



Legislative Assembly of Alberta

The 29th Legislature
Second Session

Select Special
Ethics and Accountability
Committee

Public Interest Disclosure (Whistleblower Protection) Act Review

Friday, May 27, 2016
9 a.m.

Transcript No. 29-2-4

**Legislative Assembly of Alberta
The 29th Legislature
Second Session**

Select Special Ethics and Accountability Committee

Littlewood, Jessica, Fort Saskatchewan-Vegreville (ND), Chair
Miller, Barb, Red Deer-South (ND), Deputy Chair

Anderson, Wayne, Highwood (W)
Carson, Jonathon, Edmonton-Meadowlark (ND)*
Clark, Greg, Calgary-Elbow (AP)
Connolly, Michael R.D., Calgary-Hawkwood (ND)
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Jansen, Sandra, Calgary-North West (PC)
Loyola, Rod, Edmonton-Ellerslie (ND)
Nielsen, Christian E., Edmonton-Decore (ND)
Nixon, Jason, Rimbey-Rocky Mountain House-Sundre (W)
Renaud, Marie F., St. Albert (ND)
Starke, Dr. Richard, Vermilion-Lloydminster (PC)
Sucha, Graham, Calgary-Shaw (ND)
Swann, Dr. David, Calgary-Mountain View (AL)
van Dijken, Glenn, Barrhead-Morinville-Westlock (W)

* substitution for Chris Nielsen

Also in Attendance

Yao, Tany, Fort McMurray-Wood Buffalo (W)

Office of the Public Interest Commissioner Participants

Peter Hourihan	Ombudsman, Public Interest Commissioner
Sandy Hermiston	General Counsel
Ted Miles	Director

Support Staff

Robert H. Reynolds, QC	Clerk
Shannon Dean	Law Clerk and Director of House Services
Trafton Koenig	Parliamentary Counsel
Stephanie LeBlanc	Parliamentary Counsel and Legal Research Officer
Philip Massolin	Manager of Research and Committee Services
Sarah Amato	Research Officer
Nancy Robert	Research Officer
Corinne Dacyshyn	Committee Clerk
Jody Rempel	Committee Clerk
Aaron Roth	Committee Clerk
Karen Sawchuk	Committee Clerk
Rhonda Sorensen	Manager of Corporate Communications and Broadcast Services
Jeanette Dotimas	Communications Consultant
Tracey Sales	Communications Consultant
Janet Schweigel	Managing Editor of <i>Alberta Hansard</i>

9 a.m. Friday, May 27, 2016

[Mrs. Littlewood in the chair]

The Chair: Good morning. I would like to call the meeting of the Select Special Ethics and Accountability Committee to order. Welcome to members and staff in attendance.

To begin, I'm going to ask the members and those joining the committee at the table to introduce themselves for the record, and then I'll address members on the phone. I'll begin to my right.

Ms Miller: Barb Miller, MLA, Red Deer-South, deputy chair.

Loyola: Rod Loyola, MLA for Edmonton-Ellerslie.

Cortes-Vargas: Estefania Cortes-Vargas, MLA for Strathcona-Sherwood Park.

Mr. Connolly: Michael Connolly, MLA for Calgary-Hawkwood.

Ms Drever: Deborah Drever, MLA for Calgary-Bow.

Ms Renaud: Marie Renaud, St. Albert.

Mr. Carson: Jon Carson, MLA, Edmonton-Meadowlark.

Ms Hermiston: Sandy Hermiston, lawyer for the Public Interest Commissioner.

Mr. Hourihan: Peter Hourihan, Public Interest Commissioner.

Mr. Miles: Ted Miles, director for the office of the Public Interest Commissioner.

Mr. Yao: Tany Yao, Fort McMurray-Wood Buffalo.

Mr. van Dijken: Glenn van Dijken, MLA for Barrhead-Morinville-Westlock.

Mr. Clark: Good morning. Greg Clark, MLA, Calgary-Elbow.

Dr. Amato: Hi. Sarah Amato, research officer.

Dr. Massolin: Good morning. Philip Massolin, manager of research and committee services.

Ms Dean: Good morning. Shannon Dean, Law Clerk and director of House services.

Ms Rempel: Jody Rempel, committee clerk.

The Chair: And on the phone?

Ms Jansen: Sandra Jansen, Calgary-North West.

Dr. Swann: David Swann, Calgary-Mountain View.

Mr. Nixon: Jason Nixon, Rimbey-Rocky Mountain House-Sundre.

Mr. Sucha: Graham Sucha, Calgary-Shaw.

The Chair: I'll just note for the record that Mr. Carson is an official substitute for Mr. Nielsen.

A few housekeeping items to address before we turn to the business at hand. A reminder that the microphone consoles are operated by *Hansard* staff, so there's no need for members to touch them. Please keep cellphones, iPhones, and BlackBerrys off the table as these may interfere with the audiofeed. Audio of committee proceedings is streamed live on the Internet and recorded by

Hansard. Audio access and meeting transcripts are obtained via the Legislative Assembly website.

Up next is the approval of the agenda. Does anyone have any changes to make? If not, would a member please move a motion to approve our agenda? Moved by Member Drever that the agenda for the May 27, 2016, meeting of the Select Special Ethics and Accountability Committee be adopted as distributed. All in favour? Any opposed? On the phone? Carried.

Approval of meeting minutes. Next is the minutes from our last meeting. Are there any errors or omissions to note in the draft minutes? If not, would a member move adoption of the minutes, please? Moved by Member Cortes-Vargas that the minutes of the May 19, 2016, meeting of the Select Special Ethics and Accountability Committee be adopted as circulated. All in favour? Any opposed? On the phones? Carried.

We'll move on to the Public Interest Disclosure (Whistleblower Protection) Act. As this committee organizes itself to begin its first round of deliberations, I'd like to make a few introductory comments. First, I'd like to note for the record that the office of the Information and Privacy Commissioner has been following the work of this committee. In response to some of the questions and concerns raised in the written submissions we received on PIDA, that office has sent us a memo explaining the relationship between PIDA and an individual's personal information or health information as well as the application of the Freedom of Information and Protection of Privacy Act and the Health Information Act. This document was received yesterday and made available to committee members immediately.

I would also like to thank the PIC and his staff for joining us today as we begin our deliberations on PIDA and for the ongoing support they have provided this committee. We will also have the continued support of the LAO committee staff, who will assist us with the deliberations and report drafting process. They're also available to assist us in drafting motions. We are not here, as noted last week, to wordsmith specific changes to legislation, but it is very important that any motion that could appear in the report have a clear intent.

With that in mind and as suggested by the agenda approved at the start of the meeting, our goal today is, first, to organize our deliberations by identifying areas of PIDA we wish to explore, then to consider each of those issues. Ultimately, if we wish to make any recommendations, they can be put forward as a motion and voted on. Of course, if we determine not to recommend changes to a section of the act, then no motions are necessary. Today the objective is to deliberate on the act and come up with recommendations for the committee's report.

Good morning, Dr. Starke. I'll just have you introduce yourself for the record.

Dr. Starke: Good morning. It's Richard Starke, MLA for Vermilion-Lloydminster.

The Chair: Thank you.

An issues document for PIDA was distributed to all committee members last week. This document is a tool for the committee that organizes and summarizes the issues identified by the various groups and individuals that provided their input to the committee. When applicable, the document also notes the suggestions and recommendations put forward by these submitters. This document is not intended to be a checklist for the committee. We are not bound to address the issues identified in the document or precluded from identifying issues of our own.

Before we proceed any further, I'd like to ask Dr. Massolin and Dr. Amato to give us an overview of this document.

Dr. Massolin: Thank you, Madam Chair. I don't have a lot to add except to reiterate, I think, some of the things that you said about this document being a reflection of the information that the committee has received to date. Having said that, of course, the committee is able to look at other issues that are not included or to skip issues that are indicated here. It's completely at the committee's will to do so.

Just for a very, very brief overview, I'll pass it to Dr. Amato.

Dr. Amato: Sure. The document, as you probably noted, is grouped loosely into eight major headings or issues. These pertain to the expansion of the scope and application of PIDA, changing the definition of wrongdoing, procedures for disclosure, investigations by the commissioner, reprisals, general matters – general matters, please note, are simply issues that were put forward by stakeholders and interested parties that refer to part 5 of PIDA, and part 5 of PIDA is general matters – offences and penalties, and then other issues for possible consideration. These other issues for possible consideration are a variety of recommendations and proposals that the committee may wish to consider or prioritize in its discussions. That's entirely at the will of the committee.

If you'd like, I can just give a little summary of each of the headings. Expansion of Scope and Application of PIDA is issues that aim to bring, for example, contractors and service providers under the act. Another proposal is to bring under the act the private sector, ministers and Members of the Legislative Assembly, and certain agencies, boards, and commissions.

The heading Changing the Definition of Wrongdoing refers to recommendations and proposals that suggest clarifying and expanding the definition of wrongdoing under PIDA.

Procedures for Disclosure is the third major heading. These recommendations and proposals refer to direct disclosures to the Public Interest Commissioner, disclosures to supervisors, public disclosure, processes following an internal investigation, timelines for disclosure, and remedies and rewards for disclosure.

Investigations by the Commissioner refers to recommendations and proposals about the commissioner's ability to compel information, solicitor-client privilege, processes that might be in place when the commissioner does not investigate a disclosure, the commissioner's ability to compel action, own-motion investigations by the commissioner and chief or designated officer, and reporting requirements in the commissioner's annual report.

Reprisals are all about recommendations and proposals to do with reprisals, reverse onus and reprisals, and remedies for whistle-blowers who suffer reprisals.

The heading General Matters refers to the commissioner's power to exempt, granting the commissioner privilege and protection from giving evidence, and legal counsel for whistle-blowers.

The issues grouped under Offences and Penalties refer to offences for reprisals and appeal or judicial review of the commissioner's decisions.

That's a kind of high-level summary of what's in this document. Thank you, Madam Chair.

9:10

The Chair: In addition to this issues document, which reflects the over 30 written submissions from stakeholder members of the public and multiple oral presentations, the committee also received a technical briefing from the Public Interest Commissioner. Other briefing documents such as a cross-jurisdictional comparison have also been put together to help prepare the committee for the deliberation stage of our review.

We have spent the last few months familiarizing ourselves with this information and identifying what the key issues are for the

committee's consideration. Some of these issues may align with those identified by submitters, and of course some may not. At this point I would like to open the floor for committee members to identify the issues that they wish to consider throughout deliberations.

Ms Renaud.

Ms Renaud: Thank you. I think we've talked about this numerous times, but I do think it's important. You know, we heard from the Public Interest Commissioner and the Auditor General about how important it is to extend the act to contractors and other delegated service providers of the government of Alberta. I think that, just reviewing a little bit, in his written submission to the committee the Auditor General spoke to this point and stated:

Research consistently shows that the objectives of whistleblower protection policies and legislation are best achieved through broad coverage, not only in terms of who the law applies to, but also the type of conduct that constitutes "wrongdoing" for the purposes of the Act.

I think it's really important to know that

contractors and delegated service providers are in much the same position as employees . . . [they face retaliation or] they may face retaliation if they report illegal or unethical conduct. In some cases, there is very little distinction between contractors and employees since departments or public entities may engage someone by contract who [already] works within the organization.

In addition, I just wanted to again review one of the comments made by the Public Interest Commissioner, where he stated:

It is appropriate to extend PIDA coverage to those entities providing service for government or entities receiving significant government funding such as: long-term care facilities; group homes; registry agents; private companies delegated to administer and maintain provincial parks; private companies delegated to design, construct, repair and maintain highways . . .

The Chair: Ms Renaud.

Ms Renaud: Yup.

The Chair: We're just going to make a list and then . . .

Ms Renaud: Oh, I'm sorry.

The Chair: No. It's okay.

Ms Renaud: I got a little carried away.

The Chair: You've got it all on the record. We will continue. We've got that on the list, discussing contract providers. Thank you. Are there other ideas on what we want to discuss?

Mr. van Dijken: I think, with regard to the application to the private sector: it needs to be discussed.

Cortes-Vargas: Procedures for disclosure.

Ms Renaud: Direct disclosure to the commissioner.

Mr. Clark: Public disclosure, I think, is important.

Loyola: Reprisals and remedies, for sure.

Mr. van Dijken: The recommendation with regard to amending and granting the commissioner the power to initiate investigations, I think.

Cortes-Vargas: General matters.

The Chair: Is there something maybe more specific under general matters?

Cortes-Vargas: Sure. Specifically, reporting.

The Chair: Okay. Thank you.

Mr. Yao: Procedures to protect confidentiality.

Mr. Clark: Madam Chair, I think we've identified sections under almost every major heading of this document. I actually wonder if perhaps we just went through it systematically, if that makes more sense perhaps, to just take each section and have a conversation about each major heading. You know, I think we're probably going to end up doing that anyway. I think we can all try to restrain ourselves if there are things we're in agreement on and perhaps try hard not to talk that out.

The Chair: Yeah. I think we have a good list to start here. Are there any other suggestions?

Mr. van Dijken: I would suggest that what the MLA for Calgary-Elbow is alluding to is that we've highlighted some sections that we have identified as a priority, but possibly we would also be opening up and commenting on other parts of it as well as opposed to just the items that we have brought forward at this time.

The Chair: Dr. Amato has it laid out by sections, and I think we have some things identified, so we'll start the discussion at the top, then.

Okay. For the first issue up for consideration we are underneath Expansion of Scope and Application of PIDA, discussing the contract sector.

Ms Renaud: I don't really actually have much more to add. I went through, really, what I wanted to and just highlighted some of the really important things that we heard from the Auditor General and from the Public Interest Commissioner. But I do think that it is vital that we expand the scope as recommended.

The Chair: Dr. Massolin, do you have any additional remarks on that item?

Dr. Massolin: No, not at this point. We can add, maybe, as committee members have questions, or perhaps the Public Interest Commissioner can enlighten us.

Thank you.

The Chair: Mr. Clark.

Mr. Clark: Yeah. Thank you very much. I'd like to explore a question with Mr. Hourihan if I can. You used the example of long-term care facilities in terms of inclusion of contracted service providers, and I think that seems to make a lot of sense because those long-term care facilities have a certain scale. They're quite a substantial size, and they have some resources at their disposal. But Service Alberta had noted that Human Services has contracts with more than 2,200 service providers, many being very small businesses. I'm wondering if you have any thoughts on if there are certain criteria that we can apply to perhaps narrow where those boundaries ought to be, remembering that Service Alberta has also suggested there are other legal and policy mechanisms for enforcing compliance with those service providers.

Mr. Hourihan: Yeah. I'll try. I mean, things like group homes or long-term care facilities, entities that are generally considered full-blown government activities – they're funded by government;

they're highly regulated or controlled by government and by regulation – those kinds of things stand a bit separate or different from the other types of contracts that I think Service Alberta is talking about.

Service Alberta, if I understand it correctly, are talking about, you know, any number of entities that are brought in, where, say, Infrastructure brings in contractors to do work and that sort of thing, those kinds of protections. I think that if there was clarity that they were included in the legislation, that would be beneficial. On the other side of the coin, however, that said, they can be included now in that if people report while they're working as temporary employees and that sort of thing, then that can be done. It can be handled the way the act is right now.

The challenge with this becomes: how is protection going to be provided to a contractor who comes in? Let's say that a contractor comes in and sees something that he or she believes is not being done correctly and that it is, in fact, a wrongdoing and reports it up through the government structure. Let's say that it's Infrastructure, just for an example. Infrastructure can look into that and do all the things under the act that's now structured as it is. The difficulty becomes: what if that person's parent company, ABC123 Incorporated, who hired that person, is not particularly happy with that person and reprises against him or her in that relationship? We can provide no protection to that private entity, and I don't think that you could include all private entities, very simply, in this legislation that might work at some point in time for government.

9:20

I think the protection, if it's that way in terms of the act, could be in terms of: how does it get controlled, or is there oversight provided to that person, from the government perspective, on-site and in that particular area? I don't know if I'm making myself clear, but the delineation there makes it fairly difficult, and we've considered how that might look. It would be extremely difficult unless there were considerations to go to the private sector.

Mr. Clark: Right. So are you saying, really, in your opinion, that it's all or nothing, that it's either that all contracts are included or not, that it would be, if I can paraphrase what I think I heard, quite difficult to make a delineation between a care provider and a small IT shop, you know, between a long-term care facility with 150 beds and a small IT shop of two people? Those are obviously very different things, but if I'm hearing you correctly, it actually would be quite difficult, from a policy perspective, to differentiate there.

Mr. Hourihan: I think so. You know, we haven't had to address any of those situations. Once you're faced with a factual situation, things become much clearer than what they were when you were going in hypothetically. But, yeah, it would be very hard to determine. I mean, right now if somebody comes in and says, "I was working there, and this happened" – they also have the opportunity, I suppose, to report anonymously; anybody does. I mean, people get enveloped in there or entities can get enveloped into the legislation as it stands now, but that may not be the best approach. I certainly make no comment in that regard; I just make the observation.

So it is hard to separate. You know, to take it to a care home, sure, the large facility is provided, let's say, protection if they were enveloped into the act, but then they're going to have subsidiary entities, that are much like what I just discussed, working for that particular long-term care facility on a contract basis, so then you have one more level of separation.

Mr. Clark: One final question, and then I'll cede the floor to someone else. In the crossjurisdictional comparison sense are there other provinces that have legislation that perhaps we could look at so that we would say: we ought to be emulating that approach?

Mr. Hourihan: There are jurisdictions that do have jurisdiction over health facilities, if I can phrase it that way. I'm going to defer to Sandy here. We can surely get back to you with anything on that.

Mr. Clark: I'd be really interested, because I guess what I'm really driving at – which is not to say that we ought not be the first province to do it if we feel it's the right thing to do, but it's always best to be the fast follower perhaps, you know, to learn lessons from other jurisdictions. I think you raised an important question I hadn't thought of, that knock-on effect. How far down the chain do we go, or do we simply say that everyone is included under this umbrella? I imagine that later on we're going to talk about the process piece, which we can perhaps leave for later on in the discussion.

Those are the questions, I guess, and considerations I would have around that.

Mr. Hourihan: Manitoba has jurisdiction, Sandy just advised me, over health entities and over contracted services.

Ms Hermiston: They have it “for private sector employees and contractors who disclose wrongdoings in the Manitoba public service.” This is in Dr. Amato's crossjurisdictional comparison. There is some guidance there.

Mr. Hourihan: Ontario does have a bit now, too, because the Ombudsman's office has just received jurisdiction over the MUSH sector – municipalities, universities, schools, and hospitals – so there's a very close relationship there. It's not the public interest disclosure but a very close relationship in terms of their jurisdiction over health entities.

The Chair: Dr. Amato, did you want to make a comment?

Dr. Amato: I'd just add that I noted in the crossjurisdictional that also the federal jurisdiction has some protections prohibiting the termination of a contract or withholding payment for providing information. It's a sort of more limited protection than, I think, Manitoba has. So there are other jurisdictions that have certain protections.

Mr. Clark: Thank you.

Dr. Amato: You're welcome.

Dr. Massolin: Just for those of you who have that cross-jurisdictional comparison available, it's on page 23, protection for private-sector employees. There's a whole section on that, including the section cited by Dr. Amato in terms of the governments of Canada and Manitoba.

The Chair: Mr. van Dijken, I have you next on the list.

Mr. van Dijken: Thank you. Just to go further into the discussion with regard to extending it throughout the contracted services, the note is that “these businesses might find compliance with the Act administratively burdensome.” I wonder if the commissioner could allude a little bit to administration within the act. From my exposure to it in the private sector it appeared that the larger the organization got, the more likely they had whistle-blower protection within their organization. Yet the process was minimal. Just having it available was an effect of possibly better governance. Could you allude a

little bit to what you've identified here as “administratively burdensome”?

Mr. Hourihan: Sure. I would agree that the larger the entity, the more likely they are to have policies and procedures in place and the simpler it is to ask an organization like that to do so. For the smaller ones it's much more difficult. I think that in this, in terms of contractors and service providers to government, in large part that could be handled through the government department or entity that they're working for at the time. They would just be enveloped in, very much like an employee is part of that organization during the time that they're being contracted.

To go back to that entity that they work for, you know, ABC123 Incorporated, unless there's private jurisdiction, that would be something that we wouldn't venture into by asking them. Certainly, we would help them out if they said: look, we want to put something in place; can you give us some guidance? Certainly, we could do that, but we wouldn't have the jurisdiction to go there.

I think it would be simple enough for contractors because they would envelope into government of Alberta policies and procedures that are already in place. If that were to go to a small entity, say to some of the very small schools and whatnot, that we've provided an exemption to – we've only provided that exemption insofar as the procedures required for the exact kind of structure you're talking about – then that, as opposed to having to do it themselves, would come directly to us. They can just come to us and make a direct disclosure and don't have to have the policies and procedures in place, so it provides them with the opportunity for no work involved.

Mr. van Dijken: If I may?

The Chair: Yeah.

Mr. van Dijken: Just for clarification, you're saying that if we move in that direction as opposed to where – you had made comments earlier with regard to being enveloped in to a certain degree under the current act. The comments you've made now regard how it would be improved in the recommendations.

Mr. Hourihan: I mean to be fairly consistent. Certainly, if a contracted person complains now, I can look at it, but the act is not designed to have that be the case, where they're not considered employees and that sort of thing. If they weren't able to, if it was more direct, we can just envelope them into the department's or the jurisdiction's policies and procedures. I don't think that would be too difficult to implement.

Sandy.

Ms Hermiston: Yes. It would be interesting to see what the departments thought about having to then go into their contracted entities to do these investigations. I'm not sure what their reaction would be. They may have thoughts on that. There's that alternative for the larger organizations. If there are problems that we can't foresee, the other option is this option of coming directly to us, like these small entities already can. We already know that we can do it that way as well.

The Chair: Ms Renaud.

Ms Renaud: Thank you. Maybe I can provide a little bit of clarity. Now, I understand there are literally thousands of contracts in Human Services, and some of them are quite small, comparatively speaking. That might be a contract with a family to provide supports

to a person with a disability, so they will hire the staff to surround that person. That could be five, seven people.

9:30

I think little organizations or little clusters like that really do need the support and the expertise and the access to be able to do that. They are intersecting with government, the larger entity, on so many different levels, whether it's a reporting requirement, whether it's interacting with protection for persons in care. Obviously, they're interacting financially. So I think that should be able to provide that protection and to scoop sort of all of those contracts. They go from very small to quite large, and the very large ones would be a long-term care facility.

Obviously, they would have more ability to have internal structures, but I think it's equally vital to give them very clear access and protection because, you know, that is the reality of that work. It's essential that we keep people safe, and I think ensuring that the staff, the people working there, the contractors, are very, very clear about what is their right, what they can do, and what they can expect in terms of protection – I think not only are we safeguarding Albertans, but we're safeguarding finances, the integrity of the service that we provide. So I think it's vital.

Mr. Clark: Thanks, Ms Renaud. I actually really appreciate you providing that context, because I know you have some deep expertise here. Perhaps we can come back to this when we talk about the disclosure piece or the reporting process or the structure because one of the questions I have is: is it reasonable to expect a five- to seven-person operation to have a whistleblower procedure internally versus being able to plug into a broader, you know, process? That's, I know, a discussion we'll have later, but I'd appreciate your insight on that.

Ms Renaud: Yeah. Just a very quick comment is that in the contracting of service within, let's say, a five to seven person contract with government with Human Services, there would be provision in the contract. There are some requirements about internal reporting and appeal and those kinds of things. The text is there. Whether or not they're capable and able to do it and monitor it properly is a whole other issue. So there is that capacity to, say, follow guidelines provided by the commissioner, but in terms of what it would really look like on the ground is another issue, which is why I think expanding the scope is so vital.

Mr. Clark: Thank you.

The Chair: I think on that note we will move it on to the next item up for consideration, being procedures for disclosure. Does anyone want to put a recommendation forward at this point, or do we want to discuss disclosure first?

Member Cortes-Vargas.

Cortes-Vargas: Yeah. I'm more just open to seeing what other members of the committee are wanting to do. I mean, we could discuss, but we do need to clear up – like, is there a consensus about that issue or not? Do we want to do that as we go along, or is that . . .

Mr. Clark: Yeah. Again, I think that's actually important to do, that we even just take a straw poll, not necessarily, you know, agree. But I would be actually quite interested to know the perspective of other committee members on each provision, frankly, as we go. That's, I think, important to do.

The Chair: Does someone want to make a motion? Ms Renaud. So what's the motion that you're putting forward?

Ms Renaud: You want me to make a motion on the expansion of scope and application of PIDA. Is that correct? So we're going back to the first issue?

The Chair: Yeah.

Ms Renaud: We'd like to extend the act to contractors and other delegated service providers of the government of Alberta. I'm certainly open to amendments.

Mr. Clark: Say that again?

Ms Renaud: Sure. I would like to extend the act to contractors and other delegated service providers of the government of Alberta.

Mr. van Dijken: Just for clarification on procedure here, this is going to be recorded as a motion as opposed to a straw vote. Is that correct?

The Chair: Yes.

Mr. van Dijken: I guess I struggle a little bit with the wording of the motion. If I may speak to the motion?

The Chair: Sure.

Mr. van Dijken: With the wording of the motion, in the clarity of the scope of the motion and the results of the interpretation of that motion, there's a lot to be considered here, so the process might be better to come forward with motions allowing for amendments. We can still do that here, amendments, but from my experience, many times motions that are all of a sudden put forward without due process and thought process can cause difficulty down the line with what's the true intent of the motion. I'm not sure that the process we're engaging in here has been clear moving forward in this.

The Chair: Dr. Massolin, would you be able to elaborate on the process?

Dr. Massolin: Well, thank you, Madam Chair. I just think that the committee is at a point where, you know, the committee has to decide what to do with this recommendation, whether or not it's ready to – and it seems like there's a motion on the floor to simply go ahead with that and discuss it at this point and then come to a resolution on that.

The Chair: Mr. van Dijken, did you want to ask for further discussion on the motion, then?

Mr. van Dijken: Could we have the motion read out to us again? I don't have anything printed, so I just need to have it.

The Chair: Ms Rempel.

Ms Rempel: Okay. Moved by Ms Renaud that the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be amended to extend to contractors and other delegated service providers of the government of Alberta.

The Chair: Is there any more discussion on the motion?

Mr. van Dijken: Could I get a definition for delegated service providers?

Ms Renaud: Well, I would just – and perhaps you can correct me – assume that a delegated service provider would be somebody

entering into an agreement to provide service to the person they are contracting with or in the agreement with.

Mr. Hourihan: Yeah. They contract with government to provide a particular service: short term, medium term, and long term.

Ms Renaud: Right. And that would be defined in the scope of the contract or the agreement.

Cortes-Vargas: I'm just wanting to point out that this recommendation is coming from the actual issues document itself on page 3. That is kind of what the recommendation is: "PIDA should be amended to expand the Commissioner's jurisdiction to include contracted and delegated service providers." That's kind of where the wording is coming from, just due to that recommendation.

Dr. Starke: Could you put me on the speakers list, please?

The Chair: Yes. Thank you.

Mr. Clark.

Mr. Clark: Thank you. Yeah. And thank you to Member Cortes-Vargas for that clarification. I wonder, then, given that there's a second bullet point there, if we want to consider amending the – again, perhaps Mr. Hourihan can give us some clarification. If I read these two bullet points, we've got "expand the Commissioner's jurisdiction to include contracted and delegated service providers," and the second bullet is "other delegated service providers who have a business relationship with the Government." That feels, perhaps, a bit broader. Is there a material or meaningful distinction between those two things, or is there perhaps more clarification that we can provide in the motion?

9:40

Mr. Hourihan: Not that I'm aware of. I think it's referring to the same general group of whatever is a contracted or delegated service.

Mr. Clark: So if we were to just say, "contracted and delegated service providers," that's the universe? We're not inadvertently excluding someone?

Mr. Hourihan: Not as far as I'm aware.

Mr. Clark: Okay.

The Chair: Dr. Starke.

Dr. Starke: Yes. I guess my concern is that, you know, while I agree with the general principle of extending PIDA so the commissioner's jurisdiction includes contracted and delegated service providers, I think the submission from Service Alberta made it very clear that we need to be careful about delineating that, and the motion as it stands, to me, reads as being basically sort of a carte blanche extension to all service providers. It's pretty clear in the notes on pages 3 and 4 from Service Alberta that that, I think, does not involve delineation of which service providers would be included.

At least in some way, shape, or form I think we need to try to put some sort of fences around this because I am concerned that it is an undefined term as it is now, whether we provide those that are drafting the amendments some direction as to what we want that to look like or if they could come back to the committee with some options as to where some clear delineations might exist among the group of contractors and service providers that are out there. I do have some concerns that, you know, as was discussed previously, this will create some real challenges for the smaller organizations.

The Chair: Mr. van Dijken.

Mr. van Dijken: Yes. I would agree because when we look into the notes, we find that part of the discussion was the importance to clearly delineate what types of contractual arrangements and relationships. I understand where the motion verbiage is coming from, but I do question the process that's being identified here at this meeting to move forward with regard to recommendations in a way that possibly is not going to do proper due diligence and fully encompass what the intent of the motion is. That would be my concern.

The Chair: Mr. Hourihan, is there some clarification on how we would be able to frame it differently?

Mr. Hourihan: Just in our office we've talked a little bit about this delineation and taken what Service Alberta has said, and I certainly agree with all the notions of small organizations and that sort of thing. I just don't want there to be any confusion, I guess. At least the way I'm thinking is that this wouldn't be to force – it would be very difficult to force the company where the contracted person works. That would be venturing into the private entity, into the private sector, if we're thinking that we could have jurisdiction over all of those companies that might do business with government. If that's the case, then certainly it needs to be delineated somehow, and it could be delineated by the amount of public funding they get, or let's say to exemplify a long-term care home. You know, if it's a certain magnitude of their businesses funded by government, et cetera, et cetera, there could be determinations around that to delineate things.

Otherwise, contracted personnel of companies that do business with government, I think, would be more easily managed through the government of Alberta entities where they comply with the policies and procedures in place within the department or other government entity, if that makes sense. It wouldn't be so much the ABC123 having to have all their procedures and policies in place. It would be that the government would manage that from within and say that while you're here, these are the requirements, and you have the ability to report this and do these kinds of things, and you have protections under the act, the same as any other employee.

Mr. van Dijken: I guess my question is: where does the motion go from here? What's the process that's being followed after here? We had a motion to amend the act, and I'm not sure that we have the authority to amend the act, but we have the mandate to provide suggestions to the larger Assembly, I would think, with regard to amending the act. If the chair could allude a little bit as to what jurisdiction we are covering off here, it might bring some comfort level to where . . .

The Chair: That's right. We would be making recommendations as a committee in the report to the Assembly.

Mr. van Dijken: Then we would be essentially relying on Parliamentary Counsel to draw up that report and approve that report, and then it would come to the Assembly?

The Chair: Dr. Massolin.

Dr. Massolin: Yeah. I mean, the next stage is for committee research services to take what the committee is saying and present that in a draft report for approval by the committee. Here's an example. Whatever the committee decides on this issue would come under a section of that report.

Ms Dean: Madam Chair, if I may I just supplement Dr. Massolin's response to Mr. van Dijken's question just in terms of process. Once

the committee reports to the Assembly, whether the act is going to be amended falls within the purview of the government, so any amendments that would be brought forward would be dealt with through the Department of Justice. But, certainly, the report may make general recommendations or may make specific recommendations in terms of amendments.

Mr. van Dijken: If I may, just for clarification, then the amendments to the act would still come before the Legislative Assembly as opposed to Executive Council, correct? Yes. Okay. Thank you.

The Chair: Mr. Clark.

Mr. Clark: Thank you, Madam Chair. Just on, I guess, the substance of the motion itself, we've talked around the whole question of the procedure and whether or not we would expect especially smaller service providers to have their own internal procedures. I know this is something that you and I talked about briefly in the hallway the other day, and I apologize if I haven't seen it. Is there a separate section in our summary document here that speaks specifically to a recommendation around establishing a central process? There is?

The Chair: Yes, there is. Yeah.

Mr. Clark: I apologize. I just haven't been able to put my eyes on it. Okay. So we'll come to that later. Thank you.

I do think that if we're going to include this . . .

Cortes-Vargas: If you're talking . . .

Mr. Clark: Sorry. Go ahead.

Cortes-Vargas: Are you talking about: is there an alternative like directing straight to the commissioner, for example?

Mr. Clark: Yeah.

Cortes-Vargas: That is actually another part, and it all kind of comes together, you know. Like, if we decide to do one, we have to probably consider something else as a result of the implications.

Mr. Clark: Right.

Cortes-Vargas: So it absolutely does have those different sections. I think that as we go through the deliberations, it will bring it together. As we consider this recommendation as we move forward, we know that there are implications in all of these other parts, right? We're building an overall image of what we're recommending, because we're kind of changing the system from where it's working, where everyone is responsible internally, and then you have the option internally of then going to the commissioner if it's not addressed. But there are other options. We are kind of changing that, so we do have those options, for sure.

Mr. Clark: Good. Thank you. I just wanted to make sure we're managing the web of it all, I suppose – right? – that any recommendations we come up with, we consider that formally as part of it.

Thank you.

Mr. van Dijken: I'm going to propose an amendment to the motion that's before us to essentially take in the second bullet point with regard to "extend protection to contractors and other delegated service providers who have a business relationship with the

Government." I'm not sure if the way the motion was presented to us that it actually encompassed that bullet point.

The Chair: Can I ask you to read that out?

9:50

Ms Rempel: I believe that the member is proposing an amendment that would add the word "protection" between "extend" and "to contractors and other delegated service providers."

Mr. van Dijken: Yes. Essentially, in our recommendations bullet point 1 covers off the motion that was before us. I would suggest we include that in the motion. The chair might want to rule that it be a second motion, but I would suggest that we can add to the motion that it be amended to: extend protection to contractors and other delegated service providers who have a business relationship with the government.

The Chair: Ms Rempel, would you read that out, please?

Ms Rempel: Okay. I believe that the member is proposing an amendment which would add the word "protection" between the words "extend" and "to contractors and other delegated service providers" in the original motion. I could attempt to read it out as the whole thing would sound if the amendment were to pass if that is helpful. Okay. If amended, it would read that: the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be amended to extend protection to contractors and other delegated service providers of the government of Alberta.

Loyola: My understanding is that if we're extending the act to contractors and service providers, we are indeed already protecting them.

Commissioner Hourihan, if you could just comment on that. I have no problem with the amendment. I think that it strengthens it because it makes it even more specific, but my understanding is that if it were to extend to them, you would be protecting them. Is my understanding correct?

Mr. Hourihan: If the act were extended, yes. The act includes the protections, for clarity.

Loyola: Okay. The reverse would not be the case, then?

Mr. Hourihan: No.

Loyola: Not at all, right?

Mr. Hourihan: No. It doesn't change things.

Loyola: I think it makes it more specific. I would be fine with the amendment.

Mr. van Dijken: I guess what I'm trying to identify or what I'm trying to highlight here is the fact that I have an assumed definition of delegated service providers. I don't have a definition of delegated service providers before me. So when I look at adding in the amendment to the original motion, I'm looking at service providers who have a business relationship with the government. In the initial motion there is no clarity with regard to how we're going to identify delegated service providers, and by bringing in further clarification to a business relationship with the government I think adds clarity within the motion.

Mr. Clark: I wonder if maybe it would be helpful – I don't know if we want to necessarily amend the motion here or not. If I'm

looking at the cross-jurisdictional comparison, Manitoba has some fairly specific language. It may not address your specific question. Perhaps in the context of where some definitions are, it would be earlier in the act. But section 31(1)(a) talks that about a private-sector employee who in good faith makes a disclosure to Manitoba's Ombudsman – I presume that is effectively the same role as here – is protected from reprisal by his or her employer, which I think is important and is what we're driving at here, and that the employee is also protected from reprisal, should one occur, when his or her employer believes he or she will make a disclosure.

Then section 32:

No person acting or purporting to act on behalf of the government, a government body or an office shall

- (a) terminate a contract;
- (b) withhold a payment that is due and payable under a contract; or
- (c) refuse to enter into a subsequent contract;

by reason only that a party to the contract or a person employed by a party to the contract has, in good faith, provided information to the Ombudsman about an alleged wrongdoing in or relating to the public service.

I'm reminding myself of why I didn't become a lawyer.

Ms Renaud: I certainly don't have a problem with the amendment, I think, if that makes people feel more comfortable about the intent going forward. It's additional protection and clarity. But I think it's really important to remember at this point that we're recommending that an act, the PIDA, just be expanded to include this very specific group of people. I don't think a delegated provision of service to the government is sort of loose with words. I think it's a very specific group of people, although I do appreciate that you want to add some additional words just to be sure, for added protection. I think it's important to say that we're at the stage where we're actually recommending very, very high-level expansions or changes.

Mr. van Dijken: I think it's also important to recognize that at this stage clarity is key to how smoothly it moves forward. If we don't get it right at this stage, we get stuck trying to fix it at the next stage. Since we're doing the hard work now, I believe that we should get the clarity there so that when it goes into the next stage, the people that are doing the heavy lifting in the next stage, doing the writing and the recommendations and amendments to the act, have clear direction from the committee as to what was the intent. I believe it's critical to good governance at this level, the very high level, to be very clear with the directions we are putting forth for the people to draw up those amendments in the act. Otherwise, we're going to be stuck here reviewing the report and having this whole discussion over again.

The Chair: Mr. Loyola.

Loyola: Yeah. I agree with Mr. van Dijken. I mean, we want to make sure that we're getting this right the first time around in terms of our indications, our recommendations. Just as an example, we were talking about Manitoba and the government of Canada and that the contract can't be terminated or payment withheld or to enter into subsequent contracts for reporting wrongdoing. I mean, I think that your amendment to protect really gives clear indication; therefore, I completely support it. I would recommend that all members around the table support it.

I'd like to hear from the members who are on the phone because I haven't heard too much from them on that, but I think that we're getting closer to voting on this motion.

The Chair: Is there any further discussion on the phone on the amendment to the motion?

Seeing none, I'm going to put forward a vote on the amendment.

Mr. van Dijken: Could we have it read out to us, please?

Ms Rempel: The member has moved that the original motion be amended to add the word "protection" between the words "extend" and "to contractors," et cetera.

The Chair: All for the motion? Any against? That amendment carries. Okay.

I will bring it back to the main motion. All in favour of the main motion as amended.

Mr. van Dijken: Can we please have it read out?

The Chair: Yes.

Mr. Yao: Without "et cetera."

The Chair: Ms Rempel.

Ms Rempel: Okay. The motion would be: that the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be extended to provide protection to contractors and other delegated service providers of the government of Alberta.

Did I miss a word?

10:00

The Chair: They're just doing a good job wordsmithing here, to those on the phone.

Mr. van Dijken.

Mr. van Dijken: I'll just wait for the wordsmithing, please.

The Chair: This is why we have experts in the room.

Ms Dean: Madam Chair, I think the intent is twofold: to expand the jurisdiction of the commissioner to include contracted and delegated service providers as well as to extend protection to contractors. Does that capture the intent?

Let me give this a try. The motion, as I understand it's intended to be, would be that the committee recommend that the act be amended to expand the commissioner's jurisdiction to include contracted and delegated service providers and to also extend protection to those contractors and other delegated service providers.

Mr. van Dijken: Just for a little more clarity, again, we don't have a clear definition of delegated service providers, so to add the words "who have a business relationship with the government" would help. I guess what I'm saying is that I don't have a clear definition that all delegated service providers have a business relationship with the government.

Ms Dean: I think that basically we're just combining two of the recommendations on page 3 of the issues document.

Mr. van Dijken: That's exactly it.

Ms Dean: I think that's the intent of the original mover and the mover of the amendment. If I may, Madam Chair, I'll just read in what I understand is the intent of this discussion.

Be it resolved that the committee recommend that the act be amended to expand the commissioner's jurisdiction to include contracted and delegated service providers and that the act be

amended to extend protection to those contractors and other delegated service providers who have a business relationship with the government.

The Chair: All in favour of the motion? Any opposed? Carried.

All right. We will move on to the next item for consideration, procedures for disclosure.

Dr. Massolin, do you have any introductory remarks?

Dr. Massolin: I'll pass that on to Dr. Amato. Maybe the committee member who proposed that can start off, and we can add information.

The Chair: I was putting them forward in the order that they were brought to the committee, to be honest. So if we would like to go back to using – are we in agreement that we're on procedures for disclosure? That was what I had next on the list.

Loyola: That's what we are understanding.

The Chair: Okay. Dr. Massolin.

Dr. Massolin: Yes. Thank you very much. I stand to be corrected, of course, but I think we heard at the outset here the procedures for disclosure, and under that direct disclosure and public disclosure were included. Perhaps I'll ask Dr. Amato just to simply explain and give to the committee what the stakeholders and other interested parties said, and then we can go on to the deliberations. Is that satisfactory?

The Chair: Sounds good.

Dr. Amato: You'll note that under direct disclosure to the commissioner there were two proposals that were grouped made by stakeholders and interested parties. One was that PIDA should be amended to permit individuals to make disclosures of wrongdoing directly to the Public Interest Commissioner, and the other was that if individuals are permitted to make direct disclosures to the commissioner, the commissioner should be given discretion on whether it is appropriate to accept the direct disclosure.

Then under public disclosure there are also two recommendations and proposals that were brought forward. One is that PIDA should be amended to protect employees who choose to disclose wrongdoing through other legitimate channels such as law enforcement. The other is that PIDA should be amended to permit individuals to disclose wrongdoing to a broader range of authorities, including Members of the Legislative Assembly, city councillors, school board trustees, the Justice minister, and the media.

The Chair: I will open it up for discussion. Member Cortes-Vargas.

Cortes-Vargas: Absolutely. Yeah, I think it leads on really well with where we were at before. If we're going to look at extending it to contractors and especially looking at the capacity that they have in order to do such, I think it's important to also add in the piece about direct reporting to the commissioner. Taking a step out of your book, just quoting what you've said around this:

While it may be preferable for employees to begin the disclosure process internally, the culture of the employer can have a chilling effect on employees' willingness to do so. Where an employer has a robust internal education program and a culture of positive support for a whistleblower, the expectation to report internally is reasonable. However, if the employer's policies are not well known and the culture is negative, a whistleblower should have

the option of disclosing a wrongdoing to an independent third party such as the Commissioner.

I think it talks to the fact of where both are important. You know, in internal disclosures, I mean, you can definitely promote that you're doing a great job in having internal disclosures. It's absolutely preferable for that entity to promote that and to explain that we have internal procedures that are successful. That encourages them resolving the issues themselves. Also, in the case of other situations and one that we've reviewed in the submission, there might be times where you have maybe tried that and have been unsuccessful in getting results, in which case you should be able to also get your issues addressed through the commissioner.

10:10

There is also the aspect of timeliness of process. If you kind of understand that there is a climate where maybe your issues won't be addressed, if you have to go through an internal process and it doesn't get addressed, just in the aspect of having audits and having reviews, there's kind of an atmosphere that is created. So we also have to look at how we're able to efficiently address the concerns that are raised because at the end of the day the part that we're looking at is the financial repercussions, wrongdoing, making sure that things are being addressed, so giving the whistle-blower various avenues to address their issues provides also an empowerment to the whistle-blower in knowing that they are safe to disclose directly to the commissioner and get direction from someone that knows the process in a very in-depth perspective.

Again I contrast that to smaller groups, which might be able to copy the guidelines that the commissioner provides, but when someone asks, you know, "What is the process for me to whistle-blow?" no one is very clear. So who is the best person to give that direction? The commissioner has that expertise. I think it is a benefit for the whistle-blower as well to have that information come from somebody that has expertise in that area. For the whistle-blowers themselves I think there's a great deal of benefit as well.

That's kind of my feelings on this matter.

The Chair: Mr. Hourihan, did you want to add to that?

Mr. Hourihan: I don't think that there's a downside to permitting people to report directly to us. As I said before, the international studies show that people generally prefer to report internally, but providing an external resource doesn't raise any flags or issues that aren't of assistance. If people choose not to come to our office directly, that's completely fine.

Also, after the fact when somebody does come to us, we certainly – we do that now. We first have a conversation with them to determine whether or not it is appropriate for us to look into it or maybe go back to the government entity for them to investigate. We do that in concert with the wishes and the thoughts and notions that the whistle-blower has as well. We don't just do it unilaterally.

I see no downside in reporting directly to our office.

The Chair: Mr. van Dijken.

Mr. van Dijken: Yeah. I think that when we're trying to protect the whistle-blowers and give them the ability to actually feel safe and comfortable in the process, this is exactly the type of work that will give them that confidence. Good governance always recognizes where there is an issue and gives the employees, the people that are working for us, an avenue to feel safe in being able to make the system better.

What I've been exposed to in the private sector, this kind of – Estefania, the member from . . .

The Chair: Member Cortes-Vargas? Is that who you're going for?

Mr. van Dijken: Yeah. I'm not sure if I'm supposed to be using names.

The Chair: Last names. Yeah.

Mr. van Dijken: She alluded to clarification of the process, that quite often within small organizations it's not really clear. The work we're doing here is essentially a step in allowing it to be clear, and then the key is to make sure that that message is getting all the way down to the front lines. We are drafting something that will give these individuals the opportunity to recognize that they are being taken care of and protected in their efforts to improve our system. This is evidence of good governance, reviewing this as a group in committee. That's the first step to a process of protection.

The Chair: Ms Renaud.

Ms Renaud: I agree with Mr. van Dijken. I just was looking through the notes again very quickly, and I guess just a reminder to the commissioner's comments, that making this change would not be a significant departure because the act already permits a disclosure to come to the commissioner for a specific reason. Again, it would not be a significant departure. I just wanted to put that out there.

The Chair: Mr. Clark.

Mr. Clark: Thank you. I just wanted to clarify: was this the portion that would cover the standardized procedure for – now that we've included contractors, is this the portion that would include the direct disclosure portion? Or do you envision this is, you know, especially for those smaller contractors to have a procedure to disclose? Is that what you envision here?

Mr. Hourihan: I guess it would be both because they could come directly, but we would provide, on a more systemic basis, the background to say: "Look, you don't have to put your own processes and procedures in place. Everything is direct to us. Don't worry about it." So there wouldn't be that requirement. It's attached, but it's not completely addressed in this particular section. It would be just the exemption or probably the current exemption, of course, which is another topic I know that the committee wants to talk about.

That's what we do now, currently, when they're small organizations. We don't have a hard and fast number, but the number five to seven has been tossed out. That's a fairly good number. When it's a large organization, we don't particularly want them to have the ability to just step aside and not develop their own policies and procedures. It's an important exercise for an organization to do, but there's too much diminishing return for one that's too small. So we will exempt them from the requirement to put in all of the procedures and policies in place, and they can just adopt ours, if you will.

Mr. Clark: Is that something you exercise some discretion about, the scale of that?

Mr. Hourihan: Yes.

Mr. Clark: Okay. But it sounds like it's a fairly low number.

Mr. Hourihan: It's fairly low. If somebody came in with 10 or 12 employees, you know, would I exempt? Probably, if it was with good argument. But at some point in time it becomes an issue where

it might be just a large organization trying to circumvent, if you will, the requirement to adhere to the act with the policies and procedures, where they really ought to have them because of the size and nature of their business.

Mr. Clark: Okay. Thank you.

The Chair: Any further discussion? On the phones?

Would someone like to make a motion? Mr. Loyola. Oh, sorry. Member Loyola.

Loyola: Thank you. Yes, I am a member as opposed to a Mr.

I would like to see if Mr. van Dijken wouldn't mind putting a motion forward on this one.

Mr. van Dijken: I can put forward a motion if the member wishes me to. The motion I would put forward is, essentially, that the Public Interest Disclosure (Whistleblower Protection) Act should be amended to permit individuals to make disclosures of wrongdoing directly to the Public Interest Commissioner – I'm just working on my motion; sorry, Chair – and permit that the commissioner should be given the discretion on whether it is appropriate to accept the direct disclosure.

The Chair: Ms Rempel, would you like to state the draft motion?

Mr. van Dijken: For clarity, I would respect the opinion of the Public Interest Commissioner on whether that second half of this motion would be required. I believe that probably the commissioner already has the ability to rule and give the discretion of whether or not to accept direct disclosure. I put it in the motion so that it's all encompassing, and then we can move forward with discussion and get clarity in discussion.

10:20

Mr. Hourihan: You know, it's good from my perspective from both levels that the direct disclosure be enabled and that I have the ability to determine whether or not it's appropriate to accept a direct disclosure. I do have in the act the ability to accept or decline to investigate matters, and it's an overall authority, or ability, that I have throughout the act. So the second part isn't necessary, but clarity is not forgotten either.

Mr. van Dijken: I'd like to make an amendment to the motion, then, where we would retract the second part, where the commissioner is given the discretion on whether it is appropriate to accept a direct disclosure. Am I ruled out of order if I make my own amendment? I'm just saying. I was challenged to make a motion.

Loyola: Thank you for accepting the challenge.

The Chair: I'll ask Ms Rempel to read out, perhaps, a draft motion. Ms Rempel.

Ms Rempel: Okay. If the member will correct me if this is not correct. I believe that Mr. van Dijken has moved that the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be amended to permit individuals who make disclosures of wrongdoing to report directly to the Public Interest Commissioner.

The Chair: Any more discussion on the motion? Mr. van Dijken, is that the content?

Mr. van Dijken: Just for clarity, this would be the amended motion? Or did we rule the amendment out of order?

Ms Rempel: I think you were probably just working on the wording.

Mr. van Dijken: Okay. Fair enough.

The Chair: Just wordsmithing. We're good at the wordsmithing.

Mr. van Dijken: Yeah. Okay.

The Chair: On the phones, is there any more discussion to the motion? Okay. I will put the question. All in favour of the motion? On the phones? Any opposed? On the phones? Carried.

I believe we are on to the section that discusses investigations by the commissioner. Dr. Massolin, would you or your staff like to make some introductory remarks?

Dr. Massolin: Yes, Madam Chair. We're flipping pages here. Well, it starts on page 7, and it goes to page 8. The specific issues – I think there was one. Investigations by the commissioner was one of them. We can start there. The other ones I don't have. Wait. Here are my notes. Sorry. I think it was only the own-motion investigation, so we'll go there.

Dr. Amato: There were two issues raised by stakeholders and interested parties, and those were that PIDA should be amended to grant the commissioner the power to initiate an investigation on his or her own motion, and the second was that PIDA should be amended to grant a chief or designated officer the authority to initiate an investigation or take other action when he or she has information about a potential illegal activity or other misconduct outside of the formal disclosure process.

The Chair: Is there discussion on the topic?

Mr. van Dijken: I guess I struggle with this one. If the Public Interest Commissioner were to receive these kinds of powers, we essentially turn them into an investigative body, much like a police service. It becomes a much different entity. I would be nervous of the potential of it growing into a very large bureaucratic body that wants to become the autonomous investigative body of Alberta, so I hesitate to support moving in this direction. I do believe that we are in the very early stages of understanding how to do this in good governance. I don't believe that I would support moving in this direction. I think we have a lot of other directions we are already headed in, and I wouldn't recommend at this time that the committee take a position to support this direction.

The Chair: Member Loyola.

Loyola: Thank you, Madam Chair. I take to heart the member's comments. I mean, I believe we really do want to be cautious with moving forward on this. However, I will also state that, you know, the whistle-blower protection act is still relatively new. My argument for this and my consideration for this is that we still haven't established well enough, I would say, across the government as a whole a culture where public service employees specifically and, of course, now contractors as well feel comfortable disclosing. From my understanding, the Public Interest Commissioner may grab wind of a situation that perhaps requires investigation.

Now, I understand, at the same time, where you're coming from. I mean, I think the caution that everyone has – and this is not speaking specifically to you, Mr. Hourihan. I mean, we trust that you play your role very professionally, but I think the concern that some would have – and especially in terms of the court of public opinion – would be that this could potentially open up to what

people refer to as quote, unquote, witch hunts. I think that's what people are concerned about.

However, again I go back to the fact that we still don't have a well-established culture where people feel confident or comfortable coming forward. That's the only thing that I'd ask the members around the table to consider as we continue this discussion. That being said, I'm not going to, you know, come down firm on this. I think that right now I'd really just like us to have a discussion but be open to the argument that I'm bringing forward.

Dr. Starke: Madam Chair, could you put me on the speakers list?

The Chair: Is that Dr. Starke?

Dr. Starke: Yes.

The Chair: Okay.

Mr. Clark.

Mr. Clark: Thank you. I guess I'll pick up on a couple of points. I have to say that I don't come into this with a strong feeling one way or the other, and I'm certainly open to being swayed.

I will ask Mr. Hourihan for some comments here, but Member Loyola's point that the act is new: I think that cuts both ways, doesn't it? Right? Again, I suppose probably I should let Mr. Hourihan just speak to this, but as I look through the examples that we have here in the issues summary document, there are times when information comes to the commissioner's attention by way of public reporting, which we've now just enabled, where no individual complaint is received. You know, there are occasions when a matter becomes public and would-be whistle-blowers make the decision not to come forward and therefore run the risk of reprisal or even exposure.

I guess I'm curious. Is this an issue that has presented itself – you know, this could be maybe an unfair question. Do you feel like you have been handcuffed to the point where there have been things that have been brought to your attention that you cannot investigate, that perhaps would be something of great public interest, but because there's no specific whistle-blower, you can't go down that path? How frequent is that? How grave? If you can in any way characterize those issues, I'd appreciate that to give us some context.

10:30

Mr. Hourihan: Sure. I'll try and address that on two levels, one from my perspective as the Public Interest Commissioner but also one from my perspective as the Ombudsman, which is very closely related, where I do have the power of own-motion investigations. There have been a couple of instances in Alberta when something happened. One was in the health care sector in southern Alberta. There was an incident where substandard service was the situation. It was widely reported in the press and other avenues, but we received no complaint. We did get questions as to why we never looked into it, and I said: I have no complaint; I can't. It's something that probably would have benefited from our perspective.

Two others are good examples, that I guess I'll focus on for a second. Although I didn't have to resort to it, I would never go to an own-motion if I didn't have to. I mean, I certainly understand and appreciate the perspective of a witch hunt and those kinds of things that ought not take place. More specifically, the two complaints were on the shredding of documents. At the end of the day, we did get a specific complaint, a very narrow complaint albeit, that we could look into one specific aspect of. Of course, we get a lot of questions around that and did get a lot of questions around

that one. Why didn't you look at a broader perspective? Why didn't you look at all this? Because I didn't have a complaint about that.

Another one was the purchase and deployment of computers at AHS. We did look at it because a written complaint ended up going to a member and, as well, ended up on the desk of the Auditor General, as I recall, and I sought out the complaint. So I could do that.

But there are situations where the own-motion – and now let me speak from the Ombudsman side. We have the own-motion capability on the Ombudsman side, as do, I believe, all jurisdictions across Canada, with the Ombudsman Act. That's been used over the years, over our 49 years of existence, on what I would call a regular basis, not on a particularly numerous basis. We normally probably conduct about three own-motion investigations a year in the Ombudsman office. What they focus on would be information that comes to light to the office that relates to, in that case, fairness.

In the case of the Public Interest Commissioner office it would be in relation to wrongdoings in certain areas, let's say within a particular authority or within a particular sector, that sort of thing. I certainly wouldn't go into it on a whim or just because there's an article in one of the newspapers or in the media, but we would look at it. We have some measures in place at the Ombudsman office that say: "Okay; what's the frequency of this type of complaint? Is there a lot of this? Is it high profile? How important is it?" and those kinds of things. We pare those down, and we have a look at them and say: "You know what? We should go in and have a look at this." That's the perspective that we'd use there.

I certainly throw out our reputation at the Ombudsman office as not being one where we go out and target things without due process and without particularly strong suggestions that we ought to be doing that. But we don't have that specifically within the public interest disclosure side.

The Chair: I'm going to move to the phones. Dr. Starke.

Dr. Starke: Yes. Thank you. My comments on this. I mean, I'm a little bit like Member Loyola and Mr. Clark with regard to, you know, wanting to hear the arguments in both directions on this. I guess one of the considerations that I think is important when we're crafting the legislation is that it is not crafted specific to the mindset of the current incumbent Public Interest Commissioner. This is not a reflection on Mr. Hourihan specifically but that the legislation has to survive all of the office holders. I am concerned, quite frankly, that if the opportunity to initiate investigations is vested in the PIC office, there is a potential where that commissioner, if they are what I'm going to call wishing to be specifically very active on specific files, could take that power, if you wish, and exercise it in ways that would then be allowed or offered to them through the legislation and that that power would then be very difficult to rein back in again.

I'm quite comfortable with the notion that investigations need to be initiated as a result of a specific complaint. Sections 34(1) and (2) also provide for either cabinet or a committee of the Legislative Assembly to initiate investigations as well. You know, I am very comfortable with that, and I think that's appropriate, but I do have concerns about specific officers. Again, this is not a reflection on the current incumbent, but I am concerned about office holders initiating actions because they feel for one reason or another compelled to do so.

Mr. Yao: I echo some of the comments from some of the other members. We just voted that people can already go directly to the commissioner, so that does increase their venues. One of the examples that you provided was about a health facility that was

publicly in the media, was publicly disclosed. There's a Health Advocate for that. I would question their competency or their validity at that point, and they should have been pursuing that.

The point is that some of these things could get addressed through other means, through different venues. I believe it would remove your impartiality as an impartial commissioner, whose job is to ensure the pureness of our system. Again, it's not about the individual; it is about just the role.

I'm just sitting in for Scott Cyr, but I do have one question. Do you have a code of ethics?

Mr. Hourihan: Do we have a code? We have a code of conduct in our office.

Mr. Yao: Every health care profession has a code of ethics.

Mr. Hourihan: I mean, we embrace the standardized government of Alberta code of ethics. That's not what it's titled in our office, but we do have a code of conduct, guidelines.

The Chair: Member Cortes-Vargas.

Cortes-Vargas: Thank you. I've really appreciated the discussion on this one. You know, I'm split more in the way of not providing that power to the commissioner. I mean, when we look at it, I think there is an impulse to always say yes. In the case of shredding you see it all happening, you see all of these things, and it seems almost counterintuitive. At the same time, what we're trying to address here is a culture, and this is whistle-blower protection, right? Like, we are looking at how to promote whistle-blowers to come out, to have that internal discussion.

From my perspective, I really believe that we have to avoid going straight to giving that power to the commissioner and more so to promoting that the whistle-blowers actually come out and talk on the issues that are happening. I think we're doing that through the other mechanisms that we're talking about, you know, by going straight to the commissioner and providing a broader context, including contractors.

Also, conversely, for example, the Auditor General can do his own investigations. There's also reporting that people have to do. There are all of these pre-emptive, almost limitations before he can just go in and do an Auditor General's investigation, right? So there's this sense of limitations that are put on there. Not even limitations; like, there are procedures in place in order for it to not just be whatever, at a whim, basically. The same isn't necessarily so here. In fact, the process that we're trying to enable is more where the whistle-blower comes out to discuss the systems and the process. I think it's kind of shifting a little bit of the context.

You know, I am interested. Member Starke provided a comment that it would be interesting if the Executive Council was able to ask the commissioner to investigate something.

10:40

Mr. Clark: They already can.

Cortes-Vargas: They can? Okay. Thank you. Thank you for that clarity.

I think there needs to be some form of process. I would actually lean more towards the other side.

Mr. van Dijken: I would echo what was just commented on. We are in the early stages, I would agree, of the implementation of this act. We are in the early stages of building a culture of safety for the protection of the employees. To implement this at this time I believe would possibly derail building that culture of safety, where the employees would then possibly say: okay; well, without getting

involved, we'll hope that the Public Interest Commissioner takes it on. I believe it could derail the process in a way that we don't get timely reporting also.

With the discussion with regard to the Public Interest Commissioner office as opposed to the Ombudsman office, I think a lot of what the Ombudsman's mandate is will cover off many of the concerns. I would suggest that with good legislation and good clarity the culture of safety that we are building within the Public Interest Disclosure Act will allow employees to feel very comfortable with the process moving forward, and we'll have better disclosure as we move forward. I would suggest that we continue to grow and mature in this. If we see down the line that we are not getting the results we need, possibly we could address it at that time.

The Chair: Thank you, Mr. van Dijken.

Mr. Clark: I think it's important that we look at the world the way it is as opposed to the way we wish it were. You know, I actually think this government is trying to create that culture, that openness, but let's think about what the purpose of whistle-blower protection is. The purpose of that is that in situations where you have exactly the opposite, where you really don't have that culture of openness – I reflect on the shredding example. I think it is a perfect example.

It happened at a time of government transition, where you had one person who was willing to finally stick their neck out in one very narrow area. I think the commissioner has said, you know, that in his opinion – don't let me put words in your mouth; please feel free to comment after I'm done here – there perhaps was some smoke, that perhaps there was some fire. I will ask the specific question: if you had this power, would you have done further investigations specific to the shredding instance? I'm curious about that point because these are the sorts of things that I think are rare and are absolute outliers but not nonexistent if I can put it that way.

I also think that any concern of witch hunts or investigations on a whim – certainly, the track record of this particular commissioner of this office and of all officers of the Legislature would tell me that that seems to be a very low probability, very unlikely. Frankly, I strongly suspect that that person would not be commissioner for very long if that started to happen, you know, if there was ever a question about the professionalism of the person in that position.

I do think that as we look at this legislation, part of our job here is to future-proof that legislation. Again, I come back to what Member Loyola had said. From the fact that it's so new, it does go both directions, and it's a bit difficult for us to really say. You know, I hadn't quite thought of the shredding example at the outset, but that's actually a tremendous example. That example itself may or may not repeat at some point in history, at some point in the future, but it's a really good example where you've got a culture that was, I think, a culture of fear.

I guess I'll get off my soapbox here, and I'll ask the commissioner the specific question: if you had this power, would you have exercised it in the case of shredding at the time of the transition from the past government to this current government?

Mr. Hourihan: In hindsight that's difficult to say on the one level because things did happen fairly quickly. However, having said that, we were, you know, like everybody else, watching and wondering. The concern was that there was a wrongdoing being committed, right or wrong, at the time. It was only within a few days that we got the complaint, so we did look into it.

We do have the ability to expand in terms of looking into an investigation. If we get into one and we see that there are other things going on, we can certainly expand the investigation to look at those areas. Again, we wouldn't do that on a whim or in a flimsy

fashion; we would do it based on a certain amount of guided information that we would develop during the investigation.

That's a really hard question for me to answer. Would we have expanded it? In that particular case we didn't have to because we did a co-investigation with the Privacy Commissioner, so it didn't become an issue. It was something that they could look into. Frankly, if we found an area where it was that, we would probably go to somebody like the Privacy Commissioner and say: "It's a complaint, or it's an indication of wrongdoing. However, you're best positioned to look into these areas because it's within your area of expertise." In that case we did it in a co-fashion, if that makes sense.

Mr. Clark: Thank you.

The Chair: Member Loyola.

Loyola: Thank you, Chair. Having now heard arguments on both sides and especially now that Commissioner Hourihan has described that there are other potential avenues, I think that my opinion at this moment would be that we perhaps not move in this direction but strongly suggest that when the act comes up for review once again, it be reconsidered. Again, for me, it's really important that we try to promote that culture of people coming forward. I think that the argument has been made very well that if we do move in this direction of giving the commissioner, again, not specifically this commissioner, these kinds of powers, then we could be deterring that culture. That's what I'm hearing around the table.

The Chair: Mr. van Dijken.

Mr. van Dijken: Yes. Thank you, Chair. That's more or less exactly what I would suggest. The fact is that we're in the early stages of building this culture. At a very high level in good governance we have to be confident and have faith in the system growing and covering off the intent of the act. I do believe that when the culture is fully matured, the whistle-blower will feel protected and safe within their avenues of reporting, and it has the ability then to have many eyes keeping an eye on the system as opposed to – if we move in this direction where we inhibit the proper maturation of that culture, we possibly are limiting ourselves to one set of eyes.

Again, I've seen it in the private sector, where it takes a number of years and a number of instances where people have come forward – we heard it in the last meeting – where a person has come forward and felt very comfortable with how they were protected and how the process was handled and very professionally done. As that culture matures, then we get into a situation where we have many eyes overseeing the day-to-day operations of government, and I do believe that that is in the best interests of the entire system that we're trying to cover here.

I would suggest also that we don't move in this direction, especially at this time, when we are trying to build this culture of safety and protection.

10:50

The Chair: Is there any further discussion? Mr. Clark.

Mr. Clark: Yeah. I'll be brief because it sounds like I may not win the day on this one. You'd think I'd get used to it.

Loyola: Hey, I was with you there for a while.

Mr. Clark: I know. Yeah. I'm sorry to break our winning streak here.

You know, on the culture side, I wrote down the words "let's not be naive," and that sounds a bit aggressive, I suppose, but if

we're trying to promote that culture of openness, I think that perhaps the best way to promote the culture of openness is to show what it might look like if the commissioner is able to compel an own-motion investigation and say: "See? This is what it looks like." A culture is something that takes a very long time to develop, and I think that we're at risk here of handcuffing this and future commissioners.

I do just have two quick questions. One is to pivot off the point you made earlier, which is that other officers of the Legislature here in Alberta have this power. You mentioned your role as Ombudsman. The Privacy Commissioner, by the sounds of it, has it. I'm just curious: do you know which other commissioners in Alberta have that ability, and are you the only one that doesn't? I guess that's really what I'm driving at.

From a crossjurisdictional perspective, I've done a couple of quick little searches in our documents, and I haven't been able to find anything. Do we know if other jurisdictions have this ability?

So those two questions: Alberta and then other jurisdictions.

Mr. Hourihan: In Alberta: I can't answer that with good clarity. I believe that the Child and Youth Advocate does have significant jurisdiction there, as does the Privacy Commissioner, but I can't speak beyond that, and I ought not to.

Within Canada jurisdictionally the offices of the ombudsmen do have it. I bring that up because some of the other offices are not structured like we are, where my offices are two separate offices co-located. Saskatchewan is close. However, they treat themselves more as one office of both, so it's the Ombudsman who looks into things from either perspective. The same with Manitoba, Nova Scotia, New Brunswick, I believe. Some of the other offices have the own-motion capability, and they have it as ombudsmen, but that's a co-role, where they're not just co-located. It's one body that looks after both. So I would say that they do have that jurisdiction but not specific to their PIDA legislation. I know it's not clear, and it's not clear to us as well, as we develop through this. A lot of the jurisdictions are still fairly new at this.

Mr. Clark: Sorry. Just perhaps to the research team or the table officers: do you happen to know what other officers of the Legislature have the ability to start own-motion investigations?

The Chair: Dr. Massolin.

Dr. Massolin: Yeah. I think we'd have to look into that to speak with authority on it.

Mr. Clark: Okay. I just would appreciate it. I'm happy to vote if there's a motion – I'm sure there's a motion on the floor – or to make a motion or something. Perhaps I could even do my own darn research, but I would be interested to know. It would be interesting to know.

Ms Dean: We can follow up and provide that.

Mr. Clark: I'd appreciate that. Thank you.

The Chair: I'm going to call a 10-minute break.

[The committee adjourned from 10:54 a.m. to 11:06 a.m.]

The Chair: All right. I will call this meeting back to order.

Is there any further discussion on own-motion investigations?

Seeing none, I will move on to the next issue that we have up for consideration, reprisals. Dr. Massolin, Dr. Amato, is there anything that you would like to . . .

Dr. Massolin: Yes. Reprisals and remedies were mentioned. There are specific proposals with regard to remedies, but I'm not sure what other aspects of reprisals are of interest. We'll maybe start with remedies if that's okay.

The Chair: Sure.

Dr. Amato: The issue with respect to remedies was remedies for whistle-blowers who suffer reprisals. The recommendation and proposal put forward by stakeholders and interested parties was that PIDA should be amended to provide remedies for employees who suffer reprisals as a consequence of disclosure.

The Chair: Thank you.

Member Loyola.

Loyola: Yeah. I really would like to encourage the committee to move in this direction because, again, we're coming out of the last discussion of promoting a culture where people feel more confident and comfortable coming forward, and I think that this would go a long way to contributing to that culture. As we saw not only in the submissions but actually in the other evidence that we had before us, there were particular cases where someone felt that they had a reprisal against them. I'm trying to speak very generally, of course, and you all know why. I think that it's really important that people have the confidence and knowledge that if a reprisal were to be committed against them, there would be a remedy for such cases. I'll open it up with that, and I'd like to hear from the other committee members.

The Chair: Mr. van Dijken.

Mr. van Dijken: Sure. Thank you, Chair. I guess I could go on this. I would hesitate to include this in the act primarily because I do believe that there are other mechanisms in place that would be able to be engaged if there was a conflict and the whistle-blower felt that they were treated unfairly. I do believe that there are mechanisms in place through legislation and through the courts to actually remedy those situations. I think we possibly are going in a direction here that gets – I'm not going to say overreaching, but going in a direction where we get tied up in more misunderstandings going forward. I'll just leave it at that.

The Chair: Member Loyola.

Loyola: Yes. I appreciate where the member is coming from. I'd just really like to stress that in the evidence that we had before us, we saw that whistle-blowers, when they do come forward, suffer direct emotional and, in some cases, financial costs. So I'd really like to ask the members of the committee to take that into consideration. Well, let's just put the financial costs aside for a moment. Let's just put that aside. I'm really concerned with the emotional costs to the person coming forward as well. That has a lot to do with the fact that we still don't have a culture where people feel comfortable coming forward. If we really want this act to be – how should I say it? – as effective as possible, we need to take into consideration that those emotional costs and, again as I stated before, the financial costs are addressed. To that effect, I'd like to ask the commissioner his thoughts on those aspects.

Mr. Hourihan: Well, in terms of the emotional stress it puts on whistle-blowers that come forward to us or eventually to our attention, certainly it exists. It's there. There is a lot of consternation with coming forward. Certainly, there are areas where, if somebody makes a disclosure internally and it's addressed appropriately, timely, and all those kinds of things, that consternation is not there.

It's just the way business is done in many areas. There are other areas where it's not so, and that's where it causes grief.

It causes the person grief, first, with themselves. I suppose they're questioning whether they're right or wrong or should they do it or should they expose themselves, all those kinds of things. Then there is the question as between them and their peers, between them and supervisors, and between them and executives, if you will, and so on, between them and the public. So there is a lot of stress and strain. That's really all I can comment on. We recognize that when we're dealing with whistle-blowers to try and help them through that, whether it's through confidentiality, through just time and empathy, those kinds of things.

Of course, we have no remedies which we provide to them specifically in the act. That's clear. Those would come later on in the fact that, you know, we can go back and recommend to the government authority that if they were reprimanded, they be given their job back if that's the case or, whatever the reprimand was, that that be removed. So we do have that ability, but it's again a recommendation back to the authority. Of course – and this has been said here – our bigger goal as well is the culture for managers and executives and whatnot to embrace the notion that people should come forward to address things. Reporting something that's wrong is a good thing for everybody, not a bad thing.

Loyola: Through you, Madam Chair, could you speak specifically to any financial costs that a whistle-blower may incur?

Mr. Hourihan: Legal fees would be probably the most pronounced if they get into that particular area.

Loyola: Pardon me. Could you give us an indication, a ballpark figure? I mean, what's a whistle-blower potentially looking at in terms of legal fees?

Mr. Hourihan: I can't give you an indication.

Loyola: No? Not even an average?

Mr. Hourihan: No. We don't get into those discussions with any of the whistle-blowers.

Loyola: Okay.

Mr. Hourihan: I mean, I think that, in large part, people don't go down that road because it's cost prohibitive. On the one hand, it's not anything; on the other hand, preferably, it would be something. They can't go down that road because they don't believe they can afford it, and there are no provisions to provide it in any way other than whatever other regimes are out there.

11:15

Loyola: Therefore, just to be clear, you're stating that financial costs would then stop people from coming forward to – no?

Mr. Hourihan: I don't think it stops them from coming forward. I suppose it might stop some. I imagine that there are situations where it does. We don't get into those specifics with whistle-blowers. If it comes up, we're certainly happy to discuss it but just insofar as we tell them what we can and can't do. Certainly, when you read different whistle-blowers' stories and that sort of thing, it is one of the areas that people are interested in. There are regimes that do have some remedies, and there are others that do not. The debate is certainly alive and well as to whether or not there should or should not be remedies within an act.

Mr. Yao: If I understand correctly, there are venues to address this already through the Employment Standards Code and through the Alberta Human Rights Commission. Can we clarify that? Is this a redundant action on our part?

Ms Hermiston: They could go to the courts as well if they're wrongfully – I mean, there are two questions here. The first question is to incentivize whistle-blowing so that you're saying to a whistle-blower: we'll pay for you if you come forward. The second one is compensation for those who suffer a reprisal. They're two very separate issues.

On suffering reprisals: often those can be characterized as an employment issue – if you lose your job, for example – so you'll have a remedy in the courts, where they'll say that you were wrongfully terminated or something like that, and the courts will assess what the damages are. Maybe employment standards would be another one. Conceivably there could be a human rights aspect to it, but they don't award big money, so it won't necessarily provide the same kind of compensation that a court action could. On the reprisal side, I guess, there are some avenues that are available at the present moment.

On the incentivizing of whistle-blowing, there's nothing. In terms of the cost of blowing the whistle, arguably there aren't very many costs because, especially if they can come directly to us, they won't need a lawyer. It's hard to imagine what costs a whistle-blower might incur in order to blow a whistle.

The Chair: Mr. Clark.

Mr. Clark: Thank you. Thank you again to Drs. Amato and Massolin for the great work you've done in putting together the issues summary as well as the crossjurisdictional analysis. It's tremendously helpful.

You know, I guess I'm looking at this from a couple of perspectives. One, are we potentially putting ourselves in a situation where there's a worry about a witch hunt and "Oh, I'm just going to be seeking the bounty, getting the reward," if you will? Looking at the crossjurisdictional analysis and the procedures that are in place in other provinces, I personally don't feel that that's a huge risk.

As I was thinking about this, I wrote down "How much?" and "How would we calculate what those remedies are?" Luckily, our friends in Manitoba have done that work for us. I think it is important to know that Manitoba, Newfoundland and Labrador, Ontario, New Brunswick, and Yukon have provisions for compensation to employees who have suffered a reprisal. I think that there are some interesting things – and I would encourage everyone to have a look at that – like permitting the complainant to return to their duties, reinstating the complainant, or paying damages to the complainant. Now, that is all determined by the Labour Relations Board, and I think that's a very important aspect of this, that if we're going to go down this road, it's not in any way arbitrary. There is an adjudicative body that would determine reasonable compensation. It's page 25 of the crossjurisdictional analysis. There's very good information there.

The other one, I guess, that we may want to talk about if we do go down this road – I don't want to presume what a motion may be. We may want a couple of different motions because I think we want to perhaps talk about the principle that we believe or not, depending on the will of the committee, that compensation for reprisal ought to be paid. That would be one aspect of it.

Another aspect is whether or not it includes what Newfoundland and Labrador include, which is the – sorry, I'm going to try to read

the least bit of this that I can without reading the whole darn section. Basically,

[the] person who takes a reprisal against an employee . . . I don't know what that would be: the 'reprisor'?

. . . is subject to appropriate disciplinary action, including termination of employment, in addition to and apart from [anything else].

That's a big provision but certainly, I think, would have the effect of encouraging appropriate behaviour and not bringing reprisal against the whistle-blower.

I guess, as you can probably tell, I'm quite interested in going down a path where, in fact, we do build some remedies into the act. I also think the committee ought to consider, even just by way of recommendation and perhaps some somewhat general terms referencing perhaps other provinces, that we provide in that report what we feel the scope of that compensation ought to be if, in fact, we first determine that we think that compensation is appropriate. Based on how other provinces do it and based on what we've heard before the committee, I think it is appropriate to put in some sort of remedy.

Dr. Amato: I'll just say that the information that was referred to is on page 25 of the document, and that was a completely accurate summary of what is written there. The Yukon, Manitoba, Newfoundland and Labrador, Ontario, and, to a certain extent, New Brunswick all have very, very similar provisions in which, at some point, this matter is referred to a labour relations board, which decides the compensation for reprisal. There are a number of avenues that are actually prescribed in the act that a labour relations board may follow. As I said, they're listed on page 25 of the crossjurisdictional.

I mean, I don't know whether it's worth reading them out, but the Manitoba Labour Board, for example, may:

- permit the complainant to return to his or her duties.
- reinstate the complainant or pay damages to the complainant, if the board considers that the trust relationship between the parties cannot be restored.
- pay compensation to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant.
- pay an amount to the complainant equal to any expenses and any other financial losses that the complainant has incurred as a direct result of the reprisal.
- cease an activity that constitutes the reprisal.
- rectify a situation [that results] from the reprisal.
- do or refrain from doing anything in order to remedy any consequence of the reprisal.

In Ontario there are all these provisions but also:

Where the board is of the view that continuation of the employment relationship is inappropriate, the board may direct the ministry or public body, or person acting on behalf of the ministry or public body to terminate the public servant's employment and provide compensation in lieu of reasonable notice of termination.

There is a variety of mechanisms that are actually prescribed in the act.

The Chair: Mr. van Dijken.

Mr. van Dijken: Yes. Okay. I guess when we look at the recommendation here, "PIDA should be amended to provide remedies" and when we have remedies available through other avenues, I'm not convinced that expanding the act here is in the best interests of the intent of building this culture of safety and protection in the long run. I would be nervous in cases – again, I've

seen this in the private sector – where we have difficulties in a workplace. I'd be interested to hear the Public Interest Commissioner's comments on this also. The whistle-blower is engaged – it's a third-party entity – and does the initial investigations only to find out that this is a difference of opinion or not really qualifying under what would be considered whistle-blower issues but, rather, workplace dynamics.

11:25

The very fact that we have the legislation and the act in place now will allow us over time to mature into a situation, possibly, where the managers and executives as much as – we through our models need to ensure that they're pushing down this culture of openness and accountability. The fact that people are going to come up in the system as employees and move up through the ranks, not all the time but at times: they get exposed to it right from the ground floor moving up, and a culture of whistle-blowing becomes second nature and cleans up a system to the point where everybody understands that we are operating with the highest of integrity in all avenues.

To then institute new remedies – and I understand that, sure, we've got crossjurisdictional comparisons. That others are doing it does not always prove that that's best practice. There are many unintended consequences that can arise from that. Sometimes in crossjurisdictional comparisons we are not necessarily comparing apples to apples, very similar to what we heard with regard to the Public Interest Commissioner versus Ombudsman in Alberta versus Saskatchewan versus Manitoba, how they operate in different manners.

I guess I would still land on this, that the remedies are already in place albeit not through this act but through other processes. Although those remedies are possibly going to be faced with costs that would inhibit them from occurring, I also don't want to develop a culture of whistle-blowing that would incentivize whistle-blowing in a poor workplace environment.

The Chair: Before I go to Mr. Hourihan, would I be able to see if there are any individuals on the phone that would like to be added to the speakers list?

Mr. Hourihan: I just want to say that in terms of remedies, although there are none in the act – there have been a few mentioned – there's nothing that precludes me from making recommendations back to the government entity that they ought to do certain things. They might be to give them the job back, take away the reprisal, or any of those kinds of things. It's certainly within their capability, as long as it conforms to the rules and government accountability and that sort of thing, to adhere to some of the recommendations I might give. Although it's not a remedy regime, it's certainly available to me as part of my recommendation. I just wanted to make sure that that was clear.

The Chair: Okay.
Ms Renaud.

Ms Renaud: Actually, that was perfect. I was going to ask that question. Thank you.

The Chair: Mr. Clark.

Mr. Clark: Yeah. I mean, Mr. van Dijken talked about other possible remedies, and I'm not sure that that's an apples-to-apples comparison. I also think that I don't foresee a risk of seeking to make spurious claims, the idea that we're going to somehow enrich or individual public servants will enrich themselves by making

whistle-blower complaints. You know, for that to happen, first off, the commissioner is going to have to find wrongdoing. There's going to have to actually be wrongdoing, so we've achieved – check – a finding of wrongdoing, which we hope there isn't, but if there is, then that's a benefit. It's a good thing.

You know, again I'll go quickly, not extensively, through the compensation for whistle-blowers in Manitoba.

- permit the complainant to return to [their] duties.

So if they've been fired, they get their job back. We're not going to enrich ourselves doing that.

- ... pay damages to the complainant, if... the trust relationship... cannot be restored.

Well, I'm sure that that would be something based on precedent, based on employment law, based on, you know, severance, those sorts of things. Actually, the third point, I think, is very instructional:

- pay compensation to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant.

Make him whole, right? That's really what it is. It's not about making more money than you would have. It's that you lost your job, you lost three months of salary; therefore, you get three months of salary. That seems fair.

Again, while I appreciate you raising the concerns, I actually don't see that that would be a likely situation to arise, frankly, nor something that I think would prevent us from putting in place some sort of compensation for reprisal.

The Chair: Member Loyola.

Loyola: Thank you very much, Madam Chair. I'm really appreciating all the comments that are being made regarding this discussion. As was pointed out very well, there are two discussions going on here, so I'm hoping that we can focus, first, on remedies for reprisals. Let's stick to that and then, hopefully, if people are willing, go with a motion on that particular piece before we continue on the other.

It's pointed out on page 9 of the issues document that Service Alberta also had a similar perspective, and I'm hoping that perhaps Dr. Amato or Dr. Massolin can elaborate on that.

Dr. Amato: Unfortunately, I can't elaborate. What Service Alberta stated specifically is that PIDA "is silent on compensating employees who suffer reprisals." They suggested that the committee consider – just simply consider – that consideration be given to including a mechanism for whistle-blowers to obtain remedies. They were simply drawing the committee's attention to this issue and suggesting that it might be a matter for consideration.

The Chair: Mr. van Dijken.

Mr. van Dijken: Yes. You know, again I go to providing remedies. We have heard from the Public Interest Commissioner that in his deliberations, he would be recommending and making available that type of information that would allow these individuals to seek out the remedies that are already in place. I haven't heard that there's a need for another board, another body, another unit to essentially do the work of the structure that's already in place, that can do the work, such as the Labour Relations Board and these types of entities.

As much as I agree with the need to provide remedies, I also don't want to embody in this act reinventing the wheel and going through the whole process of reinventing the wheel in having to build another structure when structures are available. The intent is right.

I agree with the intent, for sure. But is it that we do not have available the remedies already? I believe that the remedies are already available. The Public Interest Commissioner does the recommendations, and unless I can get a grasp on what remedies need to be made available that are not already available, I don't know that it would be necessary. So we've got to provide the remedies, and then we've got to go through that whole deliberation and process also.

Mr. Yao: I agree. There are other venues in place to compensate for this issue. Perhaps we should ensure that there are measures in place in the office to ensure that we can follow this and identify if there truly is an issue that they aren't getting compensated in an appropriate manner that people feel is necessary. In the future we can tweak the process or refine it, but to create another layer is just adding to the bureaucracy.

11:35

Loyola: You know, my understanding and my perspective is that a public servant or contractor would come forward to expose wrongdoing. I mean, the reprisal is not dressed as – they find something against the employee, and it may not necessarily be tied to the wrongdoing that is taking place. A reprisal is exactly that. It's a reprisal, right? It has no rhyme or reason. That's what we're trying to protect employees from.

I'm just going to quote the Auditor General. According to the Auditor General:

Currently, the Commissioner has no authority to order specific corrective action when an act of reprisal is found to have been committed against an individual. While the person found to have committed an act of reprisal may be subject to a penalty, there are no remedies to redress any potential losses or damages an employee may suffer as a result of retaliatory action.

He goes on.

Without comprehensive enforceable remedies, there may be little incentive to report wrongdoing, thereby increasing the risk that illegal activity or other serious misconduct goes unreported.

You know, I think we need to take the Auditor General's comments to heart. I think that this is something that we really need to move forward on. This would strengthen the act considerably so that we can continue to build this culture where we have people coming forward.

Dr. Starke: Madam Chair.

The Chair: Is that Dr. Starke?

Dr. Starke: That's correct. Put me on the speakers list, please.

The Chair: Thank you. I'll add you to the list.

Mr. Clark: I just want to pick up on what Member Loyola said, and I'll say it very quickly. One, there needs to be wrongdoing, a finding of wrongdoing, which, let's hope, is exceedingly rare. It's not a common thing, not impossible. That's why we have a whistle-blower protection act.

Two, there also, then, needs to be a reprisal. That, I would hope, is kind of doubly rare. So not only do we have a relatively small number of cases of wrongdoing, but now we need a proven case of a reprisal which we can quantify, which again I would hope is rare. But given the rarity of it and the severity of it, there ought to be some sort of compensation. Again, this is not a reward, a bounty. Really, this is making people whole. That's really it. The word "compensation" maybe sounds like: here's a cheque for a quarter of a million dollars. No, no. This is: you lost three months of salary; we're making you whole.

I don't know if it would be helpful – and, obviously, Dr. Starke is up next, and we'll let him speak – perhaps to break this into two motions. Do we think there should be some compensation as a principle? Then perhaps we have a little discussion around a separate motion of what specifically we feel the guidelines for those remedies ought to be. Again, I think Manitoba has got some good ones.

Anyway, that's my comment. I think we just need to remember how unusual it likely, hopefully, will be that there would actually be a reprisal. But if that extreme case happens, I do believe that there should be some sort of compensation.

The Chair: On the phones, Dr. Starke.

Dr. Starke: Thank you, Chair. Well, Mr. Clark makes a good point that we are hopeful both that the incidents of wrongdoing are relatively infrequent, or rare, and that the incidents of reprisal are similarly rare. But in the case that they do happen, I think we are in general agreement that there should be some means to address a situation where a reprisal occurs. I think where we start to separate is, you know, what the best mechanism is for providing that.

You know, I would say that if we're talking about dividing the conversation, or the discussion, into something that's a little bit easier to sort of break down, then let's start with the things that we agree with. Perhaps we should first have a discussion of: should there be a mechanism whereby reprisals are addressed? Rather than the term "compensation," I use the term "restitution." Regardless, if we generally agree with that, then let's talk about: "Okay. Well, what is the best mechanism? By what means?"

I tend to lean towards what is indicated under 5(d) on page 9, and that is whereby it's done by means of the Labour Relations Board or employment standards because, you know, these are already empowered to provide adjudication in cases of other grievances that occur between employers and employees.

I guess one other thing – and I'm not wishing to muddy the waters or overcomplicate things, but we've heard no discussion, so far at least, on point 5(b), and that's the whole issue of reverse onus. It's an interesting concept that was put forward. You know, Service Alberta under the Notes column is talking about that whistle-blower protection advocates say that a reverse onus situation with regard to reprisals is perhaps a best practice that should be considered.

I find that intriguing, that if as an employer there is indeed a finding of wrongdoing, then it is up to that employer – it's not, then, up to the whistle-blower – to demonstrate that the whistle-blower has not suffered any kind of a reprisal. Like I say, I wonder if that puts the onus in the other direction, the shoe on the other foot, if you like. You know, I think for the whistle-blower to first demonstrate that there's wrongdoing and then, in addition to that, to have to prove to someone that there has been a reprisal against them means that they have to go through sort of two sets of hoops. If the wrongdoing is established to have occurred, I think it would be at that point interesting to put the onus on the person that actually did the wrongdoing as opposed to the person who pointed it out. That's just my thought on it.

I'd be curious to know other committee members' thoughts on the whole issue of reverse onus but, again, perhaps separating this discussion. So, first of all, should there be some means or recognizing and, again, providing restitution in the case of a reprisal? That's one issue. The second issue is how to best go about doing that.

Thank you, Chair.

The Chair: Member Loyola.

Loyola: Thank you, Madam Chair. I really appreciate your comments, Dr. Starke. I would agree that we should perhaps keep

the two matters separate. I would really like to hear members' comments on reverse onus.

That being said, I think that we've had sufficient discussion. I'm willing to put a motion forward. After hearing all of the comments from everybody – you know, I came with something prepared, but I've made my own amendments to it. I move that the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be enhanced to ensure that whistle-blowers that suffer reprisals receive appropriate restitution where wrongdoing has been established.

The Chair: Is there discussion on the motion? Mr. van Dijken.

Mr. van Dijken: Again, the motion does not indicate any process here that is different than what is already available.

With regard to comments previous, the Auditor General has identified that the commissioner has no authority, but certainly the commissioner has the ability to recommend. The very fact that we have other entities that are in place to provide these remedies and the fact that the commissioner has witnessed to us that that would be the process or that that would be the obligation, possibly – I might be putting words in his mouth that way. But essentially he has the ability to recommend if there is an indication that the employee feels like there was undue reprisal.

To me, it's more about who provides the remedy. If the remedy is already in place, to now muddy the waters, I'm going to say, within this act and to need to come to – you know, we've identified that if there is reprisal, there need to be remedies. But we have not identified, in my opinion, that the remedies are not there. I hesitate to move it into the act when we see already that there are remedies available that would take care of this. It becomes overreaching, I believe, if we now put it within here and then that's another board, another overarching description of remedies. So if it's already in place, if the remedies are already in place, I would suggest that we continue to use those and tweak those.

Thank you.

11:45

The Chair: Mr. Clark.

Mr. Clark: Thank you, Madam Chair. I'd like to reverse the onus on my friend Mr. van Dijken. I guess I'd like to ask through the chair: what other entities would deal with these remedies? What other restitution or remedies are available to a whistle-blower, you know, in the broadest sense? I'm not aware of any. You've talked about creating a new bureaucracy. We look at 5(d), the Labour Relations Board. If we look at Manitoba, they've used their Labour Board as their vehicle. That exists. We would just simply need to empower them to do this. And remember that we sincerely hope and, I expect, probably will find that it's rare. This will be very rare. I would imagine that this would be infrequent. I think that if we're dealing with one or two cases a year, there's perhaps something seriously, seriously wrong in the public service. I don't know. Again I'd like to ask that question through the chair of Mr. van Dijken, and if the commissioner or his staff have any comments as well, I'm obviously interested in that. But, I guess, to Mr. van Dijken first: what other entities exist that I'm not aware of?

The Chair: Mr. van Dijken.

Mr. van Dijken: Thank you. I would suggest, for the other entities that are there and that are suggested such as the labour relations officers and the employment standards board, possibly empowering them further. You know, we have the courts available, while that's not ideal. I do believe that what we're proposing here is possibly

best identified as: yes, we need to provide remedies, but then what's that structure? If these entities such as the Labour Relations Board need to be tweaked to allow that to occur, I'm suggesting that we – maybe it's more of a discussion over the mechanisms after we've identified the "if." As Dr. Starke has identified, we need to identify "if" and then: by what means are we going to go about this?

The Chair: Mr. Hourihan, did you have anything that you wanted to elaborate on?

Mr. Hourihan: No, I didn't have – I guess just one comment. I do say that if there were power of remedy, it would be best not being in my office. If I had my preference, I would not want the power to order. I prefer the power to recommend. That's irrelevant as to whether or not there should or shouldn't be remedies. I just think that it's a good structure to have my ability stop at the recommendation stage.

The Chair: Okay.

Ms Renaud: I was just going to say that I do think that there are two separate issues that we're talking about, and given the time it sounds like there's some agreement about the fact that, you know, there probably should be some remedies if there is wrongdoing found. I think that if the remedies were already in the act, we wouldn't be doing this. Again, I also appreciate the comment that your office wouldn't be sort of assigning those; it would be recommending. So I wonder if we could move ahead and possibly call the question.

The Chair: Okay. Mr. van Dijken.

Mr. van Dijken: Thank you, Chair. I guess the intent is to provide remedies, and then we need to also understand – I don't want to see this act become overburdened with another board and another entity and another level of bureaucracy when we have that available to us. I guess my question would be: does the mover have any kind of idea of how he perceives that we are to provide remedies, like, other than what's already available? Or are those the entities that he was thinking would provide those remedies?

The Chair: Member Loyola.

Loyola: Yes. I think that it would be important for us to have counsel look into potential avenues for us to – something needs to be done. I would prefer that we provide for this in the act. I would prefer that we write this into the act, and we could explore how it could be potentially done at a later date. I don't think that that should keep us from moving in this direction.

Mr. Clark: Just quickly, I'd appreciate having the motion read out again. But just to pick up on what Member Loyola was saying, I actually think this committee ought to explore what – I don't think we should leave it to a later date to figure out the mechanism. I think we should recommend, even in very general terms, that it perhaps not be in the Privacy Commissioner's office, that perhaps we look at, you know, the Labour Relations Board if we want to be explicit about it. I think that's a second motion or a second discussion, but I'd like to have that discussion immediately after. I do think we should as a committee have that discussion. I agree. I would advocate that everyone vote for the motion to recommend that remedies be written into the act – just flat, that's the motion – that we make that recommendation, and that we have a separate discussion about what the mechanisms of that might look like.

Loyola: Madam Chair, I would suggest that we read out the motion as suggested and vote.

The Chair: Ms Dean, did you have anything to add?

Ms Dean: Just to offer to the committee that we can undertake to work on the various options and bring it back at the next meeting. I mean, just being mindful of the clock, this meeting will come to a conclusion soon, but we can certainly do that.

The Chair: Okay.

Mr. van Dijken: Mr. Clark has alluded to one thing, where he's identified the difference between providing remedies and recommending remedies. If we could look at possibly – and counsel has alluded that they will bring that forward, I do believe. Recommending remedies: I would be much more comfortable with that wording as compared to providing remedies.

The Chair: Member Loyola, I will ask you to read out your motion again.

Loyola: Okay. I move that the Select Special Ethics and Accountability Committee recommend that the Public Interest Disclosure (Whistleblower Protection) Act be enhanced to ensure that whistle-blowers that suffer reprisals receive appropriate restitution where wrongdoing has been established.

The Chair: All in favour of the motion? All opposed?

Cortes-Vargas: A point of order. Mr. Yao cannot vote.

The Chair: Mr. Yao, you're not an official substitute.

Mr. Yao: Yeah. I'm substituting for Scott Cyr.

The Chair: You're not an official substitute.

That's carried.

Other business?

Unless anyone has other business to raise, I would like to once again express our thanks to the Public Interest Commissioner and his staff for their assistance today and their other contributions to the review process.

The date of the next meeting. The committee clerk has polled for availability for the next meeting, in June. I anticipate that this meeting will include presentations from identified stakeholders as well as time for deliberations and report writing. I anticipate that once we complete our discussions on PIDA, we would move next to consideration of the election legislation we have been tasked with reviewing.

Mr. Clark: Sorry, Madam Chair. I just want to be clear on what's happening at the next meeting. Are we going to continue doing what we've just been doing?

The Chair: Yes.

Mr. Clark: Okay. I just wanted to be clear on that. Thank you.

The Chair: If there's nothing else for the committee's consideration, I'll call for a motion to adjourn.

Loyola: I so move, Madam Chair.

The Chair: Moved by Member Loyola that the May 27, 2016, meeting of the Select Special Ethics and Accountability Committee be adjourned. All in favour? Opposed? Thank you. Carried.

[The committee adjourned at 11:55 a.m.]

