OFFICE OF THE ETHICS COMMISSIONER
PROVINCE OF ALBERTA

Report

of the Re-Investigation

by

Paul D.K. Fraser, Q.C.
Acting Ethics Commissioner

Into Allegations Involving
The Honourable Alison Redford, Q.C.

March 29, 2017

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. This Report deals with a re-investigation about the Honourable Alison Redford under the *Conflicts of Interest Act*. As Minister of Justice and the Attorney General, she selected a consortium of law firms, known as International Tobacco Recovery Lawyers ("ITRL"), to represent the Government of Alberta in tobacco litigation (the "Decision"). Her Decision did not establish the retainer with ITRL, but allowed ITRL the exclusive opportunity to negotiate and ultimately enter into a contingency retainer agreement with the Government. Her former husband, Mr. Robert Hawkes, was a partner in one of the firms that comprise ITRL consortium. ITRL was chosen out of a final three consortium applicants through a Review Committee process exclusively designed and administered by three senior government officials.

2. The central issue is whether, in making the Decision, Ms. Redford improperly furthered her former husband's private interest, and thereby breached section 3 of the *Conflicts of Interest Act*.

3. This is the third investigation process dealing with Ms. Redford's Decision.

4. Ms. Redford was exonerated in the first investigation conducted by Neil Wilkinson, then the Alberta Ethics Commissioner, in a December 4, 2013 Report. In his investigation, Commissioner Wilkinson did not have access to privileged documents of the Government. The privilege was asserted to protect the Government's solicitor-client relationship in the tobacco litigation.

5. Some privileged documents were subsequently leaked to a news outlet. In addition, part of an email from one of the law firms in ITRL was also leaked. The news outlet ran stories about the documents. All of this raised questions about Minister Redford's conduct, including:

- Whether she had said to her former husband, well before the start of the selection process for a firm to represent Alberta, that ITRL was in the forefront;
- Whether she had caused directly or through staff a change to be made to a draft briefing note prepared by the Review Committee. The draft briefing note had ranked ITRL last amongst the 3 consortia seeking the work and had recommended that she select one of the other two. The final version of the briefing note removed the reference to the last place ranking of ITRL, leaving her the option to select from the 3 consortia, including ITRL; and
- After she made the Decision, there were internal government emails, all of which raised concerns, because they spoke of "sensitivity" about wording and requested changes to a memorandum from her and a memorandum from the Deputy Minister.

6. At the request of the current Minister of Justice and Attorney General, the Honourable Frank Iaccobucci, a former justice of the Supreme Court, investigated the matter and provided advice to the Government. His investigation focussed on the availability of documents to Commissioner Wilkinson's investigation, not directly on Minister Redford's conduct.

7. Mr. Iaccobucci concluded, without attributing any blame to Commissioner Wilkinson, that Commissioner Wilkinson did not have all information relevant to his inquiry, having regard for the information that was subsequently leaked.

8. Mr. Iacobucci's Report dated March 30, 2016 was referred to the current Ethics Commissioner, the Honourable Marguerite Trussler, Q.C., who appointed me to determine whether there should be a re-investigation under the *Conflicts of Interest Act*. After I determined there should be a re-investigation, I was appointed to conduct it.

9. Nothing in my decision to re-investigate this matter should in anyway be viewed as a criticism of the investigation undertaken by Commissioner Wilkinson. Information that was not available to him, due to a claim of solicitor-client privilege, has become available.

10. My re-investigation involved an extensive document review and extensive questioning of witnesses. I received and reviewed unredacted and privileged documents from the Government that dealt with the process leading to the Decision and the aftermath. A total of 19 individuals were questioned. Ten key witnesses, who had direct knowledge of or participated in key events, were questioned by written interrogatory, oral questioning under oath, or both. The other witnesses, who provided background or had a more peripheral role, were questioned orally by phone.

11. I have found on a balance of probabilities that Ms. Redford did not improperly further another person's private interest in making her Decision and, therefore, did not breach the *Conflicts of Interest Act*.

12. In the lead up to the Decision, Ms. Redford's relationship with her former husband, Mr. Hawkes, was not close. The information that I considered in this re-investigation leads me to conclude that she and her former husband were married as very young adults, almost 25 years before the relevant events took place. They were both Ministerial or Legislative assistants to Ministers of the Federal Government in the late 1980s. They had a similar career interest in politics and public service. The marriage ended after four years, followed by divorce a year later, with no ongoing dependency asked by either. They lived on separate continents for five or six more years and did not have any contact as a result. Both have subsequently remarried and have children.

13. Both Ms. Redford and Mr. Hawkes simply got on with their separate and productive lives. In the period from the mid 1990s to the material events that occurred in 2010 and 2011, their personal contact was generally limited to brief moments with a purely political focus. They were not in any way dependant on each other for either personal, career or financial reasons and neither made any demands on the other. They had a civilized and unencumbered relationship.

14. Ms. Redford was elected on March 3, 2008 as the MLA for Calgary-Elbow. Mr. Hawkes did not work on her nomination or election campaign. Between 2008 and 2011 he made contributions to the Calgary Elbow Constituency Association because he bought tickets to the fall fundraising dinners for himself and clients. Ms. Redford had no communication with him in relation to these contributions. He spoke briefly to Ms. Redford at each event.

15. On March 13, 2008, Ms. Redford was appointed as Minister of Justice and Attorney General and served in that cabinet position until she resigned on February 16, 2011 to seek the leadership of the PC Party. While she was Minister of Justice, she spoke to Mr. Hawkes on the telephone a few times, usually when she was looking for feedback on how a particular issue was being perceived in Calgary or in the legal community. She did this with many other lawyers as well. It could reasonably be said that they were simply political acquaintances during this time.

16. Mr. Hawkes only became a significant player in her political life after the Decision, where he was one of a number of individuals, including other lawyers (amongst them a lawyer for a competing consortium), who encouraged her to run to become leader of her party. He was Chair of her Campaign, but the campaign itself was run by Stephen Carter. Mr. Hawkes had limited involvement. In fact, she forgot that he had even chaired her campaign. After her surprise win, he was the volunteer chair of her transition team for a couple of weeks. Again, a lawyer from a competing consortium was also a member on the transition team. A lawyer from the same competing consortium was appointed as her Chief of Staff a few months after she became Premier.

17. She had much closer historical and personal connections with lawyers in other firms, including firms involved in consortia competing for the opportunity to represent Alberta, than she did with Mr. Hawkes. I found no motivation for her to want to further Mr. Hawkes' private interest. I was satisfied that she sought to act throughout in the best interests of Alberta. The fact that Mr. Hawkes was a partner in one member of the ITRL consortium did not enter into her decision making process.

18. Usually the selection of outside counsel in the Government is a confidential process made purely at the discretion of the Minister on her officials advice. In this case, Ms. Redford made it very clear that she wanted an open and transparent selection process and instructed Government officials to establish one.

19. She had no involvement in the design of the process, which was undertaken by a senior lawyer with the government. She had no involvement directly or indirectly through her staff in the work of the Review Committee established to provide her with recommendations for counsel to represent Alberta. Changes to the draft briefing note were substantively a result of serious concerns from the representative of the Department of Health, who had no connection to Ms. Redford or her staff, about the impact of conflicts of interest on the ability and willingness of the Department of Health to work with a firm and the extent to which the reference to the last place ranking of ITRL correctly and fairly represented the Review Committee's deliberations. Ms. Redford did not directly or indirectly have anything to do with the change of ranking or whether ITRL was to be included as an option in the final briefing note.

20. In making the choice of counsel in the tobacco litigation, she used sensible and principled reasoning, based on cogent information she received in the briefing note from Government officials and that she had collected in the course of her active tenure as Minister of Justice and Attorney General. Her focus was on ensuring:

- there was a made in Alberta solution so that Alberta's position was not impaired by being only one of a number of provinces represented by a consortium;
- conflicts and potential conflicts that could impair the working relationship between the chosen consortium and the Department of Health or could delay the litigation as challenges to the selection of counsel made their way through the justice system; and
- cost to the Government.

21. After the Decision, there were emails that called for changes to a memorandum from Ms. Redford, changes to a draft memorandum from the Deputy Minister, and an email that expressed "sensitivity around wording". There was also a reference to action request AR 40168 associated with these emails. These emails and action request remain, to some extent, unexplained and confused. The passage of time has faded memories of the officials involved. In the course of re-investigation, significant efforts were made to try to determine what motivated these communications and whether there was anything untoward lying behind them. Nothing apart from speculation was available. However, what is clear is that Ms. Redford had nothing to do with the email chain. Her last act on this file was to make her Decision. Before this rather confusing series of internal government communications began, the Decision had already been communicated to the competing consortia. During the time the officials were communicating back and forth, Ms. Redford was traveling outside of Canada with family and friends on a personal vacation, without ready access to cell phone coverage. There was no evidence in these proceedings that even intimated that Ms. Redford had anything at all to do with these communications.

22. In the result, I have found on the balance of probabilities that Ms. Redford did not improperly further another person's private interest in making her Decision and, therefore, did not breach the *Conflicts of Interest Act*.

BACKGROUND

1. In October, 2010, the Government of Alberta decided to pursue litigation against tobacco companies under the *Crown's Right of Recovery Act*. In order to do so, the Government decided to use external legal counsel and compensate them on a contingency basis. An expression of interest process was developed by the Department of Justice to identify, screen, interview and make a recommendation to the Minister of Justice and Attorney General about counsel for Alberta. The Minister was the Honourable Alison Redford, Q.C.. Ms. Redford would make the final decision. This decision would enable the Government to negotiate and enter into a contingency agreement with the chosen firm.

2. Three consortia of law firms made it through the initial screening by the Department of Justice:

- a consortium of firms including Bennett Jones LLP, Siskinds and other firms from Canada and the USA ("the Bennett Jones Consortium");
- a consortium made up of Field LLP and McLennan Ross ("the Field/McLennan Consortium"); and
- International Tobacco Recovery Lawyers ("ITRL"[1]) a consortium that included a Calgary firm, Jensen Shawa Solomon Duguid and Hawkes LLP ("JSS"), and other firms from Canada and the USA.

3. A review committee made up of three senior government officials, who were lawyers, conducted the interviews, considered the proposals and prepared a briefing note making a recommendation to the Minister. The three officials were:

- Grant Sprague, Q.C., Assistant Deputy Minister of the Legal Services Division of the Department of Justice;
- Lorne Merryweather, Q.C., Executive Director of the Legal Services Division of the Department of Justice; and
- Martin Chamberlain Q.C., Assistant Deputy Minister, Corporate Support Division of the Department of Health

("the Review Committee").

4. Ms. Redford chose ITRL, setting out her reasons for doing so in a memorandum dated December 14, 2010.

[1] Also referred to as "ITR" and "TRL". The name of the International Tobacco Recovery Lawyers changed during the relevant period from TRL to ITRL. Nothing turns on the name change in the context of this re-investigation. One official referred to it as ITR.

5. On February 16, 2011, she resigned from office as Minister of Justice and Attorney General to seek the leadership of the Alberta Progressive Conservative Party. After she resigned, the Government negotiated and entered into a contingency agreement with ITRL to represent Alberta in litigation against tobacco companies. She had nothing to do with those negotiations or the Government's agreement with ITRL.

6. Ms. Redford was chosen as leader of the Progressive Conservative Party and became Premier of Alberta in October 2011.

7. In 2012, the leaders of the Liberal Party and the Wildrose Party complained to then Ethics Commissioner, Neil Wilkinson ("Commissioner Wilkinson") about Ms. Redford's conduct in relation to the selection of ITRL. Their complaints were supported by redacted information they had obtained from the Department of Justice through access to information requests ("the FOIPP information"). Their key allegation related to the fact that she had chosen ITRL, which included JSS a firm where her ex-husband, Robert Hawkes, Q.C. was a partner. In the complaints Mr. Hawkes was also identified as a political supporter of Ms. Redford and leader of her transition team when she became the Premier.

8. Commissioner Wilkinson investigated her conduct under section 25 of the *Conflicts of Interest Act*. He considered whether Ms. Redford breached:

- the preamble to the Act;
- section 2(1) of the Act (furthering her private interest of that of a person directly associated with her or that of her minor child);
- section 3 of the Act (improperly furthering another person's private interest); or
- section 4 of the Act (using or communicating information not available to the general public that was gained in the course of her carrying out her official powers to further her private interest or another person's private interest).

9. In his investigation, Commissioner Wilkinson obtained evidence in the form of statutory declarations from a number of witnesses. Ms. Redford was also questioned under oath. One witness, James Cuming, Q.C., a lawyer with Cuming and Gillespie, a member of ITRL, was interviewed by phone.

10. On concluding his investigation, Commissioner Wilkinson found that Ms. Redford did not breach the *Act* in any respect. He prepared an extensive report to the Speaker of the Legislative Assembly dated December 4, 2013, which was filed in the Assembly and made public.

11. In the course of his investigation, Commissioner Wilkinson had not obtained access to the briefing note upon which Ms. Redford had based her decision ("AR 39999") or other privileged information. The Government claimed solicitor-client privilege over AR 39999 and other information and would not waive it despite a request from Commissioner Wilkinson. Commissioner Wilkinson recognized the issue would likely end up in the Court and extend the investigation for years. He determined that the Courts would likely support the claim of privilege so nothing would be gained and much would be lost by persisting in seeking access to the privileged information before he completed his investigation. A process was devised, involving having a retired justice of the Court of Queen's Bench review briefing note AR 39999 and confirm that the content of Briefing Note AR 39999 was consistent with the other information which Commissioner Wilkinson had obtained during his investigation.

12. After Commissioner Wilkinson's Report was finalized, CBC News obtained leaked documents including:

a. excerpts from a document apparently authored by Mr. Cuming, a lawyer involved in ITRL, which referred to a discussion between Ms. Redford and Mr. Hawkes that occurred prior to the selection process for counsel, and that included a reference to a comment by Ms. Redford that ITRL was "in the forefront" of the matter;

b. a draft of briefing note AR 39999 that ranked the ITRL consortium last of three consortia interviewed by the Review Committee and recommended that Ms. Redford select one of the other two consortia;

c. a document showing that the draft was sent to Ms. Redford's executive assistant, Jeff Henwood, and that shortly afterwards briefing note AR 39999 was changed to remove the last placed ranking of ITRL and to recommend that Ms. Redford choose from amongst any of the 3 consortia;

d. an email exchange between two members of the Review Committee, Mr. Sprague and Mr. Merryweather in which Mr. Merryweather noted that the altered briefing note would not reflect the conclusion of the Review Committee;

e. emails between Ms. Craig, Mr. Henwood, and Mr. Bodnarek's executive secretary, Laura Cline, which referred to AR 40168, changes that Mr. Henwood would make to Ms. Redford's memorandum, changes requested by Mr. Henwood in relation to a responding memorandum from the Deputy Minister, and to Ms. Craig's understanding that there had been "sensitivity regarding the wording"; and

f. the Deputy Minister's memorandum to Ms. Redford dated January 5, 2011 reflecting the changes referred to in Ms. Craig's email.

13. In November 2015, CBC News ran a series of stories about these documents and the investigation by Commissioner Wilkinson. The Minister of Justice and Solicitor General, the Honourable Kathleen Ganley, was concerned that Commissioner Wilkinson may not have had all of the information that was relevant to his investigation available to him. She appointed the Honourable Frank Iacobucci, C.C., Q.C., a former Justice of the Supreme Court of Canada, to independently review this matter and provide advice on what the Government should do to address it.

14. Mr. Iacobucci prepared a report of his investigation dated March 30, 2016. The focus of his review was to determine whether Commissioner Wilkinson had all of the information relevant to his investigation and to provide recommendations on what should be done if he did not. His was not a further investigation into the allegations of conflict of interest considered by Commissioner Wilkinson. He specifically indicated that his review should not be taken as a criticism in any way of Commissioner Wilkinson's investigation or report. He reviewed the process of Commissioner Wilkinson's investigation and the information that Commissioner Wilkinson had. He was also given information by the Government that was not provided to Commissioner Wilkinson, including materials over which solicitor-client privilege had been claimed and specifically AR 39999 and unredacted FOIPP information.

15. Mr. Iacobucci conducted interviews with 15 individuals in the course of his review. He concluded that the information disclosed by CBC News, together with the other information provided to him, gave rise to a number of questions about matters underlying the Ethics Commissioner's investigation:

> (1) Did Ms. Redford tell Mr. Hawkes that the ITRL consortium was in the "forefront" of the tobacco matter, and, if so, what did she mean?
>
> (2) Was Ms. Redford aware of the Review Committee's initial ranking of the ITRL consortium and recommendation that one of the consortia other than ITRL be selected?
>
> (3) Was Ms. Redford aware of the fact that a draft of AR 39999 had been provided to a member of her staff?
>
> (4) Why were revisions made to the draft of AR 39999 to change the recommendation that retaining ITRL not be considered further?

(5) Did Ms. Redford instruct or direct Mr. Henwood or any other person concerning a preferred outcome of the Review Committee's work, or the substance of briefing note AR 39999?

(6) Was Ms. Redford aware of any discussions between members of her staff and members of the Review Committee in connection with the Review Committee's recommendation?

(7) What was the rationale for the Deputy Minister's memorandum?

(8) What was the nature of the "sensitivity" regarding the wording of the Deputy Minister's memorandum, to which Ms. Craig referred in her email?

(9) What was the rationale for the changes contemplated by Ms. Craig's email?

(10) Was Ms. Redford aware of the communications involving Ms. Craig in connection with the Deputy Minister's memorandum?

16. He found no information that Ms. Redford:

a. was made aware of the earlier draft of AR 39999 or the fact that it had been provided to her Executive Assistant, Mr. Henwood;

b. was made aware of the Review Committee's initial recommendation;

c. had directed or instructed Mr. Henwood or anyone else in connection with the outcome of the Review Committee's work or AR 39999; or

d. was aware of the communications between Mr. Henwood and Ms. Craig in the aftermath of her selection of ITRL, or even that she had seen the Deputy Minister's memorandum.

17. Despite this Mr. Iacobucci determined that Commissioner Wilkinson did not have at his disposal all of the information relevant to his investigation. He laid out a number of remedial options, one of which was referring the matter to the current Ethics Commissioner for a possible re-investigation.

18. On April 4, 2016, Ms. Ganley wrote to Marguerite Trussler, Q.C., now the Alberta Ethics Commissioner ("Commissioner Trussler"), enclosing a copy of the report from Mr. Iacobucci. Ms. Ganley particularly noted the paragraph which indicated that Commissioner Wilkinson did not have at his disposal all of the information relevant to his investigation and the recommendation that the Ethics Commissioner determine if a re-investigation was warranted.

19. On April 5, 2016 Commissioner Trussler wrote to Ms. Ganley advising that she had a personal conflict of interest. Commissioner Trussler appointed me under section 25(8) of the *Conflicts of Interest Act* to act in her stead. My usual role is as Conflict of Interest Commissioner of British Columbia.

DETERMINATION OF WHETHER A RE-INVESTIGATION WAS WARRANTED

20. My first task was to determine whether a re-investigation was warranted.

21. I reviewed Commissioner Wilkinson's Report, the evidence gathered by Commissioner Wilkinson in the course of his investigation, Mr. Iacobucci's Report, and the package of materials that was provided to Mr. Iacobucci by the Government which included the new materials made available by the leak and unredacted FOIPP materials.

22. I also invited and received submissions from legal counsel for Ms. Redford, Mr. Macdonald, Q.C. and Mr. O'Brien, about whether a re-investigation was warranted. They took the position that a re-investigation was not warranted on the basis that the threshold for re-investigation under section 25(9) of the Act was not met because there were "no new facts that on their face might change the original findings." They pointed out that Mr. Iacobucci found no evidence associating Ms. Redford with any of the new information that he had determined was relevant. They also argued that it was out of time and that Ms. Redford had ceased to be a member of the Legislative Assembly and that the re-investigation would therefore serve no purpose. I carefully considered their submissions in the context of the information that I had received.

23. I concluded that a re-investigation was warranted. My reasons for doing so were:

a. In his March 30, 2016 Report, Mr. Iacobucci determined that Commissioner Wilkinson did not have available to him all of the information relevant to his investigation.

b. Under the *Conflicts of Interest Act*, the Ethics Commissioner

> ... may re-investigate an alleged breach or contravention in respect of which the Ethics Commissioner's findings have already been reported under this section only if, in the Ethics Commissioner's opinion, there are new facts that on their face might change the original findings.

c. This section gives the Ethics Commissioner a discretion as to whether or not to conduct a re-investigation. In my view, the words "new facts that on their face might change the original findings" set a low threshold. The Legislature chose the

word "might" which suggests something less than certainty or even a probability. A low threshold is consistent with the purposes of the *Conflicts of Interest Act*, which include maintaining "the Assembly's dignity" and justifying "the respect in which society holds the Assembly and its Members."

d. In this context, relevant information that might on its face change the original findings means information that opens a line of inquiry that might lead to a different conclusion following a further investigation. In this case, AR 39999 was a central element to Ms. Redford's decision to select ITRL and her following it was a central element in Commissioner Wilkinson's decision to exonerate Ms. Redford. Commissioner Wilkinson did not have access to AR 39999 as privilege was claimed over it. He relied upon the mechanism in which it was reviewed by a retired judge, who confirmed that Ms. Redford's decision was consistent with AR 39999. Neither Commissioner Wilkinson nor the retired judge had access to the earlier draft of AR 39999 which excluded ITRL as an option or the email correspondence about the change between the draft and the final memorandum. Commissioner Wilkinson did not have access to the email in which Ms. Redford is alleged to have said the ITRL Consortium was in the forefront of the matter. Commissioner Wilkinson did not have access to the emails about the changes to a memorandum from the Minister and the reply from the Deputy Minister and "sensitivity about wording." While none of these documents established that Ms. Redford acted to improperly further another person's interest, they opened up a significant line of inquiry that in my view needed to be pursued.

e. While a re-investigation might lead to a change in the findings from an Ethics Commissioner's Report, it also is important to bear in mind that following a re-investigation, if the evidence does not establish that the Minister or former Minister acted to improperly further another person's interest, the Minister or former Minister will be absolved. A decision to re-investigate, where there is relevant information as described above, gives the public the comfort that the integrity of the Assembly is preserved, without in any way lessening the presumption of innocence to which a Minister or former Minister is entitled.

f. The re-investigation was not barred by the passage of time. The Legislature imposed a time limit on initiating complaints, but did not impose a time limit on a re-investigation. The absence of a time limit on re-investigations is consistent with the purposes of the Act in ensuring, where there is relevant information that might change the result, a matter can be investigated and thereby preserve dignity and integrity of the Assembly. While delay may, in an extraordinary case, result in a bar to a re-investigation on grounds of unfairness, in this case there is neither the

required length of delay nor proof of significant prejudice to bar a re-investigation.

g. Further, the fact that an individual is no longer a member of the Assembly, and could not be subject to any sanction in the event an adverse finding was made, is not a bar to a re-investigation. In section 27(1.1), the Act expressly contemplates a report being made to the Speaker of the Assembly in relation to a former Minister.

FOCUS OF THE RE-INVESTIGATION

24. Section 3 of the *Conflicts of Interest Act* provides

> **Influence**
> 3 A Member breaches this Act if the Member uses the Member's office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to further a private interest of the Member, a person directly associated with the Member or the Member's minor child or to improperly further another person's private interest.

25. My re-investigation focussed on one aspect of this provision, namely, whether Ms. Redford used her office or powers to influence or seek to influence a decision to be made on or on behalf of the Crown to improperly further another person's interest.[2]

26. The decision in issue is Ms. Redford's decision dated December 14, 2010 that the best choice to represent Alberta would be ITRL (the "Decision").

27. The other person principally at issue is Mr. Hawkes, her ex-husband.

28. The private interest in issue is Mr. Hawkes' share of the opportunity granted to ITRL by Ms. Redford's Decision to allow ITRL to negotiate toward a contingency agreement with the Government to represent Alberta in litigation against tobacco companies to recover damages for health care costs. While the opportunity given by her Decision did not guarantee that ITRL and the Government would reach an agreement, it gave ITRL an exclusive opportunity to try to negotiate an agreement. Similarly, while a contingency agreement is not a guarantee that ITRL will recover damages and therefore be compensated for its efforts and costs (and indeed there is a material risk that there will be no recovery and therefore losses for the consortium), it is a valuable opportunity that was sought after not only by ITRL but two other consortia.

[2] I am aware that Commissioner Wilkinson also investigated allegations of breaches of other aspects of section 3 and alleged breaches of section 2 and 4 the Act. Nothing in the questions posed by Mr. Iacobucci nor in the information provided to me suggested that there was new evidence relevant to a breach of any of these other provisions. In the course of my re-investigation, I found no evidence to support any alleged breach of these other provisions.

29. My re-investigation focussed on the following matters:

a. The relationship between Ms. Redford and Mr. Hawkes, both before the Decision and after the Decision, including his involvement in her political career.

b. The email of Mr. Cuming in which he reported that Ms. Redford had said to Mr. Hawkes that ITRL were in the "forefront of the matter" in April 2010.

c. The change in recommendation by the Review Committee in December 2010, after a draft from the Review Committee had been shared with Mr. Henwood removing ITRL's last place designation and restoring ITRL as an option.

d. The email exchange between Ms. Craig and Mr. Henwood after the Decision about AR 40168 and the resulting memorandum from the Deputy Minister to Ms. Redford dated January 5, 2011.

e. Whether there was any other evidence to suggest Ms. Redford had improperly furthered another person's interest.

30. In relation to (e) above, in my re-investigation, I did not close my mind to the possibility that something might appear that would open a question about another person's private interest being furthered. I was aware from my reading that there was communication between Ms. Redford and Tim Wade, a lobbyist. Out of an abundance of caution, I examined this relationship as well and whether it had an improper impact on her Decision.

APPROACH TO THE RE-INVESTIGATION

31. There were 4 phases to my re-investigation:

a. I reviewed all the evidence that Commissioner Wilkinson gathered in his initial Investigation.

b. I reviewed the documents that were provided by the Government to Mr. Iaccobucci and in turn to me.[3]

c. I then arranged for key witnesses to be questioned in two phases:

i. interrogatories were sent to each witness with the requirement that the responses be in the form of a statutory declaration. The interrogatories

[3] I did not have access to Mr. Iacobucci's notes of witness interviews. I did not seek access to those notes having regard for our separate mandates and constitutional roles—he advised the Government, which is the Crown; I investigate as an independent officer of the Legislature. He did not report to me, he reported to the Government. I do not report to the Government. I report to the Speaker of the Legislature.

were staggered to allow me to gather information from some witness so as to be better informed to put interrogatories to others;

ii. most key witnesses were then questioned under oath with a court reporter present.[4]

The process described in c. above applied to the following witnesses:

Robert Hawkes
Lorne Merryweather
Grant Sprague
Martin Chamberlain
Ray Bodnarek[5]
Renée Craig
Tim Wade
James Cuming
Jeff Henwood
Alison Redford

d. Other individuals, whose roles were of uncertain relevance or materiality to the allegation before me, were for reasons of timeliness and cost questioned by mail or by phone to assess whether they had anything to contribute. This process applied to:

Denise Perret, Q.C.—no role related to the Decision; sole role related to the Government's position in respect of privilege in 2013.

Peter Watson—no role related to the Decision; sole role related to the Government's position in respect of privilege in 2013.

David Jones, Q.C.—no role related to the Decision; sole role related to the Government's position in respect of privilege in 2013.

Barb Mason—limited role covering for G. Sprague on one or two days before Christmas in 2010, no independent recollection of anything relevant to the allegation.

Glenn Solomon, Q.C.—provided background about the aftermath of the news revelations and his internal inquiries in JSS to ensure no impropriety within the firm's process. Was not involved in the ITRL bid process directly although aware of it. Was not supportive of the bid because of the risks associated with it. Was a friend of Ms. Redford. He confirmed that he

[4] In addition, in some cases, my counsel followed up with additional questions or document requests, which were handled more informally.
[5] Only statutory declaration. Follow up by phone interview.

expected no favours from her because of their friendship and that she was not the type of person to give any.

Karen Christensen – played an administrative role with respect to AR 40168, had no information relevant to the allegation and had no recollection of events in late 2010 and early 2011. Provided some background information about the administrative process.

Jennifer Fuchinsky – played an administrative role with respect to AR 39999, had no information relevant to the allegation and had no recollection of events in 2010. Provided some background information about the administrative process.

Margaret Dallimore – played an administrative role with respect to one aspect of AR 40168, provided general background on the operation of and contents of the ARTS system and contents of it for AR 39999 and AR 40168, and had no information relevant to the allegation and had no recollection of events in early 2011.

Laura Cline– played an administrative role with respect to AR 40168, had no information relevant to the allegation and had no recollection of events in late 2010. Provided some background information about the administrative process.

LEGAL PRINCIPLES APPLICABLE TO SECTION 3 OF THE *CONFLICTS OF INTEREST ACT*

32. In his December 2013 Report, Commissioner Wilkinson properly stated the legal principles applicable to the interpretation and application of section 3 of the *Conflicts of Interest Act* and the standard of proof applicable to an investigation of an alleged breach of the Act.[6] I will not repeat his analysis in detail here. I adopt it.

Principles applicable to the determination of whether a Minister improperly furthered another person's private interest

33. In my view the guiding legal principles are:

- A Minister who is the subject of an investigation or re-investigation under the *Conflicts of Interest Act* is entitled, as are all Canadians, to the presumption of innocence at the outset of the investigation or re-investigation.

[6] See paragraphs 62 to 82 and at paragraphs 108 to 110 of his Report.

- An alleged breach of the *Conflicts of Interest Act* must be proven on a balance of probabilities. The Commissioner must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred. In a system based on the rule of law, suspicion or speculation is a reason for making inquiries in an investigation or re-investigation. It is not a basis upon which one draws legal conclusions about conduct. Conclusions can only be drawn based on direct or circumstantial evidence or inferences properly drawn from that evidence. Drawing inferences when there is an evidentiary gap, based on an "educated guess", is speculation.[7]

- If an event is established to have occurred on a balance of probabilities, the Commissioner must then determine whether the conduct constitutes a breach of the *Conflicts of Interest Act.* In this case, the focus of the re-investigation is whether Ms. Redford used her office or powers to influence a decision to be made by or on behalf of the Crown "to improperly further another person's private interest."

- An allegation of "improperly furthering another person's private interest" must be contrasted with an allegation of "furthering the private interest of a Member" or "a person directly associated with a Member or the Member's minor child." There is a distinction between:

    i. "A Member", "a person directly associated with a Member[8] or a Member's minor child", where simply furthering a private interest results in a breach; and

    ii. "Another person", where there needs to be an element of "impropriety" in furthering a private interest before a breach can be found.

- In matters like the selection of legal counsel to represent the Government, the Minister of Justice has a wide discretion to select the counsel that, in her opinion, will best serve the Government. In legal terms, the Minister has discretion that engages a wide range of interlocking and interacting interests and considerations and requires the consideration of numerous interests simultaneously and the development of solutions which concurrently balance benefits and costs. A Minister is a policy maker and politician, not a judge. A Minister's discretion

[7] *Walton v Alberta (Securities Commission)*, 2014 ABCA 273 at para. 26.
[8] The categories of "person directly associated with a Member" is defined in section 1(5) of the *Conflicts of Interest Act*, and does not apply here.

may be affected by general political, economic, social or partisan considerations without being improper.

- Further, in a free market democracy, the generally accepted mechanism for getting things done is to appeal to a person's private interest e.g. any contract approved by a Minister will further the private interest of the contractor; any hiring of office staff by a Member will further the private interest of that staff person. Those things cannot be considered "improper" in and of themselves – there must be something more.

- An action or decision becomes improper where a discretion is exercised for a purpose that is alien to the reason a power or office is given to a Minister by law. There is always an outer boundary to the exercise of discretion. Where that boundary is transgressed, the exercise of the discretion becomes improper. In *Roncarelli v. Duplessis,*[9] the foundational case reinforcing the rule of law in Canada, the Supreme Court said

> …there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption … may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

34. In the final analysis, to establish that a Minister "improperly furthered another person's private interest" one must demonstrate both that:

a. there was the exercise of a power or office in a manner or for a purpose that departed from the objects or purposes of that power or office under the law; and

b. another person's private interest was furthered by the exercise of that power or office.

[9] *Roncarelli v. Duplessis*, [1959] SCR 121, 1959 CanLII 50 (SCC).

35. The inquiry as to whether a Minister is using her office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to improperly further another person's private interest is highly fact and context specific.

Principles applicable to assessing credibility

36. A key issue in this re-investigation was the assessment of credibility of the individuals who provided me with evidence. I had the key witnesses questioned under oath or affirmation before me so I had an opportunity to consider not only their evidence, but also their demeanour.

37. The assessment of credibility requires a careful assessment of the totality of the evidence, including the consistency of the testimony of a witness with the documentary evidence, the motivations of the witness and the demeanour of the witness. The assessment of credibility requires the application of common sense, experience and wisdom gained from personal experience in observing and judging the trustworthiness of a witness. In assessing credibility one must consider the witness' ability and opportunity to observe; the manner of testifying; power of recollection; any interest, bias or prejudice that the witness may have; inconsistencies in the testimony; and the reasonableness of the testimony when considered in the light of all the evidence in the matter.

38. Assessing credibility is a difficult and delicate matter. In assessing credibility, one must be particularly cautious to avoid judging based on generalizations or matters that were not in evidence. News stories and opinion are not evidence. This caution is particularly important when one considers the actions of politicians, whose actions may have been the subject of media and public commentary and speculation. I understand the significance and challenge of the task of assessing witnesses' credibility from my career as a litigator, including as a special prosecutor, as an arbitrator and in my current role as Conflict of Interest Commissioner of British Columbia. I was fortunate in this case to be from outside Alberta and unfamiliar with any of the witnesses so could look at them with fresh eyes.

39. In this case, where the events at issue were approximately six years ago and witnesses may not have seen relevant documents for an extended period, the assessment of credibility involves a recognition of remoteness in time and proportionality. A failure to remember an event proximate in time may raise an issue of credibility; a failure to remember a discussion that occurred briefly six years ago may not raise the same issue.

40. As I assessed credibility of the witnesses in this matter I was uniformly impressed by their commitment to principled action and decision making. Although I began my re-investigation with a measure of skepticism of the motives of Ms. Redford and the other key witnesses arising from my review of the leaked documents, once I had an opportunity to see the

documents in the context of other documents, consider the timing of events and consider the evidence of Ms. Redford and the other witnesses, I recognized that I was dealing with public servants committed to exercising their powers and duties in the public interest, and in the case of the private sector lawyers, individuals who sought to act with integrity. I paid particular attention to the evidence and demeanor of Ms. Redford, because of all the witnesses, she had the most to lose. Although she was angered and frustrated by the process, her evidence was credible and in making her Decision she was focussed on acting transparently and for the best interests of Alberta.

COMMENT ON CONFIDENTIALITY AND PRIVILEGE

41. The protection of legal privilege is one of the cornerstones of our system of law and constitutional order. The Supreme Court has said:

> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice. Lawyers have the unique role of providing advice to clients within a complex legal system. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances".
>
> Further, solicitor-client privilege belongs to the client, not to the lawyer. Seen through the eyes of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege. Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant."[10]

42. For that reason, I understand why Commissioner Wilkinson considered and respected the Government's claim of privilege in his investigation. There was nothing untoward in the Government claiming privilege and nothing untoward in Commissioner Wilkinson respecting it. One must bear in mind that Ms. Redford had nothing to do with the claim of privilege. It was a decision taken by legal counsel for the Government and senior civil servants, who were not key witnesses, without involvement by her. It is also important to note that there is nothing wrong with a lawyer making a proper claim of solicitor client privilege on behalf of a client, including the Government.

[10] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (Note—internal citations are omitted for ease of reading); see also *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 at para. 9.

43. My re-investigation was able to proceed on the basis of a more fulsome documentary record for two reasons:

- some documents over which privilege was claimed were leaked to the media and therefore came into the public domain; and

- the Government of Alberta gave me access to privileged documents and, through questioning, allowed officials to answer questions about privileged information relevant to the scope of my inquiry.

44. It is important to recognize that the Government did not waive privilege and only provided me access to the privileged documents and information on the basis of the assurance of confidentiality, which is set out in section 26 of the *Conflicts of Interest Act*. Without the documents and information provided to me by the Government, under this statutory assurance of confidentiality, I would not have been able to effectively undertake this re-investigation. My role as an officer of the Legislature in serving to preserve the integrity of the Legislature and its members would have been undermined. In short, this process of re-investigation should not be seen by anyone as a tool for obtaining access to privileged information of the Government. If it is, it will impair the ability of the Ethics Commissioner to fulfill her important duty to the Assembly to investigate and make recommendations relating to the discipline of members when there is a breach of the *Conflicts of Interest Act*.

RELATIONSHIP BETWEEN MS. REDFORD AND MR. HAWKES, BOTH BEFORE THE DECISION AND AFTER THE DECISION, INCLUDING HIS INVOLVEMENT IN HER POLITICAL CAREER

45. Ms. Redford and Mr. Hawkes were married in 1986, when both were young. At the time, they were political staffers for the federal Progressive Conservative Party in Ottawa. They quickly realized that they had made a mistake in getting married, but it took them a few years before they did something about it – separating in 1990 and divorcing in 1991. They had no children. There were no continuing financial obligations or social links between them. Ms. Redford described it in these terms:

> This was not a lingering anything. We simply were two young people that got married and then got divorced. And I got the Ikea furniture, and he got the car, that's it. That was how I viewed it; that was how he viewed it. Most people didn't even know we'd been married.

46. Each of them moved on with their separate lives. After the divorce, Ms. Redford lived in South Africa for six years and had no contact with Mr. Hawkes. Ms. Redford remarried in 2000 and had a daughter. Mr. Hawkes remarried in 1993 and had two sons.

47. After Ms. Redford returned to Calgary from South Africa, she came into contact with Mr. Hawkes again from time to time at political events and charitable functions. This formed the basis for a new and different relationship between them. Although they were friendly when they ran into each other, they rarely interacted otherwise. Theirs was not a close friendship or one that involved any ongoing personal connections. There was however a residual sense of trust between them based on mutual respect and their shared political experiences in Ottawa.

48. They each had an interest in politics, especially federal Progressive Conservative politics. It was principally in that arena that they would come across each other. Generally, with a few exceptions, their contact with each other before the Decision was incidental and occurred at large, public events that were of a political or charitable nature. At these events, they would either not speak to each other or speak very briefly, for a minute or so. The exceptions are:

- In the late 1990s, while a lawyer at Bennett Jones, Mr. Hawkes was involved on the periphery of a file that involved Ms. Redford that was being handled by another lawyer there.

- In 1997, they worked together on the Calgary committee running the federal Progressive Conservative Campaign for Jean Charest, where they worked together each weekday for an hour or hour and a half over the 6 week campaign period.

- In 2004, Ms. Redford ran for the federal nomination for the newly merged Conservative Party in the Calgary West riding against Rob Anders, the incumbent MP. Ron Liepert chaired her campaign. At one time, the riding was held by Mr. Hawkes' father. Mr. Hawkes did not support Mr. Anders. He was active in trying to get someone other than Mr. Anders elected. However, his role in this nomination battle was limited – he sold memberships and tried to get people to come out to vote. He did not play any leadership role in the campaign and had limited interaction with Ms. Redford.

- After she became Minister of Justice, Ms. Redford would occasionally call Mr. Hawkes to ask him how a matter was perceived in the Calgary legal or political community. This was not an exclusive arrangement—as Minister of Justice she had contacts in and with many firms in Calgary and throughout Alberta and she saw this sort of outreach as part of her mandate.

- On one occasion involving a charitable fundraiser they sat at the same table.

- He sat on a Q.C. Advisory Committee appointed by her. She attended one meeting where he was present.

49. Mr. Hawkes was not involved in Ms. Redford's move into provincial politics. He had no involvement in her 2008 nomination in Calgary Elbow. She did not contact him about it; he gave no money to her effort to obtain the nomination and did not help with it. He did not participate in or contribute to her campaign in the 2008 election where she first won a seat.

50. Mr. Hawkes noted that while records show that he made contributions either to the Calgary Elbow constituency association or the PCAA between 2008 and 2011, these were simply monies paid so that he could attend a political dinners with clients. These events were large events, with a couple of hundred people attending in the case of the constituency association or more than a thousand attending in the case of a Premier's Dinner (at the time Premier Stelmach.) They were not intended to curry favour with her. Ms. Redford had no specific recollection of contributions made by Mr. Hawkes. Ms. Redford's evidence was that while her constituency association may have used her name in acknowledgements to contributors:

> It was very important to me that I didn't get detailed information or lists of who gave me money or how much money they gave me. I didn't write thank you letters to people.

51. In the course of this re-investigation, she noted that Mr. Hawkes' contributions, which were initially put to her in Commissioner Wilkinson's investigation, were a small part of the amounts raised from many contributors. Mr. Hawkes noted that any contributions he might have made in acquiring tickets to events would pale in comparison to contributions from other firms or lawyers at other firms including firms that were members of other consortia.

52. At a political dinner, the April 2010 Premier's Dinner in Calgary, Mr. Hawkes ran into and spoke briefly with Ms. Redford, resulting in the email from Mr. Cuming that is the focus of the next part of this Report.

53. Aside from the contact noted above, I found no evidence of Mr. Hawkes having any communication with Ms. Redford about ITRL. Both their evidence was very clear and convincing that Mr. Hawkes did not expect, and Ms. Redford would not have in any way considered granting him any favours based on either their status as spouses two decades previously or the friendly relationship that developed after the approximately six years where they had no contact at all.

54. In considering the relationship between Mr. Hawkes and Ms. Redford in this re-investigation, one cannot look at it in isolation. One needs to see it in the context of her role as a

politician and the Minister of Justice and Attorney General. Ms. Redford was not just friendly with Mr. Hawkes. She had articled and worked as a lawyer in Calgary. Ms. Redford had met and knew a lot of lawyers. In her role as Minister of Justice, she met, came to know and became friends with an even wider range of lawyers. Her Executive Assistant, Mr. Henwood, characterized it this way:

> …my sense is she quite liked being a lawyer, and a lot of her friends would tend to be lawyers. So she would have friends and contacts at, you know, every major firm in Calgary for sure and at most of the smaller ones too…

Most significantly for the purpose of my re-investigation, she had ties with lawyers both in the Bennett Jones Consortium and Field/McLennan Consortium, who were part of the consortia competing with ITRL. In fact, she deposed that her connections to the Bennett Jones firm "far exceeded her connections to the JSS firm." She viewed Peter Loughheed, who went to Bennett Jones after his retirement, as a mentor. She had friends there; a lawyer at Bennett Jones represented the Alberta PC Party. She described her friendship with Michael Casey of Field as a "really close" friendship."

55. Ms. Redford spoke with lawyers throughout the province at professional meetings and at political events. These conversations included discussions about tobacco litigation as well as numerous other issues important to the legal community or aspects of it. She described her role as follows: "My job was to talk to people, my job was to listen, my job was to encourage people to participate in a process, and that's what I did." Whenever, the tobacco litigation issue came up with lawyers or lobbyists, she would tell them that the process would be merit based.

56. In my re-investigation, I closely examined the relationship between Ms. Redford and Mr. Hawkes after she made the Decision. After she made the Decision, Mr. Hawkes was part of a group who persuaded her to run for leadership of the Progressive Conservative Party, was chair of her leadership campaign team and, ultimately, when she became Premier, led her transition team. I undertook this examination to assess:

a. whether she may have been motivated to make the Decision to build support for her political future by attracting the support of Mr. Hawkes through the Decision; or

b. whether her relationship with Mr. Hawkes after the Decision provided other indications of a close friendship that may have motivated the Decision.

57. On January 25, 2011, Premier Stelmach announced that he would be stepping down as Premier. I considered and explored whether Ms. Redford might have had some inside

knowledge of this as she considered who to select to represent Alberta in the tobacco litigation. I explored whether this might have influenced her decision to select ITRL, which included Mr. Hawkes a potential political ally.

58. I found that at the time Ms. Redford made the Decision, she had no anticipation or expectation that Premier Stelmach was contemplating resignation. In questioning, she was pressed on this point and her response was clear:

> Q. You selected JSS, and you used that to build political capital because Mr. Hawkes was going to be part of a group that was going to support you for leadership, for leadership of the Party. I'd like you to address that let's just call it a hypothesis or theory.
>
> A. Well, it's entirely wrong. I had no particular interest in running for leadership. I certainly had no indication that Premier Stelmach was going to step down. In fact, if you talk about blood in the political water in December [2010], there was blood in the political water in July and June and May and March. I mean it was a really difficult time I say now, compared to now, ha. Anyway, it was a difficult time to be in public life.
>
> And we had no indication that Mr. Stelmach was not prepared to push through, that he believed that the agenda that he was putting forward was the right agenda for the province and that everything was going to continue, I mean not a bit, not a hint of anything.

59. Ms. Redford did not immediately consider running for the leadership when Premier Stelmach announced that he would be stepping down. However, she began to receive calls from individuals canvassing whether she might be interested in doing so. Mr. Hawkes was one of those that called her; but she also received other calls, including calls from James Heelan, a lawyer at Bennett Jones. Mr. Hawkes' motivation in pushing her forward as a candidate was that he wanted a candidate other than the front runner, Mr. Gary Mar, whose vision he did not share. He considered Ms. Redford to be smart and to have a good policy background and that motivated him to try to persuade her to run for leadership.

60. Ultimately, Mr. Hawkes was Chair of her Campaign, although Ms. Redford does not now even recall him playing that role. Mr. Hawkes' involvement was relatively small. The campaign was actually run by Stephen Carter, her campaign manager. Mr. Hawkes described his role as listening to complaints from others about how Mr. Carter was doing things.

61. Ms. Redford was not expected to win. Towards the end of the campaign, it appeared that the numbers might go her way and her campaign team realized that it needed to have a transition team in place. Her campaign was not "deep" in government insiders. The initial candidate

considered to be transition leader was Mr. Carter, but Ms. Redford did not want him to assume that role as she was considering him for the position of her Chief of Staff. The team then looked to Mr. Hawkes to lead the transition team. The motivation was his experience in Ottawa. Ms. Redford trusted him and respected his experience with transition in the federal government:

> He worked as legislative assistant to Michael Wilson during the introduction of GST. His father was the whip of the federal Conservative Party under Brian Mulroney. I worked for Joe Clark.
>
> We were in Ottawa at a time when Prime Minister Mulroney was radically changing the way the Government operated in terms of cabinet process, in terms of appointment process, in terms of policy process. And I wanted people who had had that experience to be part of what we did.

62. Again context is important. Mr. Hawkes was not the only lawyer on the transition team. Mr. Heelan from Bennett Jones was also on the transition team. The members of the transition team were volunteers for approximately two weeks. It is also noteworthy that a few months after Ms. Redford became Premier, Farouk Adatia, a lawyer from Bennett Jones became her Chief of Staff replacing Mr. Carter.

63. Although I examined the issue closely, I found no indication that Mr. Hawkes derived any benefit from leading the transition team or that his role on the transition team was in any way a *quid pro quo* for the Decision in favour of ITRL.

64. In conclusion, Ms. Redford's relationship with her former husband, Mr. Hawkes, was not close in the lead up to her Decision. They had been divorced for many years and had completely separate lives. After having no contact with each other for many years, they ran into each other at political events and became, at most, political acquaintances who shared a mutual interest in progressive conservative politics. Mr. Hawkes only became a significant player in her political life after the Decision, where he was one of a group that persuaded her to run to become leader of her party and then along with at least one other lawyer, from a competing firm, was part of her transition team. She had closer connections with lawyers in other firms and with the other firms competing for the opportunity to represent Alberta, than she did with Mr. Hawkes. I found no motivation for her to further Mr. Hawkes' private interest and no evidence that she sought to do so.

THE EMAIL OF MR. CUMING IN WHICH HE REPORTED THAT MS. REDFORD HAD SAID TO MR. HAWKES THAT ITRL WERE IN THE "FOREFRONT OF THE MATTER" IN APRIL 2010

Cause for Concern that led to the Re-Investigation

65. An email dated Friday April 16, 2010 from Jamie Cuming, a lawyer with Cuming & Gillespie, a member of the ITRL consortium, was leaked to a media outlet (the "Cuming email"). The email was sent to Derek Raymaker, a government relations consultant for ITRL across Canada, and Tim Wade, the lobbyist for ITRL in Alberta, and was copied to two of the Ontario lawyers in the ITRL consortium, Brad Robitaille and Paul Harte. It was not sent to Mr. Hawkes or anyone at JSS. This email was not available to Commissioner Wilkinson when he undertook the initial investigation. The material portion reads:

> Subject: RE: AB Claim
>
> Gents,
>
> ….
>
> Also, thanks to Tim, I had the opportunity to spend a few hours last night with Ms. Redford's EA over dinner. Our meeting was informal, cordial, and went very well. Kudos also to Tim for being mentioned by the Premier in his address at the dinner as a leader in the party and driving force behind the success of the Premiers' Dinner in Calgary.
>
> With respect to May Jensen Shawa Solomon, I met with Sabri Shawa and Rob Hawkes this morning. Rob is the ex-husband (on a very friendly basis) with Alison Redford, QC (our Justice Minister).
>
> Generally, the meeting went very, very well. They are interested in joining our coalition. The delay in responding to our invitation was their discussions with Siskinds about whether there was room for MJSS in the Siskinds coalition. There is not, and they want to pursue the file with us.
>
> The positives that arose from the meeting are that Rob Hawkes has discussed the file directly with Alison Redford, and she indicated to him we were in the forefront on the matter. Additionally, Rob's political connections go far, far beyond my expectations and knowledge in both Alberta, and Saskatchewan. Rob was the political point man for Bennett Jones, and remains very, very involved at what appears to be a high level with the PC party.
>
> ….

In the event we're all in agreement to move forward, I'd suggest an initial meeting with Rob, Sabri, Tim Wade and myself to discuss GR. Then, I'd like to schedule an in person meeting with Brad, Paul, Derek, perhaps Matt, myself, Rob, and Sabri in May or June. We could meet wherever it would be most convenient for an afternoon and pursue the LLP retainer agreement discussion etc.

I'm in a JDR today, so my further correspondence (if required) will be via phone, and less verbose than the above.

If we need to chat, let me know what works for all.

CUMING & GILLESPIE

James D. Cuming

66. This email is significant in this re-investigation because it apparently reveals 4 things:

a. Mr. Hawkes is on a "very friendly" basis with Ms. Redford;

b. Mr. Hawkes spoke to Ms. Redford about the "file";

c. Ms. Redford indicated to Mr. Hawkes that "we were in the forefront of the matter";

d. Mr. Hawkes is politically connected and is "very, very involved at what appears to be a high level with the PC party".

67. I first read this email as suggesting that ITRL had the inside track on the retainer for legal work that the Government of Alberta would ultimately grant, after the initial choice of candidate made by Ms. Redford, and that Mr. Hawkes' political connections and friendship with Ms. Redford would play a prominent role in that choice. If one then "connects the dots" including:

a. the change in the recommendation from the department officials to include rather than exclude ITRL as an option for Ms. Redford's consideration (after consultation with Ms. Redford's Executive Assistant);

b. the emails regarding changes to the memoranda between the Minister and Deputy Minister referring to a "sensitivity about language"; and

c. the role of Mr. Hawkes in Ms. Redford's campaign for leadership and transition team

the basis for Ms. Redford's selection of ITRL as being in the best interests of Alberta is called into question and a concern is raised that her Decision may have in fact been a decision to further the private interest of Mr. Hawkes for political or personal reasons.

68. Accordingly, I examined the email and circumstances that led to it very carefully. Mr. Cuming has been questioned about the accuracy of the reporting contained within it. Ms. Redford and Mr. Hawkes have been questioned about the content revealed in it about their relationship and the statement in the email that "we were in the forefront of the matter."

The Discussion between Cuming and Hawkes on April 16, 2010

69. The meeting between Mr. Cuming, Mr. Shawa and Mr. Hawkes that presaged the Cuming email took place over either breakfast or morning coffee at a hotel in Calgary on April 16, 2010. It was an exploratory meeting between Mr. Cuming for ITRL and Mr. Hawkes and Mr. Shawa for JSS as to whether JSS would consider joining the ITRL Consortium. Mr. Hawkes described his best recollection of the key matters discussed at the meeting as follows:

> 1) How Cuming came to be involved with ITRL, how the ITRL Ontario group was to work with and who the US partners were.
>
> 2) The history of TRL and why they were looking to add an Alberta firm with a large litigation group with experience in significant and complex tort matters and the depth to handle the tobacco litigation.
>
> 3) That TRL had lost their larger Alberta partner over a disagreement with respect to how the litigation would be managed.
>
> 4) That JSS would not be joining the Siskinds LLP group (Siskinds was part of the Bennett Jones Consortium) in pursuing the tobacco litigation work.
>
> 5) Mr. Shawa and Mr. Jensen's experience in significant files. Mr. Hawkes recalled they discussed this at some length as the Ontario and US ITRL partners were looking for a firm in Alberta that had the experience to run the litigation.
>
> 6) Mr. Cuming's understanding of how tobacco recovery litigation was likely to work in Alberta. In relation to this issue, Hawkes said "I don't believe that much was revealed as it was the initial meeting and we were still feeling each other out."
>
> 7) What Mr. Cuming knew about the status of efforts to encourage governments across the country to initiate tobacco recovery litigation.

70. Significantly, at the time the Cuming email was sent, JSS was not a part of the ITRL consortium. JSS were only considering becoming part of the ITRL consortium. The meeting was

to explore whether JSS was interested in becoming part of the ITRL. At that time it was only a "possibility."

71. To understand this, it is important to understand the evolution of the ITRL consortium. In 2009, Mr. Cuming was approached by two Ontario lawyers who were looking at putting a consortium together to represent various provinces in tobacco litigation. Mr. Cuming's firm was very small so needed to find the support of a larger firm that had depth, experience and resources to complement his firm's experience. Initially, JSS had no involvement in ITRL. The Alberta firms that were involved in ITRL with Cuming & Gillespie were McLennan Ross and Field Law LLP. Near the end of 2009, the relationship between ITRL and McLennan Ross/Field dissolved. Cuming & Gillespie began looking for other counsel with depth and experience, but it proved to be a challenge as many national firms were conflicted. Mr. Cuming emailed Mr. Shawa and Carsten Jensen, lawyers he knew at JSS, to explore having them involved in ITRL. When Mr. Shawa and Mr. Jensen learned of the opportunity, they also realized that the Bennett Jones Consortium included Siskinds, a firm with whom JSS had a good working relationship. They wanted to explore whether they could team up with Siskinds as part of the Bennett Jones Consortium. It was only when Siskinds indicated that their consortium was closed that JSS became interested in exploring the idea of joining ITRL.

72. This led to the meeting between Mr. Cuming, Mr. Shawa and Mr. Hawkes on April 16, 2010. As noted above, that meeting was exploratory; it was only later that JSS became part of the consortium. While there were discussions and some preliminary work through the summer, the relationship did not become firm until the Government issued its request for expressions of interest in November, 2010 and ITRL needed to respond.

73. Therefore, even if I was to accept that on April 15, 2010 Ms. Redford had concluded that ITRL was at the forefront of a process to select outside counsel for the Government of Alberta, ITRL must have reached that status without the involvement of Mr. Hawkes or JSS in ITRL. While that would be a complete answer to any suggestion that Mr. Cuming's email evidenced a preference for ITRL because of the involvement of JSS and Mr. Hawkes, I continued to consider the evidence regarding the email and circumstances leading to it.

74. It is important to note that the relevant portions of the email are hearsay. They represent Mr. Cuming reporting what Mr. Hawkes told him that Ms. Redford said. Mr. Hawkes was not a recipient of the email. He did not know about it until parts of its contents were revealed publicly in a news story.

75. With respect to accuracy of Mr. Cuming's reporting in the email of what Mr. Hawkes had said to him, I note that Mr. Cuming testified that he did not recall "that the specific wording in

the email reflected what Mr. Hawkes had said exactly" and that "I have no specific recollection of the exact wording of Mr. Hawkes." In questioning, he described his email as follows:

> These are my words in an e-mail that I pecked out in between a breakfast or a coffee and heading to a judicial mediation just to essentially update some of the people in our group as to what I had learned and didn't know previously. So whether I understated this or overstated it, it's certainly in my words not Robert's [Hawkes].

76. Asked about Mr. Cuming's email, Mr. Hawkes testified that he had not seen it at the time and that he was surprised by Mr. Cuming's characterization of Mr. Hawkes' role:

> …he fundamentally misunderstands a wide variety of things as it's expressed in this email, both with respect to my involvement in politics and how politics works and, you know, the import of what she said or the meaning of what she said. I just think he's got it all wrong.

77. In the 2013 Wilkinson Investigation, Ms. Redford and Mr. Hawkes each recalled that they had spoken once about the tobacco litigation. Neither recalled exactly when the conversation occurred. In the Wilkinson Investigation, Ms. Redford said in response to an interrogatory:

> …prior to requests for proposals being sought by the Government, Mr. Hawkes said his firm was likely to submit a proposal as part of a coalition. I advised Mr. Hawkes that the process would be merit based.

78. Hawkes recollection in 2013 was:

> In the summer or fall of 2010, I spoke to Redford at a social event and advised her that my firm had joined an international consortium that was intending to bid for the tobacco work. In response she indicated that the work would go to the best bid.

79. Based on the evidence of Mr. Hawkes and Ms. Redford, I am satisfied that there was only one discussion between Mr. Hawkes and Ms. Redford in relation to tobacco litigation. Based on the timing of the Cuming email and the evidence of Mr. Hawkes in my re-investigation, I am satisfied that the discussion occurred at the Premier's Dinner on April 15, 2010 in Calgary. In his evidence before me, Mr. Hawkes recognized that he had erred in respect of his 2013 recollection of the timing of the discussion and the state of the relationship between JSS and ITRL at the time of the discussion with Ms. Redford.

80. In the course of my re-investigation, a number of witnesses described the nature of the Premier's Dinners in Alberta at the relevant time. They were well attended political fundraising and social affairs, with approximately 1400 people present. Before the dinner, Ministers were expected to be generally available at informal "stations" in the cocktail area to speak to various attendees. At the dinner, the attendees sat in tables of 8 or 10 and there were speeches. After

dinner, participants might run into each other in a public hallway and chat. In short, the evidence that I have is that the Premier's Dinner was not conducive to detailed or confidential conversations. Mr. Hawkes and Ms. Redford were not seated at the same table. Based on the evidence of Mr. Hawkes and Ms. Redford, I find that the discussion between them was brief, incidental and took place in this crowded venue. Mr. Hawkes' recollection is that the discussion was a minute or less that, most likely, occurred before the dinner.

81. When Ms. Redford was asked about the statement in Mr. Cuming's email that ITRL "was in the forefront of the matter" she said:

> It is not clear what is meant by this third-hand comment by Mr. Cuming. However, to the extent that it suggests that I told Mr. Hawkes in or around April 2010, or ever, that TRL was the preferred candidate, it is incorrect. I do not know how, nor can I control how, Mr. Cuming got the impression that I had made this statement to Mr. Hawkes.

82. Mr. Hawkes said:

> I don't recall saying that to Cuming, but I accept that I said something similar as I recall a short discussion that I had with Redford at about that time. My recall is that I ran into Redford at a political event and I mentioned that we were considering joining the TRL consortium to bid on the tobacco work. I recall her saying that TRL was leading the charge, or word to that effect. I took Redford's comments to mean that she recognized the leadership role TRL was playing nationally in encouraging litigation. Redford said they would select the best bid. The conversation was in passing and very short—a minute or less. The tone was of the nature of social banter.

83. Based on the evidence that I have gathered, I am not satisfied on a balance of probabilities that Mr. Cuming's email accurately reflects what Ms. Redford said to Mr. Hawkes in 2010. Mr. Cuming was not present and did not hear what was said. Ms. Redford denies under oath that she ever suggested to Mr. Hawkes that TRL was the preferred candidate. There is no inconsistency between this denial and what she reported to Commissioner Wilkinson in 2013. I believe her.

84. Mr. Hawkes' best recollection now, after his memory was refreshed by seeing the Cuming email is that the words Ms. Redford used were that "TRL was leading the charge."

85. In my view it is plausible that Ms. Redford may have said something about ITRL "leading the charge" in April 2010 because at the time ITRL, without any involvement of JSS, was trying to persuade Alberta and other provinces to pursue litigation against tobacco companies.

86. At the time of the 2010 Premier's Dinner, ITRL could not have been in the "forefront" of any Alberta competition to select counsel in Alberta. There was no selection process in play in Alberta at that time. Although Ms. Redford expected there would be a competition to select counsel (and others, like ITRL involved in pressing the issue, hoped that there would be one) Alberta had not yet even decided formally to commence litigation, let alone begin the process of selecting a firm to conduct the litigation. In this context, they could not have been in the "forefront of the file" in any sense that would suggest that they were a preferred candidate.

87. The discussion about the actual nature of the relationship and degree of friendship between Ms. Redford and Mr. Hawkes is set out above and will not be repeated here. In short, they were not on "very friendly terms." In testimony before me, Mr. Cuming said that he used this emphasis because

> Because most of the individuals that I've encountered in my life that have ex-spouses are not on a very friendly basis. And what I meant by that is that they don't dislike each other or have animosity towards each other, not that they're best of friends from my impression.

88. Mr. Hawkes testified before me that Mr. Cuming fundamentally misunderstood the nature of Mr. Hawkes' political involvement. In April 2010, Mr. Hawkes did not have a big involvement in provincial Progressive Conservative politics. His active involvement was in federal Progressive Conservative politics before the party became the Conservative Party of Canada in 2003. In short, his high level political involvement was dated and engaged the federal level rather than provincial level of politics. His involvement in Alberta PC politics before April 2010 has been described above and included one additional role on a fundraising committee initiated not by Ms. Redford. Mr. Hawkes' involvement in politics in Saskatchewan was historical, hearkening back to his days at university, where he was acquainted with individuals, who would later go on to play a significant role in Saskatchewan political life. Mr. Hawkes' "political role" at Bennett Jones was largely related to providing advice flowing from his knowledge and experience at the federal level. Bennett Jones was well endowed with people with more experience and involvement in Alberta politics.

89. Mr. Cuming told me that he did not really have an understanding about the political process and was unable to tell me whether in 2010 he understood that any discussion he had with Mr. Hawkes about political involvement was at the federal level.

90. In conclusion, I am not satisfied that Ms. Redford said in her discussion with Mr. Hawkes that ITRL was in the forefront of the matter. In any event, even if she did use those words, and I find that she did not, the "matter" at the time could not have been the competition for counsel to represent Alberta and the "we" that prefaced the words "are in the forefront of the matter" did not and could not have included JSS or Mr. Hawkes.

91. Mr. Cuming's email was not crafted with care or any real understanding of what he was communicating; it was a quickly dashed off note extolling what he understood as the virtues of a new potential partner to his government relations consultants and fellow ITRL members. His understanding was flawed.

92. There is one additional matter from Commissioner Wilkinson's Report that requires comment. In his December 4, 2013 Report, Commissioner Wilkinson included the following finding:

> [45] After the McLennan Ross/Field group left the ITRL consortium, Mr. Cuming needed the support of a firm with greater resources than his could marshal to join the consortium. He approached a partner at JSS Barristers with whom he was familiar to gauge their interest in joining the consortium. Mr. Cuming did not know at this time that Mr. Hawkes was a member of JSS Barristers. He was "shocked" when it came to his attention through events leading up to this investigation that there was a prior relationship between Mr. Hawkes and Premier Redford. Mr. Hawkes was not involved, in any way, in any of the discussions between JSS and other member of the ITRL consortium.

93. When I reviewed this, I noted that it appeared to be inconsistent with what Mr. Cuming had said in his email of April 16, 2010. Specifically, paragraph 45 of Commissioner Wilkinson's Report suggests that Mr. Cuming was "shocked" when it came to his attention in the course of the investigation by Commissioner Wilkinson that Mr. Hawkes was a member of JSS Barristers or had a prior relationship with Ms. Redford. Mr. Cuming was questioned on this point. His evidence was that:

a. He did not provide or was not asked to provide Commissioner Wilkinson with a statutory declaration. He was questioned quite informally over the phone.

b. He noted that the first two sentences of paragraph 45 of Commissioner Wilkinson's Report are accurate and would have reflected what he said.

c. He noted that his initial contact with the JSS Firm, which we now know occurred in January 2010, would have been a contact by email both with Mr. Shawa and Mr. Jensen.

d. He noted with respect to the third sentence of paragraph 45 that the reference to "at this time" was ambiguous. In 2013, Mr. Cuming knew that Mr. Hawkes was a member of JSS Barristers. He would not have said that he did not know Mr. Hawkes was a member of JSS. What he may have said was that he did not

personally know Mr. Hawkes before they met in April 2010. Therefore, any suggestion in the third sentence that Mr. Cuming did not know Mr. Hawkes was a member of JSS is incorrect. I find that either Mr. Cuming misunderstood the question in 2013 or the answer was misunderstood. As this was a telephone interview, I cannot determine which it was.

e. In relation to the sentence "he was "shocked" when it came to his attention through events leading up to this investigation that there was a prior relationship between Mr. Hawkes and Premier Redford" Mr. Cuming noted that again there was a temporal problem with this statement. The time that he was surprised to find that there was a prior relationship between Mr. Hawkes and Premier Redford was when he first met Mr. Hawkes on April 16, 2010. His response to a question may have been misconstrued or misunderstood in the interview in 2013.

94. In his evidence before me, Mr. Cuming was clear and cogent. I am satisfied that the variance between paragraph 45 of Commissioner Wilkinson's Report and the information contained in his April 16, 2010 email was a result of a misunderstanding of a question or of an answer in 2013. One must bear in mind that neither Mr. Cuming nor the interviewer had the April 16, 2010 email at the time of the 2013 interview.

THE CHANGE IN RECOMMENDATION BY THE REVIEW COMMITTEE IN DECEMBER 2010, AFTER A DRAFT FROM THE REVIEW COMMITTEE HAD BEEN SHARED WITH MR. HENWOOD REMOVING ITRL'S LAST PLACE DESIGNATION AND RESTORING ITRL AS AN OPTION

Cause for concern that led to the re-investigation

95. The fact that an initial draft briefing note ranked ITRL last and was then changed to include ITRL on an equal footing with the other two candidates, after a discussion between Mr. Sprague and Mr. Henwood, certainly raised concerns in my mind (as it no doubt raised concerns in the minds of many Albertans). Because of my initial concerns about the change in the draft briefing note, my re-investigation involved a detailed review of the development and execution of the process of selection of counsel to represent Alberta in tobacco litigation.

The departmental process leading to a recommendation to the Minister for external counsel to represent Alberta in litigation against the tobacco companies

96. The *Crown's Right of Recovery Act*, which passed in 2009, provided the foundation for litigation against tobacco companies by the Crown to recover health costs. The Minister behind this legislative initiative was the Minister of Health, Mr. Liepert, not Ms. Redford.

97. In practical terms to operationalize this legislation, there were 4 steps that needed to be taken:

a. The legislation was enabling—the Government had to decide to use the legislation to commence litigation.

b. The Government had to decide how to conduct the litigation—was it going to do it in-house (as Ontario had done) or was it going to use external counsel (as other provinces had done)?

c. If external counsel were going to be used, the Government needed a process to select those counsel, which would in turn involve 4 sub steps:

i. the Government had to decide how the external counsel was going to be paid—on an hourly basis or by contingency;

ii. the Government had to decide on a process for the identification of external counsel who were interested in and had the capability of representing Alberta;

iii. the Government had to conduct the process; and

iv. the Government had to make the selection of counsel.

d. If external counsel was to be compensated under a contingency fee agreement, the Government had to come to an agreement with the firm on the terms of that contingency agreement. (There is no suggestion that Ms. Redford had any involvement in the process of negotiating the contingency agreement at all. It was handled by officials. The substantive steps in relation to it occurred after Ms. Redford had resigned as Minister on February 16, 2011 to pursue the leadership of the PCAA. Therefore, I do not discuss this further in this Report.)

98. In the fall of 2010, the Government decided to proceed with tobacco litigation under the *Crown's Right of Recovery Act*. I understand the direction came from Cabinet. I do not know the precise date, but it preceded October 25, 2010. On October 25, 2010, Ms. Redford made a ministerial statement in the Legislative Assembly that the government would be initiating legal action to recover health care costs from the tobacco industry.

99. Mr. Sprague recommended to Ms. Redford that the Government should retain external counsel and do so on the basis of a contingency agreement. Ms. Redford accepted his recommendation. The factors behind this recommendation and decision were the time frame for the litigation, capacity issues for the Department of Justice, the volume of documents and the fact that the government had not been involved in an action of this sort before. (I note that Ms. Redford had independently formed the view that Alberta should not go the way Ontario had and try to pursue the litigation through an "in house" agency.) The individuals involved in this part of

the process, Mr. Sprague, Mr. Merryweather and Ms. Redford could not recall when this decision was made, but my sense is that it was relatively early and certainly the basic concept was firmly in Ms. Redford's mind no later than April 2010.

100. The process for the selection of external counsel to represent Alberta in tobacco recovery litigation was developed and directed by senior officials in the Department of Justice. It was the sort of process that one would expect to see in a major procurement of legal services in a unique and complex matter. The ultimate decision on the choice of counsel lay with the Minister, which was appropriate. I examined each step in the departmental process in detail as part of my re-investigation. In the next section, I will deal with the decision making process of Ms. Redford.

101. At its most elemental, the process involved senior and experienced lawyers within the Departments of Justice and Health, using their expertise to make recommendations to the Minister. I found no evidence whatsoever of any direction from

a. Ms. Redford, or

b. Mr. Henwood, the Minister's Executive Assistant, who was the key conduit between the Minister and the Department,

to favour ITRL in either the design of the process or the recommendations that flowed from it.

102. To the contrary, each of the senior lawyers involved expressly denied under oath that they had been instructed or directed by Ms. Redford or her staff to include or favour ITRL at any stage of the process. I found their evidence compelling. I had the opportunity to observe each member of the Review Committee being questioned in detail under oath. I was impressed by the experience, desire to serve Alberta and forthrightness of this group of senior legal counsel and civil servants.

103. Ms. Redford and Mr. Henwood also expressly denied both in statutory declarations and under oath in questioning that they had instructed or directed anyone to include or favour ITRL. I found their evidence credible.

104. In plain English, there was no evidence that the "fix was in" for ITRL in the process of developing a recommendation to the Minister. The ranking of ITRL last in the initial draft of the key briefing note and its re-emergence as a contender in the final version of the briefing note was not the result of any improper influence by the Minister or Mr. Henwood. It was a result of proper concerns of the senior officials on the Review Committee, and in particular Mr. Chamberlain from the Department of Health, who did not feel the first draft accurately and fully captured the concerns he had about conflicts and ability to work effectively with the Department

of Health. He was also concerned that the initial draft did not fully reflect the assessment of the Review Committee of the strengths and weaknesses of the various candidates.

105. For the purpose of understanding how I came to these conclusions, despite my initial concerns, it is important to go through a fairly detailed analysis of the departmental process.

106. In the ordinary course, where a retainer was expected to exceed $20,000.00, the Department of Justice would make a recommendation to the Minister, which would include relevant considerations including potential conflicts. The Minister ultimately approved the choice of counsel in all significant matters. The process was opaque and completely internal to the Minister and Department. This is understandable because the selection of legal counsel is a sensitive and legally privileged matter. It requires a nuanced decision that must be built on trust and confidence in the counsel who is going to act in a particular case for the Province.

107. On this file, Ms. Redford decided from inception that it was important to have a more rigorous and transparent process than routinely applied. She took this view because it was going to be the largest piece of litigation outside the oil and gas sector that the Province would ever be involved in, would take years, and was a monumental piece of litigation in terms of financial and policy implications. She gave the Department general direction to make sure that it developed a good process. This was proper and consistent with her role as a Minister.

108. Mr. Bodnarek, the Deputy Minister, directed Mr. Sprague, the ADM—Legal Services, to design a process for the selection of counsel to be provided to Ms. Redford. This was a logical delegation because Mr. Sprague was a senior lawyer and his job included retaining all external counsel in civil matters for the Government.

109. Mr. Sprague developed the process for the selection of counsel, together with Mr. Merryweather, the Executive Director of Legal Services, who is also a senior lawyer and official. Mr. Merryweather's involvement was logical. He was responsible for litigation services in Alberta and had also been involved in some of the early work in government on tobacco recovery litigation.

110. On October 23, 2010 Mr. Sprague prepared an email to Ms. Redford outlining a proposed expression of interest process. An expression of interest process avoided the rigidity of an RFP process, which was understandable in the context of selection of counsel where issues of trust and fit with the client departments, Health and Justice, were critical. In his proposed process, Mr. Sprague set out the timelines, specified that a contingency agreement would be the basis for the retainer, provided initial thoughts on the make-up of the Review Committee and set out general criteria that would be considered. He said that it was not going to be a mathematical evaluation but a more nuanced appraisal of factors. Following the Departmental review the

officials would make a recommendation to Ms. Redford. Ms. Redford approved the recommended process. There was nothing untoward in her doing so.

111. Mr. Sprague directed Mr. Merryweather to manage the process. At no point in the process did Mr. Merryweather have any contact with Ms. Redford or Mr. Henwood. Generally, Mr. Merryweather had few contacts with the "political side" of government.

112. Mr. Sprague's role was to ultimately provide advice to the Minister on the result of the process. He was accountable for the process. Mr. Merryweather provided Mr. Sprague with direct support on the file and handled the day-to-day logistics of the file.

113. Mr. Sprague selected the members of the Review Committee--Mr. Merryweather, Mr. Chamberlain and himself. Mr. Merryweather was his first choice to assist him on the file because he was responsible for the litigation group and had been involved in preparation of earlier briefings about tobacco recovery litigation. Mr. Chamberlain was included because he was the lead of the Alberta Health law team and this matter was absolutely central to Alberta Health. Mr. Chamberlain and Mr. Merryweather had been involved in the Government's contemplation of the possibility of tobacco litigation from early on. Mr. Chamberlain was a key participant in order to bring Alberta Health onside. Alberta Health was going to have a critical role in the document production process.

114. The Review Committee's role was to review and evaluate the proposals and assist Mr. Sprague with his responsibility in making an appropriate recommendation to the Minister. The ultimate recommendation would go, not from the Review Committee to the Minister, but from Mr. Sprague to the Minister. Formally it would go through the Deputy Minister to the Minister, but I find that in this case, Mr. Bodnarek, who was dealing with other pressing matters, had no substantive involvement in this file after tasking Mr. Sprague with developing a process on or about October 23, 2010.

115. On November 1, 2010, Mr. Merryweather invited a number of firms to respond to the Government's expression of interest process. The goal was to approach firms that had contacted the Government about being involved in tobacco litigation (which included the Bennett Jones Consortium, the Field/McLennan Consortium as well as ITRL), but also to reach out to other qualified firms that might be interested. About 10 firms were contacted. Firms were given until November 15, 2010 to respond.

116. On November 17, 2010, a briefing note was prepared by Mr. Merryweather for the Minister. It was formally routed through Mr. Sprague and Mr. Bodnarek. It described the process to date, identified the 4 firms/consortia that had responded by November 15, 2010 and set out the next steps in the process.

117. One firm was screened out based on the initial documentary review. Three consortia advanced to the interview stage—the Bennett Jones consortium, the Field/McLennan consortium and ITRL.

118. The Review Committee conducted interviews with the 3 consortia. Each interview was similar in structure and nature. The Review Committee met in early December to consider how to approach the task of comparing and contrasting the 3 candidates in order to give their best advice to the Minister.

119. I have carefully considered whether the fact that Mr. Hawkes was a partner in JSS could in any way have affected or influenced the deliberations or recommendation of the Review Committee. It did not and it could not have. Mr. Hawkes was not one of the lawyers featured in the ITRL proposal. Mr. Hawkes did not participate in the interview with the Review Committee. No one on the Review Committee knew who Mr. Hawkes was. No one knew that he had been married to Ms. Redford.

120. In fact, it was not widely known that Ms. Redford and Ms. Hawkes had been married. During questioning of Mr. Sprague, I learned that it was 2011 before he had first discovered in passing from someone that Ms. Redford and Mr. Hawkes had been married. He placed no significance on this information—he did not see any issue arising. Even her Executive Assistant, Mr. Henwood, did not know they had been married until she mentioned it to him informally, almost as a joke. I was not able to determine the timing of this, but it may have been after the Decision when they were campaigning together in her leadership run.

121. Mr. Sprague described the Review Committee's task as arduous because each of the consortia had interesting strengths and different weaknesses. The Review Committee found it a challenge to undertake a comparison. Mr. Sprague testified that "all three of the firms were very well qualified to take on the work" and that it was very difficult for the Review Committee to come to a conclusion. In their analysis, the Review Committee prepared a matrix in an effort to distinguish the firms but found that depending on how they weighted the factors that they had identified as important, they came up with different results. From Mr. Sprague's perspective they were struggling to come to a conclusion that would differentiate one firm from the other.

122. Following their meeting, Mr. Merryweather was given the task of preparing a draft briefing note to the Minister to reflect the Review Committee's deliberations.

123. Mr. Merryweather left the deliberations with a fixed view that the Review Committee had determined that all three consortia were capable of adequately conducting the litigation, that no one consortium stood out above the others but that ITRL had been ranked last because of their

lack of depth and lack of any presence in Edmonton. He prepared his initial draft briefing note for review by the other members of the Review Committee on that basis.

124. Mr. Chamberlain had a different view of the status of their deliberations. He said that while the draft briefing note was consistent with their discussion, "at this point we had not landed on final recommendations and I still had significant concerns about potential conflicts."

125. This initial draft briefing note, dated December 6, 2010, did not have an assigned AR # and was meant purely as a draft for consideration. In keeping with Mr. Merryweather's understanding of the Review Committee's conclusion it recommended that the Minister "select either the Bennett Jones or the Field McLennan consortium." In the body of the briefing note, Mr. Merryweather said:

> All three are capable of adequately conducting the litigation. No one consortium stood out above the others. However, after considerable discussion the Review Committee ranked international Tobacco Recovery Lawyers last, primarily due to their lack of depth and the lack of any presence in Edmonton.
>
> The Review Committee was unable to recommend one of the remaining two consortiums over the other. Both have unique strengths and weakness, and the decision really depends on what "package" is most appealing to Government.

126. There was then a summary of key strengths and weaknesses of the Bennett Jones Consortium and Field/McLennan Consortium in the body of the briefing note.

127. This focus on the Bennett Jones Consortium and the Field/McLennan Consortium in the recommendation must, of course, be read in the context of the overall draft of the briefing note, which

a. stated that "All three consortiums submitted excellent proposals and interviewed very well". It then listed 8 strengths that they all shared:

   • Clearly did their homework
   • Put together talented legal teams
   • Appreciate the need for a national strategy and are keen on working with the other provinces
   • Appreciate the need to be aggressive and the importance of having the right expert witnesses
   • Have experience with large litigation
   • Will conduct the litigation on a contingency fee basis, fronting all disbursements
   • Have a fairly good handle on our document production issues

• Are likely prepared to shave a point or two off their contingency fees, particularly once recovery exceeds a set amount

b. included a matrix in an appendix that was longer than the briefing note itself, identifying the strengths and weaknesses of all three candidates. This appendix revealed that the two bases identified for ranking ITRL last were just two of the many factors considered by the Review Committee. Even a casual reading of this matrix shows a number of significant areas where ITRL performed well—the lowest overall contingency fee, no conflicts at all, a willingness to work exclusively for Alberta.

128. In this initial draft briefing note, Mr. Merryweather identified "cons" for the other consortia, which would prove to be significant as Mr. Sprague and Mr. Chamberlain considered the draft. For the Bennett Jones Consortium there were "confidentiality and conflict issues representing multiple jurisdictions, and as they are already at the national table, they would not be bringing any new ideas to that table." Significantly, Mr. Merryweather noted Bennett Jones:

• Routinely represents the Canadian Medical Protective Association and is opposite the GoA [Government of Alberta] on a number of Health's Third Party Liability (TPL) files. Even assuming these can be "walled off', there may still be issues in that they would now be working with the same people in Health who currently oppose them on the TPL files.

• Do not appear to have put a great deal of thought into a "made in Alberta" litigation plan.

129. For the Field/McLennan Consortium, he noted in the matrix "May face (likely unsuccessful challenge) from Tobacco to be removed due to conflict of interest."

130. On December 6, 2010, Mr. Merryweather sent the initial draft briefing note to Mr. Sprague and Mr. Chamberlain for comments. He noted "notwithstanding a fair bit of weekend mulling, I still don't favour one consortium over the other." In this regard, he was referring to the Bennett Jones Consortium and Field/McLennan Consortium.

131. Mr. Sprague responded very quickly suggesting minor editorial changes but not suggesting any changes to the recommendation or the statement that ITRL was ranked last. Mr. Chamberlain responded a little over an hour later, raising two slightly more substantive points, concluding "I am ok with the information and recommendation." Mr. Sprague responded quickly "agree with both comments—[Lorne] can we repair."

132. Mr. Merryweather promptly provided them with a new draft, with tracked changes. Mr. Merryweather sent the draft to his assistant, Ms. Fuchinsky, asking her to format it, but

concluding “don’t put it on ARTS yet.” (ARTS, the Action Request Tracking System, is the government action request tracking system.) Although this may seem odd to an outsider, it was not to the officials involved and did not raise any concerns. Mr. Sprague said it was “just another recut to get looked at again”—to this point he had just made editorial changes, which were “not reflective of great reflection on his part.” Mr. Chamberlain said this type of briefing note would not be uploaded to ARTS until it was final. Mr. Merryweather knew that it would be less cumbersome to make changes before it was in ARTS. He anticipated that there might be more changes and he knew that the final call on the content and timing of the briefing note lay with Mr. Sprague, not him.

133. As instructed, Ms. Fuchinsky cleaned up the draft and sent it back to Mr. Merryweather (now with an AR #39999).

134. At 1.50 p.m., the following day, December 7, 2010, Ms. Fuchinsky sent the draft briefing note to Mr. Henwood noting “it has not been uploaded to ARTS.” Her email was copied to Mr. Sprague, Mr. Merryweather and Ms. Christensen, another assistant in the Department. It was not copied to Mr. Chamberlain.

135. There was nothing unusual about providing a draft briefing note to an Executive Assistant. It was common practice in the Government to “run stuff up” to Executive Assistants (or Chiefs of Staff as they were subsequently known) to get comments on it or to see if the officials were doing what was required by the responsible Cabinet Minister.

136. At 3.39 p.m. on December 7, 2010, Mr. Merryweather sent an email with the latest version of the briefing note to Mr. Sprague and Mr. Chamberlain and asked if it was “Okay to upload?” to ARTS. Mr. Chamberlain responded at 6.05 p.m. “I am okay, leave to Grant for final call.” Mr. Sprague does not appear to have responded to the 3.39 p.m. email from Mr. Merryweather.

137. Although Mr. Chamberlain indicated approval of the 3.39 p.m. draft, he was still stewing over conflicts involving each of firms in each of the other two consortia that concerned him. He was concerned about Bennett Jones and McLennan Ross having access to financial information and systems for the purposes of assessing and supporting the damages claim in the tobacco litigation because those two firms were adverse to the Government on other files where that information could be useful.

138. Mr. Sprague and Mr. Henwood spoke everyday on a variety of files that the Department felt the Minister or her Office should be aware of. There was nothing unusual about them speaking on this file. Mr. Sprague and Mr. Henwood spoke about the draft briefing note. Mr. Sprague was still struggling with trying to “winnow out the firms and say this one is better than

that one." Mr. Sprague asked Mr. Henwood if the draft briefing note was the sort of thing the Minister was looking for—whether she wanted a specific recommendation or a list showing the strengths and weaknesses of each. While initially Mr. Henwood had no specific recollection of the details of the discussion, he was able to recall more after seeing the drafts of the briefing note.

139. Mr. Henwood recalls that he told Mr. Sprague that the draft briefing note was not what the Minister would have wanted. Mr. Henwood thought that the officials had "half assed" it because they neither made a specific recommendation of a firm nor gave the Minister the flexibility to choose among the three. His recollection of what the Minister wanted was the pros and cons of each firm. Mr. Henwood was also concerned that one of the criteria the Review Committee had identified as a basis for ranking ITRL last—the fact that they did not have a "presence in Edmonton"—would get his head taken off if he took that to a Minister from outside Edmonton. He said that he had worked for Ministers from Peace River, Red Deer and Calgary and that

> That's not a good reason to take to a Minister from Calgary or a Minister from Peace River or a Minister from Red Deer and say, Oh, a firm from your home town doesn't qualify because they don't have a strong enough presence in Edmonton.
>
> …. Like, that's crazy. I would get my head taken off if I take that to the Minister.

140. Mr. Henwood has no recollection of showing the draft briefing note to Ms. Redford or discussing it with her. Ms. Redford testified that she was not made aware at any time before she made the Decision that ITRL had been ranked last or that a copy of the draft briefing note had been provided to Mr. Henwood. Mr. Sprague testified that: "I can be unequivocal in saying, at no time did anyone tell me that ITRL was a favoured client, a special firm. I never received any direction like that at all."

141. Mr. Sprague called Mr. Chamberlain after his call with Mr. Henwood.[11] Mr. Sprague recalls conveying that he had been questioned about why the briefing note did not include all three consortia. Mr. Chamberlain recalls that Mr. Sprague told him that he had been asked about ITRL. In the context of the discussion between Mr. Sprague and Mr. Henwood described above, I do not read anything into their differing recollections more than 6 years after the event.

142. Mr. Sprague did not specifically ask Mr. Chamberlain to do anything. However, Mr. Chamberlain undertook a further more searching review of the draft briefing note and realized

[11] Neither Mr. Sprague nor Mr. Chamberlain had an independent recollection of when they spoke. Their discussion triggered Mr. Chamberlain to reconsider his support for the recommendation in the draft Briefing Note. Therefore it was clearly after 6.05 p.m. when Mr. Chamberlain was still expressing concurrence with the initial draft briefing note.

that from his perspective the draft briefing note did not fairly represent the Review Committee's assessment. He deposed:

> I recommended changes after realizing the briefing note did not fairly represent our assessment. Following interviews of the proponents the committee discussed the merits of each and determined that they were all capable of carrying out the litigation. As selection was ultimately in the discretion of the Minister the Request for Proposals did not contain any evaluation criteria. We decided to make one up to see if we could differentiate between the proponents in order to provide some guidance for the Minister. We identified a number of criteria and scored each proponent against them. The results were not conclusive, very subjective and provided little to inform a decision. We then did a weighted assessment. We identified what we considered to be more important criteria. We used the same scoring but gave each of the more important criteria a larger weight. We used a number of different weightings to emphasis what we considered were the more important criteria. This resulted in a number of different scores depending on the criteria emphasized and identified the Bennet Jones consortium as being a good choice if experience was the primary factor and the Field/McLennan consortium as being a good choice if an Alberta focus was the primary factor. I believe this was the basis of the first draft briefing note.

143. He then reflected on how they had handled ITRL and:

> ….realized that we were relying on the weighted assessment to describe the strengths of two of the consortia but had not done the same for ITR. On each of the weighted scorings ITR finished second. On both the experience and Alberta focus weightings they were second while the other two firms flipped from first to last. My conclusion was that if both factors were considered important by the Minister that ITR could be considered a reasonable compromise. I was concerned that the draft briefing note was not only inaccurate but also unfairly suggested ITR was last, when in fact they were second on all of the weighted scorings.

144. Mr. Chamberlain contacted Mr. Sprague with his concerns. Mr. Sprague agreed and they worked on language that Mr. Chamberlain felt was a fairer reflection of their assessment while still reflecting the pros and cons for each proponent.

145. On the morning of December 8, 2010, Mr. Sprague called Mr. Merryweather and left a message on his phone. Mr. Sprague directed Mr. Merryweather to change the briefing note so that it reflected the changes that Mr. Sprague and Mr. Chamberlain had worked out. Mr. Sprague followed it up with an email on December 8, 2010 asking if his message got through.

146. At this point, Mr. Merryweather was not a part of or kept informed of the discussions between Mr. Sprague and Mr. Henwood or the discussions between Mr. Sprague and Mr. Chamberlain. Mr. Merryweather responded, with some annoyance, that he had received the

message but expressed concern about the removal of the sentence referencing the last place ranking of ITRL:

> But removing that sentence would suggest the third consortium is on the same footing as the other two, which is not the conclusion the Review Committee came to. So the BN [briefing note] would not be accurate and M [Minister] would be missing a valuable piece of information.

147. Mr. Sprague responded: "I think she gets it—once done can we send into the system." In response to an interrogatory Mr. Sprague said that it was a typo on his phone—he should have typed "she will get it." When questioned on phrase he had chosen, he testified that at this point he had not discussed the briefing note with the Minister. His email response had reflected some irritation at Mr. Merryweather. Mr. Sprague noted that he was trying to get this completed because Government needed to make a decision and that he just wanted Mr. Merryweather, who had not been party to his discussions with Mr. Henwood and Mr. Chamberlain, to make his changes. He said: "these two points, while are not utterly irrelevant, in my mind, weren't hidden facets that the Minister of Justice wouldn't comprehend that JSS is a slightly smaller firm and doesn't have an Edmonton presence." A review of the final briefing note reveals that those were factors that remained present in it—they just ceased being factors that resulted in a "last place" ranking.

148. Mr. Merryweather then prepared a draft with the revised wording which comprised the following:

a. the recommendation was now for the "Minister to select the appropriate consortium"

b. the paragraph that "ranked ITRL" last was amended by changing the last sentence from:

> All three are capable of adequately conducting the litigation. No one consortium stood out above the others. <u>However, after considerable discussion the Review Committee ranked International Tobacco Recovery last primarily due to their lack of depth and the lack of any presence in Edmonton.</u>

To:

> All three are capable of adequately conducting the litigation. No one consortium stood out above the others. <u>All three consortiums have unique strengths and weakness, and the decision really depends on what "package" is most appealing to Government.</u>

c. A new heading and paragraph was added:

> **International Tobacco Recovery Lawyers**
> This consortium does not have the depth or the experience the other two have, nor does it have any presence in Edmonton, where almost all of the documents will be located. On the positive side, their proposed contingency fee is the lowest of the three, and they are not seeking any compensation related to the nonmonetary part of a settlement.
> (Emphasis added)

149. It is noteworthy that the new paragraph makes the points about lack of depth and experience and the absence of a presence in Edmonton, but leaves it to the Minister to assess how to weight those factors amidst the numerous other factors considered in the note and especially the accompanying appendix.

150. Other than these changes, briefing note AR 39999 remained substantially unchanged from the edited draft of 1.50 p.m. of December 7, 2010. Mr. Merryweather directed that the final version be uploaded to ARTS at 11.45 a.m. December 8, 2010.

THE MINISTER'S DECISION

151. After Briefing Note AR 39999 was finalized, Ms. Redford was required to choose.

152. I tried to understand the process through which briefing notes would get to her and how she would make decisions. Briefing notes to Ms. Redford would generally be put in a "pouch" that would go from the Deputy Minister's office to her office. A number of pouches might be sent over on any particular day. A staff member in the Minister's office would put the briefing notes on the Minister's desk. Ms. Redford would deal with them when she found some time in a day.

153. In relation to Briefing Note, AR 39999, no one can recall how it actually found its way to Ms. Redford's desk. It was probably placed in a file with numerous other briefing notes and memos; although it is possible that it was handed to her by an official. If that occurred, it would most likely have been Mr. Sprague, as he would have been the one in most regular contact with her from the Civil side of Alberta Justice. Ms. Redford had little facility with computers and would rely on paper documents provided to her by her staff or officials.

154. From a timing perspective, there is a version of the Briefing Note in the ARTS system dated December 8, 2010, so I have concluded that it was provided to Ms. Redford on or after December 8, 2010. The version of AR 39999 that she reviewed after December 8, 2010 was not dated, but was identical to the December 8, 2010 version. The version she had was not signed by

either Mr. Sprague or Mr. Bodnarek. Although the usual practice would have been to have them sign off on it before it was provided to her, when questioned, neither official nor Ms. Redford raised any concern with me about the absence of their signatures on it.

155. Ms. Redford's evidence was that after she received the briefing note, she vaguely recalled that she may have discussed the matter with Mr. Sprague.

156. Ms. Redford initially signalled her decision by writing "ITRL" on her copy of Briefing Note AR 39999 and signing it. She had gone through the attached chart and her view was that ITRL was the best choice to begin negotiations with. She handed it to someone in her staff. A memorandum was then prepared to memorialize her decision, most likely by someone in the department.

157. No one was able to recall who prepared the memorandum dated December 14, 2010. The memorandum reads:

> Thank you for preparing briefing note AR 39999 regarding Tobacco Litigation. I note that the Review Committee considers all three firms interviewed to be capable of adequately conducting the litigation and believes that while no consortium stood above the others, all three have unique strengths and weaknesses.
>
> Considering the perceived conflicts of interest, actual conflicts of interest, the structure of the contingency arrangement and the importance of a "made in Alberta" litigation plan, the best choice for Alberta will be the International Tobacco Recovery Lawyers.

Ms. Redford does not have an actual recollection of signing the Memorandum. Her general practice was to sign memoranda on or about the dates they were dated. It is unclear to me whether the December 14 memorandum bears her actual signature or an electronic version.

158. Although Commissioner Wilkinson's investigation and this re-investigation have focussed on the details of every aspect of this process, Ms. Redford's Decision needs to be considered in context. This was not the only or main item that she was dealing with in mid-December 2010. She testified:

> I can't tell you what they were, but there were major items every day, in addition to whatever the regular schedule was. So I know that there has been six years of salacious speculation about all of these events. This really was just a part of my day-to-day work.

And

> … my role in them [these sorts of documents] was that I would walk into my office at some late time at night or first thing in the morning.

> There would be a pile of documents on my desk; I would deal with them to the best of my ability. If I had questions, I would ask those questions. I would hand them back to somebody, and the world would proceed. And when I got back that night, there would be another pile of documents on my desk.

159. In her evidence before me, Ms. Redford described her rationale for selecting ITRL, which had nothing to do with Mr. Hawkes or JSS. She had strong views about the factors that made ITRL her preferred choice. It was especially important to her for Alberta to have counsel that "was independent and only serving the people of Alberta and not involved in serving more than one client" in the pending tobacco litigation. She did not want the firm that represented Alberta to have "split loyalties" in acting for multiple other provinces. She was also concerned about potential and actual conflicts of interest posed by the Bennett Jones Consortium representing other provinces and representing the CMPA (in litigation against Health). She was concerned that a partner in the Field/McLennan Consortium had done work for one of the proposed defendants. This was a concern for her because based on the history of tobacco litigation elsewhere, it could lead to a multi-year fight with rounds of appeals by the tobacco companies to have counsel representing Alberta removed from the file. She was also concerned about the impact on the treasury of the litigation.

160. She did not have Mr. Hawkes in mind when she made the decision:

> … he was simply a lawyer in Calgary, anyone who lived in a legal world or a political world understood completely that the fact that I had been married to that person had nothing to do with anything I ever did in my personal life or my professional life and that the relationship that I had with that person was no different than a relationship that I would have had with, you know, as I said in my original transcript, with Mike Casey [a lawyer with Field that she had discussed in her interview with Commissioner Wilkinson]…..

161. She said, when she testified before me:

> I mean ultimately at the end of the day, I did what I thought was best as justice minister. I made a decision, I made it a transparent process. That's one of the reasons that I think there was so much public information available at the time, and that's why it was a political issue. And that's how it started, and people can't let go of it because it's just too good a political issue.

162. To her recollection, the last thing she did on this file was sign off on the December 14, 2010 memorandum. She left for a family holiday in India for the last two weeks of December and first week of January. During that holiday, she had limited if any contact with her office and certainly had no contact in relation to the tobacco file.

163. On December 21, 2010, Grant Sprague told Mr. Merryweather that the official word about the "winner" was on his desk. Letters were prepared to send to the unsuccessful consortia. After consulting with the communications division of the Department and Mr. Henwood, Mr. Sprague called Mr. Jensen at JSS on December 22, 2010 to advise him that ITRL was the successful consortium.

THE EMAIL EXCHANGE BETWEEN MS. CRAIG AND MR. HENWOOD AFTER THE DECISION ABOUT AR 40168 AND THE RESULTING MEMORANDUM FROM THE DEPUTY MINISTER TO MS. REDFORD DATED JANUARY 5, 2011

Cause for Concern that led to the Re-Investigation

164. Ms. Redford's December 14, 2010 memorandum is clear—it states:

> Considering the perceived conflicts of interest, actual conflicts of interest, the structure of the contingency arrangement and the importance of a "made in Alberta" litigation plan, the best choice for Alberta will be the International Tobacco Recovery Lawyers."

It contains no question or vacillation about the decision.

165. In view of this, beginning on December 28, 2010, there is an odd set of communications between a Justice Department lawyer, Renée Craig, who was handling this matter over the Christmas break along with other duties that she had, and Mr. Henwood. On December 28, 2010, Ms. Craig emailed Mr. Henwood to say:

> When I talked with Ray on Thursday, he had reviewed the correspondence regarding the above AR. The memo for Ray's signature provided latitude regarding any of the choices. The memo that the Minister sent, however, was framed differently, seeking confirmation of a "best choice".

166. Mr. Henwood and Ms. Craig arranged to speak the following day. After they spoke, Ms. Craig sent an email to an assistant in the Department of Justice, Laura Cline (who was covering for the ARTS Coordinator, Margaret Dallimore) that said:

> As discussed, Jeff will get the Minister's memo changed so that the final sentence, a question seeking confirmation of the "best choice" is deleted. He has asked that the responsive memo from Ray to the Minister get signed off this week, and has asked for an addition of wording to the effect of:
> 'Therefore, based on the criteria, the International Tobacco Recovery Lawyers would be capable of adequately representing Alberta's interest.'
> Would you please send the memo back to Legal Services Division, and seek their revision to incorporate wording to this effect? I do understand there has been sensitivity regarding the wording, so please let me know if there are any questions.

167. I have not seen, nor have I been able to find any memo from Ms. Redford "seeking confirmation of the 'best choice'." I have seen a memorandum from Mr. Bodnarek, signed on his behalf by Mr. Sprague dated January 5, 2011, that includes the words "Therefore, based on the criteria, the International Tobacco Recovery Lawyers would be capable of adequately representing Alberta's interest."

168. This left me suspicious—what other memorandum from the Minister was extant in late December 2010 that was changed to remove a "final sentence seeking confirmation of best choice" and what was the sensitivity regarding the wording that led to the call for changes to the memorandums for the Deputy Minister and the Minister. As a result, I made a detailed examination of the documents that were available to me and had questions about this exchange put to Ms. Redford, Mr. Bodnarek, Mr. Sprague, Ms. Mason, Ms. Craig, Mr. Henwood, Ms. Dallimore, and Ms. Cline.

What I learned about the email exchange

169. Ms. Redford knew nothing of the email exchange and had nothing to do with it. Her last involvement on the file was making the Decision. She had no recollection of seeing any memorandum from the Deputy Minister dated January 5, 2011 and had no understanding why he might have wanted to respond to her memorandum of December 14, 2010, which was clear. She said:

> I have no recollection of this. I have no recollection if I would have received things like this. I don't know if I ever read this. I don't know if every time I wrote a memo to the Department, the Deputy Minister wrote me a memo back and someone in my office looked at it and sent it back to the department, I have no idea.

170. The documents show me that:

a. On December 21, 2010, the die was cast with respect to the Decision. Draft documents were being prepared to send to the unsuccessful candidates and a decision was made that it was "safe to notify the "successful" firm that [Mr. Sprague] will be approaching them to negotiate a contingency agreement with them". Mr. Sprague had formal confirmation of the Decision. Mr. Merryweather asked Mr. Sprague in an email dated December 21, 2010 "When will we be getting official word as to who the winner is?" Sprague responded saying "jss – word is on my desk (or Karen's [Christensen] desk)".

b. However, Mr. Sprague goes on to say "Barb [Mason] note there is a memo from Ray to min that ray [Bodnarek] should sign".

c. There is an Action Request cover sheet for AR 40168. This Action Request was received December 21, 2010 with an original due date of December 23. The

action requested is “Draft for Deputy Minister’s Signature” and the description is “Memo from Minister re AR 39999”.

d. The tracking system in the action request cover sheet states that Barb Mason, acting ADM [for Grant Sprague] has reviewed/approved. I take from this that by December 22, 2010 there was a memo from the Minister re AR 39999 and there was a draft response for the Deputy Minister’s signature signed off by Ms. Mason.

e. The tracking sheet shows “MD Dec. 23 – not signed; given to Renée Craig to discuss with Deputy.” On Thursday December 23, 2010, Mr. Bodnarek and Ms. Craig spoke about AR 40168 and the memorandum that had been prepared for his signature. Mr. Bodnarek did not sign it. A description of the discussion between Mr. Bodnarek and Ms. Craig can be found in an email from December 28, 2010 where Ms. Craig explained to Mr. Henwood “When I talked with Ray on Thursday, he had reviewed the correspondence regarding the above AR. The memo for Ray’s signature provided latitude regarding any of the choices. The memo that the Minister sent, however, was framed differently, seeking confirmation of a “best choice”.”

f. As noted above, Ms. Craig emailed Mr. Henwood on December 28, 2010. In addition to the paragraph described above, she said “I will phone tomorrow to see what was intended.”

g. Mr. Henwood responded on December 29, 2010 saying “I reviewed the draft memo from Ray to the Minster. I’m at McDougall today so please call me on my cell [] when you have a chance.” That email was 8:53am on December 29, 2010. At 11:53am, Ms. Craig emailed an assistant in the Department of Justice, Laura Cline. She said:

> As discussed, Jeff will get the Minister’s memo changed so that the final sentence, a question seeking confirmation of the “best choice” is deleted. He has asked that the responsive memo from Ray to the Minister get signed off this week, and has asked for an addition of wording to the effect of: ‘Therefore, based on the criteria, the International Tobacco Recovery Lawyers would be capable of adequately representing Alberta’s interest.’ Would you please send the memo back to Legal Services Division, and seek their revision to incorporate wording to this effect? I do understand there has been sensitivity regarding the wording, so please let me know if there are any questions.

h. The Action Request cover sheet says:

> Dec. 29 – see new instructions scanned & attached. LMC.
> Dec 30/10 – Memo revised and approved verbally by Grant Sprague. Please Review.
> Dec. 30 – reviewed; please package. LMC

…

Dec 30 – revised memo dated Dec. 30/10 submitted for Deputy's signature. MD

i. There was a memorandum dated January 5, 2011 addressed from Ray Bodnarek to the Honourable Alison Redford. The memorandum was signed by Mr. Sprague acting as Mr. Bodnarek's delegate, not Mr. Bodnarek. Mr. Bodnarek has no recollection of having anything to do with it. The memorandum included the line as contemplated by Ms. Craig's memorandum "Therefore, based on the criteria, the International Tobacco Recovery Lawyers would be capable of adequately representing Alberta's interest."

171. None of the above would have changed the fact that JSS or ITRL had been selected as the candidate with whom the Alberta Government was going to negotiate exclusively for the purposes of entering into a retainer agreement. However, it poses questions about why Mr. Henwood of the Minister's office and officials in the Department were discussing and changing a memorandum in relation to AR 39999.

172. Despite significant efforts on my part, I was unable to obtain any other document with reference to AR 39999 that could be construed as a "memorandum from the Minister" that had any sort of question on it. It is possible to infer either that:

a. there was another memorandum from the Minister that included a question, or

b. that there was another version of the December 14, 2010 memorandum, not in the form which I have seen, and that included a question at the end of it "seeking confirmation of the best choice."

173. Despite my efforts to obtain more information about the chain of communications described above and despite careful questioning in respect of it, I was unable to obtain any clarification. None of the officials involved had any recollection that could assist me. From their demeanor and approach and willingness to address this, I draw no adverse inference against them. After the passage of time, they simply have no memory of this. I attempted to understand why this occurred because it is in every respect a "loose thread".

174. Today, I still have no information that helps me understand:

a. Why the Deputy Minister would need to prepare a responsive memorandum to the only direction I have seen, the clear and definitive memorandum dated December 14, 2010 from Ms. Redford?

b. What the contents of the memo from the Minister referenced in AR 40168 said and why Ms. Craig said there was a "question seeking confirmation of best choice"?

c. What the "sensitivity about wording" was that motivated the changes contemplated in Ms. Craig's email?

175. In all of this however, one thing is clear – Ms. Redford had nothing to do with the file after she made her Decision. And although I am not perfectly clear on precisely when she made the Decision between December 8, 2010 and her departure for India (approximately December 17 or 18, 2010), her Decision was definitely final on December 22, 2010 when Mr. Sprague advised Mr. Jensen that ITRL was the successful consortium.

176. Therefore, even if officials from her office and officials from the Department were debating the nuances of official memoranda, I cannot find anything linking that to her. It cannot therefore be suggestive of any impropriety on her part. Before this series of internal government communications began, the decision had been communicated to the successful party and letters had been prepared to send to the unsuccessful parties. During the time these opaque communications were going back and forth, Ms. Redford was travelling outside Canada with family and friends on a personal vacation, without ready access to cell phone coverage. There was no evidence available to me that she had anything to do with these communications. It is a disconcerting loose thread, but it does not lead back to Ms. Redford.

WHETHER THERE WAS ANY OTHER EVIDENCE TO SUGGEST MS. REDFORD HAD IMPROPERLY FURTHERED ANOTHER PERSON'S INTEREST

177. The tobacco file was the subject of considerable lobbying, not only at the Ministerial level but also the departmental level. The lobbying included not only lawyers but also anti-smoking interest groups keen to have the government undertake litigation. Lobbying is a lawful activity so long as the individual doing the lobbying acts within the boundaries of the law and, where required under the *Lobbyist Act*, registers and makes the required disclosure.

178. ITRL, through Mr. Wade, was lobbying for the government to sue tobacco, use external counsel, and choose that external counsel through a competition (rather than the usual internal process).

179. I examined the role of Mr. Wade and found that he conducted a low key lobby that focused on trying to provide the Minister, her staff, and officials with information about developments in tobacco litigation elsewhere and information that he thought might encourage litigation against tobacco companies. He arranged a meeting with Mr. Sprague in 2009 (while

Field/McLennan Ross were still part of the consortium). It was to allow the American counsel to explain how the litigation was conducted and settlement achieved in the US. In July 2010, he managed to arrange to have Ms. Redford drop by a dinner at a Calgary Restaurant to meet briefly with the American counsel for ITRL. She dropped by for 5 or 10 minutes and spoke with one of the American counsel about the American experience. Before October 25, 2010, Ms. Redford asked him for a comment on a draft ministerial statement. When he responded, he made no reference to ITRL and his comments related to messaging generally. It was unclear whether his response even made it from her staff to her.

180. I found no evidence that Mr. Wade's efforts had any particular impact on Ms. Redford, who was gathering information from a variety of sources in the lead up to the Decision she would make, including most importantly, her Department and the Department of Health, Ministers from other provinces, and conversations and contacts with interest groups and individuals. Ms. Redford relished her role as Minister of Justice and Attorney General and actively sought out input and received input on all aspects of her mandate from a wide variety of individuals. Mr. Wade was only one source of information and did not have any inordinate effect on her.

CONCLUSION

181. This re-investigation arose in large measure because Mr. Iacobucci reviewed the more fulsome documentary record and had questions. His questions are central in the assessment of whether there was evidence that could support a finding that Ms. Redford used her office or power to improperly further another person's private. Although I have addressed the substance of each of these questions in the course of preparing the report, it is useful to summarily state the answers here.[12]

(1) Did Ms. Redford tell Mr. Hawkes that the ITRL consortium was in the "forefront" of the tobacco matter, and, if so, what did she mean?

No. Ms. Redford spoke with Mr. Hawkes in April 2010; however, the evidence is clear that she did not suggest any preference for ITRL. Further, when they spoke JSS was not part of the ITRL consortium which would belie any suggestion of a preference for ITRL because of Mr. Hawkes.

[12]I have reordered and condensed questions 8-10 for clearer understanding and to eliminate overlap.

(2) Was Ms. Redford aware of the Review Committee's initial ranking of the ITRL consortium and recommendation that one of the consortiums other than ITRL be selected?

No.

(3) Was Ms. Redford aware of the fact that a draft of AR 39999 had been provided to a member of her staff?

No.

(4) Why were revisions made to the draft of AR 39999 to change the recommendation that retaining ITRL not be considered further?

The process of identifying a preferred candidate was challenging for the Review Committee as each of them had strengths and weaknesses. Even though initial drafts provided two options for the Minister (and ranked ITRL last), Mr. Sprague continued to struggle with the recommendation in his own mind. The draft was sent to Mr. Henwood who suggested that the Briefing Note simply provide Ms. Redford with the information about all 3 options and let her decide.

Mr. Henwood was not in any way motivated by the fact that Mr. Hawkes was part of ITRL. Indeed, he may not even have known at the time that Mr. Hawkes had ever been married to Ms. Redford or knew her. He certainly had no direction from Ms. Redford to favour ITRL or to ensure that they were included as an option in the briefing note. Mr. Henwood felt the recommendation that had 2 of the 3 viable candidates listed as options "half assed it" because it neither provided a clear recommendation to the Minister nor the full scope of options. He was also concerned that the recommendation listing ITRL last was based in part on the factor that they did not have an Edmonton presence and that would not sit well with a Cabinet Minister from outside Edmonton. He knew this from his experience in working with a variety of Cabinet Ministers from outside Edmonton.

The real driving force for the substantive change to the briefing note actually came from Mr. Chamberlain, the representative of the Minister of Health on the Review Committee, who was concerned that conflicts and potential conflicts with Bennett Jones would undermine the critical working relationship required with Health on the file. Once the discussion between Mr. Sprague and Mr. Henwood had opened up the possibility for further review, he realized that the Review Committee had treated ITRL unfairly because when the Committee applied weightings to their scoring, ITRL ranked second, not last. Depending how the weightings were applied, the Bennett Jones Consortium and Field/McLennan Consortium

flipped from first to last. He realized that depending on what factors mattered to the Minister, ITRL could be a good compromise candidate. He and Mr. Sprague worked on redrafting the briefing note.

Ms. Redford had nothing to do with the decision to amend the briefing note or the content of the amended briefing note.

(5) Did Ms. Redford instruct or direct Mr. Henwood or any other person concerning a preferred outcome of the Review Committee's work, or the substance of briefing note AR 39999?

No.

(6) Was Ms. Redford aware of any discussions between members of her staff and members of the Review Committee in connection with the Review Committee's recommendation?

No

(7) Was Ms. Redford aware of the communications involving Ms. Craig in connection with the Deputy Minister's memorandum?

No.

(8) What was the rationale for the Deputy Minister's memorandum?
(9) What was the nature of the "sensitivity" regarding the wording of the Deputy Minister's memorandum, to which Ms. Craig referred in her email?
(10) What was the rationale for the changes contemplated by Ms. Craig's email?

I have been unable to determine what the rationale for the Deputy Minister's memorandum was, what the "sensitivity" was and what the "rationale for the changes" was.

All memories of the officials about it have faded and no clarifying documentation was available to me.

However, all communication in relation to this memorandum occurred after Ms. Redford had made her Decision, after she had left the country for a family vacation and after ITRL was notified that they were the successful candidate. Ms. Redford had nothing to do with the file after she selected ITRL in mid-December.

182. It was necessary to clear the air. In the course of what has been a long and painstaking review, I have given this matter the very best consideration I can, after carefully analyzing the entire body of evidence and information provided to me and considering a variety of concerns

that flowed from the information that was not available to Commissioner Wilkinson. I can assure Albertans that I am very sure that the result is correct and that this unfortunate chapter can safely be considered to be at an end.

183. The existence of this re-investigation has received broad public attention in Alberta. The allegations spurred by the leaked documents, understandably, galvanized citizen attention. Aside from the extensive information that I have received from the Government and through questioning of witness, no individual has come forward with new information. If any individual or organization outside Government possessed any additional information, I would have expected them to provide it. There can surely be no valid reason for any new information to have been withheld by anyone and I assume, therefore, that all of this story has now been told.

FINDING

184. I find no breach of the *Conflicts of Interest Act.*

Paul D.K. Fraser, Q.C.
Acting Ethics Commissioner

Acknowledgement

I want to record my thanks to William W. Shores, Q.C. whose assistance as my counsel was invaluable; and to Ms. Carmen Kohlman, who acted as our administrative coordinator.