EXEMPTION DECISION 18-05

Brynn Bourke (BC Building Trades)

July 31, 2018

SUMMARY: The applicant is an in-house lobbyist with the BC Building Trades. She served for 6.5 weeks as a ministerial assistant in the office of one minister during the transition from the previous provincial government to the present administration. Her application for an exemption from the two-year lobbying prohibition that applies under section 2.2 of the LRA does not properly arise for decision. This is because she clearly does not fall within the plain and unambiguous language of the LRA's definition of "former public office holder." She is therefore not subject to the s. 2.2 cooling-off period in the first place. The Legislature may have intended to cover individuals in the applicant's position, but enacted language that does not do so.

Statutes Considered: *Lobbyists Registration Act,* SBC 2001.

BACKGROUND

[1] The *Lobbyists Registration Act* (LRA) regulates lobbying of public office holders. The applicant, Brynn Bourke, an in-house lobbyist with the BC Building Trades, has applied for a public interest exemption, under section 2.3 of the LRA, from the two-year prohibition on lobbying that applies under s. 2.2 of the LRA.[1] Section 2.2 prohibits any "former public office holder" from lobbying for two years after they ceased to be a former public office holder.

[2] The applicant served as for 6.5 weeks as a ministerial assistant to a single minister during the 2017 transition from the previous provincial government to the present administration. She accepted that temporary position on the condition that she would not be assigned to any minister whose portfolio related to the work of the BC Building Trades. This was because both the applicant and the BC Building Trades wanted to ensure that the applicant could, on returning to work, be able to continue her government relations work.

[3] During the applicant's time as a ministerial assistant to Hon. Jinny Sims, Minister of Citizens' Services (Citizens' Services), the minister took a single issue to Cabinet, which related to the minister's portfolio and not a matter of interest to the BC Building Trades. The applicant attended no Cabinet meetings, and the Legislative Assembly was not in session during her employment with the minister.

[1] Sections 2.2 and 2.3 were enacted in 2017 and came into force on May 1, 2018. The amendments were made by the *Lobbyists Registration Amendment Act, 2017*, SBC 2017, c 19.

DISCUSSION

[4] The LRA defines the term "lobby", in relation to any lobbyist, as "to communicate with a public office holder in an attempt to influence" a range of activities. These include the establishment of programs or policies, development or enactment of legislation, outsourcing of services, awarding of contracts and sale of assets. In this case, the applicant wishes to be able to lobby again for the BC Building Trades, although she has committed not to lobby Citizens' Services.

[5] As noted in Exemption Decision 18-01, the Legislature has acknowledged, through the definition of "lobby," that lobbyists—both in-house and consultant lobbyists—may be selling any one or more of access to office holders, access to expertise on a subject, or information an individual has acquired when serving in government. All of these aspects of what it means to "lobby" must be considered, on the facts of each application, in light of the circumstances relevant to their application.[2] It is not necessary to consider this application, however, as the applicant is not a "former public office holder."

[6] This is the operative provision in this case (my underlined emphasis):

> **"**former public office holder" means
> (a) a former member of the Executive Council and any individual formerly employed <u>in the former member's former office</u>, other than administrative support staff,
> (b) a former parliamentary secretary, or
> (c) any individual who formerly occupied
> (i) a senior executive position in a ministry, whether by the title of deputy minister, chief executive officer or another title,
> (ii) the position of associate deputy minister, assistant deputy minister or a position of comparable rank in a ministry, or
> (iii) a prescribed position in a Provincial entity[.]

[7] Sections 2.2 and 2.3 read as follows:

> ***Lobbying prohibition***
>
> 2.2 Subject to section 2.3, a person who is a former public office holder must not lobby, in relation to any matter, for a period of 2 years after the date the person ceased
> (a) to be a member of the Executive Council or an individual employed in the member's office,
> (b) to be a parliamentary secretary, or
> (c) to occupy a position referred to in paragraph (c) of the definition of "former public office holder".

[2] In assessing the applicant's exemption request, I have applied my analysis of the intent and meaning of the LRA as a whole, and ss. 2.2 and 2.3, specifically, set out in Exemption Decision 18-01, without repeating it here.

Exemption from prohibitions

2.3(1) If the registrar is satisfied that it is in the public interest, the registrar may, on request and on any terms or conditions the registrar considers advisable, exempt a person from a prohibition set out in section 2.1(2) or 2.2.[3]

(2) If the registrar grants an exemption under subsection (1), the registrar must enter the following into the registry:

(a) the terms or conditions of the exemption;

(b) the registrar's reasons for granting the exemption.

[8] This definition applies to a former member of Cabinet and, apart from administrative support staff, anyone else who was formerly employed in the office of a *former* member of Cabinet. The meaning is clear. It allows an individual who seeks to lobby to escape the two year cooling off period if the Minister they worked for is still in Cabinet.

[9] During legislative debate, opposition members expressed concern that members of the staff hired by the government to assist with the 2017 transition to the new administration would not be covered by the s. 2.2 cooling-off period. They contrasted this with the federal approach, which captures short-term transition staff. This passage fairly summarizes the debate, and the response of the Attorney General, who introduced the amendments:

> **L. Throness:** I want to move on now to just ask a few general questions about this section. The minister said publicly that he was patterning this bill after the federal Conflict of Interest Act, which includes the transition team of the Prime Minister.
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> I want to read section 2(3) of that act — the Lobbying Act federally: "(3) Any person identified by the Prime Minister as having had the task of providing support and advice to him or her during the transition period leading up to the swearing in of the Prime Minister and his or her ministry is subject to this Act…."
>
> This bill before us does not include the transition team. Why did the government omit the transition team from this bill?
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> **Hon. D. Eby:** The individuals that the member is asking about were hired as contractors to provide short-term advice. There were many people hired by government as contractors to provide short-term advice to government. There were many people under the previous administration. There are and will be many people under the current administration hired in those kinds of roles.
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> Essentially, this was a line-in-the-sand drawing exercise about who do you include and who do you not include. MLAs, for example, which the member just asked about —

[3] Section 2.1(2) prohibits lobbying on a matter in relation to which the person lobbying, or a person associated with that person, holds a "contract for providing paid advice" to the government. It also prohibits such persons from entering into a "contract for providing paid advice" on a matter in relation to which the person, or a person associated with that person, is lobbying. Section 2.1(1) defines the term "contract for providing paid advice" as "an agreement or other arrangement under which a person directly or indirectly receives or is to receive payment for providing advice to the government of British Columbia or a Provincial entity, but does not include reasonable remuneration for serving on a board, commission, council or other body that is established under an enactment and on which there are at least 2 other members who represent other organizations or interests."

> backbench MLAs and opposition MLAs are not included, and third-party MLAs. Similarly, people who were on short-term contract on the transition team are not included, either in the current government's administration or in the transition that took place following the 2017 election on the opposition side of the House.
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> The decision was made not to include these various groups of people simply because of the fact that these are short-term contracts, not the long-term relationship-building process of working in a ministry office. Any individual who took on these kinds of jobs after transition, obviously, would be caught, and I can advise the member that we're not aware of anybody that is a registered lobbyist that took on one of these responsibilities.
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> **L. Throness:** Well, the minister's stated intent of the bill is to target those with insider information who want to, as he said, sell that information. So I want to ask a few more questions about the members of the transition team to find out about their access to that kind of insider information. Did transition team members take an oath or affirmation of office or of secrecy or of confidentiality when they signed their contracts?
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> **Hon. D. Eby:** I don't know the answer to that question that the member has raised, and to be totally honest, I don't understand what it has to do with the bill.
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> **L. Throness:** What kind of powers did the transition team have? Did they have direct or indirect contact with potential ministers, deputy ministers, other senior public servants and appointees? I think this is important, because we're trying to find out about categories of people who have insider information, which is what this bill is all about. So we're just trying to establish whether this could be another category.
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> **Hon. D. Eby:** I'll try to be as helpful to the member as I can. I'm afraid that I did not bring a bunch of details about the government's transition team, as I just didn't anticipate that this was particularly germane to the text of the bill.
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> In any event, as far as I understand, the transition team was on short-term contracts, which were complete, in many cases, before ministers were appointed. Some people went on to work in ministers' offices. Those people would be captured by the bill. So trying to be helpful, but again, I'm not sure how it relates to the bill.[4]

[10] The Attorney General's statement that individuals hired to assist with a transition who go "on to work in ministers' offices" will be "captured by the bill" suggests that the intention was to cover someone in the applicant's situation. That is not, however, what the plain meaning of language of the "former public office holder" definition achieves.

[11] The Supreme Court of Canada has regularly endorsed the modern, purposive approach to statutory interpretation: "Statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's scheme and object."[5] Section 8 of the *Interpretation Act* also requires me to interpret the LRA as "remedial" and to give it "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[12] In *Philip Morris*, the Court declined to interpret the phrase "particular individual insured persons" as if "particular" meant "identifiable", noting that other provisions of the statute in

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[4] British Columbia Legislative Assembly, *Hansard*, No. 58 at 11:40 A.M.

[5] *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 at 17 [*Philip Morris*], citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 [*Rizzo Shoes*], at para. 21.

issue would be redundant if "particular" meant "identifiable". In *Rizzo Shoes*, the Court interpreted a provision requiring severance pay where an employer terminates the employment to include cases where an employer goes bankrupt, not just cases where an employer intentionally terminates employment. The Court acknowledged that the Ontario Court of Appeal had looked to the plain meaning of the provisions but concluded that it had not paid enough attention to the legislative scheme, its object, the intention of the legislature or the context of the words in issue.[6]

[13] In a similar vein, the majority of the Supreme Court of Canada recently said this about plain meaning:

> [31] This Court has repeatedly observed that plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 43; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140, at para. 48; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-41. In the words of McLachlin C.J. and Deschamps J. in *Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, this is necessary because (para. 10):
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> > Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
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> [32] Ruth Sullivan makes a similar point in *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 2.9:
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> > At the end of the day . . . the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.[7]

[14] I also find the following observations by McLachlin J. (as she then was) useful here:

> 73 This Court has recently affirmed that the process of statutory interpretation requires that the intention of Parliament be ascertained first by considering the plain meaning of the words used in the statute, and has determined that where "the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament" (*R. v. Multiform Manufacturing Co.*, 1990 CanLII 79

[6] *Rizzo Shoes* at para. 23.

[7] *R. v. Alex*, [2017] 1 SCR 967, 2017 SCC 37 (CanLII) [*Alex*], per Moldaver J. for the majority. The Court split 5:4, with the outcome of interpreting the *Criminal Code* using the approach outlined above dividing the Court.

> (SCC), [1990] 2 S.C.R. 624, at p. 630; *Thomson v. Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 S.C.R. 385, at p. 399).
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> 74 However, s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, is equally clear that a legislative enactment "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Thus, it is apparent that a court should only be satisfied with the plain meaning of a statute where that meaning is clear and consistent with a purposive reading of the statute as a whole. Where the plain meaning is ambiguous, unclear or uncertain in scope, more is required.
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> 75 *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131, surveys the terrain of statutory interpretation and condenses it into one "modern" rule: that courts must interpret legislation "in its total context, having regard to the purpose of the legislation, the consequences of its proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids", in order to further the achievement of the legislative purpose and to attain an outcome that is reasonable and just.[8]

[15] I acknowledge that, as the Court affirmed in *Alex*, "plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms."[9] However, the challenge in this case is that the words of the LRA's definition of "former public office holder" are "clear and unambiguous," their "grammatical and ordinary sense" is plain. I acknowledge that the overall aim is to achieve the legislative purpose and a reasonable and just outcome, but even keeping this, and what the *Interpretation Act* requires, in mind, I cannot ignore the "clear and unambiguous" language that has been used. This is not a case where words that have a plain meaning might, when interpreted in context and in light of the statutory purpose, mean something else. The word "former" means what it says, even viewed in context and in the light of statutory purpose.

[16] In this case, the applicant would be captured under the definition of "former public office holder" only if I ignore the presence of the word "former" in the definition's stipulation that a "former" member of Cabinet must have been the individual's employer. For the applicant to fall within the express, plain language of the definition, I would have to pretend that the word "former" is not there, that the legislature did not use that word at all.

[17] As already acknowledged, there are indications in the legislative debate that the legislature may well not have intended to exclude individuals in the applicant's position from the definition of "former public office holder," but the language it chose to put on the page does exclude her. Perhaps the legislature erred in using the word "former," but it is undoubtedly not my proper role, as a statutory decision-maker, to ignore the legislature's clear and unambiguous choice of language.

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[8] *Opetchesaht Indian Band v. Canada*, [1997] 2 SCR 119, 1997 CanLII 344 (SCC) [*Opetchesaht*].
[9] *Alex* at p. 31.

CONCLUSION

[18] In light of the express language of the LRA, the applicant is not subject to the s. 2.2 cooling-off period. It is therefore not necessary for her to seek an exemption under s. 2.3 and I will therefore not make a decision on her request.

July 31, 2018

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Michael McEvoy
Registrar of Lobbyists for British Columbia