



Legislative Assembly of Alberta

The 29th Legislature
Second Session

Standing Committee
on
Public Accounts

Justice and Solicitor General

Tuesday, April 12, 2016
8 a.m.

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

Standing Committee on Public Accounts

Fildebrandt, Derek Gerhard, Strathmore-Brooks (W), Chair
Anderson, Shaye, Leduc-Beaumont (ND), Deputy Chair

Barnes, Drew, Cypress-Medicine Hat (W)
Cortes-Vargas, Estefania, Strathcona-Sherwood Park (ND)*
Cyr, Scott J., Bonnyville-Cold Lake (W)
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Fraser, Rick, Calgary-South East (PC)
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Hunter, Grant R., Cardston-Taber-Warner (W)
Luff, Robyn, Calgary-East (ND)
Malkinson, Brian, Calgary-Currie (ND)
Miller, Barb, Red Deer-South (ND)
Nixon, Jason, Rimbey-Rocky Mountain House-Sundre (W)**
Renaud, Marie F., St. Albert (ND)
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** substitution for Scott Cyr

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Standing Committee on Public Accounts

Participant

Ministry of Justice and Solicitor General
Philip Bryden, QC, Deputy Minister

8 a.m.

Tuesday, April 12, 2016

[Mr. Fildebrandt in the chair]

The Chair: Good morning. I would like to call this meeting of the Public Accounts Committee to order and welcome everyone in attendance.

My name is Derek Fildebrandt, the MLA for Strathmore-Brooks, chair of the committee. I'll ask members and those joining the committee at the table to introduce themselves for the record, beginning to my right with the deputy chair.

Mr. S. Anderson: My name is Shaye Anderson, deputy chair and MLA for Leduc-Beaumont.

Cortes-Vargas: I'm Estefania Cortes-Vargas, MLA for Strathcona-Sherwood Park, and I'm substituting for Cam Westhead.

Mr. Hunter: Grant Hunter, MLA for Cardston-Taber-Warner.

Mr. Barnes: Drew Barnes, MLA, Cypress-Medicine Hat.

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

Mr. Gotfried: Richard Gotfried, MLA, Calgary-Fish Creek.

Mr. Bryden: Philip Bryden, Deputy Minister of Justice and Solicitor General.

Ms Gibson: Mary Gibson, office of the Auditor General.

Mr. Leonty: Eric Leonty, Assistant Auditor General.

Mr. Saher: Merwan Saher, Auditor General.

Ms Luff: Robyn Luff, MLA for Calgary-East.

Dr. Turner: Bob Turner, MLA, Edmonton-Whitemud.

Mr. Malkinson: Brian Malkinson, MLA for Calgary-Currie.

Ms Renaud: Marie Renaud, St. Albert.

Mr. Dach: Lorne Dach, Edmonton-McClung.

Dr. Massolin: Good morning. Philip Massolin, manager, research services.

Mrs. Sawchuk: Karen Sawchuk, committee clerk.

Ms Goehring: Good morning. I'm Nicole Goehring, MLA for Edmonton-Castle Downs.

The Chair: The following substitutions were received for today: Jason Nixon for Scott Cyr and Estefania Cortes-Vargas for Cameron Westhead.

A few housekeeping items to address before we turn to business. Microphone consoles are operated by *Hansard*, so there's no need for members to touch them. Audio of committee proceedings is streamed live on the Internet and recorded by *Hansard*. Audio access and meeting transcripts are obtained via the website. Please turn your phones to silent as they may interfere with the audiostream.

I will be addressing the 2016 CCPAC conference, time permitting, under other business.

Are there any additional changes to the agenda as distributed?

Seeing none, would a member move that the agenda for the April 12, 2016, meeting be approved as distributed? Moved by Member Cortes-Vargas. Any discussion? All in favour? Opposed? Carried.

Do members have any amendments to the April 5 meeting as distributed?

Seeing none, would a member move that the minutes of the April 5, 2016, meeting of the Standing Committee on Public Accounts be approved as distributed? Moved by Ms Goehring. Any discussion? All in favour? Opposed? Carried.

I would like to officially welcome our guest, Mr. Bryden from Alberta Justice and Solicitor General, here to address the report of Justice Iacobucci on the awarding of the tobacco litigation contract.

Before we hear the presentation respecting Justice Iacobucci's report, I want to advise the committee that the working group discussed a proposal for time allotment for today's meeting similar to the one approved following the committee's February 3 meeting, with the appropriate adjustments to accommodate for today's schedule. Are there any questions on this process?

If not, would a member move that

the Standing Committee on Public Accounts adopt the following time allotment for the April 12, 2016, meeting to review Justice Iacobucci's report on the awarding of the tobacco litigation contract. For the hour following the ministry's opening statement, the rotation will be Official Opposition and government members for 12-minute blocks, followed by the third party for six minutes. During the second rotation, ending at 9:55 a.m., the Official Opposition, government members, and third party will each have 10-minute blocks, followed by five-minute blocks for independent members, if any, and then revert to the original rotation for any time remaining.

Would a member so move? Moved by Mr. Hunter. Any discussion? All in favour? Opposed? Carried.

I'll start by asking Mr. Bryden to please provide opening remarks of no more than 10 minutes on behalf of Alberta Justice and Solicitor General.

Mr. Bryden.

Mr. Bryden: Thank you, Mr. Chair, and thank you to the members of the committee for this invitation. I thought it might be useful for me to begin with a brief chronology of the history of events leading up to the award of the tobacco litigation contract and to Mr. Iacobucci's report. I assume that you've all had an opportunity to read the report, so I don't propose to get into the report in detail in my opening remarks. I'm happy to address the report in response to your questions.

In November of 2009 the Alberta Legislature passed the Crown's Right of Recovery Act, and part 2 of that act creates a statutory right of recovery of the cost of health services caused or contributed to by tobacco-related wrongs. This type of legislation was pioneered in British Columbia in 2001, and it's been enacted by various other provinces and territories over the course of the years.

In the fall of 2010 then Justice Minister Alison Redford announced that Alberta would be suing tobacco companies under the act, and the decision was made to retain outside counsel to conduct that litigation. After a process that will be, I'm sure, discussed in more detail, in December of 2010 then Justice Minister Redford decided to award the right to negotiate for the contract to a consortium called International Tobacco Recovery Lawyers, or ITRL. Part of that consortium was a law firm called JSS Barristers from Calgary, and Ms Redford's former spouse, Robert Hawkes, is a partner of that firm.

In January of 2011 the government retained an outside firm to negotiate a contract with ITRL, and that contract was signed by then Justice Minister Verlyn Olson in June of 2011. The decision to

award the negotiating rights took place in December of 2010. There was a negotiation, and the contract was signed in June of 2011.

In late November, early December of 2012 opposition leaders asked the then Ethics Commissioner Neil Wilkinson to investigate if the hon. Alison Redford had breached the province's Conflicts of Interest Act during her time as Minister of Justice. In December 2013 Ethics Commissioner Wilkinson issued a report determining that then Premier Redford did not breach the Conflicts of Interest Act.

In November of last year a series of CBC news stories raised concerns that Mr. Wilkinson may not have had all of the information relevant to his inquiry. Those concerns focused on a 2010 briefing note that had changed over the course of time. An earlier draft had recommended that ITRL come in third place and not be considered; a later draft recommended that it be considered along with two other firms. There was a concern that this material had not been before Ethics Commissioner Wilkinson.

On November 30 of 2015 JSG Minister Ganley announced an independent review by former Supreme Court of Canada Justice Frank Iacobucci to determine two things: one, whether Ethics Commissioner Wilkinson had all of the evidence relevant to his 2013 investigation and, secondly, if he didn't have all of the evidence relevant to his investigation, to advise the government on what steps to take. Officials of the Justice and Solicitor General ministry were instructed to provide documents sought by Mr. Iacobucci and to co-operate with him in his inquiry, and public officials were instructed by the Premier to speak freely to Mr. Iacobucci. He was asked to complete his report by February 29 of this year. He requested additional time to complete interviews, and we agreed to that time extension and asked him to provide his report by the end of March.

8:10

On April 4 of this year the Iacobucci report was publicly released, and as you'll know, Mr. Iacobucci concluded that Commissioner Wilkinson did not have all of the information relevant to his inquiry and recommended that the matter be referred to the current Ethics Commissioner, the hon. Marguerite Trussler, to determine if reinvestigation is warranted pursuant to section 25(9) of the Conflicts of Interest Act and, if so, to conduct a reinvestigation.

Minister Ganley wrote to Commissioner Trussler asking her to determine whether a reinvestigation is warranted pursuant to the provisions of the act and to conduct that investigation if necessary. The next day, April 5, Commissioner Trussler wrote to Minister Ganley advising that she knows individuals involved in the matter. In order to ensure that the matter is reviewed without any perception of bias, she has appointed the British Columbia Conflict of Interest Commissioner, Paul Fraser, to act on her behalf pursuant to section 25(8) of the Conflicts of Interest Act, and that review is under way.

I can advise members that I've been in contact with Mr. Fraser. He's requested documents from the ministry, and we've provided him documents and will continue to assist him in any way that he asks, but his review is being conducted independently. So the ministry doesn't have any control over the process that's being used by Mr. Fraser.

I think that's probably enough by way of background, and at this point I'm happy to answer any questions that you may have.

The Chair: Thank you very much, Mr. Bryden.

Does the Auditor General have anything to add at this point?

Mr. Saher: Nothing, Mr. Chairman.

The Chair: Thank you.

Thank you to our guests for joining us today.

We'll now begin with questions. We'll begin with the Official Opposition.

Mr. Nixon.

Mr. Nixon: Thanks, Mr. Chair. First, I'd like to just begin by thanking Justice Iacobucci for his work on this report. I think that thanks to his work, we now have a greater understanding as to why there was a shroud of secrecy around the process that awarded one of the largest litigation contracts in this province's history. It's clear from this report and from the Auditor General's special duty report that the actions of staff around Ms Redford both in her office and in the wider government were problematic when she was the Minister of Justice and then the Premier.

Now I'd also like to thank the representatives of the Justice department for attending Public Accounts today to bring clarity to what is clearly a significant and blatant breach of public trust.

With that said, I want to state that I will be careful in my questioning today to stay within the confines of the Public Accounts Committee, to keep the exploring of this issue to matters that could lead to a better management of public monies in the future. I will avoid straying into territory that rightly belongs to the ethics commissioner of B.C. and his investigation, which I am happy to hear has commenced.

Thank you, Deputy Minister Bryden, for being here today. Mr. Bryden, that you played an integral role in the production of this report is my understanding, and I'm hoping that you're going to be able to answer some of our key questions today.

With that, we'll get right into it if that's okay with you. During the development and investigation of this report, Mr. Bryden, you were responsible for providing Mr. Iacobucci with relevant documentation, including the documents that were before the Ethics Commissioner, as well as arranging meetings between government officials and Mr. Iacobucci. Is that correct?

Mr. Bryden: That's correct.

Mr. Nixon: Justice Iacobucci found that the previous Ethics Commissioner was not provided all the information necessary to conduct a thorough investigation. Given the release by CBC of AR 39999 it's clear that not all information was originally provided. Has your ministry reviewed how the lack of full disclosure of documents occurred?

Mr. Bryden: Yes. I think it's important to recognize that at the time and indeed currently we're in litigation with tobacco companies. It's been the history of that litigation that the production of documents that may be relevant to the conduct of the litigation is of considerable interest to the tobacco companies and that the government has an interest in protecting solicitor-client and litigation privileges over documents that may be useful to the tobacco companies in conducting their defence.

A rather complex process was employed by Commissioner Wilkinson in his investigation in order, on the one hand, to allow the government to co-operate and, on the other hand, to continue to protect privilege. Even in the course of Mr. Iacobucci's review one of the reasons that we retained him was that he was in a position to give advice to the government without breaching privilege.

Now, we recognize that there is a public interest in disclosure of information, and I think it's fair to say that the current government and the current minister are open to disclosing more information even if it may be at some risk to us in terms of the conduct of the tobacco litigation, but we want to be fairly cautious in the release of information. In particular, we'd like to protect privilege over some documents that may be of particular interest to the tobacco companies but we don't think are as relevant to the investigation.

We are conscious of the desire of this government to be more forthcoming in relation to the production of documentation. At the same time we don't want to abandon the benefits to the province of Alberta of the privileges against disclosure that the law provides to us.

Mr. Nixon: Mr. Bryden, in our legal system not providing full disclosure of evidence and documents is very serious, and it could be considered contempt. Now, I'm sure – well, I'm not so sure, actually, if you actually agree that the Justice department failing to provide full disclosure of documents to the Ethics Commissioner is very concerning. Do you agree with that?

Mr. Bryden: The rules under the Conflicts of Interest Act do not provide us with an opportunity to provide privileged documents. It's important to recognize that solicitor-client privilege and litigation privilege are privileges that are recognized and protected by our law, and this is not only a privilege that is extended to the government; it is extended to everyone who seeks confidential advice from a lawyer. As a lawyer it's my professional obligation to protect the confidential information that has been provided to me by my client and to protect the confidences that we engage in when we're exchanging information in order to provide legal advice to the client. So I take that obligation very seriously.

Minister Ganley has asked us to consider whether there is a mechanism that would allow us to provide information to the Ethics Commissioner and perhaps other organizations who have an oversight role in relation to government while still protecting privilege. We're exploring those options, and we'll be coming forward with proposals, we anticipate, later in the summer. I think that it is important that the government have the same rights as anyone else to consult lawyers in a privileged situation. Those privileges belong to the government as a client. The government may make a decision to waive those privileges, and I think there's openness on the part of this government to consider that in this particular instance, but I think because of the magnitude of the tobacco litigation, if the government is making those decisions, it's wise for the government to proceed cautiously in doing so.

8:20

Mr. Nixon: Mr. Bryden, were there any employees or former employees of the government who were asked to participate in this report that denied your request?

Mr. Bryden: Commissioner Wilkinson would not be a former employee of the government. He declined to participate in the inquiry. None of the current government officials declined to participate, and my recollection is that all of the other individuals that Mr. Iacobucci invited us to contact, whether they were former government officials or not, did co-operate.

Mr. Nixon: Aside from Mr. Henwood, did you reach out or arrange meetings with any former staff of the minister's office during the time that AR 39999 was being drafted, sent back and forth to the minister's office, and finally acted upon, and if so, what were the results of that, Mr. Bryden?

Mr. Bryden: We acted on Mr. Iacobucci's instructions with respect to who it was appropriate for him to contact. He asked us to get in contact with Mr. Henwood, and we did. He asked us to get in contact with former Premier Redford, and we did, and both of them co-operated.

Mr. Nixon: Were there any other former staff of the minister's office that were a part of that list?

Mr. Bryden: Not to my . . .

Mr. Nixon: Just Mr. Henwood?

Mr. Bryden: Just Mr. Henwood is my recollection.

Mr. Nixon: Thanks.

Mr. Bryden, seeing as how you were deputy minister in the Energy department in December 2010 – I think I'm correct on that.

Mr. Bryden: I'm afraid you're not.

Mr. Nixon: Okay. Where were you in 2010?

Mr. Bryden: I was the dean of Law at the University of Alberta.

Mr. Nixon: Perfect. I apologize for that.

I'm hoping, though, that you'll provide your perspective from your previous roles on the relationship between the ministerial staff and high-ranking members of the bureaucracy. Did you ever work in a different ministry?

Mr. Bryden: A long time ago I worked in the federal government – that would have been 1980 – in a minister's office. That's the sum total of my experience.

Mr. Nixon: In your experience now as a deputy minister is it common for political staff to have a role in contract selection? I want to be clear on that: political staff.

Mr. Bryden: Okay. So in the wake of this controversy – and I don't know when, precisely, this took place because I've only been deputy since July of 2015 – the ministry had a change of policy in terms of how we contract, particularly with lawyers, so at the time of the awarding of the tobacco contract, contracts over \$20,000 were awarded by the minister, so the department would make a recommendation and . . .

Mr. Nixon: So was it common for political staff to participate in that process?

Mr. Bryden: Sorry. You're going back before I was deputy, but it wouldn't surprise me that at least a minister might seek advice of his or her political staff in relation to those contracts. That's no longer the practice, so now if there are contracts over \$20,000, they are awarded – I make the decision on those contracts, and I . . .

Mr. Nixon: So is there a policy on that now?

Mr. Bryden: Yes.

Mr. Nixon: Was there a policy on that when this process was taking place?

Mr. Bryden: The policy in those days was that the minister made those decisions rather than the deputy.

Mr. Nixon: Okay. Let me ask you this: do you think the political staff should have a role in these types of contracts?

Mr. Bryden: Well, there's a . . .

The Chair: Sorry. We'll have to continue when you're on your next rotation.

The next 12 minutes are to members of the government. Mr. Malkinson.

Mr. Malkinson: Thank you very much, Mr. Chair. I'd like to start off by just thanking the former Supreme Court of Canada Justice Frank Iacobucci for conducting this report – I think it has been of

much interest to all members of the committee – and for shedding light on the allegations of the conflict of interest involving former Premier Alison Redford. I'd also like to thank the current Ethics Commissioner, Ms Trussler, for passing along, because of her perceived conflict of interest, to Mr. Paul Fraser, who is the B.C. Conflict of Interest Commissioner. I'm sure we all look forward to getting his report in due time. I think it speaks to the commitment of everyone to be transparent and accountable to all Albertans.

To start off, my question is that – and this is a point of clarification – you know, we've seen news interest, confusion around this story, and people are looking for clarity. I was wondering, Mr. Bryden, what your involvement was in the selection of counsel for the tobacco litigation, just to be really clear.

Mr. Bryden: Just to be perfectly clear, I was dean of Law at the University of Alberta at the time. I had no involvement in the selection of counsel.

Mr. Malkinson: Okay. Thank you very much. I think I just missed the date when you answered the previous question, for when you joined the office of Alberta Justice and Solicitor General.

Mr. Bryden: I became deputy minister in July of 2015.

Mr. Malkinson: Perfect. Thank you for that clarification. I just missed it when you answered the question previously.

Going on then, being the dean: that was your background before becoming the minister, correct?

Mr. Bryden: Yes. I was dean of Law at the University of Alberta. Before that I was dean of Law at the University of New Brunswick. Before that I was a faculty member at the University of British Columbia and practised law part time while I was at UBC, and I had a number of other jobs before becoming an academic.

Mr. Malkinson: So an extensive career in law.

Mr. Bryden: Yes.

Mr. Malkinson: Perfect. Thank you.

The Chair: Are those all your questions?

Mr. Dach: No. I have other questions just to follow up, if I may.

The Chair: Mr. Dach.

Mr. Dach: Thank you, Mr. Bryden and members of the Auditor General's staff, Mr. Saher, for being here today and attending to these important matters. The members of the House, Mr. Bryden, and the public were all anxiously awaiting the release of this report. We were originally expecting this report at the end of February, but its completion was delayed. Are you able to speak to why it was extended?

Mr. Bryden: Yes. Mr. Iacobucci wanted more time to conduct interviews, and in particular former Premier Redford's schedule meant that at the time in January that he wanted to interview her, she was out of the country. So he asked us if we would agree to an extension, and we agreed to the extension in order to enable him to conduct interviews, particularly of former Premier Redford, but there were some other people in Calgary that he spoke to.

Mr. Dach: So other than Madam Redford, the reasons for delay were simply scheduling, or was there resistance?

Mr. Bryden: I think it was just scheduling. There were discussions between us and Ms Redford's counsel about timing and what kinds

of questions would be asked, but at the end of the day Mr. Iacobucci told us that she co-operated with the inquiry. I shouldn't call it an inquiry; it's a review.

Mr. Dach: Very well.

Now, the hon. Frank Iacobucci's resumé is extremely impressive, and he's clearly an expert in law in a way that none of us on this committee are, and your resumé is, frankly, pretty impressive as well in the field of law. I think the people of Alberta are incredibly lucky that we are able to have Mr. Iacobucci conduct the review for us, and I'm sure the fact that a former Supreme Court justice was responsible for conducting this review will make all Albertans feel confident in his findings. I don't believe we currently have any lawyers on this committee, let alone a former Supreme Court justice, so his insight is much appreciated. Did this review require using a former Supreme Court justice? What additional value did his background bring to the investigation?

8:30

Mr. Bryden: I think there are two things about former Justice Iacobucci that made him particularly suitable for this inquiry. One, of course, is the fact that he had such a great reputation as a lawyer. He was dean of law at the University of Toronto law school, a former Deputy Minister of Justice federally before he was appointed to be Chief Justice of the federal Court of Appeal and then on to the Supreme Court of Canada. So, you know, his reputation as a lawyer and as a justice I think is unimpeachable. That's valuable because it's not every day that you have an inquiry involving a former Premier of the province, and I think the government wanted to treat this with the seriousness that it deserved. The other advantage of Mr. Iacobucci is that he had been a former Deputy Minister of Justice at the federal level, so he understood the workings of government perhaps better than some of the other retired justices whose experience had been more in the private bar or in other areas.

So those were the reasons why he was attractive to retain.

Mr. Dach: You spoke a little bit earlier about the question of privilege and the danger of waiving privilege in a way that might put at risk future investigations, future legal actions. Could you perhaps expand on that a little bit?

Mr. Bryden: Certainly. The law of solicitor-client privilege allows individuals or organizations to protect from disclosure confidential discussions that they have with their lawyers as they are seeking legal advice. As I mentioned earlier, this is a privilege that's accorded to each of us as individuals, and it's also available to organizations, including government. The Supreme Court of Canada has described it as almost a quasi-constitutional right.

The reason we have privilege is that in our society we think it's important for people to seek legal advice in order to guide their actions in legal matters and that to be able to have frank exchanges with their lawyers, it's important for clients to be able to say things and know that they will not be revealed to other people and know that the advice that they get from their lawyers will not be revealed. It's a privilege that belongs to the client, not to the lawyer. The lawyer has an obligation to protect privileged information, but the client can decide to release information.

There's also a concept that's significant, which is the concept of waiver. If a client decides to release some information, the basic idea is that you can't pick and choose which information that's privileged you want to release because that might be misleading. So you can't claim privilege and at the same time selectively release in a way that might be misleading. That's why we're cautious when we advise the government about waiver. It might be that by waiving

some documents, we would put in jeopardy our ability to protect privilege over others.

Mr. Dach: Thank you, sir. That's most helpful.

I read the recommendations in this report, sir, with particular interest, and I'm sure that I speak for all other members of this committee when I say that I was a little surprised to see that our committee was especially singled out in one of the recommendations. Given that we are currently discussing this report and the report directly states, "Nor does this matter appear to me to be one most appropriately dealt with by the Standing Committee on Public Accounts," what are your thoughts regarding the hon. Frank Iacobucci's recommendation that our Public Accounts Committee is not the best place to assess a report before us here today?

Mr. Bryden: Well, I think what Mr. Iacobucci wanted to do was explore different options and give the government advice based on his years of experience about different options. He explored the idea of reinvestigation, he explored the idea of a referral to the Public Accounts Committee, and he explored the idea of conducting a public inquiry under the Public Inquiries Act. His recommendation was that the most suitable place to conduct this kind of process was through the Ethics Commissioner, and that's the advice that Minister Ganley on behalf of the government accepted.

Mr. Dach: Thank you.

At paragraph 97 he further states: "Legislative committees are . . . better suited to determine matters of policy or legislative fact rather than matters of adjudicative fact." He further notes: "They are also part of the political process, unlike the independent office established to consider conflicts of interest issues – the Office of the Ethics Commissioner." Given that these were findings of a former Supreme Court justice, I am inclined to believe he knows what he's talking about here. Now, do you think this is an accurate summary of the role?

Mr. Bryden: Well, I certainly respect Mr. Iacobucci's opinion. He's more experienced in public life than I am. Members of the committee can make their own determinations about what is and isn't the best use of your time and experience.

Mr. Dach: As a general rule Public Accounts does look at issues which are formulated and presented from the Auditor General's . . .

The Chair: Sorry, Mr. Dach. We'll resume in a few minutes.

The next six minutes go to the third party.

Mr. Gotfried: Thank you, Mr. Chair, and thank you, Mr. Bryden, for coming today and joining us. Of course, our sincere appreciation is extended to former Supreme Court Justice Iacobucci for his diligence in his review and his report. And thank you to all of our guests today for your time and your kind assistance and, of course, for the good work that you do on behalf of Albertans throughout the year.

Having thoroughly reviewed the recommendations of the hon. Frank Iacobucci and noting his expertise, that you have referred to as well, and depth of experience in reviewing the past rulings and reviews of this matter and the appropriateness and depth of disclosure of relevant information in regard to this issue, my colleagues and I are satisfied and supportive of his recommendations, specifically referring the matter to the current Ethics Commissioner for possible reinvestigation and to be dealt with in the most suitable manner, as you've noted as well, as recommended by the former Supreme Court Justice Iacobucci. Of

course, transparency and full disclosure within law are important to all members of the Legislature and to all Albertans, and I think that we need to respect and honour that going forward. Perhaps that's a note and a caution and a lesson to us all as we embark on such reviews in the future.

It is our belief that all public servants are not only responsible and accountable for their actions and the decisions that they make, but they should be held to account by the appropriate authorities for such actions while in service to Albertans. It is what we all expect, and it is what we believe we should take into account as stewards of the public purse and, of course, of the public trust as well. We are also hopeful that all civil servants and members of the bureaucracy will feel not only comfortable but compelled to come forward if they perceive any wrongdoing in the actions of government or bureaucracy. We welcome the recommended review by the current Ethics Commissioner and will support and abide by any decisions reached in this regard in upholding what is in the best interests of Albertans now and in the future.

Mr. Bryden, I would perhaps, without having to get into any depth of questions, just ask if you have any comments with respect to this process and the involvement of the Public Accounts Committee in this process and your comments on the recommendations, I guess the most compelling recommendation being that we move this back to the Ethics Commissioner for review and for further action.

Mr. Bryden: Yeah. What I would say is that the Conflicts of Interest Act expresses a desire on the part of the Legislature of Alberta to have ethical issues addressed by who we call in this province our Ethics Commissioner – in other provinces the same officer would be called the conflicts of interest commissioner – and I think that Mr. Iacobucci's recommendation reflects that.

8:40

The act also recognizes that there's an interest in finality of decision-making, but there may be circumstances in which reinvestigation is appropriate. Section 25(9) of the act provides for reinvestigation if there is an initial determination about whether new factual information might make a difference in the outcome. I'm confident in the ability of Mr. Fraser to make that initial determination, and if after his review he decides that a further reinvestigation is warranted, I'm sure he'll do an excellent job in conducting that reinvestigation.

Mr. Gotfried: Great. Thank you, Mr. Bryden. I think that aligns with our thoughts on this as well, that we move this to the appropriate authorities and to the authority of the Ethics Commissioner to make those decisions as recommended by the Chief Justice. We thank you for your comments on that.

Mr. Chair, that's all. We're ceding our time back to the opposition.

The Chair: Thank you very much, Mr. Gotfried.

The next 12 minutes go to the Official Opposition.

Mr. Nixon: Mr. Bryden, do you think that political staff should have a role in contract selection such as these contracts?

Mr. Bryden: There are ideas about ministerial accountability and roles for oversight of public decision-making and public spending that would argue for a role for political actors and potentially for their staff. If you look historically not just in this province but in other parts of the country, it hasn't been unusual for ministers of justice to select the law firms who are retained to represent the government in a variety of different elements . . .

Mr. Nixon: Well, do you know of other roles here in Alberta where political staff have played a role in contract processes like this?

Mr. Bryden: Well, as I mentioned earlier, our approach at the moment is to not involve our minister or our minister's office in the retention of counsel. We make those decisions within the bureaucracy. You know, I think that when you have ministries who are going outside for work, we try to respect the views of our client ministries on the preference for counsel. Sometimes they've worked with a law firm in the past, and they'd like to continue to work with them, so we tend to respect that view. But our role is to try to make sure that Albertans get adequate representation in the lawyers that we retain to do outside counsel work and also that they get value for money, and we think we're in the best position to make those decisions.

Mr. Nixon: Well, how about this, Mr. Bryden. Do political staff often play a role in drafting briefing notes as has occurred here? Do chiefs of staff, for example, intervene in the process to exert the will of the minister's office, and is that appropriate?

Mr. Bryden: If you're talking about briefing notes more generally, in my experience it's not at all unusual, and I think it is appropriate for a minister's staff to give us advice about how the minister is thinking on a certain issue. When I was an academic, I used to get comments from other people about my work, and I would make changes to my work. I've observed that the same thing is true within government, you know, that we have a variety of different people who provide their input into briefing notes. Sometimes things come up to me, and I will send them back for further work. Sometimes we send it up to the minister's office, and the minister's office says, "Have you thought about this?" and then we take it back, and we do more work. So I don't find that, in and of itself, strange or unusual.

Mr. Nixon: Thanks.

In February at an appearance at this committee the Auditor General, in discussing his special duty report on the office of former Premier Redford, said:

Any member of the public service – it doesn't really matter what your rank or place is – has a fundamental duty to do something about anything that you believe is not correct. You should not – and there is no expectation – follow through and do things that you don't believe are the right thing to do.

Do you agree with that statement?

Mr. Bryden: I do.

Mr. Nixon: Would you feel comfortable telling a minister that they are incorrect or that something they have asked of you is wrong?

Mr. Bryden: Yes.

Mr. Nixon: Under the previous government was there a culture of ministerial interference that you're aware of?

Mr. Bryden: Well, I wasn't involved with the previous government, so I can't answer that question.

Mr. Nixon: We often heard under the previous government – an aura of power was a term that was used. Because you weren't underneath them, you can't tell me if that was unique. But what can you tell me now, with your experience, should be done to prevent such an aura of power from improperly interfering in government decisions in the future?

Mr. Bryden: Well, my experience of my minister – and that's the person that I have the most interaction with – is that she's very respectful of the work that the civil service does. It's important for us to, you know, in a sort of time-worn phrase, speak truth to power, and at the same time it's important for us to respect the fact that you and the other members here got elected. The people of Alberta trusted you to carry out the functions of governance, and the government was elected by the people of Alberta. We're advisers; we're not decision-makers. Political actors take responsibility. We try to give our advice with integrity, but at the same time . . .

Mr. Nixon: Well, speaking of advice, as a professional ministry, how would you respond if you knew that a minister had a real or perceived conflict of interest in a matter that they were to decide on? How would you respond? How would you advise them?

Mr. Bryden: Well, if there were a minister that had a conflict of interest . . .

Mr. Dach: A point of order, Mr. Chair.

The Chair: Yeah?

Mr. Dach: The current speaker is speaking out of context and really off topic and is approaching a line of questioning that is nearing an inquisition. We'd really prefer if the individual stayed on topic with respect to the questions regarding the report that's before us.

The Chair: Noted, but I believe it is in order. Mr. Nixon could continue with his question.

Mr. Bryden: If a minister had what I understood to be a conflict of interest under the act, I would feel obliged to advise the minister that there was a conflict of interest under the act and expect the minister, you know, in the case of my minister, to recuse herself or take whatever other action is appropriate.

Mr. Nixon: Thanks, Mr. Bryden.

In your experience how often has the public interest disclosure act been brought up, considered, or used in the course of making decisions in your department?

Mr. Bryden: The whistle-blower protection act?

Mr. Nixon: No. The public interest disclosure act.

Mr. Bryden: Okay. I'm blanking on that.

Mr. Nixon: Okay. Well, we can move on.

Mr. Bryden: I'm afraid I can't answer that question.

Mr. Nixon: Is it part of a standard process to ask the minister if they might have any reason to have a potential or perceived conflict of interest and to discuss any such reason to determine if further action is required because of that conflict of interest?

Mr. Bryden: Well, ministers are given training, along with members, by the Ethics Commissioner in terms of their ethical obligations, and we expect ministers to abide by those obligations. I wouldn't say that we routinely inquire into whether there are perceived or actual conflicts of interest under the act, but if we became aware of one, we would draw it to the minister's attention.

Mr. Nixon: But when you're going through these processes and there are discussions, is that one of the things that you – it sounds like you would expect the minister to notify the team that they have

a conflict or a perceived conflict. Is it something that's part of the decision-making process?

8:50

Mr. Bryden: I would think that it would be more likely that it would come up from the minister's perspective than ours because the minister knows her personal circumstances much better than we do. If there was an issue, we would of course want to give advice to the minister, and that would be true if there was a minister in another ministry who had questions. One route is going to the Ethics Commissioner to seek advice, and the Ethics Commissioner has a right to give rulings, but it's also conceivable that we would be asked for advice from the Justice minister.

Mr. Nixon: My colleague from Medicine Hat will have a few questions for you.

Mr. Barnes: Thank you. Thank you, Mr. Bryden, for your work here today and your work on behalf of Albertans.

When I look at this – and, of course, the main reason for the second report was information that may not have been available – I'm looking at the balance between public interest versus what might be private privilege. Of course, the public interest is huge. Quebec won a \$15 billion lawsuit. Alberta is suing for \$10 billion. B.C., Manitoba, New Brunswick, Nova Scotia, P.E.I., and Saskatchewan have all joined together to sue tobacco companies as well.

Justice Iacobucci has recommended another look by the Ethics Commissioner, of course, which has been passed on to the B.C. ethics commissioner. You mentioned that Minister Ganley, I believe – and please clarify – is talking about or is willing to look at other mechanisms to provide the information or other ways to look at the information at the time. Of course, if I understood the report right, Ethics Commissioner Wilkinson had a situation where a Mr. MacCallum, actually, was interviewed only and on behalf of five or six others. Can you comment on what other mechanisms the B.C. ethics commissioner could use and why this would be any different an outcome than last time? Is there not a better way to get to the heart of the public interest?

Mr. Bryden: One of the issues that we've been considering is the desirability of waiving privilege over certain information, and we're trying to be very cautious in terms of what information that we can waive without undermining the value of the privilege that is advantageous to Alberta in the conduct of the litigation. You know, of course, once documents come into the public domain, that changes the calculation that's made. I think the current government is instructing us to err on the side of openness and transparency in order to resolve this issue, but if we can do it in a way that doesn't compromise our ability to protect privilege over documents that we think may be particularly valuable to the tobacco companies in defending the litigation, we're going to try to do that. But it's a difficult balance. There's no question about that.

Mr. Barnes: Okay. I . . .

The Chair: Okay. Thank you. We're out of time here. Twelve minutes to the government. Yes.

Ms Miller: Thank you, Mr. Bryden, for being here and to the Auditor General and his staff. I was happy to see that the main recommendation of this report has already been acted on and, further, that in order to avoid any perceived conflict of interest, the Ethics Commissioner, the hon. Marguerite Trussler, QC, has referred this case to the British Columbia Conflict of Interest Commissioner. I understand that the B.C. Conflict of Interest

Commissioner will be looking into the issue to see whether or not a reinvestigation is needed. What will the B.C. Conflict of Interest Commissioner look for in deciding whether or not to investigate?

Mr. Bryden: The test under section 25(9) of the act – and let me just see if I can quote from it – is that a reinvestigation can be conducted “only if, in the Ethics Commissioner's opinion, there are new facts that on their face might change the original findings.” So the test that Mr. Fraser is going to direct himself toward is: are there new facts that on their face might change the original findings? That's up to him to determine. Mr. Iacobucci has identified a number of new facts that weren't before Commissioner Wilkinson, so I'm sure that the first order of business for Mr. Fraser is to apprise himself of those new facts and of what facts were available to Mr. Wilkinson and then decide whether the new facts might on their face affect the outcome.

Ms Miller: Thank you.

I'm pleased with the transparency of the Ethics Commissioner in referring it to the B.C. ethics commissioner. Who decided that B.C. was the best place to refer the determination of a reinvestigation?

Mr. Bryden: Commissioner Trussler made that decision. That's her call. She operates independently from government. You know, for what it's worth, Mr. Fraser is one of the most experienced of the conflict of interest or Ethics Commissioners in the country, and I think he was an admirable choice.

Ms Miller: Thank you.

Ms Goehring: I'd like to thank everyone for coming here today. I'm a little curious about the process that the government uses when it comes to selecting outside counsel. Why does the government select outside counsel? There must be a number of extremely competent lawyers working for Alberta Justice. Why couldn't they handle this lawsuit?

Mr. Bryden: We actually have the largest law firm in the province, but we have a number of different roles that we play, and our resources are sometimes stretched. There are areas where it's not worth our while to develop the expertise to conduct, particularly, litigation. This is a very specialized form of litigation that typically takes a long time. British Columbia passed its counterpart to our legislation in 2001. It's now 2016. The matter still hasn't come to trial. So for us to tie up staff lawyers for a really long time on a very specialized piece of litigation is not a good investment.

The other advantage in this particular situation is that firms were willing to operate on what's called a contingency agreement. The province doesn't pay anything unless the firm achieves a recovery, and then they get a percentage of the recovery, so the lawyers are making an investment in the litigation. They think it's worth while, but that saves money for the province in the short term.

That's relatively unusual, but in this particular type of litigation I think that it was a good decision to go that route. If I had to do it over again, I would do exactly the same thing and look for outside counsel, and if we could get a favourable contingency agreement, that would make sense to me as well.

Ms Goehring: Thank you.

It's clear from this report that there are areas of improvement in the process for the selection of outside counsel. I'm sure that all Albertans would expect that we are doing everything we can to ensure that something like this does not happen again. What processes have changed in selecting outside counsel since this contract was awarded?

Mr. Bryden: As I mentioned earlier, there were changes that took place under the previous government, before I became deputy, and I don't know the precise timing of those changes. But since I have come to be deputy minister, decisions on contracts of more than \$20,000 are made by me. Typically I take advice from our staff.

9:00

It's often the case that we will contact three different firms, get expressions of interest and try to identify whether they have the expertise to do the work, whether they're willing to do the work at government tariffs, which are usually lower than what lawyers would charge private-sector clients. I get recommendations, and then I make a decision.

As I mentioned to Mr. Nixon, we do take into account the preferences of a client ministry. So if a client ministry has worked with a particular lawyer or law firm in the past, that often influences our choice, but ultimately it's my call.

Ms Goehring: Thank you very much.

The Chair: Member Turner.

Dr. Turner: Thank you very much, Mr. Chairman, and again thank you to Mr. Bryden for this very fulsome explanation of a complex area.

I think that one of the most important things that we do as MLAs is to actually review what is going on in the government, and the mandate is to make sure that Albertans, as was mentioned by Mr. Barnes, are getting what they're due. I really want to turn the tone of this discussion a little bit to that sort of thing. Basically, I want to know how we can get the most money out of the tobacco companies that's possible.

I'm going to read a quote that came from the *Canadian Medical Association Journal* just a week ago. It's a peer-reviewed commentary. It starts:

Tobacco use is still the leading cause of preventable death in Canada and is a leading cause of preventable morbidity and mortality worldwide. Tobacco use has declined in Canada from 50% in the 1960s to 19% in 2013, but the rate of decline has slowed substantially in recent years.

The commentary goes on to talk about the role of increasing taxation to decrease the use of tobacco, but I would submit that punishing the tobacco companies for their nefarious deeds with a big \$10 billion claim would also help in that regard.

The commentary actually finishes:

High levels of taxation can discourage young people from starting smoking and can help smokers quit, which will decrease the overall tobacco use and associated morbidity and mortality in Canada.

I put this on the record because that's what we want to do. We want to stop people smoking. We want to curtail the marketing of cigarettes to our youth in particular but to all Canadians and Albertans, and we want to make sure that the health care costs that this province has taken on as a result of smoking are compensated for.

With that preamble, I'm actually interested in your experience, particularly perhaps in New Brunswick, which was mentioned as a province that has initiated product litigation against the tobacco companies. Did you have any experience with that?

Mr. Bryden: No. I was the dean of law there. I'm sort of vaguely conscious of the fact that this kind of litigation was being commenced since it's been commenced pretty much across the country. At this point none of the provinces have had a recovery. The recovery in Quebec, that was mentioned earlier, was a recovery in a class-action lawsuit by smokers. The theory of our case and the

other governmental tobacco recovery cases is to recover the costs to the health care system that have been incurred by governments in response to illnesses that people have gotten from using tobacco products. That's the theory of our litigation.

Dr. Turner: Right. I wonder if you could expand on the wisdom of that theory from your experience as dean of law at, by the sounds of it, three different faculties of law.

Mr. Bryden: Dean at two and a faculty member at the third.

There are particular aspects of tobacco harms that have made it challenging conceptually to try to figure out how you're going to have recovery from what you might otherwise call a product's liability case. If somebody makes a product that injures an individual, the manufacturer of the product is liable on a products-liability theory. The difficulty with tobacco is that it's something where the injuries occur over a period of time. [A timer sounded] Can I finish this answer?

The Chair: I'll let you finish your answer, yeah.

Mr. Bryden: They occur over a period of time, and it's difficult to trace which tobacco company sold the tobacco to the individual. So what we do is create a special set of rules. British Columbia pioneered these rules, and they're mirrored in our legislation and other provincial legislation.

The Chair: Thank you.

We'll now have six minutes to the third party.

Mr. Gotfried: No further questions, Mr. Chair.

The Chair: We are now onto 10-minute blocks between the parties.

It's 10 minutes to the Official Opposition.

Mr. Barnes: Thank you, Mr. Chair. Thank you again, Mr. Bryden. I want to come back to the information that may not have been available. Of course, we're talking about draft briefing note AR 39999. Am I correct that in the work you did for Chief Justice Iacobucci and his report, there was no subpoena power, that people testified, and they were not under oath?

Mr. Bryden: That's correct.

Mr. Barnes: Okay.

Mr. Bryden: He would say that he interviewed them rather than that they testified to him.

Mr. Barnes: Okay. I understand that a lot of what Ethics Commissioner Wilkinson did was by memo or by letter. Was he able to put people under oath and subpoena them? Will the B.C. Ethics Commissioner have subpoena power?

Mr. Bryden: The act provides subpoena power to the Ethics Commissioner and authorizes the taking of testimony under oath, so it's not a question of power. The Ethics Commissioner operates on an independent basis from government, and that will be true of Conflict of Interest Commissioner Fraser. What process he chooses to use is up to him, so I can't tell you what process he's going to use. What I can tell you is that we will co-operate in his investigation. He has the powers under the act to take testimony under oath if that is what he chooses to do.

Mr. Barnes: Okay. Thank you.

I want to ask some questions around the briefing note. On page 14 of the report Mr. Iacobucci describes the initial draft briefing,

again note AR 39999, as being sent to Ms Redford's executive assistant, a Jeff Henwood. Okay. This briefing note, according to the three deputy ministers who comprised the committee that wrote it, ranked ITRL, the ultimate winner of the bid, as the lowest ranked and the least-worthy law firm to represent our province. This was a crucial piece of evidence, which, if produced in its entirety, would be able to either exonerate Ms Redford or, well, not exonerate her. Apparently, this briefing note had unusually failed to have been uploaded to the government's data system, ARTS. A key briefing note related to a very large contract was not uploaded to the government's document tracking system. Has your department determined if this was deliberate or accidental?

Mr. Bryden: I couldn't comment on that.

Mr. Barnes: Do you have any comments at all on why this note wasn't uploaded?

Mr. Bryden: It would be speculation, and I don't think it's helpful to speculate on that. I can say that there are times now, when we're in a rush, that we send something up to the minister's office and put it into ARTS later.

Mr. Barnes: Okay. Thank you.

Early on Ms Redford had used the phrase, that maybe wasn't validated or confirmed, that this partnership was in the forefront to get the contract. Do you think that statement had any bearing on the ultimate changing of the note, on the ultimate circumstances that went down?

9:10

Mr. Bryden: That would be speculation on my part. I'm sure that it's something that Conflict of Interest Commissioner Fraser will be considering as he conducts his review. There were a number of items that Mr. Iacobucci pointed out, and I'm sure Mr. Fraser will be alive to that set of issues.

Mr. Barnes: Okay. Thank you.

Has Justice made any changes to its document management system? Are changes necessary to the document management system in your department?

Mr. Bryden: I don't think so. I mean, I think that it certainly is the case that we have a lot of documents going back and forth, so having a tracking system is important. It's also the case that there are, you know, times when we're in a rush and we put documents into ARTS after the fact rather than before the fact.

Mr. Barnes: Okay. Thank you.

Do you ever receive verbal instructions from the minister? Does Minister Ganley ever give verbal instructions? And how would you then input that? How would you track that for oversight and follow-up?

Mr. Bryden: Certainly. Well, it's common for us to take a briefing note up to the minister to have a discussion and for her to say: well, you know, I think you need to do more work in a particular area. We would take the briefing note back, do further work, and send a new briefing note up to her. As I mentioned earlier, I don't see that as unusual.

Mr. Barnes: Okay. Just to be clear, in December 2010, when the AR 39999 was sent to Ms Redford's assistant Jeff Henwood and that document was not uploaded to ARTS, that was a breach of standard practice.

Mr. Bryden: I couldn't comment on what standard practice was at the time. Normally if we had a document like that, our practice would be to upload it to ARTS. I don't know what the practice was at the time then.

Mr. Barnes: Is it the practice now, then?

Mr. Bryden: Normally it would be, but as I've mentioned, sometimes we're in a hurry, so we send the briefing note up, whether by e-mail or walking it over, and then add it to ARTS afterwards.

The Chair: Four minutes.

Mr. Barnes: Okay. Thank you.

I guess the whole – you know, I still want to go back to the public interest versus waiving privilege and stuff. Obviously, if Alberta Justice would have used their own lawyers, that would have changed how the privilege would have been handled. It would have obviously ended the whole crux of the issue here.

Mr. Bryden: We wouldn't have had the discussion.

Mr. Barnes: We wouldn't have had the discussion. How would that have panned out in terms of what privilege government employees would have had versus a subcontractor as was hired?

Mr. Bryden: We would have the same privilege protecting our information as an outside counsel would have. When we conduct litigation on behalf of the government, we'll often be interviewing a minister to give advice, and in those contexts we have privilege, and we would assert that privilege unless the government chose to waive it. The fact that the litigation is being done by outside counsel doesn't change the basic rules of privilege. But, as you rightly point out, it changes the context because we're engaging outside counsel and we're seeking, in this particular instance, submissions from them on how they would plan to conduct the litigation, and that's privileged information. Even if we didn't hire a firm, if they provided that information to us, that would be privileged information.

Mr. Barnes: Okay. Thank you.

When Justice MacCallum became the interviewee and, I guess, represented the four or five people as a way to get some information with the privilege in effect, what other avenues would Ethics Commissioner Wilkinson have had to have done that instead? Would he have had other options he could have used instead? Legally is there a mechanism, a court to challenge people's right of privilege?

Mr. Bryden: The law protects privilege, and it's up to the client to decide whether or not to waive the privilege. We have been thinking within the ministry about whether it would be better to amend legislation like the Conflicts of Interest Act to make it clear that documents could be produced to the Ethics Commissioner without waiving privilege in relation to other people, so without making them accessible to third parties in litigation but nevertheless allowing the Ethics Commissioner to review the information. That's a policy area that we're working on, and we hope, if the government approves, to come forward with some amendments in the relatively near future.

Mr. Barnes: Okay. Thank you.

The Chair: We're at the next 10 minutes to the government. Dr. Turner.

Dr. Turner: Thank you. I want to turn back to my previous line of questioning just for a moment. It does seem that there's a lot at stake in this litigation, billions of dollars owed to Albertans due to the long-term health impacts of smoking, so clearly it's important that we get this litigation right. How has the law firm that has been selected been doing?

Mr. Bryden: We've been asked to check on whether or not we're satisfied. We have one lawyer who's working significantly with this firm, and he's been impressed with the quality of the work and the progress that they've been making. In particular, he's found that the American firm that's part of the consortium has added significant value in terms of their approach. One of the areas of potential concern for us early on was that JSS is a smaller firm than the other firms that were competing. Bennett Jones is a very big national firm, and the consortium of McLennan Ross and Field Law are big Alberta firms, much bigger than JSS. So there was a question: will they be able to staff up the litigation? From what we're seeing today, the answer is yes. There were other aspects of the JSS bid that were advantageous from the government's perspective, particularly on things like rates. It was an attractive bid for those reasons.

Dr. Turner: Thank you. I just had one follow-up to a previous question. I noticed that Justice Iacobucci thanked his associates Mr. Laskin and Mr. Roth, I think it is.

Mr. Bryden: That's right.

Dr. Turner: I wonder if you would comment on their qualifications in general.

Mr. Bryden: Mr. Roth is an associate with the firm, and I think his role was primarily taking notes, producing drafts of documents. Mr. Laskin is a very experienced lawyer and litigator. I think that Mr. Iacobucci wanted to have a team on this so that it wasn't just his perspective but that he was getting the perspective of one of his partners and having the work of one of the associates.

Dr. Turner: Laskin is a very famous name in jurisprudence in this country.

Mr. Bryden: That's right. Yes. John is Bora's son.

Dr. Turner: Okay.

The Chair: Ms Renaud.

Ms Renaud: Thank you. You mentioned that early on there were some concerns with JSS. I wonder if you could expand on that and also expand on the advantages.

9:20

Mr. Bryden: Certainly. The main concern was associated with the size of the firm. If you look at page 13 of Mr. Iacobucci's report, it notes that the review committee assigned different weightings to different factors in making their assessment. Typically the ITRL consortium ended up coming second, and the Bennett Jones bid and the McLennan Ross and Field consortium alternated between first and third. You know, I think that looking at it with the benefit of hindsight, there was something to be said for all three firms.

The advantage that we've seen with the ITRL consortium is that they're only doing the Alberta litigation. Part of the contract was that if they wanted to act for anybody else, they had to get the province's permission. My understanding is that they had expressed an interest in acting for Nunavut as well. They contacted the

province, and the decision of the province was: no, we want you to focus on the Alberta litigation. So they were able to do that.

My understanding is that the contingency rates are favourable to the province and that the approach that they're taking to the litigation and the use that they make of their American partner has been advantageous. So we think this is a good deal for the province, and Minister Ganley has indicated that she plans on continuing moving forward with this particular firm.

Ms Renaud: Okay. I imagine that changing counsel in the middle of litigation would have the potential to be pretty damaging. It makes me hesitant, especially with so much on the line. Can you speak to the risks associated with switching counsel at this time?

Mr. Bryden: Yeah. We'd probably have an obligation to compensate the firm. You know, we've done some estimates, and it's probably in the order of \$12 million, but that's just an estimate. I couldn't say for sure what it would cost us.

Then there's the whole question of retaining a new firm and getting them up to speed, so you lose momentum on a file. This litigation has taken a long time. People develop knowledge about the facts that's highly specialized. It's one thing to say, "Okay: the documents move from one firm to another," but the information doesn't automatically transfer from the brains of one set of lawyers to another set of lawyers, so it's going to take some time to get them up to speed. Our recommendation to the minister has been to continue with this firm, and she's publicly announced that she's taking that advice.

Ms Renaud: Okay. Thank you very much.

The Chair: Ms Luff.

Ms Luff: Thanks. Thanks very much for being here. I think a lot has been made of the issue of privilege thus far, and rightly so. In the report Mr. Iacobucci does note that legal privilege is foundational to our legal system. Solicitor-client privilege is being described in the report as fundamental to the justice system in Canada. I think you've done a really good job so far of explaining to all of us the complications and concerns that arise from waiving claims of privilege and why the department has been abundantly cautious in this particular issue, but it does seem to me that in this particular case the issue of privilege has resulted in sort of this whole process happening.

In the report Justice Iacobucci does mention that the government may wish to make amendments to the act. I was just wondering if you could expand a little bit more on how the government assesses whether privilege to documents should be asserted and if the policy has been reviewed.

Mr. Bryden: Certainly. There are sort of two aspects, I think, to your question. One is how we deal with situations involving officers of the Legislature like the Ethics Commissioner and whether those officers should have access to privileged information, not in order to make it public but in order to conduct their oversight roles, and whether there's a way to do that and still protect the government's privilege. That's a piece of policy work that the minister has instructed us to get under way.

There's another question, which is: how do we more generally approach the assertion of privilege. One of the complications with privilege is that it takes a long and complicated process, typically before a judge, to determine whether or not privilege has been asserted properly. Lawyers tend to be cautious, so they're likely to overassert privilege because they're afraid of waiver. Minister Ganley has instructed us to do a rethink of our approach to privilege. We've been doing that in consultation with the justice

ministries in Ontario and British Columbia, and we expect that by the end of June we'll have a new policy approach that will allow us to take a more balanced approach to when we assert privilege.

The Chair: Ten minutes to the Official Opposition.

Mr. Nixon: Mr. Chair, before I ask my question, I just want to double-check process. I have a couple of motions I'd like to bring forward. Do I do it during this time period or under other business?

The Chair: I would bring those forward during other business. I'll ensure that we finish the questioning portion of the meeting with enough time for motions.

Mr. Nixon: Thank you very much, Mr. Chair.

The Chair: When we do that, we do have a motion that has been discussed by the working group, which I think we'll bring forward first to get it out of the way, and then we'll move to those motions.

Mr. Nixon: Thank you, Mr. Chair.

Mr. Bryden, Mr. Iacobucci stated – and I may be pronouncing this name wrong, and I apologize if I am – that Mr. MacCallum, who is an independent judge, was brought in to deal with the issue of privilege between the government and the Ethics Commissioner. Mr. Iacobucci's report makes it clear that that judge was not provided all versions of documents that he was tasked to review ultimately to determine if Ms Redford was in conflict of interest. So the simple question for me is: how could he make that recommendation, that Redford had not violated conflict of interest, when he did not have all the documents to review in his possession?

Mr. Bryden: The government sought outside counsel's legal advice on whether or not to produce the draft document, and the advice was that it wasn't necessary to produce the draft document, so it was not produced.

Mr. Nixon: Outside counsel determined that based on privilege, but if you're the justice attempting to determine conflict of interest in regard to Ms Redford and you don't have the full documents, can you make that determination?

Mr. Bryden: Well, I think that that's what Mr. Iacobucci said was the problem with the original inquiry, and therefore there's not the full range of information available, so we want to make the full range of information available to Mr. Fraser.

Mr. Nixon: Thanks, Mr. Bryden.

My colleague from Cypress-Medicine Hat has a few more questions, I believe.

Mr. Barnes: Okay. Just a couple, please. Thanks again, Mr. Bryden. I just want to be clear. The initial briefing note, that didn't list the JSS consortium as one of the top two finalists, that was asking the government at the time to pick between the other two, was not uploaded.

Mr. Bryden: That's my understanding.

Mr. Barnes: Okay. The altered one, that ranked all three of them as equal and basically asked the department to pick: that one was uploaded and handled properly as per the system.

Mr. Bryden: That's my understanding as well.

Mr. Barnes: Okay. As an aside, do you know if the JSS consortium was the low bidder?

9:30

Mr. Bryden: That's my understanding. I mean, it's a little bit complicated to make an assessment of which organization had the best bid because you've got to factor a variety of things into it, but my understanding was that the ITRL had the most favourable contingency rate in its bid.

Mr. Barnes: Do you have any thoughts on if the government were to release the bids now?

Mr. Bryden: Well, that's an area where we want to be particularly cautious because the bids contain the strategy that the firms were proposing to pursue in the litigation. Those documents and particularly the contract with ITRL are the ones that would be most valuable to the tobacco firms, and those are the ones we're most anxious not to have to produce. That's my caution, the observation that I'd make. I think it's an area where the government should proceed cautiously because this is a large piece of litigation, and we don't want to disadvantage the province in its pursuit of this litigation.

Mr. Barnes: Is there a point in time where it's prudent to release them? Five years after the trial? Is there anything like that?

Mr. Bryden: You know, I think that after the fact there's not as much value to the tobacco companies as there would be right now, you know, prior to a trial.

Mr. Barnes: Okay. Thank you.

The Chair: Further questions from the government? Member Cortes-Vargas.

Cortes-Vargas: Thank you very much to all our guests for being here and for answering all the questions.

As you've mentioned, our government is committed to, in your words, being more forthcoming, and we made that commitment to Albertans. We're happy to continue that on. That's the commitment. My question is: is there anything else that you saw within the review of the report that you feel that this committee should be aware of?

Mr. Bryden: No. I think that the recommendations speak for themselves, and the review does a very nice job of setting out the factual framework, you know, in a clear and concise manner. It's what we would have expected from Mr. Iacobucci, and I think he's done a good job in that respect.

Cortes-Vargas: Thank you for your answer.

Given some of the concerns from the public and the potential seriousness of these allegations why hasn't the government asked the RCMP to investigate?

Mr. Bryden: Well, my understanding is that a member of the opposition – I believe it's Mr. Cyr, but I could be mistaken – has asked the RCMP to conduct an investigation. The RCMP, obviously, operates independently from the government. We don't influence them, and I don't think that adding to Mr. Cyr's request would make any difference and might be regarded by the RCMP as an attempt at political interference. I'm sure that the RCMP is taking the matter seriously, and they will do what they're going to do in the fullness of time.

Cortes-Vargas: Thank you very much.

Do you feel that this matter would be suited for a public inquiry?

Mr. Bryden: Well, I think that for the reasons that Mr. Iacobucci gave, the best course of action is the one that he recommended, and it's the one that the government has pursued. I think that one of the things that's useful to bear in mind is that the Legislature of Alberta has spoken to how it wants conflicts of interest to be investigated through an Ethics Commissioner with a particular process, with a particular mandate, and I think that it's wise to carry through on the process and the approach that the Legislature of Alberta has mandated.

Cortes-Vargas: Thank you very much for answering those questions.

That's all I have.

The Chair: Thank you very much.

We will end our questioning there. I'll thank our guests very much for coming today and participating in this meeting of the Public Accounts Committee.

We're going to move to other business now, so you're free to stay for other business or to leave.

Mr. Bryden: I have other business. Thank you.

The Chair: Yeah. You've got things to do.

I will take calls for other business, but first we will move to the issue of the 2016 CCPAC conference in Yellowknife, which is scheduled for August 21 to 23. This conference is generally attended by PAC chairs and deputy chairs as well as committee research staff and committee clerks. I would recommend that the committee consider attendance by the committee working group, which includes myself, the deputy chair, and Mr. Gotfried, as well as the committee clerk and one of the committee research staff.

The approved committee budget would accommodate the charges in this respect. A tentative cost estimate has been put together with the available information. I asked the committee clerk to complete a cost estimate based on three nights' accommodation, general meal costs, airfare, and conference registration fees for five participants. The estimated cost comes to approximately \$1,750 per person. I would think that we can safely say that the cost per person would not exceed \$2,000, which is within the committee budget allotment for both travel and conference registration fees.

If members are in agreement with the proposal, I would suggest the following motion in this respect, that

the Standing Committee on Public Accounts approve attendance by the chair, the deputy chair, Mr. Gotfried; the committee clerk, and a committee researcher at the 2016 CCPAC-CCOLA conference in Yellowknife from August 21 to 23, 2016, and that if an approved committee member is unavailable to attend, that member shall identify an alternate committee member from within their caucus to attend.

Would a member so move?

Mr. Dach: Would an amendment be in order at this point?

The Chair: We would have to move the motion and then entertain the subamendment. Would a member move the motion as stated first? Moved by Mr. Gotfried.

There's an amendment.

Mr. Dach: Certainly, I'd like to amend the motion so that we follow the past practice, that was set up last year, whereby this committee authorized the chair and the deputy chair alone to be fully funded for the conference and those other committee members who wished to attend had their conference fees alone paid. If we did adopt the motion, the extension of fully funded attendance to all

members of the working group, an additional one member would be funded. That would be about \$750.

What we're doing is expanding the budget beyond what we agreed to last year and what the practice of this committee has become, to send just the chair and the deputy chair fully funded. What I would wish to have amended is that we continue the practice we set last year, where only the chair and the deputy chair are fully funded and subsequent committee members wishing to attend should do so on their own dime with the exception of the conference fees. It would be most fiscally prudent to do that.

The Chair: If I understand correctly, the amendment would be to strike "Mr. Gotfried." I will say that there was a working group consensus between the three parties. Perhaps it has changed since. I feel that there is value in having a representative of the third party in attendance. I've been to this conference. It's extremely valuable to the functional working of the Public Accounts Committee, and it certainly helped me to do my job better. You were there last year; I think it certainly helped yourself.

9:40

Mr. Dach: Yes. That's correct. I attended on my own dime with the exception of conference fees, which were paid by this committee. I recommend to Mr. Gotfried that if he would take advantage of it, if the committee sees so fit to pass this amendment, and pay his own way to get there, his accommodations except conference fees be paid by the committee.

Mr. S. Anderson: Just to speak to this, I know that we had talked in our working group about this. Mr. Gotfried had brought up about being fiscally prudent, and it was something that I had brought up as our concern in this climate, right? We understand that this conference is beneficial knowledgeable and experience-wise, and I don't think any of us are disagreeing with that. You know, we had discussed it yesterday. I'm not sure why there was confusion. I apologize for that, but I know that we had brought it up yesterday. I just want to let you guys know that, realistically, it's just about trying to be fiscally prudent and kind of, like I'd mentioned yesterday, about what I had understood to be past practice. So that's kind of where that went with that. I'm not sure if Mr. Gotfried has anything . . .

Mr. Gotfried: You know what, Deputy Chair? If there are any issues on this, I would like to withdraw the motion.

The Chair: Okay. Mr. Gotfried has withdrawn that motion. I think, if I understand correctly, the idea is that committee staff, the clerk and research, would still attend, however, as well as the ability for other members of the committee to have only their conference fees covered if they wished to attend. All right?

Ms Renaud: I'm just wondering if we could limit that number so that it's not open.

The Chair: We'll say up to two.

Ms Renaud: Okay.

The Chair: I don't think there'd be too many taking us up on it, anyway.

Dr. Turner: If you go back to I think it was the very first meeting of this new Public Accounts Committee, MLA Cyr and I discussed this very issue, and between the two of us we came to the same conclusion, that it should only be the chair and the deputy chair that got the travel funding. So I think the precedent is well established.

Mr. Gotfried: The motion has been withdrawn.

Sorry. I have to excuse myself, Mr. Chair. Thank you.

The Chair: Yeah. Very well.

Well, the motion has been withdrawn. I think I understand where members want to go, so I'll put a different motion on. We'll call the question, members, on the amendment, and then we'll put forward . . .

Mr. Hunter: How can you amend if it's already been withdrawn?

The Chair: I guess he can't withdraw. The amendment, then, if I understand – let me go based on that – is to strike “Mr. Gotfried” and replace “up to two other members of the committee may have their conference fees only paid.” Is that in keeping with the spirit of where members are?

Mr. Dach: Correct.

The Chair: All right. Any further discussion?

Mr. Malkinson: Just to clarify, it would be for the chair, the deputy chair, and staff and then up to two other members to go, assuming they get themselves there with their own accommodation?

The Chair: Yes.

Mr. Malkinson: Okay. Perfect. I just wanted to make sure that was clear.

The Chair: Any further discussion?

I'll call the question. All in favour of the amendment to the motion? Opposed? Carried.

Now to the motion itself as amended. Further discussion? All in favour? Opposed? Carried.

All right. Well, let's see if we can continue in the spirit of cooperation for the next bit. Is there any other business for the committee? Mr. Nixon.

Mr. Nixon: Yes, Mr. Chair. I have a motion, two motions actually, but we'll start with the first one. I move that

the Standing Committee on Public Accounts direct the Ministry of Justice and Solicitor General to produce within two months all correspondence in any form, electronic or otherwise, that occurred between December 1, 2010, and January 1, 2014, pertaining to the awarding of the tobacco litigation contract.

I have copies, Mr. Chair.

The Chair: All right. We'll open discussion on this as this is distributed.

Mr. Nixon: The reason I'm bringing this forward, Mr. Chair, is that, quite frankly, the Alberta public deserves full disclosure once and for all on this tobacco litigation contract. This has gone on for way too long, in my mind and in my colleagues' minds.

I also think it's important that we're clear that the Ethics Commissioner is focused on the behaviour of MLAs. While I'm happy that the B.C. Ethics Commissioner is going to undertake this review – and I look forward to reading that report – wrongdoings related, though, to government contracts are not within the Ethics Commissioner's scope. I think that the best place to deal with that is in Public Accounts, which is clearly a better venue to examine potential corrupt tendering processes.

I think it's also important that we're clear that the only reason we have this review from Justice Iacobucci is because of a whistleblower sharing key documents with the media. If this individual had chosen not to act, the public would have never known that the

contract process was potentially being manipulated by political staff.

At the very least there's a perception by the Alberta public that Alberta Justice has been hiding information from the public, the media, and the former Ethics Commissioner. This is made even worse when you know the fact that Alberta Justice has refused to release key information through freedom of information requests from several sources.

So that's why I brought forward this motion, and I do encourage all of my colleagues, on all sides of the aisle, on the committee to vote for this.

The Chair: Thank you.

In consultation with the deputy chair, we're going to ask, for the purpose of getting through in the time of the meeting, that only a single member of the government would speak in response to the motion. Ms Renaud.

Ms Renaud: Thanks. While I applaud the opposition's exuberance for transparency, I would like to remind the committee members of what Justice Iacobucci, a former Supreme Court justice, stated in his report.

Nor does this matter appear to me to be one most appropriately dealt with by the Standing Committee on Public Accounts.

Legislative committees are, in general, better suited to determine matters of policy or legislative fact rather than matters of adjudicative fact. They are also part of the political process, unlike the independent office established to consider conflicts of interest issues – the Office of the Ethics Commissioner.

That is in paragraph 97.

Based on this clear finding, I will not support this motion, and I encourage all other members to join me.

The Chair: Any further discussion?

All right. I will call the question on the motion moved by Mr. Nixon.

Mr. Nixon: Recorded vote, Mr. Chair.

The Chair: All right. We'll go from my right around the table to my left. So as we go around, just state yes or no as it comes to your turn.

Mr. S. Anderson: I vote no.

Ms Goehring: I vote no.

Cortes-Vargas: No.

Mr. Hunter: I vote yes.

Mr. Barnes: Yes.

Mr. Nixon: Yes.

Ms Luff: No.

Dr. Turner: No.

Mr. Malkinson: No.

Ms Renaud: No.

Ms Miller: No.

Mr. Dach: No.

The Chair: The motion is defeated.

Any other business?

Mr. Nixon: I have another motion, Mr. Chair. I move that the Standing Committee on Public Accounts direct the Ministry of Justice and Solicitor General to produce within two months the following documents:

- (a) all copies of each stage of revision of briefing note AR 39999;
- (b) all correspondence in any form, electronic or otherwise, that occurred between December 1, 2010, and December 31, 2010, pertaining to briefing note AR 39999; and
- (c) all correspondence in any form, electronic or otherwise, that occurred between January 1, 2013, and December 31, 2013, pertaining to briefing note AR 39999.

I have the appropriate copies, Mr. Chair.

9:50

The Chair: All right. We'll allow for further discussion while this is distributed.

Mr. Nixon: The reason I brought this forward, Mr. Chair, is that while I think the first motion would have been more thorough, at the very least Albertans deserve to know how key information was manipulated to allow one of the biggest contracts in Alberta history to be awarded to a political ally in regard particularly to the briefing note that appears to have been manipulated.

Let's be clear, Mr. Chair. The public was led to believe that three law firms were equally suited to lead litigation for the government of Alberta, and that was never true. The winning bidder was politically connected and the least qualified of the three contenders. Political staff forced changes to key government briefings that led to a politically connected firm winning a \$10 billion contract. Albertans deserve a Justice department that acts with integrity. Being transparent about how the briefing notes in question were manipulated and by whom would be a much-needed step to restoring Albertans' confidence in their system.

I would also, in closing, Mr. Chair, make it clear that I believe any attempt by the governing members to continue to block this information from the public brings into question why the government members are determined to protect the previous government.

Ms Miller: I would like to remind the committee of our mandate, which, according to the public website, is: "The Committee reviews the reports of the Auditor General of Alberta and the public accounts of the province." Further, in the standing orders, Standing Order 53(1) to be exact, the only reports or issues that are permanently referred to the committee are those of the Auditor General.

This motion is clearly trying to create a mandate for the committee that does not exist, so I cannot support it.

The Chair: All right. Any further discussion?

Mr. Nixon: Recorded vote, Mr. Chair.

The Chair: Very well. Going from my right to left.

Mr. S. Anderson: No.

Ms Goehring: No.

Mr. Hunter: Yes.

Mr. Barnes: Yes.

Mr. Nixon: Yes.

Ms Luff: No.

Dr. Turner: No.

Mr. Malkinson: No.

Ms Renaud: No.

Ms Miller: No.

Mr. Dach: No.

The Chair: The motion is defeated.

Is there any other business for the committee today?

All right. Seeing none, I'll just mention a quick note to our first piece of other business for the record, that the host jurisdiction has indicated that they may need to limit the number of attendees to four from each jurisdiction. However, this has not been confirmed and will be confirmed later in the spring. Should this issue arise, committee support staff attending the conference may be restricted to one. Committee members may wish to attend this conference at their own cost. They can e-mail the committee clerk if they wish to go, and she will advise them if there will be other attendees and if there is space once confirmation is received.

The date of the next meeting will be determined once the main estimates have been tabled.

I will therefore call for a motion to adjourn. Moved by Mr. Malkinson. Discussion? All in favour? Opposed? Meeting adjourned.

[The committee adjourned at 9:54 a.m.]

