



Legislative Assembly of Alberta

The 28th Legislature
First Session

Standing Committee
on
Legislative Offices

Thursday, February 14, 2013
10:03 a.m.

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Standing Committee on Legislative Offices

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McDonald, Everett, Grande Prairie-Smoky (PC), Deputy Chair

Bikman, Gary, Cardston-Taber-Warner (W)
Blakeman, Laurie, Edmonton-Centre (AL)
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Legislative Officers

Jill Clayton	Information and Privacy Commissioner
Brian Fjeldheim	Chief Electoral Officer
Del Graff	Child and Youth Advocate
Peter Hourihan	Ombudsman
Merwan Saher	Auditor General
Neil R. Wilkinson	Ethics Commissioner

Office of the Ombudsman Participants

Joe Loran	Deputy Ombudsman
Suzanne Richford	Director, Corporate Services

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Standing Committee on Legislative Offices

Participants

Ministry of Justice and Solicitor General
Tim Hurlburt, QC, Solicitor
James Mallet, Barrister and Solicitor

10:03 a.m.**Thursday, February 14, 2013**

[Mr. Xiao in the chair]

The Chair: Good morning, everybody. Welcome to the Standing Committee on Legislative Offices. My name is David Xiao, MLA for Edmonton-McClung and the chair of this committee.

Before we start the meeting, let's go around the table and introduce ourselves. We'll start with our deputy chair.

Mr. McDonald: Good morning. Everett McDonald, Grande Prairie-Smoky.

Mr. Quadri: Sohail Quadri, Edmonton-Mill Woods.

Mr. Rogers: George Rogers, Leduc-Beaumont.

Ms DeLong: Alana DeLong, MLA for Calgary-Bow.

Mr. Reynolds: Rob Reynolds, Law Clerk. Happy Valentine's Day.

Mr. Loran: Joe Loran, Deputy Ombudsman.

Mr. Hourihan: Peter Hourihan, Alberta Ombudsman.

Ms Richford: Suzanne Richford, with the Alberta Ombudsman.

Mr. Pedersen: Blake Pedersen, MLA, Medicine Hat, standing in for Gary Bikman.

Mr. Eggen: Good morning. I'm David Eggen, MLA for Edmonton-Calder.

Mrs. Leskiw: Genia Leskiw, MLA for Bonnyville-Cold Lake.

Dr. Brown: Neil Brown, MLA for Calgary-Mackay-Nose Hill.

Mrs. Sawchuk: Karen Sawchuk, committee clerk.

Ms Blakeman: I'm Laurie Blakeman, and I'm devastated not to be in the fabulous constituency of Edmonton-Centre.

The Chair: Oh, that's too bad.

Ms Blakeman: But I'm happy to join the meeting.

The Chair: Before we start, I just want to remind everybody that the microphones are operated by *Hansard*, and please keep your BlackBerrys and any other devices off the table as these can interfere with the audiofeed.

Now that there are a few housekeeping items out of the way, we will move on to the business at hand. First of all, I would like to ask somebody to make a motion to approve the agenda for the February 14, 2013, meeting of the Standing Committee on Legislative Offices.

Mr. Quadri: Yeah. I move to approve the agenda as presented.

Mr. Rogers: I'll second it.

The Chair: All in favour? Okay. Any opposed? No. Okay. The motion is carried.

I would also like to have a member make a motion to adopt the meeting minutes that we have, the three sets of minutes, requiring separate motions. Who would like to make the first motion?

Mr. Rogers: I'll move the minutes of September 13, 2012, as circulated, Mr. Chairman.

Mr. Quadri: I'll second it.

The Chair: We don't need a seconder, actually.

Those in favour? Okay. Any opposed? The motion is carried. We need another motion.

Ms DeLong: I'll move that.

The Chair: Okay. Alana.

Ms DeLong: For the meeting of the 23rd.

The Chair: All those in favour? Opposed? The motion is carried. Now the minutes for November 26: who would like to make that motion?

Mr. Quadri: Yeah. I move that.

The Chair: Mr. Quadri. All those in favour? Any opposed? The motion is carried.

As members are aware, Bill 4, the Public Interest Disclosure (Whistleblower Protection) Act, was introduced during our fall sitting, received royal assent on December 10, 2012, and will come into force on proclamation, which is expected to be June 1, 2013. This act designates the Public Interest Commissioner as an officer of the Legislature, and the committee is considering a request by the hon. Mr. Scott, Associate Minister of Accountability, Transparency and Transformation, to have the Ombudsman appointed as the Public Interest Commissioner.

Before we do that, I would like to invite Mr. Hourihan, the Ombudsman, and his staff to join us at the table today. The committee also will review, as suggested, the 2013-14 budget estimates for the operation of that office in anticipation of proclamation.

The members should have a copy of the memo from the hon. Mr. Scott, noted as received on January 30, 2013, as well as the proposed 2013-2014 budget estimates put forward by the office of the Ombudsman. With the information in hand I will turn it over to Mr. Hourihan to speak to the appointment of the Ombudsman as commissioner.

Before we do that, I would like to request of Mr. Reynolds: would you like to add anything at this point?

Mr. Reynolds: Thank you, Mr. Chair. I just wanted to run over, so to speak, some provisions in the act relating to the appointment of a commissioner. As you pointed out, Mr. Chair, and as the hon. Mr. Scott pointed out, the act received royal assent on December 10, so when the committee met in November on budget matters of the officers, this bill was still before the Assembly.

With respect to the appointment of the officer if one has a copy of the act there, it's part 6 of the act that talks about the appointment of the officer. The act says that, subject to certain subsections, "the Lieutenant Governor in Council, on the recommendation of the Legislative Assembly, must appoint a Public Interest Commissioner to carry out the duties and functions set out in this Act." Now, the Assembly operates on the recommendation usually of this committee with respect to the appointment of officers. This is a new officer.

10:10

Subsection 38(2) states: "Notwithstanding section 3(1) of the Ombudsman Act, the Legislative Assembly may, by resolution, appoint the Ombudsman as the Commissioner." Now, that's important because the Ombudsman, under section 3(1) of his act, is not allowed to take any other position of, I believe, trust or profit while he serves as Ombudsman. So subsection 38(2)

relieves him of that obligation. Clearly, it was in the contemplation of the Assembly when it passed the bill that the Ombudsman may be appointed commissioner. I just wanted to give you a little overview with respect to the act so that you had a context in which to consider further items.

I also wanted to say that the present Ombudsman's term expires on October 16, 2016, I believe, so if one was looking for a recommendation with respect to the Ombudsman being appointed the first Public Interest Commissioner, it would be my recommendation that the term not go beyond October 16, 2016, just because it should coincide with his term as Ombudsman if you accepted a motion in that regard.

Those are my comments. Thank you, Mr. Chair.

The Chair: Thank you.

Now I would like to invite Mr. Hourihan to make some remarks.

Mr. Hourihan: Thank you, Mr. Chair. I was going to say a couple of things that Mr. Reynolds said, just in terms of the act and the authorities that as I understand it are there, and reference the memorandum from Associate Minister Scott. I've reviewed the act, as have legal counsel in my office and others, and it's very consistent in general terms with the Ombudsman Act, the philosophy and the scope and that type of thing in both acts. I think it would be very consistent to have the offices together in terms of what they do and the standards that are there and the processes that are to be followed and the structure of the office. I support the notion and would be honoured to take on the role.

The Chair: Thank you.

Any questions from the members? Seeing no questions, I have the wording of a suggested draft motion.

Dr. Brown: I would be prepared to make a motion, Mr. Chairman, if you want.

The Chair: Ms Blakeman, do you have a question?

Ms Blakeman: I do. I'm sorry. I was trying to unmute my phone.

The Chair: Okay. Please go ahead.

Ms Blakeman: I'm wondering if the budget anticipates an increase in the salary to the individual holding the office of Ombudsman in recognition of the additional duties taken on.

The Chair: Okay. Ms Blakeman, we are on the appointment only now. After we deal with this issue, then we'll move on to the budget.

Ms Blakeman: Okay. Thank you.

The Chair: Okay. Any questions from the table?

I have wording for a suggested draft motion for the committee's consideration in respect to the appointment of the Public Interest Commissioner. Would anybody like to make a motion? Dr. Brown, go ahead.

Dr. Brown: Thank you, Mr. Chairman. I would move that the Standing Committee on Legislative Offices recommend to the Legislative Assembly that Mr. Peter Hourihan be appointed Public Interest Commissioner for a term commencing with the proclamation of the Public Interest Disclosure (Whistleblower Protection) Act and expiring October 16, 2016, and that the Speaker be authorized to make any arrangements required concerning Mr. Hourihan's appointment as Public Interest Commissioner.

The Chair: Any questions?

Seeing none, I will call the question now. All those in favour? Anyone opposed? Okay. The motion is carried.

The next item is going to concern the budget estimates for 2013-14 for the office of the Public Interest Commissioner. I will again turn the floor over to Mr. Hourihan to address this item.

Mr. Hourihan: Thank you, Mr. Chair. On the heels of the support for the pending appointment to the office of the Public Interest Commissioner I'm here to present a budget for the fiscal year that we're about to enter, '13-14, and the needs associated with the duties and functions of the act given that my office or I would ultimately be appointed as the Public Interest Commissioner.

Public disclosure is a significant concern of Albertans and for the government. Transparency and accountability are fundamental requirements. The focus on public disclosure and protection has been accentuated in recent months by a few high-profile and publicly debated incidents. If appointed, it is my intent to ensure that the needs and expectations of Albertans, the government, and the various entities that will come under the jurisdiction of the new Public Interest Commissioner are met.

It's anticipated the demand for this office will be high. Initially this will be in the form of awareness and implementation of the requirements of the act. The act sets out a number of requirements to be met by the various government departments and public entities, yet to be completely determined, that will require significant policy and procedure development. It will be the role of the commissioner to ensure these are implemented and conform to the requirements of the act and regulations. Complaints and the subsequent investigations will also be required. In fact, until a department or other authority has approved processes in place, complainants would come directly to the commissioner. Ongoing awareness and outreach will be required province-wide. The management and oversight of compliance will be demanding.

Complaints will also be demanding. Investigations of this type are often quite complex, and equally as often they are systemic in nature, requiring significant resources. Timelines will be a key factor in this effectiveness. Indeed, it is anticipated that the regulations will set out strict requirements in respect of timelines.

Our research in this area indicates that to effectively perform the functions and duties of the office, we will require eight new personnel and the accompanying supply and services costs. Further, we would enter into a shared services agreement with the Ombudsman office to provide the necessary leadership, corporate, legal, and some administrative support in addition to infrastructure. The work of the Ombudsman office will not be adversely affected. This will enable us to provide strong awareness and outreach to the various departments and public entities and to the personnel that are affected. It will enable us to properly analyze and investigate complaints and reprisals and provide quality recommendations for change where warranted. Fewer resources would negatively impact our ability to meet the requirements of the act and the expectations of Albertans and the government.

I'm aware that the act has not yet been proclaimed and that I have not been appointed as the commissioner. This information is, of course, in anticipation of this pending appointment and proclamation. I know you have one form in front of you. I can provide further rationale – and I have further rationale now – or I can do it in the form of questions. I'm at your pleasure, Mr. Chair.

The Chair: Sure.

Before making the motion, I'd like to see if any members would like to ask some questions. Go ahead, Mr. Quadri.

Mr. Quadri: You know, in 2013-2014 you have advertising for \$30,000, right?

Mr. Hourihan: Correct. That's largely recruiting, how you get the personnel hired and get them on staff. I've got a breakdown of costs like advertisements in the major papers – the *Herald*, the *Journal* – and that sort of thing, and that eats up the lion's share of that \$30,000, approximately two-thirds of it. The rest of it is for other activities within the office.

Mr. Quadri: That's the only concern I have.

The Chair: Thank you.

Ms Blakeman, I understand you have a question?

Ms Blakeman: Yes, I do. I have two questions. The first is about the salary and whether an increase in salary or an allotment or an allocation, recognizing the additional tasks, is included in the payroll lines.

The second question is if Mr. Hourihan can give us the rationale for the increases between the '14-15 year and the '15-16 year. In a number of cases it just seems to be fairly arbitrary. It goes from \$2,000 to \$3,000 or \$1,000 to \$2,000. I'm just wondering how you managed to arrive at such a perfect number.

10:20

The Chair: Go ahead.

Mr. Hourihan: Yes. On the first question, in terms of the salary for my office, what's contemplated in the budget is the operational, the new personnel, the eight people, would be new additions to the office of the Public Interest Commissioner. The other administrative costs – that would include the Ombudsman; the Deputy Ombudsman; corporate services, which encompasses technology, human resources, finance, and those types of entities; legal; and some administrative support – would be borne by the office of the Ombudsman as it is structured now.

We currently have at the Ombudsman office 24 personnel. If we added eight, the notion is that those duties could be handled administratively and from a leadership perspective within the office. It would be pro-rated at a term of 25-75: 25 per cent to the Public Interest Commissioner, 75 per cent to the Ombudsman office, and no contemplation of increase in salaries for any individual other than the normal things that might come up in terms of cost of living and those types of things in the future.

Mr. Chair, in terms of the second question, what's contemplated from year 1 to 2 to 3, there's an anomaly in year 1. I will say that 2013-14 contemplates 10 months because the proclamation date is set and proposed to be June 1, so that would be 10 months in the fiscal year. It's pro-rated to ten-twelfths of the year. That would be one reason why there's a significant increase from year 1 to 2 to 3, with a minor one between years 2 and 3. There are some added costs if you look down the supply and services line for 2013-14. It would decrease in '14-15 and '15-16 because of the nature of getting the office set up. They are contemplating a 3 per cent increase in the cost of doing business year over year.

The Chair: Thank you.

Any other questions? Would the member make a motion? Go ahead.

Mr. Quadri: I, Sohail Quadri, move that the Standing Committee on Legislative Offices approve the 2013-2014 budget estimate for the office of the Public Interest Commissioner in the amount of \$1.46 million as submitted.

The Chair: Any questions? I'll call the question now. All those in favour? Any opposed? Okay. The motion is carried.

Thank you for your attendance, and I wish you all the best.

Mr. Hourihan: Thank you, Mr. Chair, and we look forward to the opportunity.

The Chair: We can take a five-minute break. Then we can get our other guests seated.

[The committee adjourned from 10:24 a.m. to 10:28 a.m.]

The Chair: I'd like to call the meeting to order. Let's go around again and introduce ourselves since we've got our new guests. We'll start with our deputy chair.

Mr. McDonald: Thanks, Mr. Chair. Everett McDonald, MLA, Grande Prairie-Smoky.

Mr. Quadri: Sohail Quadri, Edmonton-Mill Woods.

Mr. Rogers: George Rogers, Leduc-Beaumont.

Ms DeLong: Alana DeLong, Calgary-Bow.

Mr. Reynolds: Rob Reynolds, Law Clerk and director of inter-parliamentary relations.

Mr. Fjeldheim: Brian Fjeldheim, Chief Electoral Officer.

Mr. Hurlburt: I'm Tim Hurlburt from Alberta Justice. I'm presenting today.

Mr. Mallet: James Mallet, Alberta Justice.

Mr. Pedersen: Blake Pedersen, MLA, Medicine Hat, standing in for Gary Bikman.

Mr. Wilson: Jeff Wilson, Calgary-Shaw.

Mr. Eggen: Dave Eggen, Edmonton-Calder.

Mrs. Leskiw: Genia Leskiw, Bonnyville-Cold Lake.

Dr. Brown: Neil Brown, Calgary-Mackay-Nose Hill.

Mrs. Sawchuk: Karen Sawchuk, committee clerk.

The Chair: David Xiao, Edmonton-McClung. I'm the chair of the committee.

Welcome, gentlemen, to our Standing Committee on Legislative Offices.

Now we're going to discuss the cost to the parties involved in the judicial recount for Calgary-Fish Creek. All the members should have copies of the memo and the attachment from the office of the Minister of Justice and Solicitor General.

I would like to welcome Mr. Tim Hurlburt from the Department of Justice and Solicitor General, with the Edmonton litigation unit of the department. Is that correct?

Mr. Hurlburt: Yes, Mr. Chairman. I'm here as counsel for the provincial Crown.

The Chair: Okay. Also, Mr. James Mallet from the same department.

Mr. Mallet: That's right.

The Chair: As well, Mr. Brian Fjeldheim, our Chief Electoral Officer, and Mr. Bill Shores, solicitor for the office of the Chief

Electoral Officer. No? Okay. Mr. Shores is not in attendance today. That's okay.

Before I invite our guests to make a presentation, I would like to ask Mr. Rob Reynolds, our Senior Parliamentary Counsel to this committee, to provide an overview of the issue before the committee, and then I will turn the floor over to Mr. Hurlburt.

Mr. Reynolds, go ahead.

Mr. Reynolds: Thank you, Mr. Chair. I just wanted to provide the committee with some background to put what I anticipate will be Mr. Hurlburt's presentation in context, and I may have some comments afterwards.

With respect to the committee's involvement with respect to costs this was last visited in 2005, when a request came to the committee concerning the costs arising from the 2004 recount in Edmonton-Castle Downs. In that case, there was a subsequent appeal to the Court of Appeal, which is not the case with respect to the Calgary-Fish Creek recount. The Court of Appeal issued a decision from the bench on January 24, 2005, indicating that the now current Member for Edmonton-Castle Downs, Mr. Lukaszuk, had the most votes in that recount.

A matter of more concern to this committee might be that there was a separate decision with respect to costs that was issued by the Court of Appeal on July 26, 2005. In its brief decision the Court of Appeal noted that there was no provision in the Election Act allowing for the Crown to pay the costs of the recount. Mr. Hurlburt would be intimately aware of that as he was counsel for the Crown at the time, I believe, at that cost hearing.

What the Court of Appeal did in paragraph 5 is recommend that legislation be passed. They said:

We strongly recommend that the Legislative Assembly consider adopting costs legislation in recount cases such as this, similar to that in effect under The Local Authorities Election Act, supra. The issue here involves more than the personal interests of either of these candidates in this election. Rather, the overriding issue is the public interest in ensuring that the candidate validly chosen by the people through the electoral process is declared elected.

Prior to that, in paragraph 4 the court said, "We accept that there is no statutory authority for awarding costs against the Crown in this matter."

Skip forward to 2010. There is a Bill 7 introduced, which was the Election Statutes Amendment Act, 2010, which included an amendment to the Election Act that would add section 148.1, which, I believe, you all have. I believe it was attached to one of the items, or we've put it up. In any event, 148.1 of the Election Act states:

If a recount is conducted or an appeal is heard under this Part, the court may direct

- (a) that the parties bear their own costs, or
- (b) that costs be paid to one or more of the parties by any or all of the following:
 - (i) the applicant;
 - (ii) one or more of the candidates;
 - (iii) the Crown in right of Alberta.

To summarize, in 2005 there was no legislative provision with respect to costs. Now when you have this, there is a legislative provision with respect to costs.

I'll let Mr. Hurlburt discuss how this matter came to you today, and perhaps I might have a few more comments afterwards. I just wanted to present the context in which this arises. Thank you.

10:35

The Chair: Yeah. Thank you.

Mr. Hurlburt, please go ahead with your presentation.

Mr. Hurlburt: Thank you, Mr. Chairman, and thanks to members of the committee for the opportunity to appear on this matter this morning. For clarity, I am here as legal counsel for the provincial Crown, which has been presented with two claims for legal expenses arising out of this judicial recount. I think I could best assist this committee by giving a brief overview. I will not cover the same ground as Mr. Reynolds fully has. The short two-pager of background is there. I'll draw out only the essential points for the committee. I think I can do this in 10 minutes if that is satisfactory. Mr. Reynolds will in his accustomed role no doubt, I trust, offer comments and guidance. Here's a quick snapshot of what is here.

The executive summary version is simply that Treasury Board has referred these claims to this committee, and my purpose in appearing today is to inquire whether this committee might make a recommendation that could assist the Crown in resolving these two claims rather than parties seeking a resolution through the court process. I would like to emphasize and confirm at the outset that no one, of course, suggested that this committee has any ability to pay these claims directly or any ability to order someone else, including the office of the Chief Electoral Officer, to pay these claims. I note that the Chief Electoral Officer is present with us today. The only funds that might respond to these claims are Crown funds. I clarify that no one is asking this committee to adjudicate anything or to do anything that is properly the function of a court. It is simply that the provincial Crown is faced with these claims, and it is the committee's assistance that is being sought in that connection.

The key facts I won't repeat. They're very short, and many elected officials in Alberta know already that in last spring's general election there was a close result in Calgary-Fish Creek. It did go to a judicial recount before a judge. Of course, Mrs. Forsyth was represented by one law firm. Ms Fraser, the second-place candidate, was represented by another law firm. Mr. Fjeldheim's office had counsel there just because it was a recount. As it turned out, the judge confirmed the result.

Mr. Reynolds has already referred to the Lukaszuk case back in 2004-2005, where the courts clarified essentially – it's quite interesting – the subject of spoiled ballots. The Court of Appeal actually changed the law so that a lot of ballots that many of you here today would think were spoiled ballots are in fact now deemed acceptable. Anything that indicates the voter's intention is acceptable. With the benefit of the Lukaszuk clarification the judge last year was able to rule on the small handful of ballots that were an issue. In fact, fewer ballots were an issue than the margin of victory, so the outcome would not have been overturned in any event, but they had to go through the process because that is what the legislation requires.

Then the two candidates through their respective lawyers asked the Crown, whom I act for, to consider paying their legal expenses. They submitted copies of their bills, they have been reviewed, and in round terms the lawyers for Fraser are seeking a little over \$10,000. The lawyers for Forsyth started at a quite remarkable \$31,000 and are presently seeking around \$18,700. The committee will have noticed there is a marked discrepancy between those two numbers, and I'll return to that in just a moment.

Now, legally – and I'm explaining now why this is before the committee – the Crown does not have the ability to simply pay these amounts or pay some lesser amount. That is because the Crown, you may know, is prohibited by law from paying any claim to anybody anywhere over \$10,000 without the approval of Treasury Board. That is a measure designed to ensure a very tight scrutiny over the expenditure of public funds. Accordingly, these

claims did go to Treasury Board back on September 19 of last year. After reviewing the matter, Treasury Board felt it appropriate to refer the matter to this committee for its consideration and, hopefully, for a recommendation.

We've dealt with the Lukaszuk case already, so I won't repeat that. Mr. Reynolds has advised that back then there was no power in the court to order costs of a recount. The Court of Appeal expressed the hope that the Crown would pay *ex gratia*. So the claims went to Treasury Board on that occasion, then in turn came to this committee for a recommendation, and the motion that was passed is on the second page of the two-page handout that is, I hope, before you. The Chief Electoral Officer on that occasion – it was different then – did have the ability to pay those amounts, but that is expressly not the situation currently. Payment by the office of the Chief Electoral Officer on this occasion is not an option that is before you.

Then Mr. Reynolds referred to the fact that in 2010, after the Lukaszuk case, the legislation was amended, and the court can order various people to pay costs, as Mr. Reynolds indicated. So for the first time the Crown is one of the entities who can be ordered to pay costs, and Forsyth and Fraser have asked the Crown to pay, failing which we will be appearing before a judge on March 7, and those parties will be seeking a court order. They are claiming their costs against the Crown.

What is before the committee this morning is a request by Treasury Board to consider this matter. Specifically, the hope is that the committee may pass a motion regarding two specific questions. One, would the committee recommend and approve of the Crown making some payment for the legal expenses of Mrs. Forsyth and Ms Fraser? The second question: if so, then does the committee have a view on what it might consider to be reasonable in the circumstances?

On that point, I again point out that the first legal bill is about \$10,000, and I suggest that most people who are familiar with legal matters would not regard that as unreasonable because, in fact, the work was done in fairly urgent and intensive circumstances. A judicial recount is very important, and you have to drop everything. But the second account, which was initially some \$31,000 and is now being presented for payment at \$18,700 and change, is, I would suggest, considerably in excess of the first one and looks on the face of it unreasonable such that most people would hesitate before simply paying that in full.

The two firms here presumably did the same basic work on the same case and over the same period of time. I can advise the committee that if you run the numbers, the higher of these two accounts is, in fact, 186 per cent as compared to the lower account. That's based on dollar value. If you compare the actual hours that are listed as being expended, this one account is 181 per cent of the other. Either of those is so far in excess of the other that reasonableness is very much in question.

The Crown would suggest that a reasonable range for the second account might be something like the \$10,000 from the first account plus, say, an increase of something like 25 per cent, which in round numbers would put that at around \$13,000.

I will conclude by saying that the Crown, since this matter has been referred to this committee by Treasury Board, respectfully asks whether the committee would see fit to render some assistance here by first making a recommendation as to whether the Crown should pay something in respect of these claims and, if so, what the committee might view as being reasonable amounts such as the approximately \$10,000 and \$13,000 figures that I've mentioned. I'm happy to provide any clarification the committee may require.

Mr. Chairman, that concludes my remarks, and I again thank the committee for its time and consideration this morning.

The Chair: Thank you.

Any questions? Go ahead, Ms DeLong.

Ms DeLong: Yes. I find us in a strange situation here in that as an MLA I've always been told that the courts are separate and that I am not to ever get involved in anything that is coming before the courts. It seems that this is coming before the courts, so I need a little bit of personal guidance with this.

Mr. Hurlburt: There's a very good answer for that, and thank you for the question. These are, in fact, just parallel processes, and Mr. Reynolds is going to set the matter straight for us all in a moment. Of the three great branches of government – that would be the executive, judicial, and legislative – of course, we respect those differences. I indicated this is not a case where someone is asking this committee to substitute its views or in any way to usurp the function of a court.

It is entirely appropriate, before something goes to court, to pursue a resolution through some other means. That happens all the time in a various number of ways. So it is not that this committee would be arrogating or taking over something that is not properly its function. It is, rather, something where on a preliminary basis if we can resolve something through a recommendation by this committee and then by the Crown paying some amount, that would obviate and take care of the court process. But it is, logically, prior to it and very separate from it.

So I submit that the committee need not fear that they're stepping on anyone's toes or encroaching on judicial territory. You are a committee of the legislative branch of government, and that is very much being respected here.

10:45

The Chair: Mr. Reynolds.

Mr. Reynolds: Well, thank you, Mr. Chair. I'm not trying to usurp the questions by the other committee members. I just want to respond to the point raised by Ms DeLong. First of all, let me say that Mr. Hurlburt is a senior member of the Department of Justice, and he's very well respected by lawyers throughout the province. Having said that, I may disagree with him.

Mr. Hurlburt: And it is a privilege to be disagreed with by persons of Mr. Reynolds' calibre.

Mr. Reynolds: Yes. Right.

In any event, one of the issues – and I think you've hit on it – you know, is: is there a dual process in place here? While there's certainly nothing wrong with the committee considering this matter of cost and recount if it so chooses, one might say that there is a procedure already laid out, that you've adopted by legislation, which is to have the courts make an order with respect to this. You may wish to consider whether this committee or the courts are better situated to evaluate the costs involved in the legal action. I mean, the courts do it all day, every day either through their taxing officers or by judges looking at these matters. With respect, the committee doesn't necessarily look at this, in fact, never really does except for 2005.

The other thing that's interesting is that there's no role for the committee or any committee with respect to the operation of elections – right? – apart from making a recommendation, perhaps, or reviewing the Chief Electoral Officer's budget. The committee plays no role with respect to the operation of elections.

So one question I would have for the committee is: do you see that that's a role you want to take on in this instance?

Finally, well, I just have two more points with respect to whether it's sub judice – and it's always good to use a little Latin – as to whether it's before the courts. Just to clarify, when we were throwing around the term *ex gratia*, I think the correct legal term for that would be “gift.” In any event, that's what Mr. Hurlburt was referring to with respect to the last payments that were made *ex gratia* to the parties because there is no provision in the Election Act to order costs.

In any event, this matter I believe is set down for March 7. However, is this going to prejudice the matter? This is the test under the standing order. It appears, based on what Mr. Hurlburt has said, that the parties were interested in the committee hearing this. However, I believe it is set down for March 7 by the courts.

On that note, I would also like to say to anyone who may be listening or who may be reading these proceedings that what is said before committee or in the Assembly cannot be used in any other place. That's stated in article 9 of the English Bill of Rights of 1689, that what is said in Parliament shall not be impeached in any other place. For instance, in my respectful submission, what is said here in this committee could not be used in court because court is a different place, and what's said in the Assembly and in committees is not supposed to be taken up, criticized, impeached in a court. The one exception to that is with respect to a statutory interpretation, where the courts have allowed certain exceptions to be made to the exclusionary rule with respect to interpreting a statute. That would not be the case here.

I just wanted to get that on the record, Mr. Chair. Thank you.

The Chair: Thank you, Mr. Reynolds.

Mrs. Leskiw: I don't know too much about legalities, but I know that when MLAs have wide discrepancies, the public goes haywire. I don't know how legal firms decide what to charge or what not to charge, but when you do have two legal firms doing exactly the same job on the same issue – it'd be different if it was two different issues, but it's on the same issue – to have such a wide discrepancy, that bothers me. If it was within a thousand dollars or \$500, I think – but this is a huge discrepancy, and that bothers me. From a public perspective that's going to be using public funds to pay this. Then I have a problem with two people charging two different amounts for the same task.

Mr. Hurlburt: Thank you for that. I should in fairness point out that on my detailed review of the two bills it is true that the lead lawyer for one has a higher hourly rate than the other one, but it is only about one-third higher and not sufficient to account for the marked discrepancy between the two bills.

If I could just respond to the first point, if I wasn't clear, this committee does not today have before it two litigants who are seeking you to render a judgment as a court would. All you have before you today is a representative speaking as legal counsel for the Crown. It is as if Treasury Board sent a letter to this committee, a body from the executive branch of government asking a body from the legislative branch of government, simply inquiring whether this body could lend its assistance to the Crown in resolving this matter. It is in no way an adjudication. You're not being asked for the wisdom of a Solomon here. You're simply being asked: if you could provide your views on the matter, it might assist the Crown in resolving this. I would suggest that that is certainly not prohibited. It's certainly a proper function of this committee.

The Chair: Mr. Eggen, your turn.

Mr. Eggen: Thank you, Mr. Chair. I have a question and then a comment if you don't mind. I heard somewhere in these opening comments that Treasury Board referred this issue to this committee. Now, if they didn't refer this to the committee and they were obliged to make a ruling on payment because it was over \$10,000, would this matter have been resolved at the Treasury Board level with them making the approval of the payment of these legal costs?

Mr. Hurlburt: The answer is that it could have been resolved. If Treasury Board had authorized payment at a certain level, then I would have communicated those levels to these two parties. If they accepted it, then the matter would be over. If for whatever reason they did not accept it – I'll take an extreme example to illustrate. If the Treasury Board authorized payment of \$1, probably no one would agree and we would be off to court. But any reasonable sort of amount I would communicate, as is my duty, with the hopes of resolving the matter.

Mr. Eggen: Right. It's my view, then, that somehow this matter has drifted over to this committee without clear intentions. If the Treasury Board is not willing to accept these payments for the costs of legal expenses, then the matter should be moving toward the courts. I can only speculate as to the reasons why it has appeared here. I don't think it's necessarily appropriate that it be here. I don't want this to be a place where we're making comment on the relative values of legal costs and hourly disbursements of fees with neither the knowledge of what going rates might be, say, for example, of legal costs or any of these details that I've been given here. So I don't really want to be part of something that seems to me, at least, a little bit suspicious, using this committee as an opportunity to perhaps cast aspersions on the relative value of each of these legal costs. I don't think it's appropriate that we are discussing this here, in this committee, this morning.

The Chair: Mr. Wilson.

10:55

Mr. Wilson: Thank you, Mr. Chairman. Just for, perhaps, some clarification for some committee members who may want some context, from my understanding of the difference in the legal fees perhaps some of it came from the sense that this was sprung upon the defendant and there were very tight timelines that needed to be met, that that wasn't necessarily, from my understanding, the case on the other side. They had a bit more time because they were the party that initiated it whereas this was more of a reactive measure by the defending firm. That's just simply what I've heard through conversation at that level.

I would like some clarification on the fees that were paid in the last case, in the case of Mr. Lukaszuk. The motion that Dr. Pannu suggested: \$160,000. So we're now looking at a difference of \$30,000 to \$160,000. I'm just curious if there is a clarification on that.

Mr. Hurlburt: The clarification, certainly, is that the Lukaszuk matter went through not one court but two courts. A judicial recount was conducted in Court of Queen's Bench, and then the Hon. Thomas Lukaszuk appealed that to the Court of Appeal of Alberta. So it was twice as much in terms of time. As I indicated, the law was unsettled. It required a lot more legal argument. I can also advise that there were multiple law firms involved on that occasion. I can't tell you exactly, but there were at least two or three law firms involved on at least one side of that dispute. So there were reasons. That aggregate dollar figure that you've referred to of \$160,000 represents probably, I'm sure, six to eight lawyers.

Mr. Wilson: Thank you for that. I appreciate it. It is quite a difference, and I can appreciate where that comes from now.

I'm wondering if Parliamentary Counsel or yourself, sir, have any suggestion as to the precedent that other courts may offer. I understand this is a unique case in Alberta, perhaps, but outside of the province – I mean, you know, is the defendant expected to pay legal fees when they win and questionable ballots weren't even enough to overturn it in the first place? Is there any precedent that we can expect the courts to look at in this?

Mr. Hurlburt: No. Mr. Reynolds indicated that the legislation was new in 2010, and I'm not aware of any precedent or decided cases under this provision. I'm not aware of similar provisions or decisions in other parts of the country that might offer you some guidance.

Mr. Wilson: Thank you.

Mr. Reynolds: Just to answer Mr. Wilson's question, quite frankly, the only precedent I was concerned about was setting a precedent for having this committee review the issue of paying costs as opposed to having the courts review it. Since this is the first time, a matter of first blush, as it were, that this provision is being considered, I leave it to the committee, but is this the precedent that you want to see set, whereby these requests come to the committee first rather than the courts?

Mr. Hurlburt: I'll just note for the record that there have only been two such requests in the last quarter-century, to my knowledge, so I'd suggest that the committee need not fear a floodgate being opened and numerous requests being submitted to this committee. These are as rare as hen's teeth.

Mr. Wilson: Well, in that case, I would ask my fellow committee members to consider where they would want to be if this were your riding and your election. The legislation clearly suggests that if you are to apply for a judicial recount in a close call, the courts could essentially rule that this falls on your dime. So is that the direction we want to lead this? I'm merely putting that out there for discussion.

The Chair: A good question.

Mr. Rogers.

Mr. Rogers: Thank you, Mr. Chairman. I've listened intently to the points by our counsel representatives, Mr. Reynolds, and some of the discussion. I am of the opinion that the fact that we do have legislation in place now, that did not provide the provisions on the last occasion when this type of matter was dealt with, it's important that we not set a precedent that this committee would attempt to decide on these matters. This is a highly technical process, and I think it is already before the courts. I would support leaving the matter there and that this committee not make a decision or that the decision we make is to not make one at this point.

The Chair: Okay.

Dr. Brown.

Dr. Brown: Thank you, Mr. Chairman. Mr. Hurlburt, I take it that you would concede that it's an appropriate case for the award of costs. The only issue here is what the appropriate amount is. Is that correct?

Mr. Hurlburt: Well, there are two questions. First, who would be liable for costs and then, secondly, in what amount?

Dr. Brown: Right. But you seem to be conceding that it's an appropriate circumstance for the Crown to pay the costs.

Mr. Hurlburt: No. I don't concede that, and if I wind up in court, I would not be conceding that.

Dr. Brown: Oh, okay. All right. Well, I would submit, certainly, that the costs issue here, the amount, the quantum of costs, is a very technical matter. Having practised for a number of years, I know that it depends on a number of things, including success – and, of course, the applicant in this case was successful in the end result – the complexity of the case, and the amount and the probity of evidence, the effectiveness of the counsel, and so on. While it does seem that the costs of 186 per cent are somewhat high – and I really don't understand why there were two law firms involved – I think that I would be uncomfortable in making an adjudication of that appropriate quantum of costs in this case because it is technical in nature.

The second reason is that those of us sitting around this table belong to parties and we're somewhat partisan. I think that, as Mr. Rogers has suggested, it's probably an appropriate circumstance to have the court, which has the proper expertise to determine the matter, determine what the appropriate quantum of costs in this case is. So I think it's an appropriate circumstance for us to defer the decision to the experts, the court.

The Chair: Mr. McDonald.

Mr. McDonald: Thank you, Mr. Chair. I totally agree. This should be something that has been dealt with by the courts. I don't think we have the expertise to deal with this. I wish them well on their court case and settlement.

The Chair: Ms DeLong.

Ms DeLong: Thank you. I'm very averse to essentially overruling the legislation that we've put in place. We have said that it is up to the courts. No matter how much we think personally that, yes, when situations like this arise, we don't want somebody out of pocket, I do believe that we can pass it back to the court as we've put in the legislation. I just see no reason for it to come to us, partly because the legislation is properly there and, secondly, we just don't have the expertise to be able to make this decision.

The Chair: Thank you.

Mr. Fjeldheim, do you wish to make some comments on this matter?

Mr. Fjeldheim: No.

The Chair: Okay. Thank you.

Any other questions? If not, I would like to invite a member to make a motion.

Dr. Brown: I don't know whether it's necessary to have a motion.

Mr. Reynolds, what would you advise, given the comments?

Mr. Reynolds: Well, it's not, I would say, necessary. There was a request made by the Minister of Justice. I was just wondering, in the sense of sort of completing the circle, if the chair was to write back to the minister with respect to the matter, whether it would be better to have a motion saying something like: moved by the committee that the committee defers any decision to be made with respect to the matter of cost in the Calgary-Fish Creek recount to be determined by the courts.

The Chair: Thank you.
Mr. Rogers.

Mr. Rogers: Thank you, Mr. Chairman. I'm prepared to make a motion.

The Chair: Okay. Go ahead.

Mr. Rogers: The motion would read very simply for the record that the committee advises the Minister of Justice and Solicitor General that it is the opinion of this committee that this matter belongs with the courts and that this committee wishes that the matter proceed as outlined with its current standing before the courts.

The Chair: Thank you.

All those in favour? Any opposed? The motion is carried.

Well, thank you very much for your presentation. Just for you to know, there are some sandwiches prepared for you in the next room. Have a nice day. Thank you.

Mr. Wilson: Mr. Chairman?

The Chair: Yes?

Mr. Wilson: Confirmation of the date of the next meeting, please.

The Chair: Well, we don't have a date. I think that if the committee agrees, that would be at the call of the chair. Before I call the meeting, I will circulate the date. How's that?

Mr. Wilson: Fair enough. Thank you.

The Chair: There's no outstanding business for now.

Mr. Wilson: Thank you.

The Chair: Thank you.

I need a motion to adjourn the meeting.

Ms DeLong: I move that we adjourn the meeting.

The Chair: Okay. Ms DeLong made the motion to adjourn. All in favour? Okay. The motion is carried. Thank you.

[The committee adjourned at 11:05 a.m.]

