OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER for British Columbia

Order F09-10

(Re-opening of Order F08-18)

OFFICE OF THE PREMIER

Celia Francis, Senior Adjudicator

May 20, 2009

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Summary: Re-opening of Order F08-18 to consider s. 12(7), which was enacted in 2002 but only first published after Order F08-18 was issued and before the time for compliance by the public body had expired. New subsection does not affect the outcome in Order F08-18 nor, alternatively, does reconsideration of the interpretation of "committee" in s. 12(1) in Order 02-38. Decision in Order F08-18 stands.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 12(5), 12(6), 12(7); *Committees of the Executive Council Regulation*, B.C. Reg. 290/2002; B.C. Reg. 173/2003, amending B.C. Reg. 290/2002; *Committees of the Executive Council Regulation*, B.C. Reg. 229/05; *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 37.

Authorities Considered: B.C.: Order F08-17, [2008] B.C.I.P.C.D. No. 30; Order F08-18, [2008] B.C.I.P.C.D. No. 31; Order 02-38, [2002] B.C.I.P.C.D. No. 38. **Ont.:** Order P-604, [1993] O.I.P.C. No. 372; Order PO-2707, [2008] O.I.P.C. No. 166; Order PO-2725, [2008] O.I.P.C. No. 185.

Cases Considered: *United States of America v. Dynar*, [1997] 2 S.C.R. 426; *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Mandavia v. Central West Health Care Institutions Board*, [2005] N.J. No. 69 (N.L.C.A.).

Authors Considered: R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada Inc., 2008), pp. 573-615.

1.0 INTRODUCTION

[1] Order F08-18[1] concerns the application of s. 12(1) of the *Freedom of Information and Protection of Privacy Act* ('FIPPA") to information in records that the applicant, the Freedom of Information and Privacy Association, requested from the Office of the Premier ("Premier's Office").

[2] Order F08-18 was issued on November 5, 2008. Before the date for compliance had passed, the Premier's Office learned that when ss. 12(5) and (6) were enacted in 2002, subsection (7) was also enacted but its publication was overlooked by the Queen's Printer. As a result of this, now corrected, publication error, the existence of s. 12(7) was unknown to the parties or me when Order F08-18 issued.

[3] The Premier's Office requested me to re-open Order F08-18 to consider s. 12(7). I decided that, in these unusual circumstances, even though the inquiry process itself had been procedurally fair, I would re-open Order F08-18 to consider the significance of s. 12(7). I gave the parties an opportunity to make submissions and this is my decision on the significance, if any, of the new subsection.

2.0 ISSUES

[4] The issue is whether s. 12(7) alters the outcome in Order F08-18.

3.0 DISCUSSION

[5] **3.1 Cabinet confidences**—The relevant parts of s. 12 read as follows:

> 12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
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> (2) Subsection (1) does not apply to
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> (a) information in a record that has been in existence for 15 or more years,
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> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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> (c) information in a record the purpose of which is to present background explanations or analysis to the Executive

[1] [2008] B.C.I.P.C.D. No. 31.

Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 or more years have passed since the decision was made or considered.

….

(5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

(6) A committee may be designated under subsection (5) only if

(a) the Lieutenant Governor in Council considers that

(i) the deliberations of the committee relate to the deliberations of the Executive Council, and

(ii) the committee exercises functions of the Executive Council, and

(b) at least 1/3 of the members of the committee are members of the Executive Council.

(7) In subsections (1) and (2), "committee" includes a committee designated under subsection (5).

[6] **3.2 Order F08-18**—The records in issue in Order F08-18 consisted of parts of minutes for meetings of:

(a) the Government Caucus Committee on Health from January to December 2002 and January to May 2004;

(b) the Government Caucus Committee on Education from January to July 2004; and

(c) the Government Caucus Committee on Natural Resources from January to December 2002.

[7] The Premier's Office had disclosed the following information in the minutes: committee name; date, time and location of committee meeting; date of next committee meeting; names of people attending or absent; subject headings and most text on presentations from outside organizations and reviews of ministry service plans; the word "Cabinet Submission" in subject headings; and some subject headings and text for reviews of named legislation and ministries. The information the Premier's Office had withheld under s. 12(1) included: names of legislation, programs or policies in subject headings; topics of any Cabinet Submissions in subject headings or text; names or initials of responsible ministries in subject headings; and text under subject headings.

[8] The applicant took issue with whether the attendance roll at each committee meeting had met the one-third Cabinet members requirement in s. 12(6)(b). I held that this provision related to the designation of committees by regulation under subsection (5) and not to a quorum requirement for committee meetings. I agreed with the Premier's Office that there was no attendance quorum requirement for Cabinet members in order for the meetings of a committee already designated under s. 12(5) to qualify as a Cabinet committee under s. 12(1).

[9] The applicant also took issue with whether the committees had been properly designated by regulation under s. 12(5). The Premier's Office conceded (Order F08-18, at para. 33) that the Government Caucus Committee on Natural Resources was not a committee of Cabinet for purposes of s. 12 because, going behind the *Committees of the Executive Council Regulation*, B.C. Reg. 290/2002, it had discovered that less than one-third of its members were also members of Cabinet when the designating regulation was deposited. It submitted that s. 12(1) still applied because the information in issue was the committee's advice, recommendations and policy options for the consideration of Cabinet and would reveal the substance of deliberations of Cabinet.

[10] I decided not to go behind the requirements in s. 12(6) for designation by regulation under s. 12(5), that the relevant regulations[2] should be taken on their face. On that basis, I concluded (Order F08-18, para. 52) that all three committees were designated by regulation under s. 12(5) from November 1, 2002 (the effective date of the *Committees of the Executive Council Regulation*). I therefore analyzed the applicability of s. 12 for all the minutes of the Government Caucus Committee on Education, for the November to December 2002 and January to May 2004 minutes of the Government Caucus Committee on Health and for the November to December 2002 minutes of the Government Caucus Committee on Natural Resources on the basis that they were all Cabinet committees at the relevant times.

[11] I analyzed the minutes of committee meetings before November 2002, (*i.e.*, January to October 2002 minutes for the Government Caucus Committee on Health and the Government Caucus Committee on Natural Resources) on the basis that these committees were not Cabinet committees, but that s. 12(1) would still apply if the disclosure of information in the minutes would reveal the substance of Cabinet deliberations.

[12] **3.3 Section 12(7)—**The Premier's Office submits that the non-exhaustive word "includes" in subsection (7) changes the meaning of

[2] *Committees of the Executive Council Regulation*, B.C. Reg. 290/2002; B.C. Reg. 173/2003, amending B.C. Reg. 290/2002; *Committees of the Executive Council Regulation*, B.C. Reg. 229/05.

"committee" in subsection (1), by signifying that there may be committees under subsection (1) other than those designated by regulation under subsection (5).

[13] I agree with the Premier's Office about the effect of the word "includes" in subsection (7). However, in my view, subsection (5) has the same effect on the meaning of "committee" in subsection (1), with or without subsection (7). A "committee" in subsection (1) is a committee of the Executive Council at common law or as designated by legislation (such as the Treasury Board in the *Financial Administration Act*) or a regulation under subsection (5). The discovery of subsection (7) does not give a new and different meaning to subsection (5). It merely confirms the existing meaning.

[14] I say this recognizing that the regulations made under subsection (5) have included Cabinet committees, such as Treasury Board, that did not need to be designated by regulation. I do not know, nor do I need to determine, whether the drafter did this simply to ensure there was a published list of all the Cabinet committees under subsection (1) or because the drafter interpreted (in my view, misinterpreted) subsection (5) to limit "committee" in subsection (1) to mean only a committee designated by regulation under subsection (5).

[15] The Premier's Office submits that, not knowing of the existence of subsection (7), I concluded in Order F08-18 (and in Order F08-17) that a committee must be designated under subsection (5) in order to qualify under subsection (1). That is not the case. In Orders F08-17 and F08-18, I did not conclude as the Premier's Office now surmises. My interpretation is as I have stated above, although the issue was not addressed in those orders inasmuch as the Premier's Office conceded that the Government Caucus Committee on Natural Resources was not a Cabinet committee and did not assert that a government caucus committee was still a Cabinet committee under subsection (1) if not designated by regulation under subsection (5).

[16] **3.4 Does s. 12(7) Affect the Outcome in Order F08-18?**—I will first address the post-November 1, 2002 minutes of committee meetings. The discovery of the existence of s. 12(7) does not affect the outcome for these records because in Order F08-18 I accepted that the relevant committees were Cabinet committees under subsection (1) and subsection (7) is not instrumental to my analysis and conclusions regarding the severing of the records.

[17] This leaves the January to October 2002 minutes for the Government Caucus Committee on Health and the Government Caucus Committee on Natural Resources. For the Government Caucus Committee on Health, these records total 24 pages. The Premier's Office disclosed 8 pages in full and 10 pages in part, and withheld 6 pages in full. Order F08-18 required the disclosure of some further information in 10 pages. For the Government Caucus Committee on Natural Resources, these records total 51 pages. The Premier's Office disclosed 17 pages in full and 31 pages in part, and withheld 3 pages in

full. Order F08-18 required the Premier's Office to disclose some further information in 19 pages. The further information required to be disclosed is names of legislation and programs or policies in subject headings on some pages, as well as some text on other pages.

[18] The applicant objects that the Premier's Office is attempting to re-argue the "crystal clear" law decided in Order 02-38[3], before sections 12(5) to (7) were enacted, that government caucus committees are not Cabinet committees under subsection (1). As I see it, because subsection (7) confirms and does not expand the effect of subsection (5) on the meaning of Cabinet committee in subsection (1), the new subsection also does not affect Order F08-18 as regards the pre-November 2002 minutes of government caucus committee meetings.

[19] It is only fair to observe that while subsection (7) does not alter the meaning of Cabinet committee in subsection (1), its discovery has caused the Premier's Office to see that meaning differently from when it made submissions to the inquiry for Order F08-18. Those submissions fastened on whether a designation under subsection (5), effective November 1, 2002, covered minutes from earlier committee meetings (which I rejected). They did not contend that the committees were Cabinet committees whether or not they were designated under subsection (5). That argument—the same issue the Commissioner analyzed at length in Order 02-38 and that gave rise to the 2002 amendments adding subsections (5) to (7)—was not made by the Premier's Office in the inquiries for Order F08-18 and its companion Order F08-17.

[20] With respect, I do not think these circumstances are grounds for re-opening an order. Subsection (7) does not change the effect of subsection (5) or the meaning of "committee" in subsection (1). The discovery of subsection (7) has simply caused the Premier's Office to see the correct meaning of "committee" in subsection (1), which it could have done before, and to want to argue that the committees in question were Cabinet committees under subsection (1) whether or not they were designated under subsection (5), which it also could have done before.

[21] **3.5 Alternative Analysis—**In the event that I am wrong in concluding that the current circumstances are not reason to re-open Order F08-18 for the purpose of re-visiting the implications of Order 02-38, I am going to consider the current arguments of the Premier's Office about Order 02-38.

[22] The Premier's Office has provided legislative history in the form of *Hansard* around the 2002 amendments to s. 12 to establish that, in its submission, the government of the day did not accept the correctness of the Commissioner's interpretation of "committee" in subsection (1) in Order 02-38 and the Legislature's intention was not to expand the meaning of committee in

[3] [2002] B.C.I.P.C.D. No. 38.

subsection (1), but rather just to make its meaning more transparent by listing Cabinet committees in designating regulations made under the new subsection (5). The Premier's Office says that subsection (7) makes this even more clear by establishing that a committee may still be a Cabinet committee (at common law or by statute) even if it is not designated under subsection (5).

[23] The law on the admissibility and weight to be given to legislative history as an aid to statutory interpretation is more relaxed than it once was. Professor Ruth Sullivan discusses this development in the most recent edition of her book, *Sullivan on the Construction of Statutes*.[4] In the introduction to Chapter 22, on Extrinsic Aids, she summarizes as follows:

> In modern interpretive practice, courts have become accustomed to reading legislative texts in a broad context. Increasingly this context includes extrinsic aids that formerly were considered inadmissible. Some materials, like foreign case law or international conventions, are now considered admissible as part of the legal context in which a statute is drafted and operates. Other materials, like commission reports and scholarly publications, may be consulted as evidence of the external context. Legislative evolution and legislative history are relied on as both direct and indirect evidence of legislative intent.[5]

[24] Does the legislative history that is before me have a bearing on my consideration of the reasoning and conclusion in Order 02-38? As I see it, the legislative history that the Premier's Office has brought forward casts light on the background of the 2002 amendments to s. 12, but it is not authoritative as to the soundness of the Commissioner's decision in Order 02-38. Much as there has been relaxation of the exclusionary rule against using legislative history as a tool in statutory interpretation, defined limits do remain. The relevant limit here is the rule against consulting subsequent legislative history as an aid to interpreting prior enactments. The Supreme Court of Canada described this principle in *United States of America v. Dynar*,[6] as follows:

> [45] …the respondent points to a bill (Bill C-17) that Parliament has introduced to amend the money-laundering provisions to replace the word "knowing" with the words "knowing or believing". This might be taken to suggest that, in the judgment of Parliament, the present money-laundering provisions do not contemplate punishment of one who merely believes that he is converting the proceeds of crime. But in our view this argument is misconceived. What legal commentators call "subsequent legislative history" can cast no light on the intention of the enacting Parliament or Legislature. At most, subsequent enactments reveal the interpretation that

[4] 5th ed. (LexisNexis Canada Inc., 2008), pp. 573-615.
[5] *Ibid.*, p. 573.
[6] [1997] 2 S.C.R. 426, at paras. 45-46. Also see: *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 42, *Mandavia v. Central West Health Care Institutions Board*, [2005] N.J. No. 69 (NLCA), at paras. 98-100, and R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., at pp. 589-591.

> the present Parliament places upon the work of a predecessor. And, in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was.
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> [46] Parliament recognized as much, when, in the *Interpretation Act*, R.S.C., 1985, c. I-21, s. 45(3), it declared:
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> > The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.
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> Moreover, to consult "subsequent legislative history" as an aid to the interpretation of prior enactments would be to give the subsequent enactments retroactive effect; and, as this Court has often observed, statutes are not to be given retroactive effect except in the clearest of cases:
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> > The situation is completely different with respect to a statute subsequent in time to the facts which gave rise to the action. The construction of prior legislation is then exclusively a matter for the courts. In refraining from giving the new enactment retroactive or declaratory effect, the legislator avoids expressing an opinion on the previous state of the law, leaving it to the courts.
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> > (*Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667.)

[25] I am aware of s. 37(2) and (3) of the *Interpretation Act*,[7] which read as follows:

> (2) The amendment of an enactment must not be construed to be or to involve a declaration that the law under the enactment prior to the amendment was or was considered by the Legislature or other body or person who enacted it to have been different from the law under the enactment as amended.
>
> (3) An amendment, consolidation, re-enactment or revision of an enactment must not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[26] These provisions, the British Columbia legislative parallel to s. 45(3) of the federal *Interpretation Act* referred to *Dynar*, remove any common law presumption that the 2002 amendments changed the meaning of "committee" in s. 12. The subsequent legislative history is not authoritative as to whether Order 02-38 was correct or incorrect. It does not answer the question of whether, as submitted by the Premier's Office, the amendments merely clarified

[7] R.S.B.C. 1996, c. 238.

the existing statutory meaning and introduced the transparency of listing Cabinet committees in regulations under subsection (5).

[27] I have reviewed Order 02-38 with particular attention to paragraphs 69 and 79-97, where the Commissioner considered the question of whether a committee comprised of Cabinet members and non-members was a committee of Cabinet under s. 12(1). After examining the jurisprudence, historical and constitutional context and evidence about the government caucus committee system instituted by the government elected in May of 2001, the Commissioner concluded that "committee" under subsection (1) was limited to committees composed of members of Cabinet. This limits the meaning of disclosure of "information that would reveal the substance of deliberations of the Executive Council or any of its committees" in subsection (1) to the deliberations of Cabinet or committees of Cabinet members. Subsection (1) does not extend, borrowing a phrase from paragraph 97 of Order 02-38, to the deliberations of a "multitude of advisory bodies with members who were not members of the Executive Council or an historical equivalent" unless, of course, the minutes of meetings of those non-Cabinet committees are established to reveal the substance of deliberations of Cabinet or a committee of Cabinet.[8]

[28] I respectfully agree with the analysis of this question in Order 02-38 and the Commissioner's conclusion.

[29] I also note that the Ontario access and privacy legislation uses essentially the same phrase, "Executive Council or its committees",[9] and that that phrase continues to be interpreted as it was in Ontario Order P-604[10] which, the Commissioner remarked in Order 02-38 (para. 93), held that a Cabinet committee had to be composed of ministers and that a non-ministerial committee that reported to Cabinet or a Cabinet committee was not itself a Cabinet committee.[11]

[30] As I have said, I agree with the Premier's Office that "committee" in subsection (1) means a Cabinet committee at common law, as provided by another statute such as the *Financial Administration Act* or as designated by regulation under subsection (5). And I agree with that interpretation without resort to the text of subsection (7) or *Hansard* around the 2002 amendments to s. 12.

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[8] I say this also recognizing that now, as a result of the 2002 amendments to s. 12, a "committee" under (1) may be designated by regulation under subsection (5).
[9] Section 12(1) of the British Columbia statute uses the phrase "Executive Council or any of its committees."
[10] [1993] O.I.P.C. No. 372.
[11] See Ontario Order PO-2707, [2008] O.I.P.C. No. 166, at para. 62, and Ontario Order PO-2725, [2008] O.I.P.C. No. 185, at paras. 43-47 (record prepared for government members of a committee of the Legislative Assembly not prepared for a Cabinet committee).

[31] As I have also said, in my respectful view, Order 02-38 is sound. There is therefore no reason to consider disturbing Order F08-18 on the basis that the Commissioner should have reached in Order 02-38, or I should now reach, a different conclusion on whether "committee" in subsection (1), absent the 2002 amendments for designation by regulations under subsection (5), must be composed of members of Cabinet.

[32] A government caucus committee that is not designated under s. 12(5), or before its designation under s. 12(5), is not a "committee" of the Executive Council under s. 12(1).

4.0 CONCLUSION

[33] On re-opening Order F08-18 to consider the significance of s. 12(7), which was enacted in 2002 but only first published after Order F08-18 was issued and before the time for compliance by the Premier's Office had expired, I conclude for the reasons given that subsection (7) does not affect the outcome in Order F08-18.

[34] The decision in Order F08-18 stands with the addition of these reasons on re-opening and with the variation for compliance by the Premier's Office within 30 days of the date of this order, as "day" is defined in the *Freedom of Information and Protection of Privacy Act*, that is, on or before July 2, 2009, and with a concurrent copy to me of its cover letter to the applicant and the records disclosed.

May 20, 2009

ORIGINAL SIGNED BY

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Celia Francis
Senior Adjudicator

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