

Exhibit Number: 2

The following exhibit is several assorted documents that exceeds the 10-page limit therefore it cannot be scanned. A small portion has been scanned to aid in your research for information. The exhibit is on file at the Montana Historical Society and can 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 August, 1999.

FILED
AUG 03 1999
Clerk of the Supreme Court
STATE OF MONTANA

[Signature]
Chief Justice
[Signature]
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Justices

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."

Common Cause, 263 Mont. at 330, 868 P.2d at 608 (citations omitted). There can be no doubt, this Court is a group of individuals organized by and under the Montana Constitution for a governmental purpose. It follows, then, that this Court is a public or governmental body.

Similarly, in *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, ¶ 16, 289 Mont. 155, ¶ 16, 959 P.2d 508, ¶ 16, this Court, in determining whether the Department of Corrections Committee for Private Prison Screening and Evaluation was a “public body,” looked to the Montana Procurement Act, which defines “governmental body” as

a department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other entity, instrumentality, or official of the executive, legislative, or *judicial branch* of this state, including the board of regents and the Montana university system.

Section 18-4-123(11), MCA (emphasis added). We stated that, since the committee was a committee of the executive branch of government, and a “governmental body” for purposes of procurement, “it necessarily follows that it is an agency of state government to which Article II, Section 9, applies.” *Great Falls Tribune*, ¶ 17. This Court is clearly an “entity . . . of the . . . judicial branch of this state,” and, therefore, a “governmental body.” Section 18-4-123(11), MCA. Thus, it “necessarily follows” that this Court is a “public body” to which Article II, Section 9, applies. *Great Falls Tribune*, ¶ 17.

The same conclusion can be drawn from our decision in *Becky v. Butte-Silver Bow Sch. Dist. 1* (1995), 274 Mont. 131, 906 P.2d 193. In *Becky*, this Court, in determining whether the records of an organization were “documents of public bodies,” looked to § 2-6-

101(2)(a), MCA, which states that “public writings” are

the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, *judicial*, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

Becky, 274 Mont. at 137, 906 P.2d at 197 (quoting § 2-6-101(2)(a), MCA) (emphasis added).

Section 2-6-101, MCA, also states that there are four classes of public writings and that “judicial records” are one of the classes. Section 2-6-101(3)(b), MCA. Finally, although we recognized that “documents of public bodies” is not defined in the Montana Constitution, we stated that “it must reasonably be held to mean documents generated or maintained by a public body which are somehow related to the function and duties of that body.” *Becky*, 274 Mont. at 138, 906 P.2d at 197.

Applying the definition of “public writings” found in § 2-6-101(2)(a), MCA, it is clear that most, if not all, of the documents which this Court generates and maintains are “public writings,” and, therefore, are “documents of a public body.” Thus, since the documents which this Court generates and maintains are “documents of a public body,” it follows (perhaps backwardly) that this Court is a “public body” to which Article II, Section 9, applies.

As these cases demonstrate, this Court has been particularly vigilant and uncompromising in protecting Montanans’ constitutional “right to know” and in rejecting other governmental bodies’ attempts to limit or subvert this right. In *Great Falls Tribune*, for example, the committee argued that the public’s right to observe its meetings with private

companies which had submitted proposals to build a private correctional facility in Montana and to review the papers associated with the companies' proposals was outweighed by the companies' right to privacy in the information that they had submitted. *Great Falls Tribune*, ¶ 8. We held, however, that the *Great Falls Tribune* had a constitutional right under Article II, Section 9, to observe the committee's deliberations and to examine the committee's documents, including proposals that had been submitted to it. *Great Falls Tribune*, ¶ 33. We also stated that the only exception to the public's right to observe the committee's deliberations and documents concerned information to which the companies had a privacy interest. *Great Falls Tribune*, ¶ 33.

In sum, and based on the foregoing, if there exists some valid argument for exempting the deliberations and decision-making processes of this Court from the operation of Article II, Section 9, the rationale is neither apparent in the tenor of our prior jurisprudence nor, more importantly, in the plain language of the constitutional provision itself or in the history of its adoption.

And, with regard to the latter, while the concurring Justices read the Constitutional Convention history of Article II, Section 9, a great deal more restrictively than I do, nevertheless that history--and our disagreement over what it means--is largely academic. For, as we made eminently clear in *Associated Press*,

[t]he language of [Article II, Section 9] speaks for itself. It applies to all persons and all public bodies of the state and its subdivisions without exception. Under such circumstances, it is our duty to interpret the intent of the framers from the language of the provision alone and not to resort to

extrinsic aids or rules of construction in determining the intent of the delegates to the Constitutional Convention.

Associated Press, 246 Mont. at 392, 804 P.2d at 379 (quoting *Great Falls Tribune v. District Court* (1980), 186 Mont. 433, 437-38, 608 P.2d 116, 119).

Similarly irrelevant are the concurring Justices' concerns as to the impact of complying with Article II, Section 9, on the operations and functioning of this Court. In this regard, I make three observations. First, since we are bound by the "right to know" provision of the Constitution of Montana, we, and litigants, will simply have to deal with the consequences and changes that flow from opening our deliberations and operate accordingly. Other public bodies of state government seem to be able to comply with the requirements of Article II, Section 9, and, yet, function quite well. I find it difficult to believe that, given the caliber of the justices serving on this Court, that we are not, likewise, up to the task. Likewise, I refuse to be cowed by the concurrences' parade of horrors--internal memos and proposed opinions being made public, media blitzes, masses of the unwashed converging upon the Court, cases settling, criminals jumping bail. Good grief! If, before a final opinion is handed down, litigants want to settle, jump bail or jump off a bridge, for that matter, they can, and often do that now. If votes change between the time of initial discussion and final opinion, then those who acted prematurely will have to bear the consequences of their bad or good decision.

Second, in my experience, every public body that has been faced with the prospect of opening its operations to the press and public has put forth a whole list of problems and