given the amount of work that is required in relation to the financial components."[124] However, Ms. Bains expressed the view that it depends on the investigation. She explained that investigations of breaches of the cash transactions rule are often straightforward, whereas those in which the lawyer knew or ought to have known they were facilitating dishonesty, crime, or fraud are often more complex.[125]

As of September 30, 2020, the Investigations Group had 230 open files, of which 92 pertained to the client identification and verification rules, the cash transactions rule, or potential misuse of a trust account and/or failure to make inquiries in suspicious circumstances.[126]

As I noted above, members of the Law Society's Investigations Group, Discipline Group, and Forensic Accounting Group have anti–money laundering qualifications including the certified anti–money laundering specialist certification, certified fraud examiner status, and chartered professional accountant designation.[127] In my view, it is crucial that those charged with implementing, overseeing, and enforcing the Law Society's anti–money laundering and Trust Assurance programs have training focused on anti–money laundering. I endorse the Law Society's focus on specific anti–money laundering training and recommend that the Law Society make it a requirement for those investigating possible transgressions of the trust accounting rules.

120 See Exhibit 225, Trust Assurance Program Summary, Figures 4 and 5.

121 Transcript, November 19, 2020, p 91.

122 Exhibit 225, Trust Assurance Program Summary, Figure 6.

123 Transcript, November 19, 2020, pp 93–94.

124 Transcript, November 18, 2020, p 14.

125 Transcript, November 19, 2020, pp 100–1; see also Transcript, November 19, 2020, pp 108–9.

126 Exhibit 223, Law Society of British Columbia, Investigations and Discipline Programs Summary, para 36 [Investigations and Discipline Programs Summary].

127 Ibid, paras 5–8.

Recommendation 61: I recommend that the Law Society of British Columbia require that all trust auditors and investigators charged with investigating possible transgressions of the trust accounting rules receive anti–money laundering training.

Ongoing Review of Law Society and Federation Rules

As of the Commission's hearings in 2020, the FLSC Anti–Money Laundering Working Group was in the middle of another review of the Model Rules. This second review is focused on source of funds, source of wealth, risk assessments, compliance measures, virtual currencies, the cash exceptions, politically exposed persons,[128] trustees of widely held or publicly traded trusts, electronic funds transfers and exceptions, and the proposed 2019 amendments to the *PCMLTFA* regulations.[129]

As noted above, the Law Society has identified ambiguities in its Rules, including with respect to source of money, and is studying possible solutions. The Law Society also recognizes the need for stronger fines[130] and penalties for serious breaches of the trust accounting rules. It is looking into ways in which to increase capacity for investigations and other matters, some of which may require legislative changes.[131]

In addition, the Law Society is considering whether to require law firms to have an "anti–money laundering compliance officer" and a firm risk policy, as is done in the United Kingdom.[132] As Dr. Benson explained, legal professionals in the United Kingdom must carry out and maintain a risk assessment to identify and assess money laundering and terrorist financing risks faced by their firms. They must also establish and maintain appropriate written policies, controls, and procedures,[133] and appoint a compliance officer responsible for ensuring the firm complies with its anti–money laundering requirements.[134]

Education

Another important aspect of Law Society and Federation activities involves educating lawyers about their obligations and risks. Ms. Wilson testified that, in the Federation's

128 Ms. Wilson noted that politically exposed persons pose an issue because there is little publicly available information to help lawyers identify them: Transcript, November 17, 2020 (Session 1), pp 50–52. I discuss this matter further in Chapter 3.

129 Transcript, November 17, 2020 (Session 1), p 48; Exhibit 224, Regulation of the Practice of Law, para 62.

130 Ms. Bains noted, however, that in some situations there are more effective measures for protecting the public interest than fines. For example, the Law Society has in the past required lawyers, who operate trust accounts about whom it has concerns, to give an undertaking either not to operate a trust account or to do so under supervision: Transcript, November 19, 2020, pp 71–72. Mr. Ferris also noted that an issue with increasing fines is that Law Society discipline panels are independent tribunals that build on precedent, which limits what they can be told to do: Transcript, November 19, 2020, pp 72–73.

131 Evidence of D. Avison, Transcript, November 19, 2020, p 70.

132 Ibid, pp 54–55.

133 Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), p 124.

134 Exhibit 245, Michael Levi, *The Legal and Institutional Infrastructure of Anti–Money Laundering in the UK: A Report for the Cullen Commission,* p 46.

experience, it is a minority of lawyers who deliberately breach the rules. Accordingly, it is crucial to focus on educating "the great majority of lawyers who want to comply, who want to do the right thing, who want to understand a risk when it's in front of them, who want to know what it looks like, what the indicia are and how to avoid it and how to respond." Thus, discipline and education are both important tools.[135]

UK money laundering expert Simon Lord similarly expressed the view that education is a useful tool in the fight against money laundering. He noted that, following a lecture he gave to a law society in the United Kingdom, he has had "non-stop questions" from lawyers asking about situations that might be suspicious.[136]

As I have noted throughout these chapters, the Federation has produced a number of educational materials. In addition to the 2019 Risk Advisory produced by the FLSC Anti–Money Laundering Working Group (discussed in Chapter 26), it has produced other guidance documents on specific anti–money laundering topics.[137]

The Law Society has also been prolific in this regard. It added an anti–money laundering component to its Professional Legal Training Course in 2004.[138] It has also produced a number of guidance documents, ranging from materials on the website[139] to *Benchers' Bulletins*[140] to discipline advisories to specific anti–money laundering programs.[141] Members can also phone a Bencher or practice advisor with questions about an ethical issue.[142]

Although these educational materials are available, there is currently no *requirement* that lawyers in British Columbia receive any specific anti–money laundering education. Notably, the Financial Action Task Force Guidance states that legal professionals should be required to complete periodic continuing legal education in customer due diligence and money laundering / terrorist financing topics.[143]

135 Transcript, November 17, 2020, (Session 1), pp 67–68.

136 Transcript, May 29, 2020, p 58.

137 See, for example, Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix K, *Guidance for the Legal Profession: Your Professional Responsibility to Avoid Facilitating or Participating in Money Laundering and Terrorist Financing* (February 19, 2019); Appendix M, *Risk Assessment Case Studies for the Legal Profession* (February 2020); Appendix O, *Guidance on Monitoring Obligations: Client Identification and Verification* (July 6, 2020); Appendix P, *Guidance on Using an Agent: Client Identification and Verification* (July 6, 2020).

138 Exhibit 226, Law Society of British Columbia – Education of the Profession, para 25 [Education of the Profession].

139 The Law Society's website contains various materials and resources relevant to money laundering. For example, a page on the client identification and verification rules groups together a free webinar, checklists, sample forms, *Benchers' Bulletins*, relevant rules, discipline advisories, Federation resources, and more: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/your-clients/client-id-verification/.

140 As Mr. Avison explained, these "go out on a regular basis where there has been a consistent theme identified for the membership": Transcript, November 19, 2020, p 33. Essentially, they are newsletters that update lawyers, articled students, and the public on Benchers' policy and regulatory decisions, committee and task force work, and Law Society programs and activities: Exhibit 226, Education of the Profession, para 8; see also paras 9–11 for a review of bulletins relating specifically to anti–money laundering.

141 D. Avison, Transcript, November, 19, 2020, pp 32–35. See also Exhibit 226, Education of the Profession, paras 19-22, for a review of a number of educational programs offered by the Law Society.

142 Evidence of C. Ferris, Transcript, November 19, 2020, pp 35–36.

143 Exhibit 193, Overview Report: Legal Professionals and Accountants Publications, Appendix A: *Guidance for a Risk-Based Approach: Legal Professionals* (FATF, 2019), para 153(e).

As noted, the Law Society does offer programs related to anti–money laundering and has produced a variety of educational materials. However, the average recorded attendance in courses relating to anti–money laundering between 2009 and 2017 was under 1 percent of practising lawyers, with a modest increase to 6 percent in 2019.[144]

Mr. Ferris doubted that it would be prudent to make such training mandatory for lawyers. He noted the duty on lawyers to be competent in the areas in which they practise and said he has seen no evidence that lawyers are not educating themselves about the rules when they are operating in high-risk areas. In his view, making such education mandatory for all BC lawyers would be too sweeping, and making it mandatory for specific practice areas would be challenging given that the Law Society does not currently regulate lawyers according to their area of specialization. He was also concerned that imposing such a requirement could lead to a "checkbox" approach where lawyers feel they are in the clear if they have done the education.[145] Ms. Bains similarly had doubts that mandatory anti–money laundering education would be the best approach, noting that the Law Society has found measures such as risk advisories to be effective.[146] Ms. McPhee added that the compliance audit program is intended to be educational as well.[147]

The above concerns are well taken. I agree that imposing a mandatory anti–money laundering education requirement on all members of the profession would be too sweeping. I also appreciate the potential difficulties of imposing it only on lawyers practising in particular areas. Nonetheless, I am of the view that those lawyers who are most at risk of facing money laundering threats should be subject to mandatory anti–money laundering training. This requirement should include, but need not be limited to, lawyers who engage in the following activities: the formation of corporations, trusts, and other legal entities; transactional work, including real estate transactions; some transactions that do not involve the transfer of funds (such as transfer of title); and litigation involving private lending. As I noted above, over half the referrals to the Law Society Investigations Group in 2019 related to potential breaches of the anti–money laundering rules. Further, the percentage of practising lawyers who have attended the specific anti–money laundering courses is very low, ranging from 1 to 6 percent between 2009 and 2019.

It is in keeping with a risk-based approach, in my opinion, to impose a mandatory education requirement on those lawyers who are most at risk of facing money

144 Exhibit 237, Law Society of British Columbia, Briefing Note (October 7, 2020). Mr. Avison cautioned that these numbers only reflect participants who sought credit for the course. He explained that it did not account for lawyers who took the course but did not claim credit as they had already completed the annual education requirements, or lawyers who had participated in other educational opportunities that were not available for credit: Transcript, November 19, 2020, pp 40–44.

145 Transcript, November 19, 2020, pp 45–49. Mr. Ferris also expressed concerns about access to justice in the sense that increasing regulatory requirements has the potential to increase the cost and burden for certain practices and create impediments to marginalized people getting legal advice: Ibid, pp 57–58.

146 Transcript, November 19, 2020, pp 59–62.

147 Ibid, p 62.

laundering threats. As I discuss throughout this Report, money laundering is, by its nature, often difficult to detect; a proactive approach based on risk has great potential to at least deter the conduct. Moreover, the nature of money laundering means that it is constantly evolving, requiring professionals working in risky areas to continuously update their knowledge.

Overall, there is no dispute that lawyers are gatekeepers when it comes to money laundering, particularly in much solicitors' work, and I consider it essential for lawyers who practise in high-risk areas to be properly educated on the risks they face. This is not to doubt the sincerity of the concerns expressed by the Law Society witnesses or to suggest that their current measures are inadequate; rather, a mandatory education requirement appears to me to be the surest way that all or most lawyers who face the greatest money laundering risks are properly educated about them. I am therefore recommending that the Law Society implement mandatory anti–money laundering training for lawyers whose work puts them most at risk of facing money laundering threats. This training need not be an annual requirement, but it should be required before lawyers start engaging in such activities and at regular intervals thereafter.

Recommendation 62: I recommend that the Law Society of British Columbia implement mandatory anti–money laundering training for lawyers who are most at risk of facing money laundering threats. The education should be required, at a minimum, for lawyers engaged in the following activities:

- the formation of corporations, trusts, and other legal entities;
- transactional work, including real estate transactions;
- some transactions that do not involve the transfer of funds (such as transfer of title); and
- litigation involving private lending.

Law Society and Federation Engagement with Government

Before leaving the topic of anti–money laundering measures by the Law Society and the Federation, I note that both bodies have been active in engaging with government about areas affecting the legal profession. The Law Society has provided comments on initiatives including the *Land Owner Transparency Act White Paper*.[148] Similarly, the Federation has made submissions to Senate committees, the House of Commons Standing Committee on Finance, the Department of Finance, and the Department of Innovation, Science and Economic Development.[149] I encourage the Law Society

148 Exhibit 191, Overview Report: Anti–Money Laundering Initiatives of the LSBC and FLSC, Appendix A.
149 Exhibit 191, Appendices C, H, I, and N.

and the Federation to continue bringing forward their perspectives when legislative measures are contemplated to ensure these measures do not have unintended consequences on affected populations.

Law Society Collaboration with Law Enforcement and Other Stakeholders

I discussed in Chapter 27 how subjecting lawyers to a reporting regime would be challenging from a constitutional perspective. However, this does not mean that all information possessed by lawyers or the Law Society is automatically out of reach for law enforcement and other stakeholders. Other pathways to accessing that information exist, and it is crucial that they be used. First, the Law Society must continue its efforts to enter into and maintain information-sharing agreements with law enforcement and other regulators and stakeholders. Second, the Law Society must make better use of its ability to refer cases to law enforcement in appropriate circumstances. Third, law enforcement must appreciate that, although there are unique difficulties (such as privilege) when investigating lawyers, there are nonetheless ways for them to access the information they seek. Finally, information about the foregoing measures must be publicly disseminated to counter the perception that transactions conducted through a lawyer in furtherance of an unlawful aim are immune from detection.

Overall, all stakeholders must understand the roles played by each other and collaborate effectively. The Law Society has unparalleled access to its members' activities and must share that information as much as it is permitted. Meanwhile, law enforcement and other regulators and stakeholders must appreciate the role played by the Law Society and refer cases to it wherever appropriate.

The Need for a Shared Response

It is easy to reason that, because money laundering is a crime, the best response is a law enforcement response. Law enforcement is undoubtedly crucial to the fight against money laundering. However, we must not assume that regulators do not materially contribute to the fight as well. This is especially true in the case of lawyers, given that the Law Society is uniquely placed to investigate lawyers while avoiding the difficulties of privilege and confidentiality.

Dr. Benson's research points out numerous advantages of a regulator response. These include the regulator's specialist knowledge and expertise, understanding of the profession, access to material that may not be available to law enforcement, and ability to impose a broad range of sanctions.[150] Blair Morrison, chief executive officer of the BC Financial Services Authority, testified that regulators can also adapt to changing threats

150 Evidence of K. Benson, Transcript, November 17, 2020 (Session 1), pp 156–57.

more quickly than government because their rule-making power allows them to be "more agile" in responding to new developments.[151]

Further, a broad range of regulatory sanctions can be imposed, including fines, conditions on practice such as supervision, suspension, and even disbarment. This range may allow a regulator to "more accurately target the problem identified and provide a more tailored and appropriate response." Further, sanctions can be imposed to address professional misconduct falling short of criminal activity and can be imposed more quickly and cost efficiently than criminal sanctions.[152]

Dr. Benson concludes that a shared response is ideal, with regulatory and criminal justice responses addressing different kinds of conduct:

> In certain cases, criminal prosecution and robust sanctions are appropriate; for example, cases where lawyers (or firms) have participated in "high-end" money laundering, involving the proceeds of serious economic crimes such as corruption or tax evasion, or provide services for multiple individuals or groups engaged in criminal activity. However, for those whose role in facilitating money laundering is less active or intentional, or is considered to be unwitting or based on poor judgment, a regulatory response would be both more practicable and proportionate. Regulatory action should not be the answer in all cases as it does not provide the same moral condemnation or signal the gravity of the offending in the same [way] as criminal prosecution and sanctions. Therefore, a shared and cooperative response to the suspected facilitation of money laundering is suggested, involving law enforcement and regulators working together when a legal professional is identified during the course of a financial investigation, for example, or potential involvement in money laundering is identified through the course of routine monitoring by the professional or regulatory bodies. An effective shared response would require, firstly, greater prioritisation of suspected "professional enablers" in criminal and financial investigations at the "ground level" of policing, not just in high-level rhetoric, and, secondly, effective communication and collaboration between regulators, police and prosecuting authorities.[153]

I agree with Dr. Benson that a shared response is desirable and necessary. In what follows, I highlight areas in which the Law Society, law enforcement, and other regulators collaborate already and how that collaboration can be more effective.

151 Evidence of B. Morrison, Transcript, February 16, 2021, pp 28–29.

152 Exhibit 218, Katie Benson, "The Facilitation of Money Laundering by Legal and Financial Professionals: Roles, Relationships and Response" (DPhil, University of Manchester, School of Law, 2016) [unpublished], p 190.

153 Exhibit 220, Katie Benson, *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and Its Control* (London and New York: Routledge, 2020), p 170.

Information-Sharing Arrangements

The Law Society and the Federation consider information sharing to be essential. Ms. Bains testified that information sharing is "critical" to the Law Society's investigations and that she spends a lot of time building relationships with other entities. She explained that the sharing of both general information (e.g., about new typologies) and more specific information (about particular files) is important.[154] Similarly, Ms. Wilson testified that law societies are "very interested" in information sharing, particularly with law enforcement "about specific circumstances that law societies might be able to do something about."[155] Indeed, "even a name gives a law society something to go on. Even the suggestion or the question, have you looked at lawyer X, without any of the details is helpful because … the power of law societies to go in and look at what lawyers are doing are extensive."[156]

Various formal information-sharing arrangements exist in British Columbia. Since the early 2000s, the Law Society has had memoranda of understanding with all 11 municipal police forces and the RCMP "E" Division. These memoranda establish procedures for the Law Society to request information from police where it believes that law enforcement may have information relevant to an investigation, as well as terms and conditions for use of that information.[157] Ms. Bains testified that the Law Society has "very good relationships with law enforcement and the cooperation and communication and dialogue that we have with them is very helpful on our investigations."[158] The Law Society notes that, in recent years, it has met with members of "the RCMP 'E' Division's Financial Integrity Unit, the Vancouver Police Department's Financial Integrity Unit, and with other law enforcement personnel, both directly and through … meetings of the Association of Certified Fraud Examiners and the Association of Certified Anti–Money Laundering Specialists."[159]

The Law Society has not tracked the number of requests it has made under its memoranda of understanding with law enforcement. However, a review of its records revealed that at least nine written requests have been made since 2018, and that these requests were made when an investigation had already been initiated by the Law Society.[160] As of September 2020, the Law Society and the RCMP were working to update their memorandum of understanding.[161]

The Law Society has also established protocols to obtain information from the Criminal Justice Branch at the BC Ministry of the Attorney General.[162] Since 2016,

154 Transcript, November 19, 2020, pp 110–11.

155 Transcript, November 17, 2020 (Session 1), p 82.

156 Ibid, pp 82–83.

157 Exhibit 223, Investigations and Discipline Programs Summary, para 32; Exhibit 241, Memorandum from C. George to the Cullen Commission, Re Information-Sharing with Law Enforcement (September 24, 2020) [Information Sharing with Law Enforcement], p 2.

158 Transcript, November 19, 2020, pp 110–11.

159 Exhibit 241, Information Sharing with Law Enforcement, p 1.

160 Exhibit 243, Memorandum from C. George to the Cullen Commission, Re Information-Sharing with Law Enforcement (October 26, 2020) [Information Sharing with Law Enforcement #2], p 1.

161 Exhibit 241, Information Sharing with Law Enforcement, p 2.

162 Exhibit 223, Investigations and Discipline Programs Summary, para 33; Exhibit 241, Information Sharing with Law Enforcement, p 2.

the Law Society has delivered at least 27 written requests for information during an investigation.[163] Although the Law Society has no formal information-sharing agreement with the Public Prosecution Service of Canada, the Law Society engages with it on a case-by-case basis when a lawyer is charged with a federal offence.[164]

The Law Society has informal arrangements with other regulatory bodies including the BC Securities Commission and the US Securities and Exchange Commission.[165] Since 2018, the Law Society has delivered seven written requests for information to the BC Securities Commission, and the latter has referred six matters to the Law Society.[166] The Law Society also discussed information requests with the US Securities and Exchange Commission in a June 2019 meeting and encouraged the latter to refer matters to the Law Society.[167]

The Law Society is also an associate member of Counter Illicit Finance Alliance of British Columbia, which I discuss further in Chapter 39.[168]

Referrals to the Law Society

The testimony before me made clear that the Law Society finds the referrals it receives from other agencies to be important and useful. Ms. Bains testified that she frequently encourages other agencies to refer matters involving lawyers to the Law Society and to provide as much information as possible. She noted that "at the end of the day we want to serve our public interest mandate and we want to uncover concerns about lawyer misconduct that otherwise may not come to our attention."[169] Similarly, Mr. Avison noted that the Law Society has been engaging with other entities including the Ministry of the Solicitor General, the Ministry of the Attorney General, and the RCMP to explain its role and encourage referrals of matters involving lawyers.[170]

The Law Society has not tracked how many referrals it has received from government agencies. However, it notes that it has received referrals from Crown corporations, the Ministry of Justice Corrections Branch, the courts, and the Criminal Justice Branch when lawyers have been charged with criminal offences.[171] A review of the Law Society's records from 2020 revealed 14 referrals from law enforcement.[172]

163 Exhibit 243, Information Sharing with Law Enforcement #2, p 1.

164 Exhibit 223, Investigations and Discipline Programs Summary, para 33

165 Ibid, para 34.

166 Exhibit 243, Information Sharing with Law Enforcement #2, p 2.

167 Exhibit 243, Information Sharing with Law Enforcement #2, p 2.

168 Evidence of D. Avison, Transcript, November 18, 2020, p 55.

169 Transcript, November 19, 2020, pp 114–15. See also Evidence of F. Wilson, Transcript, November 17, 2020 (Session 1), p 83.

170 Transcript, November 19, 2020, pp 116–17. See also Exhibit 241, Information Sharing with Law Enforcement, p 2.

171 Exhibit 243, Information Sharing with Law Enforcement #2, p 2.

172 Ibid.

In its closing submissions, the Law Society noted that it "recognizes the unique regulatory responsibility it carries by virtue of its ability to audit and investigate lawyers in a manner unhindered by client confidentiality or privilege."[173] I agree that the Law Society has a heightened responsibility to conduct stringent money laundering regulation and investigation given the lack of lawyer reporting and the difficulties posed by client confidentiality and privilege. It is crucial that potential lawyer wrongdoing be referred to the Law Society. I therefore recommend that the British Columbia Solicitor General direct law enforcement to refer matters involving lawyers to the Law Society where appropriate. I further recommend that the Law Society continue its advocacy with government, regulators, and other stakeholders in order to clarify its role and when matters should be referred to it.

Recommendation 63: I recommend that the British Columbia Solicitor General direct law enforcement to refer matters involving lawyers to the Law Society of British Columbia where appropriate, and that the Law Society continue its advocacy with government, regulators, and other stakeholders about its role and when referrals to the Law Society should be made.

Law Society Referrals to Law Enforcement

Under the *Legal Profession Act*, the Law Society is not permitted to disclose information, files, or records that are confidential or privileged except as permitted by that statute or the Rules.[174] The Rules permit the Law Society's executive director, with the consent of the Discipline Committee, to deliver to a law enforcement agency any information or documents that may be evidence of an offence.[175] In March 2020, the Law Society developed guidelines to assist the Discipline Committee when considering such a request by the executive director. They include the following considerations:

- The Committee should be satisfied that there are reasonable grounds to believe the information or documents in the Law Society's possession are likely evidence of an offence.
- Absent exceptional circumstances, it will be in the public interest for the Executive Director to disclose information about a criminal offence to law enforcement.
- Disclosure to law enforcement will not be necessary if the conduct is already known to them.

173 Closing submissions, Law Society of British Columbia, July 9, 2021, para 77.

174 *Legal Profession Act*, SBC 1998, c 9, s 88.

175 Rules 2-53(4), 3-3(5), 3-23(3), 3-46(5)(c), 4-8(5); Exhibit 241, Information Sharing with Law Enforcement.

- If there are reasonable grounds to believe that disclosure to law enforcement is necessary to prevent an imminent risk of death or serious bodily harm, which may include serious psychological harm, to any person then disclosure to law enforcement will generally be in the public interest.[176]

If the committee consents to disclosure, the executive director may prepare a summary or an outline to provide to law enforcement. The summary or outline cannot contain information subject to privilege unless it has been waived by the client.[177]

Since 1998, there have been four incidents in which the executive director sought to disclose information to law enforcement, and in each case, the Discipline Committee consented.[178] Four referrals in the span of 23 years is a very low number. It is not clear on the evidence before me why this number was so low. However, Mr. Avison testified that there had previously been processes that contemplated three different committees playing a role in these decisions. Given the role is now centralized to a single entity – the Discipline Committee – Mr. Avison expects it will be "somewhat easier to be able to accommodate" such requests.[179]

Mr. Avison also testified that "regular information sessions … take place with entities like the RCMP and the financial integrity unit." However, in his view, there is a "strain on the resources … available to the RCMP to be able to engage in those kinds of exchanges to the extent that I think they would like to. That is an issue that comes up pretty consistently."[180]

Whatever the reason, four referrals since 1998 is far too low a number. It is highly implausible that in 23 years the Law Society came across only four instances that warranted a referral to law enforcement. I recommend that the Law Society review and assess its approach to determining whether it is in possession of information or documents that may be evidence of an offence and, if so, whether the executive director should seek approval from the Discipline Committee to provide it to law enforcement.

Recommendation 64: I recommend that the Law Society of British Columbia review and assess its approach to determining whether it possesses information or documents that may be evidence of an offence, and, if so, whether the executive director should seek approval from the Discipline Committee to deliver the information or documents to law enforcement.

176 Exhibit 242, Law Society of British Columbia, Guidelines for Disclosing Information to Law Enforcement.
177 Ibid.
178 Exhibit 243, Information Sharing with Law Enforcement #2, p 3.
179 Transcript, November 19, 2020, pp 115–16.
180 Ibid, p 116.

Tools Available to Law Enforcement

Law enforcement agencies certainly face challenges when investigating matters that involve lawyers, most notably the effects of solicitor-client privilege. However, they should not simply assume that, because a lawyer is involved, there is no way of getting the information sought. Below are some avenues that law enforcement should make use of in appropriate circumstances.

First, law enforcement can obtain a search warrant or production order for a lawyer's office in certain circumstances. To facilitate such searches while ensuring protection for solicitor-client privilege, the Law Society published guidelines for law office search warrants and procedures in 2013.[181] These were developed in consultation with the Public Prosecution Service of Canada, the Ministry of Justice (Criminal Justice Branch), and the British Columbia Association of Chiefs of Police. The process set out includes appointing a "referee" to execute the search warrant and maintain confidentiality, advising the Law Society of the search before carrying it out, and ensuring that reasonable efforts are taken to advise the lawyer of the search. The referee is tasked with obtaining the documents sought in the warrant, sealing them, and delivering them to the court so privilege claims can be resolved.

Second, law enforcement should keep in mind the crime exception to privilege. Under this exception, "no privilege attaches to communications criminal in themselves or intended to further criminal purposes."[182] In other words, if a client seeks to use a lawyer to facilitate a crime, including money laundering, no privilege will attach to those communications. It does not matter if the lawyer is knowingly assisting in the facilitation of a crime or not.[183]

I am not suggesting that the crime exception will always be easy to establish. To rely on it, law enforcement needs more than a mere allegation that advice was sought to facilitate a crime and more than simply proof that a crime occurred and that the criminal consulted a lawyer beforehand.[184] Nonetheless, when it can be established, it is clearly a powerful investigative tool. When law enforcement has a reasonable basis to show that the exception should apply, it should seek to invoke the exception and gain access to that information.

Third, law enforcement can, in appropriate circumstances, seek the production of trust accounting records. In Chapter 27, I discuss difficulties in designing a reporting regime based on trust account records, as they would appear to be presumptively privileged. However, although disclosing such records as a matter of course poses complex constitutional issues, this does not mean that law enforcement is precluded

181 Law Society of British Columbia, Guidelines: Recommended Terms for Law Office Search Warrants, online: https://www.lawsociety.bc.ca/Website/media/Shared/docs/lawyers/search-warrants.pdf; see also Exhibit 241, Information Sharing with Law Enforcement, pp 2–3.

182 *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10; *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860 [*Descôteaux*] at 881; *R v Campbell*, [1999] 1 SCR 565 [*Campbell*] at para 55.

183 *Solosky v The Queen*, [1980] 1 SCR 821 at 835; *Descôteaux* at 873.

184 *Campbell* at para 62.

from seeking access to trust account records on a case-by-case basis. Indeed, British Columbia courts have ordered production of redacted records, and the Supreme Court of Canada's case law would seem to allow for a process for judges to resolve claims of privilege. Indeed, the procedures I outlined above for law office searches would seem to be equally useful for trust account records, in that the materials could be sealed, privilege claims resolved, and the records passed on to law enforcement as appropriate.

Public Awareness

As I have noted throughout the chapters on lawyers, it is important that the public be aware of measures available to the Law Society and law enforcement when investigating lawyers. Such awareness is crucial to countering any perception that transactions conducted through a lawyer in furtherance of an unlawful aim are immune from detection. Although aspects of the lawyer-client relationship – particularly solicitor-client privilege – pose complications when investigating lawyers, the challenges are not insurmountable. I therefore recommend that the Law Society and the provincial government work to increase public awareness of the measures I have just described.

Recommendation 65: I recommend that the Law Society of British Columbia and the Province work to increase public awareness of measures available to investigate wrongdoing involving lawyers, including:

- the limitations on the use of a lawyer's trust account;
- the information-sharing agreements that exist between the Law Society and government agencies;
- the ability of the Law Society to refer matters to law enforcement when there is evidence of a potential offence; and
- the pathways that exist for law enforcement to obtain information about lawyers during investigations.

Conclusion

The involvement of lawyers in money laundering is a complex area. Clearly, lawyers possess the knowledge, skill, and scope of practice that would be of interest to criminals, and the practice of law inherently involves numerous money laundering risks. In this section of the Report, I have sought to outline the key areas of risk facing lawyers, without doing so exhaustively, and to recommend areas in which measures can be improved. I have also noted that research in this area is unfortunately relatively limited and expressed my hope that the AML Commissioner, academics, and

others will continue the research into lawyer involvement in and facilitation of money laundering. This would enable the Law Society, government, and law enforcement to apply their resources effectively to address key areas of risk.

In my view, the exclusion of lawyers from the *PCMLTFA* regime does not, contrary to dominant discourse, leave lawyers in British Columbia free of anti–money laundering regulation. The evidence before me suggests that lawyers will continue to be exempt from the *PCMLTFA*, and as I have explained, even a regime in which lawyers reported to the Law Society or another entity involves complex and challenging constitutional issues. Given this reality, it is imperative that the Law Society continue to maintain and enforce a robust anti–money laundering regime in British Columbia.

Although lawyers and indeed the Law Society are constrained in the extent to which they can disclose privileged information, it is important to recognize that this impediment does not constrain the Law Society in supervising and enforcing against lawyers. In fact, the Law Society has an advantage in that it does not face the same barriers as law enforcement: its officers can see everything in a lawyer's file, including privileged materials, and can use this information to inform their investigative and disciplinary powers.

It is clear to me that the Law Society, with the support of the Federation, has taken its role as the public interest regulator seriously. I find that it is engaged with anti–money laundering issues and continues to revisit its Rules to address emerging issues and risks. I trust that the Law Society will seriously consider my recommendations for ways in which the regime can be strengthened.

Chapter 29
British Columbia Notaries

British Columbia notaries are a unique profession in Canada. They are unlike both Quebec notaries, whose work under the civil law resembles that done by solicitors in other provinces and is subject to solicitor-client privilege, and notaries in other common law provinces, who have a narrower scope of practice.[1] Given their unique scope of practice and the effects of the Supreme Court of Canada's 2015 *Federation* decision,[2] BC notaries are, at the time of writing, the only legal service providers in Canada who are subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (*PCMLTFA*).

In this chapter, I describe the scope of practice of British Columbia notaries, the regulation undertaken by the Society of Notaries Public of British Columbia (Society), and the application of the *PCMLTFA* to British Columbia notaries and notary corporations. I then discuss the money laundering risks involved in this sector, which relate primarily to BC notaries' role in real estate transactions. Finally, I consider how information sharing between the Society and others can be strengthened.

1 As I understand it, the role of notaries in other provinces is largely limited to witnessing or certifying and attesting the execution of a document; certifying and attesting true copies of documents; and exercising the powers of a commissioner for taking affidavits: see, for example, *Notaries Act*, RSO 1990, c 6, s 3 (Ontario); *Notaries and Commissioners Act*, SA 2013, c N-5.5, s 4 (Alberta). However, the Quebec profession is distinct from the common law profession. It is governed by the *Notaries Act*, CQLR, c N-3, which specifies that a notary is a legal advisor and that professional secrecy (the civil law equivalent of solicitor-client privilege) attaches to their activities (ss 10, 14.1). The Supreme Court of Canada has noted that the role of Quebec notaries is very similar to that of solicitors in common law provinces: *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 at para 42.

2 *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 [*Federation*]. I discuss that decision in detail in Chapter 27. Briefly, it concluded that the application of the *PCMLTFA* to lawyers was unconstitutional because it interfered with constitutionally protected duties that lawyers and Quebec notaries owe to their clients.

British Columbia Notarial Profession

The role of BC notaries can be traced back to the practice of notaries in England in the mid-1800s. Indeed, the oath taken by BC notaries is taken directly from the English *Public Notaries Act* of 1843.[3] The profession is governed by the *Notaries Act*, RSBC 1996, c 334. It refers to two categories of notary: members of the Society, and non-member notaries appointed by cabinet.[4]

Members of the Society

Members of the Society can carry out the functions set out in section 18 of the *Notaries Act*. These include, but are not limited to:

- drawing instruments related to property that can be registered, recorded, or filed in a registry or public office;
- drawing and supervising the execution of certain kinds of wills;
- attesting or protesting commercial or other instruments; and
- drawing affidavits, affirmations, and statutory declarations.

John Mayr, chief executive officer of the Society, testified that, although the list in section 18 is long, most services provided by BC notaries are in real estate, personal planning,[5] and notarizing documents and contracts.[6] As Mr. Mayr put it, BC notaries' scope of practice is essentially "areas of non-contentious law."[7] Marny Morin, secretary of the Society, explained that, if a matter becomes contentious, it is referred to a lawyer or accountant.[8]

Mr. Mayr testified that BC notaries are legal service providers and that courts have determined they must meet the same standard of service as lawyers.[9] For example, like lawyers, notaries owe fiduciary duties to their clients.[10] Importantly, however, solicitor-client privilege does not attach to their work. Although BC notaries do owe a duty of confidentiality under the *Personal Information Protection Act*,[11] they can be obliged to produce materials to the RCMP, local police, and government agencies.[12]

3 Opening statement of the Society of Notaries Public of British Columbia, Transcript, February 25, 2020, p 33.

4 *Notaries Act*, RSBC 1996, c 334, ss 15, 16.

5 "Personal planning" refers to representation agreements, powers of attorney, and wills: Evidence of J. Mayr, Transcript, March 5, 2021, pp 19–20.

6 Transcript, March 5, 2021, p 19.

7 Ibid.

8 Transcript, March 5, 2021, pp 29–30.

9 Transcript, March 5, 2021, p 19.

10 Ibid, p 20.

11 SBC 2003, c 63.

12 Evidence of J. Mayr, Transcript, March 5, 2021, pp 20–21.

Members of the Society can practise on their own or through notary corporations.[13] Mr. Mayr testified that, as of March 2021, there were 404 members and that, although notary corporations exist, the vast majority of members are sole practitioners with zero to four staff members.[14]

Becoming a member of the Society involves applying to the British Columbia Supreme Court, passing examinations, and satisfying other requirements set by the Society.[15] The Society requires applicants to have a master's degree in applied legal studies.[16] The registrar of the BC Supreme Court maintains the Roll of Notaries Public.[17]

Cabinet-Appointed Notaries

The second category of notaries contemplated in the *Notaries Act* are those appointed by cabinet for limited functions. Such notaries can only administer oaths; take affidavits, declarations, and acknowledgements; attest instruments; and give notarial certificates (section 15(2)). They are not members of the Society and cannot carry out the other roles that members can (sections 15(4), (18)).

The title "Notary Public in and for the Province of British Columbia" can be used only by members of the Society, cabinet-appointed notaries, and lawyers.[18] Section 17 of the *Notaries Act* sets out when a person is considered to act as a notary public, and section 48 states that a person must not act as or hold oneself out as a notary public unless authorized by the statute.

The remainder of this chapter will focus on notaries public who are members of the Society. For simplicity, I will refer to them as "notaries" or "members."

Regulation by the Society

The Society's powers to regulate its members are set out in the *Notaries Act* and the *Notaries Regulation*.[19] The Society has passed the *Rules of the Society of Notaries Public of British Columbia* (Rules), which regulate the conduct of its members.[20] I review some key powers of the Society and rules applying to members below.

13 *Notaries Act*, ss 57–65.

14 Transcript, March 5, 2021, pp 19, 82–83.

15 *Notaries Act*, ss 5, 6, 11; *Notaries Regulation*, BC Reg 229/2004.

16 Evidence of M. Morin, Transcript, March 5, 2021, p 3; Simon Fraser University, School of Criminology, "MA in Applied Legal Studies Program," online: https://www.sfu.ca/criminology/appliedlegalstudies.html.

17 *Notaries Act*, s 13.

18 *Notaries Act*, s 16; *Legal Profession Act*, SBC 1998, c 9, s 14(3).

19 BC Reg 229/2004.

20 The Society of Notaries Public of British Columbia, *Rules of the Society* (April 2020), online: https://snpbc.ca/wp-content/uploads/2020/07/SNPBC-Rules_Revised-_July_2020.pdf.

General Duties of Notaries

Rule 2.01 specifies that every notary "shall in the public interest actively and independently pursue [their] profession." Notaries have a general duty to their clients to "represent that client competently and with undivided loyalty to the client" (Rule 11.01). In this regard, various rules address conflicts of interest and dealings with unrepresented parties (Rules 11.02–11.06).

Notaries can give undertakings, defined in Rule 10.01 as "a written or implied absolute and irrevocable covenant and commitment to act without fail upon certain circumstances, facts, deeds, or evidence." Notaries are personally responsible for undertakings, which can be released or altered only by the recipient (Rule 10.02). As I discuss below, undertakings frequently come into play during real estate transactions.

Practice Inspections, Investigations, and Discipline

Notaries are subject to practice inspections. Mr. Mayr testified that a practice inspection involves a team of senior notaries (practice inspectors) that engage with the notary and conduct a comprehensive review of the notary's practice, ranging from consideration of employment or partnership arrangements to a detailed examination of the member's files.[21] Ms. Morin testified that practice inspectors receive annual training and use a standardized checklist that covers all areas of practice.[22]

Compliance with practice inspections is mandatory. Notaries must answer the inspectors' questions, provide necessary information, and provide printed or electronic copies of documents (Rule 18.04). These inspections can identify deficiencies, lead to a requirement for re-inspection, require a member to enrol in a suitable education plan, or result in a referral to the Discipline Committee (Rule 18.05). Ms. Morin testified that all new notaries are inspected in their first year of practice. Following that, inspections occur randomly on a rotating four-year basis, targeting 25 percent of the membership (approximately 100 members).[23]

The *Notaries Act* empowers the Society to conduct audits of a member's or former member's books and accounts at any time. Ms. Morin testified that practice inspections and audits are separate processes, with trust account regulation largely addressed through audits.[24] If the audit discloses a contravention of the *Notaries Act*, *Notaries Regulation*, or the Rules, the directors may suspend the notary and direct an inquiry by the Discipline Committee.[25]

The Society also investigates complaints against notaries. Mr. Mayr testified that most complaints come from members of the public, but that they also come from

21 Transcript, March 5, 2021, pp 12–13.

22 Transcript, March 5, 2021, pp 14–15.

23 Transcript, March 5, 2021, p 15.

24 Ibid, pp 15–16.

25 *Notaries Act*, s 25.

lawyers, real estate agents, and other notaries.[26] The Society prepared a chart for the Commission categorizing complaints it has received since 2017, showing that the numbers ranged from 17 to 26 per year.[27]

Mr. Mayr is the lead investigator. He does a preliminary investigation of all complaints before presenting them to the Discipline Committee. The committee can direct further investigation and determine how to advance the complaint.[28] It is composed of five notaries and one member of the public.[29] Mr. Mayr testified that all notaries on staff have undertaken the anti–money laundering training I describe below, but none are certified anti–money laundering specialists.[30]

As noted above, matters can be referred to the Discipline Committee based on practice inspections, audits, or complaints. The committee can inquire into whether a member or former member has been guilty of the following:

- misappropriation or wrongful conversion of money or other property entrusted to them;
- incompetence;
- other professional misconduct;
- a breach of the *Notaries Act*, the *Notaries Regulation*, the Rules, or the Society's bylaws; or
- conduct that is "contrary to the best interest of the public or the notarial profession or tends to harm the standing of the notarial profession."[31]

The Discipline Committee reports to the directors of the Society, who make the ultimate determination of whether a notary is guilty of one of the above.[32] The directors may impose the following sanctions:

- a reprimand and fine of up to $5,000;
- a suspension of a member's practice or conditions on a member's practice, as well as a fine of up to $5,000; or
- termination of membership.[33]

26 Transcript, March 5, 2021, p 8.
27 Exhibit 683, SNPBC Complaints Summary.
28 Evidence of J. Mayr, Transcript, March 5, 2021, pp 5–6.
29 Ibid.
30 Evidence of J. Mayr, Transcript, March 5, 2021, pp 7–8.
31 *Notaries Act*, ss 27, 28.
32 *Notaries Act*, ss 33, 35(1).
33 *Notaries Act*, ss 35(2)(b) and (c).

Mr. Mayr testified that the *Notaries Act* is "fairly dated legislation," noting that the maximum fine of $5,000 is low and that there are no provisions for other sanctions.[34] Given the possibility of notaries' being used to facilitate money laundering through, for example, the transfer of real property, I agree that the maximum fine should be raised to provide a meaningful deterrent for such misconduct. I recommend that the provincial government, in consultation with the Society, raise that maximum fine.

Recommendation 66: I recommend that the Province, in consultation with the Society of Notaries Public of British Columbia, raise the maximum fine that can be imposed when a member of the Society is guilty of misconduct as set out in the *Notaries Act*.

On petition by the Attorney General of British Columbia, the Society, or an aggrieved person, the BC Supreme Court may inquire into alleged breaches of the *Notaries Act*, *Notaries Regulation*, or Rules, or into the professional conduct or alleged incompetence, negligence, or fraud of a notary. Following an inquiry, the court may suspend or terminate the notary's membership.[35]

The Society can apply to court to appoint a custodian of a notary's property and to manage, arrange for the conduct of, or wind up a member's practice in various circumstances, including if a notary's membership has been suspended or terminated or "other sufficient grounds exist." Mr. Mayr testified that the Society moves very quickly to determine if there is validity to complaints relating to conversion, fraud, or theft, and that a representative of the Society can be in court within a day or two seeking an order of custodianship.[36]

Notaries must immediately notify the Society of any judgment or determinations made by a discipline panel against them. They must also advise the Society if they are subject to: a summons, writ, or statement of claim; an investigation by another regulatory body or agency; or any proceeding, event, or development that might result in a claim against the notary's professional liability insurance or the Society's special fund.[37]

Regulation of Trust Accounts

Like lawyers, notaries are permitted to operate trust accounts. However, because solicitor-client privilege does not apply to notaries' work, the constitutional issues I outlined in Chapter 27 concerning privilege and trust accounts for lawyers do not arise, and notaries have reporting obligations under the *PCMLTFA*.

34 Transcript, March 5, 2021, pp 97–98.

35 *Notaries Act*, s 38.

36 Transcript, March 5, 2021, pp 98–99.

37 Rules 2.16–2.17.

The *Notaries Act* provides that money received by a notary on someone's behalf is trust money and must be held in an accredited financial institution.[38] The account must bear interest, and the notary must instruct the financial institution to pay that interest to the Notary Foundation.[39]

Notaries are required to inform the Society within one month of opening a trust account (Rule 4.02(a)). They must, at all times, keep sufficient funds in the account to meet the gross trust liability and must report shortages to the Society within five days (Rule 4.13). They must reconcile their trust accounts every month and correct errors promptly (Rule 4.14). A notary cannot deposit more than $2,500 into their trust account in the course of a single transaction

> unless such money consists of guaranteed institutional draft(s), electronic transfer of funds by the financial institution, or sent or received pursuant to these rules, cheque(s) certified by Members themselves; or trust cheque(s) issued by a notary, solicitor or licensed real estate agent. [Rule 4.03]

There are also detailed rules governing online wire transfers (Rule 4.03(1)).[40]

Notaries must pay funds into their trust account no later than the next banking day following receipt, with the exception of mortgage funds that cannot be deposited until after completion (Rule 4.05). They must record trust transactions no later than one week after the transaction date (Rule 4.06). They must also keep up-to-date records showing and readily distinguishing funds belonging to clients and to the notary.[41]

Trust funds cannot be withdrawn unless they are paid to or on behalf of the client, used for payment of the notary's fees or disbursements, or paid into the account by mistake.[42] They cannot be withdrawn in connection with registration in a land title register before the registration is completed (Rule 4.11).

Notaries must complete self-audit reports and deliver completed "trust administration fee remittance forms" every month to the secretary of the Society, declaring the total number of trust transactions involving the receipt or disbursement of funds (Rules 4.22, 4.26). A trust transaction includes, but is not limited to, a conveyance transaction acting for a buyer or a seller, a conveyance transaction involving a mortgage refinance, or any other transaction requiring funds to be held in trust (Rule 4.26).

The directors of the Society can audit a member's or former member's accounts or require an investigation by a chartered professional accountant at any time.[43]

38 *Notaries Act*, s 23(2).

39 *Notaries Act*, s 54; Rule 4.02(b).

40 Rule 4.03.1.

41 *Notaries Act*, s 23(1); Rule 4.01.

42 Ibid, s 23(3); Rule 4.09.

43 *Notaries Act*, s 24(1); Rule 4.20.

The Society audits approximately 25 percent of its membership every year.[44] As I noted above, audits can lead to referrals to the Discipline Committee and to re-inspection.

Insurance and the Society's Special Fund

Every member of the Society must participate in the Society's liability (errors and omissions) group insurance plan (Rule 7.01). Ms. Morin explained that all members must have $16 million in insurance covering errors and omissions and that an excess insurance package worth $23 million is available. The insurance provider, BC Notaries Captive Insurance Company, also offers a fidelity insurance program covering malfeasance, theft, and the like.[45] She testified that there are typically around 25 to 35 claims per year. In her experience, the Society has never needed to go into excess coverage with respect to errors and omissions. As for fidelity claims, she is aware of only a few over the course of 30 or so years.[46] However, she is aware of one large fidelity claim where a member was running her trust accounting improperly. The member was found to have been taking money from her clients and then left the country.[47]

The Society is required under the *Notaries Act* to maintain a special fund to reimburse losses that are caused by misappropriation or wrongful conversion by a member or former member of money that was entrusted to them. If a person makes a complaint for such a loss, the directors can conduct an inquiry and pay the claim out of the special fund.[48] Notably, Rule 6.12 provides that when a payment is made out of the special fund, the Secretary shall "turn information in the case over to the local police authorities or Crown counsel in the area where the offence occurred" and, unless the board otherwise directs, take steps toward having charges laid against the member.

The Society's Anti–Money Laundering Activities

Notaries are required to take 12 credits of continuing education every year. The Society approves the notary's chosen content and assigns it a credit value.[49] The Society has worked with a consultant, ABC Solutions, to develop an optional, modular anti–money laundering online training course[50] for notaries and notary staff. It is provided to members through a subscription.[51] The training satisfies the obligations under the *PCMLTFA*. The training is not mandatory, but is accredited for continuing education.[52]

44 Evidence of M. Morin, Transcript, March 5, 2021, p 15.

45 Ibid, p 17.

46 Ibid, p 18.

47 Ibid, pp 18–19.

48 *Notaries Act*, ss 20(1), (9), (10).

49 Evidence of M. Morin, Transcript, March 5, 2021, p 86.

50 See Exhibit 686, ABC Solutions Training Brochure (Redacted) and Exhibit 1021, Overview Report: Miscellaneous Documents, Appendix 6, A Guide for Developing a Notary Practice Risk Assessment Program – July 2018.

51 Evidence of M. Morin, Transcript, March 5, 2021, pp 75–76.

52 Ibid, pp 76, 85.

Ms. Morin testified that the Society used to hold the subscription and that approximately 300 to 350 members took the course annually. The subscription has since been taken over by the Notary Association, and Ms. Morin understands that around 200 members have taken the course since then. She noted that 200 is "quite a significant number given the size of our organization"[53] (around 400 members).

The Society also offers seminars on fraud generally, and it has invited auditors from the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to attend seminars and conferences to discuss the audit process, common deficiencies, and related topics.[54] The Society has also worked with ABC Solutions to create a risk assessment workbook that can aid members in assessing the risk potential for their practice and in implementing mitigation tools.[55]

Mr. Mayr testified that every complaint the Society receives is evaluated to consider whether it might have a money laundering aspect. However, the Society has not received any complaints that would bear on money laundering or terrorist financing.[56] Ms. Morin indicated that the Society has not come across any money laundering indicators through practice inspections.[57]

Application of the *PCMLTFA*

British Columbia notaries are reporting entities under the *PCMLTFA*. Ms. Morin testified that they are the "only 400 people in the country that are legal service providers that are reporting entities" under that regime.[58] The *PCMLTFA* regime applies to BC notaries public (defined to mean members of the Society) and BC notary corporations (defined to mean "an entity that carries on the business of providing notary services to the public in British Columbia in accordance with the *Notaries Act*").[59] In particular, it applies to notaries and notary corporations when they:

- receive or pay funds or virtual currency, other than in respect of professional fees, disbursements, expenses, or bail;
- purchase or sell securities, real property or immovables, or business assets or entities;
- transfer funds, virtual currency, or securities by any means; or
- give instructions with respect to the above.[60]

53 Ibid, pp 76, 81.

54 Ibid, pp 79–80.

55 Ibid, p 86.

56 Ibid, pp 95–96, 100.

57 Ibid, p 96.

58 Ibid, p 21.

59 *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 [*PCMLTF Regulations*], s 1(2).

60 Ibid, s 38(1).

It does not apply when the notary or notary corporation engages in those activities as an employee.[61]

Notaries and notary corporations must also keep a receipt of funds record when they receive $3,000 or more in respect of the above activities,[62] as well as large cash and large virtual currency transaction records when they receive $10,000 or more in connection with these activities.[63] Ms. Morin testified that the Society's requirements for retaining records are longer than the periods required under the *PCMLTFA*.[64] For example, the Rules require notaries to retain documents relating to residential conveyances for 10 years after the state of title certificate is received (Rule 17).

British Columbia notaries and notary corporations are subject to the same reporting requirements as other reporting entities, namely:

- reporting large cash and large virtual currency transactions of over $10,000 in respect of the above activities;[65] and
- reporting suspicious transactions where they have reasonable grounds to suspect that the transaction is related to the commission or attempted commission of a money laundering or terrorist financing offence.[66]

Notaries and notary corporations must also verify the identity of persons or entities involved in a large cash or large virtual currency transaction, or when they receive $3,000 or more.[67] They must also take reasonable measures to verify the identity of every person or entity that conducts or attempts to conduct a suspicious transaction.[68] Ms. Morin testified that notaries have always been required to identify their clients because of conflict of interest rules. She noted that the Society's best practices require using government-issued identification even when the *PCMLTFA* offers other methods.[69] As of June 2021, notaries and notary corporations must also obtain information about beneficial ownership when verifying the identity of an entity.[70]

Notaries and notary corporations must implement a compliance program, which has five aspects:

- appointing a designated compliance officer responsible for implementing the program;

61 Ibid, s 38(2).
62 *PCMLTF* Regulations, s 43.
63 Ibid, ss 41, 42.
64 Transcript, March 5, 2021, pp 23–24.
65 Ibid, ss 39, 40.
66 *PCMLTFA*, s 7.
67 *PCMLTF Regulations*, ss 84(a) and (b), 109(4)(a), 112(3)(a), 96(a), 105(7)(a).
68 Ibid, ss 85(1), 105(7)(c), 109(4)(b), 112(3)(b).
69 Transcript, March 5, 2021, pp 21–22.
70 *PCMLTF Regulations*, s 138(1).

- producing written policies and procedures that are kept up to date and, in the case of firms, approved by a senior officer;
- developing and applying policies and procedures to assess and document the risk of a money laundering or terrorist financing offence, taking into consideration organization-specific factors;[71]
- maintaining an ongoing compliance training program for employees and agents; and
- having an internal or external auditor carry out an effectiveness review of the policies and procedures, risk assessment, and training program every two years.[72]

Finally, notaries and notary corporations must monitor their business relationships with clients on an ongoing basis.[73]

The Financial Action Task Force's 2016 mutual evaluation of Canada[74] noted that British Columbia notaries had filed very few reports of suspicious transactions at the time of the assessment. One such report had been filed in 2011–12 and another in 2014–15.[75] The mutual evaluation noted that the low reporting "raise[s] concern" and described the number as "very low," while also observing that "FINTRAC is of the view that the quality of [suspicious transaction reports] is generally good and improving."[76] The report also notes that notaries were examined 23 times between 2009 and 2015.[77] The mutual evaluation concluded that BC notaries are "not fully aware of the risk and their gatekeeper role in relation to real estate transactions. Like real estate agents, they consider that all risks have been mitigated by the bank whose account the funds originated from."[78] It noted that FINTRAC had "identified several deficiencies in record-keeping procedures of BC notaries as well, especially with respect to the conveyancing of real estate."[79]

The 2021 follow-up to the mutual evaluation[80] did not discuss notaries in particular, but noted that with respect to suspicious transaction reporting, the "deficiencies identified in the [mutual evaluation report] in relation to the scope of the *PCMLTFA*

71 These include the nature of the clients, business relationships, products, services, and delivery channels, and the geographic location of their activities: *PCMLTF Regulations*, s 156(c).

72 *PCMLTFA*, s 9.6; *PCMLTF Regulations*, s 156.

73 *PCMLTF Regulations*, s 123.1(b).

74 Exhibit 4, Overview Report: Financial Action Task Force, Appendix N, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures – Canada, Fourth Round Mutual Evaluation Report* (Paris: FATF, 2016). See Chapter 6 for a discussion of the mutual evaluation process. Mutual evaluations are essentially peer reviews in which members of the Financial Action Task Force evaluate other members' anti–money laundering and counter-terrorist financing measures against the task force's 40 recommendations.

75 Ibid, p 84.

76 Ibid, paras 30, 233.

77 Ibid, p 93.

78 Ibid, para 215.

79 Ibid, para 226.

80 Exhibit 1061, FATF, *Anti–Money Laundering and Counter-Terrorist Financing Measures, Canada, 1st Regular Follow-up Report & Technical Compliance Re-Rating* (October 2021).

remain a minor deficiency."[81] Mr. Mayr testified that he did not have the numbers readily available, but recalled that the numbers of suspicious transaction reports filed by notaries follow the pattern of the real estate market and were much higher in 2017.[82] To the best of his recollection, the numbers used to be fewer than 10 and the highest annual figure was just under 100.[83]

Mr. Mayr also expressed the view that the numbers of large cash transaction reports are concerning:

> The large cash transaction reports do raise some concern because we have very strict cash acceptance rules … [O]ur sense is that people [who] are trying to launder money, they know that notaries are subject to … FINTRAC reporting and therefore don't necessarily go to a notary with a large cash transaction. Of course, lawyers have rules against accepting large cash amounts as well.
>
> So it would be interesting to try to find out more about those circumstances and really whether it's confusion by notaries as to … what is a large cash transaction report and when it's appropriate to submit one.[84]

Ms. Morin added that these may be *attempted* large cash transactions, but noted, "I can't really wrap my head around whether there would be any large cash transaction reports from our members."[85]

Involvement of Notaries in Real Estate Transactions

The evidence before me largely centred on notaries' involvement in real estate transactions, which is a key area of their practice and one in which money laundering risks can certainly arise. Moreover, in a similar manner to other "gatekeeper" professionals, such as lawyers and accountants, a notary's involvement in a transaction can provide an air of legitimacy that is attractive to criminals.[86]

81 Ibid, p 3.

82 Transcript, March 5, 2021, p 94.

83 Ibid, p 95.

84 Ibid, pp 94–95.

85 Ibid, p 95.

86 An example of how an air of legitimacy may attach to a notary's work is the case of Rashida Samji. As explained in court cases and in testimony before me, Ms. Samji was a notary public who was found to have operated a Ponzi scheme over a period of nine years, which put approximately $100 million from more than 200 investors at risk. She was found to have promoted false investments in an international wine distributor and told investors that their money would be held in her trust account, would not be at risk, and would not leave her account without their consent and instructions. She apparently told investors that they would receive a return of 6 percent every six months. However, according to published decisions, Ms. Samji did not in fact operate a trust account. The circumstances resulted in class actions, proceedings before the British Columbia Securities Commission, and criminal proceedings: Evidence of M. Morin, Transcript, March 5, 2021, pp 105–6; *Jer v Society of Notaries Public of British Columbia*, 2015 BCCA 257 at paras 6–9; *R v Samji*, 2017 BCCA 415 at paras 3, 8.

As noted above, Ms. Morin testified that notaries deal with non-contentious transactions. She explained that registration with the Land Title Office is the "ultimate goal."[87] The Society provided a document setting out the various steps in a real estate transaction and the notary's involvement,[88] which Ms. Morin thoroughly explained in her testimony. She testified that a notary usually becomes involved a few weeks before closing, when the realtor transfers funds to the notary to be held in trust as part of the closing funds.[89] The notary then advises the buyer how much money will be needed to complete the transaction, taking into account adjustments, such as expenses to be apportioned between buyer and seller, tax adjustments, mortgage funds, et cetera.[90] The remaining money is usually received into the notary's trust account up to two days before closing, though mortgage funds typically come the day of.[91]

Ms. Morin explained that the notary receives a "mortgage advice" or "instructions" from the financial institution outlining the terms of the mortgage, which the client signs.[92] The mortgage funds are typically received by bank draft, as the Rules limit what kinds of funds can enter a notary's trust account (see above).[93]

At closing, the notary uploads the necessary forms onto the Land Title and Survey Authority website, and the authority registers the mortgage on title.[94] After closing, the seller's notary pays out the seller's mortgages and any other charges or debts that were agreed upon. The notary pays their own account and then transfers the net sale proceeds to the client.[95] Within five days of closing, the seller's notary must provide the buyer's notary with proof of payment of the mortgage. Banks must provide a discharge of the mortgage within 30 days under the *Business Practices and Consumer Protection Act*, SBC 2004 c 2. If this is not done within 60 days, the notary must report to the Society's Mortgage Discharge Centre.[96]

Ms. Morin testified that it can take up to six weeks after closing for title documents to show that the seller's mortgage has been paid out. As a result, it might appear for some time that the seller still has a debt when in fact they do not. Both parties are relying on undertakings that the mortgage will be paid off.[97]

87 Transcript, March 5, 2021, p 30.

88 Exhibit 685, Conveyancing Cash Flow Charts v3 (October 2020).

89 Evidence of M. Morin, Transcript, March 5, 2021, pp 33–35.

90 Ibid, pp 36–37.

91 Ibid, pp 37–40.

92 Ibid, pp 41–43. This includes information such as the amount advanced, the interest rate, the parties, security, the property's civic address and legal description, the amortization period, and the term.

93 Evidence of M. Morin, Transcript, March 5, 2021, pp 38–39.

94 Ibid, pp 62–66.

95 Ibid, pp 66–67.

96 SBC 2004 c 2; Evidence of M. Morin, Transcript, March 5, 2021, pp 70–73.

97 Evidence of M. Morin, Transcript, March 5, 2021, pp 69–70.

Use of Trust Accounts

As the above demonstrates, notaries are heavily involved in real estate transactions and frequently have closing funds pass through their trust accounts. Handling large sums of money on behalf of clients clearly poses money laundering risks. These risks are lessened somewhat in comparison to lawyers' trust accounts because solicitor-client privilege does not attach to notaries' work and because notaries are reporting entities under the *PCMLTFA*. Nonetheless, although the Society's regulation of trust accounts is relatively strong, there remain ways in which it can be improved.

Mr. Mayr testified that notaries are not required under the *PCMLTFA* to determine the source of a client's funds. As the lender is almost always a financial institution, the notary relies on the bank to do its due diligence before forwarding the funds.[98] Indeed, Ms. Morin testified that the notary will only see what is on the face of the bank draft – the name of the account holder or client, the financial institution, and the amount. They would, of course, also have information about the terms of the mortgage.[99]

Ms. Morin testified that, although there is no obligation under the *PCMLTFA* to make inquiries into the source of funds, the notary would likely make inquiries, such as asking about a client's occupation, in certain situations, including where a client: provides bank drafts from multiple financial institutions;[100] demonstrates any resistance to providing documentation or responding to questions; or lacks knowledge about the transactions. Further, as notaries are now required to make inquiries as a result of the *Land Owner Transparency Act*,[101] it would be clear if a client did not have adequate knowledge of the property.[102] Notaries would also see discrepancies between identification documents and what is recorded on mortgage applications. Ms. Morin testified that any such discrepancies would need to be investigated.[103]

Although I appreciate that a notary should, as a matter of best practice, make the inquiries Ms. Morin described, it strikes me that a rule in this regard would be beneficial. A rule would move beyond mere hope to require that, in all cases, a notary must make such inquiries. Having such a requirement would more effectively address the risks arising. As noted above, the Financial Action Task Force's mutual evaluation stated that notaries appeared to rely on due diligence undertaken by the financial institution and were insufficiently aware of their gatekeeper obligations. In the absence of an obligation under the *PCMLTFA* to inquire into the source of funds, I recommend that the Society fill that void and require its members to obtain, record, verify, and maintain that information. Although the Society is best placed to determine all the situations in which inquiries into source of funds should be required, these should include at least the situations where a lawyer is obliged to inquire into source of funds (see Chapter 28).

98 Evidence of J. Mayr, Transcript, March 5, 2021, pp 90–91.

99 Evidence of M. Morin, Transcript, March 5, 2021, pp 39, 90–91.

100 Ibid, p 92.

101 SBC 2019, c 23.

102 Evidence of M. Morin, Transcript, March 5, 2021, p 93.

103 Evidence of M. Morin, Transcript, March 5, 2021, pp 89–90.

Recommendation 67: I recommend that the Society of Notaries Public of British Columbia require its members to obtain, record, and keep records of the source of funds from their clients when those members engage in or give instructions with respect to financial transactions.

Private Lending

I discuss private lending in more detail in Chapters 17 and 26. The risks inherent in private lending apply equally to notaries, although it appears that not many notaries are involved in transactions with private lenders. Ms. Morin testified that private lending is a "niche" area for notaries. Those who are involved in such transactions usually have a relationship with only one or two lenders. Further, whereas notaries can act for both a buyer and lender in a residential mortgage with a recognized financial institution, they cannot act for both a private lender and a buyer.[104]

Ms. Morin testified that the Society considers private lending to pose risks for clients, given that interest rates are substantially higher and the lender and buyer do not necessarily have the same interests:

> And these are the reasons why notaries can't act for both borrower and lender in a private situation because the interests are a little different, whereas with a financial institution everybody … wants the same thing. The buyer wants a house and the bank wants … to lend the money, that they can pay back … [Further,] the lending risks are lower with financial institutions than they are with private lenders. And that's just the nature of the beast when it comes to private lending.[105]

Ms. Morin noted that the consequences for missing a payment or an NSF cheque can be "quite high" with a private loan. Similarly, penalties for paying out a mortgage early are often much higher than they would be with a mainstream financial institution.[106] However, Mr. Mayr testified that the Society has not taken a position on whether private lending poses a money laundering risk:

> [W]e have certainly not taken a position on it. Part of the rationale would be the funds that come to the notary are coming from a financial institution even if it's through a private lender. A client couldn't show up with a personal cheque or a bag full of cash and say … here, I borrowed this money; I want you to put this … into the transaction.[107]

The Society has not issued advisories, training modules, or other education to members on private lending specifically (though there are regular education seminars

104 Ibid, pp 56–57.

105 Ibid, p 60.

106 Ibid, pp 59–60.

107 Evidence of J. Mayr, Transcript, March 5, 2021, pp 60–61.

on mortgage transactions). Ms. Morin testified that there are few claims concerning private lending and that not many members are engaged in this work. She noted that practice inspections of notaries who engage in private lending would consider whether the notary is paying close attention to the risks and obligations and has specific procedures in place that are dependent on who the lender is.[108]

Although it appears that not many notaries are involved in private lending transactions, there are nevertheless money laundering risks inherent in such transactions (as outlined in Chapters 17 and 26), and it is important that notaries who are involved in such transactions are alive to those risks. While the Society's representatives, in their evidence, focused on private lending by registered lenders, the ambit of private lending extends to unregistered entities and individuals who are operating outside the purview of regulators such as the Registrar of Mortgage Brokers. The potential for money laundering through mortgages exists equally where a mortgage is registered by a notary, and notaries should be aware of the vulnerabilities in this area.

Given the risks associated with private lending and the potential for notaries to be involved, I consider it important for the Society to be educating its members on the risks arising. As I discussed in Chapter 26, the Law Society of British Columbia and the Federation of Law Societies of Canada have both issued risk advisories to the profession regarding private lending. I recommend that the Society develop similar materials for its members.

Recommendation 68: I recommend that the Society of Notaries Public of British Columbia educate its members on the money laundering risks relating to private lending through educational materials or other means.

Possible Indicators of Money Laundering in Real Estate Transactions

The testimony before me outlined some possible indicators of money laundering that notaries may come across in their practice. Ms. Morin testified that the training she provides for notary students involves discussing what money laundering is, what it looks like, indicators of suspicion, the notary's obligations, and risk assessment.[109] One possibly suspicious circumstance is a short closing period, when a client wants to close in a day or two and will pay high fees to do so. Ms. Morin testified that a notary would need to investigate such a situation.[110] Another possibly suspicious circumstance is the involvement of third parties, such as someone acting under a power of attorney or a realtor who is interpreting for the client. Ms. Morin testified that these could be perfectly legitimate scenarios but would "require some additional scrutiny" by the notary.[111]

108 Evidence of M. Morin, Transcript, March 5, 2021, pp 61–62.

109 Ibid, pp 78–79.

110 Ibid, pp 87–88.

111 Ibid, pp 88–89.

Ms. Morin testified that the Society sometimes receives complaints when a client has prepared their own forms and wants the notary to sign them, but the notary refuses:

> And that's one of the areas in which we get complaints from time to time, it's members of the public saying well, I prepared my own, and they refuse to sign it, and all they want is … a fee. Well, that's not all they want. They can't provide a service if they haven't done the due diligence necessary to ensure that the party before them that is giving up that interest as a seller is getting what they're supposed to get. So, it's very difficult for a person to do their own real estate transaction documents and then just go out and try and get somebody to sign them for them.[112]

Such a situation, Mr. Mayr added, could lead to a requirement to file a suspicious transaction report. Further, with the introduction of the *Land Owner Transparency Act,* SBC 2019, c 23, there "has to be now a much deeper discussion about beneficial ownership."[113]

In Ms. Morin's view, notaries are familiar with the circumstances that may indicate money laundering. This is because of their duty to know their clients and gather information in order to effect the transaction. She testified that she emphasizes to her students that "it's not people that are suspicious; it's their behaviour. And so you have to look at behaviour of the person in front of you and see if it adds up to the context of the transaction that they're involved in."[114]

Referrals and Information Sharing

The evidence before me demonstrated that the Society is eager to engage with other regulators and law enforcement in order to further its public interest mandate. Mr. Mayr expressed the view that the Society has a good relationship with the Vancouver Police and the RCMP and works closely with them in respect of complaints and allegations. He noted some complexity in terms of collaboration with other regulators:

> When it comes to regulatory bodies, that tends to be a little more difficult to work around. We have a very good relationship with the Law Society, but their complaints and investigation do tend to be fairly siloed and segmented, and we generally find out when there's a complaint that involves a lawyer where there's a notary involved after they have completed discipline.
>
> And certainly we are actually just in the process of developing a framework for lawyers and notaries, not only to work together, but hopefully get to a point where we can either share information more freely about different members and … ideally I think combined investigations where you've got notary involvement with a lawyer would be an ultimate goal for us.[115]

112 Ibid, pp 84–85.

113 Evidence of J. Mayr, Transcript, March 5, 2021, p 85.

114 Evidence of M. Morin, Transcript, March 5, 2021, pp 93–94.

115 Evidence of J. Mayr, Transcript, March 5, 2021, pp 96–97.

Ms. Morin testified that she would like to see more communication between sectors. This is particularly so in real estate transactions given the various actors who are involved before the notary comes into the picture.[116]

As I have discussed throughout this Report, information sharing and collaboration are key to the fight against money laundering, given its clandestine nature and the evolving methods by which it is done. I encourage the Society to develop approaches to sharing information and collaborating with other regulators, such as through memorandums of understanding.

Conclusion

In this chapter, I have reviewed the work of BC notaries, their regulation by the Society, and the application of the *PCMLTFA*, and the key money laundering risks that arise in this sector. Although the Society has fairly strong regulation in place, I have identified areas in which it can strengthen its anti–money laundering measures. Finally, I have highlighted ways in which information sharing and collaboration can be improved between the Society and other agencies.

116 Transcript, March 5, 2021, pp 101–2.