

Exhibit Number: 2

This exhibit is a petition, which contains several pages of Montanans' addresses and signatures. The petition exceeds the maximum number of pages for scanning. Four pages have been scanned for your research. The original exhibit is on file at the Montana Historical Society and may be viewed there.

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE THE SELECTION OF A FIFTH MEMBER)
TO THE MONTANA DISTRICTING) ORDER
AND APPORTIONMENT COMMISSION)

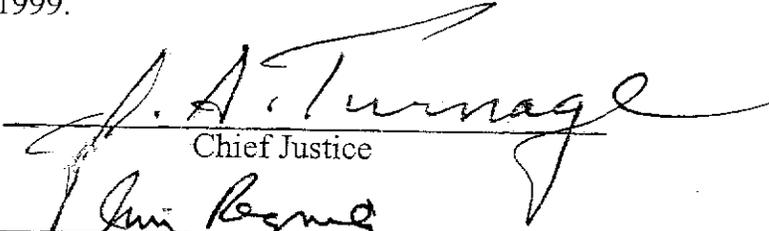
On April 21, 1999, Joe Lamson, Sheila Rice, Elaine Sliter, and Jack Rehberg, members of the Montana Districting and Apportionment Commission informed the Court by letter that they had been unable to select the fifth member and presiding officer of the Commission within the time allowed under Article V, Section 14(2) of the Montana Constitution and Section 5-1-102(1), MCA.

Under Article V, Section 14(2) of the Montana Constitution and § 5-1-102(1), MCA, if the first four designated members of the Commission fail to select the fifth member within the time prescribed, a majority of the Montana Supreme Court shall select the fifth member.

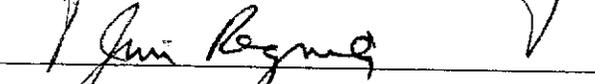
The Court having now considered various recommendations,

IT IS ORDERED that Dr. Janine Pease-Pretty On Top is selected as the fifth member and presiding officer of the Montana Districting and Apportionment Commission.

DATED this 3RD day of ~~July~~ ^{August}, 1999.



Chief Justice

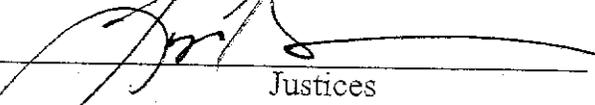












Justices

FILED

AUG 03 1999


CLERK OF SUPREME COURT
STATE OF MONTANA

Justice James C. Nelson specially concurs and dissents.

Introduction

I concur with this Court's appointment of Dr. Janine Pease-Pretty On Top to be the fifth member and chairperson of the reapportionment commission. I strongly dissent, however, from the manner in which we have exercised our power of appointment under Article V, Section 14(2) of the Montana Constitution. This entire process of appointment, including all of this Court's deliberations on this matter, should have been open to the public.

In this regard, and as pointed out by the specially concurring Justices, my dissent does not arise from a ruling by this Court in response to an original proceeding or suit to open to the public our deliberations on this matter. Rather, the genesis of my disagreement is the 5-2 rejection of my motion, made before we began our discussions on this appointment, that we conduct our deliberations and make our decision on this particular matter in open sessions. As noted, the more conventional route for raising this issue would have been an adversary proceeding filed in or against this Court. Notwithstanding, in the twenty-seven years since the adoption of the 1972 Constitution, no one has seen fit to file such a challenge. Why, I do not know, but I suspect that the reason for this failure goes more to the politics of not wanting to go head-to-head with the highest court in this State on a controversial issue directly affecting the fundamental way we conduct our business, rather than it does with the merits of the constitutional arguments for and against.

More to the point, however, how this issue was raised is of little consequence. The

fact of the matter is that no one and no organization should have to sue us or even request that we conform our own operations to the clear and unambiguous mandate of the Constitution. As we stated in *Associated Press v. Bd. of Public Educ.* (1991), 246 Mont. 386, 391, 804 P.2d 376, 379, "[f]irst and foremost, is the realization that the Constitution is the supreme law of this State. *Its mandate must be followed by each of the three branches of government.*" [Emphasis added]. Therefore, it is with this mandate that I begin.

Discussion

Article II, Section 9 of the Montana Constitution provides:

Right to know. No person shall be deprived of the right to examine documents *or to observe the deliberations of all public bodies* or agencies of state government and its subdivisions, *except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.* [Emphasis added.]

My research reveals no Montana case law ruling on the applicability or inapplicability of this constitutional provision to the judicial branch or, more specifically, to the proceedings and deliberations of this Court. Therefore, I turn to the rules of constitutional construction.

In resolving disputes of constitutional construction, this Court applies the rules of statutory construction. Under those rules, the intent of the framers of the Constitution is controlling and that intent must first be determined from the plain language of the words used. *Butte-Silver Bow Local Govern. v. State* (1989), 235 Mont. 398, 403, 768 P.2d 327, 330 (citation omitted). Moreover, under these rules, if the language is clear and unambiguous, no further interpretation is required. *Lovell v. State Comp. Mut. Ins. Fund*

(1993), 260 Mont. 279, 285, 860 P.2d 95, 99 (citation omitted). The courts may not go further and apply any other means of interpretation, *Tongue River Elec. Coop. v. Mont. Power Co.* (1981), 195 Mont. 511, 515, 636 P.2d 862, 864 (citation omitted), nor may a judge insert into a constitutional provision what has been omitted or omit what has been inserted, *see* § 1-2-101, MCA.

Applying these well-settled rules of constitutional construction, it is clear that the plain language of Article II, Section 9, does not exempt this Court from the provision's mandate. Rather, Montana's constitutional "right to know" unambiguously covers the deliberations of *all public bodies of state government*.

Nonetheless, even ignoring the clarity of Article II, Section 9, and the dictates of our constitutional construction jurisprudence, the proceedings of the 1972 Constitutional Convention also lead to the conclusion that the "right to know" requirements do not apply exclusively to the legislative and executive branches of state government and its subdivisions to the exclusion of the judicial branch.

In point of fact, the delegates to the Constitutional Convention amended the language of what became Article II, Section 8 of the Montana Constitution, which gives the public the right to participate in the operations of governmental agencies, on Delegate Berg's motion, so as to exclude the judicial branch. *See* Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, pp. 1663-67 (comments of Delegates Berg, Dahood, and McNeil). Notwithstanding that these same delegates discussed the language of what became Article

II, Section 9 of the Montana Constitution on the same afternoon that they amended the language of what became Article II, Section 8, they did not even discuss amending the language of what became Article II, Section 9, so as to exclude the judicial branch. *See* Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, pp. 1667-1680.

Delegate Berg, however, subsequently moved to amend the language of what became Article II, Section 9, out of his concern that the phrase "public bodies" could be interpreted to include juries, grand juries, or the deliberations of this Court. Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, pp. 2499-2501. Delegate Dahood stated that he agreed with Delegate Berg and that the committee was "not trying to upset any traditional rule of procedure with respect to anything within the judiciary." Notwithstanding, Delegate Dahood stated that he would not amend the section as Delegate Berg had suggested. Delegate Berg then stated in his closing statement in support of his motion that "my purpose in asking to delete the word[s] 'bodies or' is to eliminate the potential interpretation that it might include juries, grand juries, [or] Supreme Court deliberations." Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, p. 2501. Despite Delegate Berg's concerns, his motion failed. Montana Constitutional Convention, Verbatim Transcript, March 16, 1972, p. 2501.

Thus, even though Delegate Berg expressed the same concern with regard to what became Article II, Section 8, and what became Article II, Section 9, the delegates amended only the language of what became Article II, Section 8, so as to exclude the judicial branch.

More to the point, the delegates declined to amend the language of what became Article II, Section 9, so as to exclude the judicial branch even though faced with the same concern that prompted them to amend what became Article II, Section 8.

Hence, not only the plain language but also the constitutional history of these companion provisions of the Montana Constitution show that Article II, Section 9, is broader than Article II, Section 8. Article II, Section 9, gives the public the right to *observe* the deliberations of *all public bodies* and agencies while Article II, Section 8, gives the public the right to *participate* only in the operations of *agencies*. That, of course, begs the question whether this Court is a “public body.” The answer to this question is undeniably “yes.”

In *Common Cause v. Statutory Committee* (1994), 263 Mont. 324, 329, 868 P.2d 604, 607, we noted that the rights which Article II, Section 9, guarantees are protected and implemented primarily through Montana’s open meeting statutes, codified at §§ 2-3-201, *et seq.*, MCA. One of these statutes, § 2-3-203(1), MCA, provides:

All meetings of *public or governmental bodies*, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public. [Emphasis added.]

In *Common Cause*, we recognized that the legislature did not define “public body” or “governmental body” in the open meeting statutes. *Common Cause*, 263 Mont. at 330, 868 P.2d at 608. Thus, we gave the words in these phrases their “plain, ordinary and usual meaning” and stated that “the common understanding of the phrase ‘public or governmental body’ would include a group of individuals organized for a governmental or public purpose.”