

**REPORT TO
CITY OF NEW WESTMINSTER COUNCIL
AND RESPONDENT**

**IN THE MATTER OF
AN ETHICS COMMISSIONER INVESTIGATION
UNDER THE CORPORATION OF THE CITY OF NEW WESTMINSTER
BYLAW NO. 8408, 2023**

Submitted by Jennifer Devins
Ethics Commissioner
City of New Westminster

September 23, 2024

I. BACKGROUND

1. On February 19, 2024, Councillors Fontaine and Minhas (the “Complainants”) filed a complaint (the “Complaint”) against Mayor Johnstone (the “Respondent”) under the City of New Westminster’s (the “City”) Bylaw No. 8408, 2023: The Code of Conduct for Council Members (the “Code of Conduct”).
2. The Complaint alleged that the Respondent breached the Code of Conduct and section 105 of the *Community Charter*, S.B.C. 2003, c. 26 (the “*Community Charter*”) in attending at a conference in December 2023 and receiving complementary travel, meals, and accommodation in order to do so.
3. The Complaint was filed with the Interim Ethics Commissioner, who requested an explanation from the Complainants as to why the Complaint was filed past the 60 days timeline in section 45 of the Code of Conduct.
4. On March 15, 2024, the Interim Ethics Commissioner determined that it was appropriate to exercise her jurisdiction to allow the Complaint to proceed notwithstanding that it was filed past the 60-day timeline.
5. The Complaint was held in abeyance pending my appointment as Ethics Commissioner.

II. PROCESS

6. I received a written response from the Respondent to the Complaint, and a Reply submission from the Complainants. After reviewing the materials filed by each of them, I determined that it was not necessary to interview witnesses in this matter, as it can be decided off of the written record. Credibility is not an issue in this matter.
7. Although the Respondent included submissions regarding the timeliness of the Complaint, I have accepted the decision of the Interim Ethics Commissioner that this matter should proceed.

III. ISSUES FOR DECISION

8. The issues to be decided in this Complaint are:
 - (a) Did the Respondent receive a “fee, gift or personal benefit that is connected with [his] performance of the duties of office” within the meaning of section 105 of the *Community Charter*?
 - (b) If so, was the “gift or personal benefit received as an incident of the protocol or social obligations that normally accompany the responsibilities of office” within the meaning of section 105(2)(a)?
 - (c) If not, did the Respondent act “inadvertently or because of an error in judgment made in good faith” within the meaning of section 105(3)?
 - (d) If the Respondent received a gift or benefit within the meaning of section 105(2)(a), did he file a timely disclosure statement as required within the meaning of section 106 of the *Community Charter*?

- (e) If the disclosure statement did not meet the requirements of section 106 of the *Community Charter*, was the failure to meet those requirements done inadvertently or because of an error in judgement made in good faith?

IV. FACTS

9. On November 3, 2023, SpecialEvents@bloomberg.org sent an email to Clerks@newwestcity.ca inviting the Respondent to attend the COP28 Local Climate Action Summit ("LCAS") from December 1-2, 2023 in Dubai. The invitation read:

We are delighted to invite you to the inaugural Local Climate Action Summit, held during COP28 at Expo City Dubai from December 1-2, 2023. Hosted by Bloomberg Philanthropies and the COP28 Presidency, this historic convening will recognize the critical role of local leaders in reducing emissions, addressing climate risk, and supercharging national efforts to move further and faster on climate progress.

Over the last decade, subnational governments have played a critical role in climate mitigation and adaptation as many cities are reducing per capita emissions faster than their national governments. With an expected 70% of the global population to live in cities by 2050 and climate-driven natural disasters on the rise, more needs to be done faster to reduce emissions and ensure subnational governments are equipped for population growth and the economic, social, and environmental challenges resulting from a warming planet.

Cross-sector and multi-level governmental cooperation is critical to retaining climate ambition, especially as the first Global Stocktake – an assessment of progress towards delivering the goals of the Paris Agreement – concludes at COP28 and reveals the gaps in our efforts to keep a 1.5°C future within reach.

Backed by world-leading networks of local leaders including the C40 Cities Climate Leadership Group, the Global Covenant of Mayors for Climate & Energy, ICLEI – Local Governments for Sustainability, United Cities and Local Governments (UCLG), United States Conference of Mayors, the Under2 Coalition, and others, the Summit aims to bring together hundreds of national and subnational climate leaders to transform climate finance, enhance multilevel action, fast-track the energy transition, and strengthen resilience and adaptation at the local level.

The cost of travel, lodging, and most meals while attending the Local Climate Action Summit will be covered by C40 Cities Climate Leadership groups. Public officials, including any employee of a government entity, should consult applicable rules and regulations to ensure that their attendance (including the acceptance of related costs) complies.

Our team would be glad to answer any questions you might have. To RSVP, please reply to this email or email specialevents@bloomberg.org.

Thank you for your consideration, and we look forward to seeing you in December.

Sincerely,

Michael R. Bloomberg
United Nations Secretary-General's Special Envoy
on Climate Ambition and Solution

H.E. Dr. Sultan Ahmed Al Jaber
COP28 President-Designate
UAE Special Envoy for Climate Change

10. On November 6, 2023, the Respondent's assistant forwarded the invitation to the Respondent.
11. The Respondent sought further information about the conference from the City's Manager, Climate Action.
12. Based in part on the information provided by her, the Respondent determined on or about November 14, 2023 that there would be value to the City in attending the conference.
13. The City declared a climate emergency in 2019 and committed to taking action to reduce greenhouse gas emissions.¹
14. The Respondent's assistant worked with C40 Cities to make travel arrangements. The Respondent informed the City's Chief Administrative Officer ("CAO") and the Acting Mayor of his intent to attend.
15. The Respondent attended the conference and related events from December 1-6, 2023, and returned home on December 7, 2023.
16. The Respondent flew business class to Dubai and stayed at the Waldorf Astoria Hotel. Those costs were borne by C40 Cities Climate Leadership groups, as was any cost of the Respondent's attendance at the conference events itself.
17. The Respondent's attendance at the conference was made known to Council during the conference and was publicized by the Respondent on his personal social media accounts. In particular, the Respondent posted about the trip on his public Instagram page on December 3, 2023, and on his blog, beginning on December 21, 2023.²
18. Following his return, the Respondent received advice from internal counsel to the City that his attendance at the conference likely did not constitute a "gift" within the meaning of section 105 of the *Community Charter*.
19. The Respondent also sought legal advice from external counsel, who advised him that his attendance at the conference likely constituted a gift or personal benefit but fell within the exception under section 105(2)(a) for things "received as an incident of the protocol or social obligations that normally accompany the responsibilities of office".
20. On December 21, the Respondent submitted to the City's Corporate Officer a disclosure statement as contemplated by section 106 of the *Community Charter*. The disclosure statement indicated:
 - (a) The Respondent's cost of travel, lodging and most meals while attending the LCAS and related COP28 conference was covered by C40 Cities;
 - (b) He attended from November 29 to December 7, 2023, including travel time; and
 - (c) The disclosure statement was filed without prejudice to the Respondent's ability to later claim that the sponsorship was not a "gift or personal benefit".

¹ <https://www.newwestcity.ca/environment/climate-emergency>

² See <https://www.patrickjohnstone.ca/2023/12/cop28-part-1.html>

21. According to its website, the C40 Cities is a global network of mayors of the world's leading cities that are united in action to confront the climate crisis.³ The "what we do section of their website" states that it is involved in:

- (a) Raising climate ambition;
- (b) Influencing the Global Agenda;
- (c) Building a movement; and
- (d) Scaling up climate action.

22. C40 Cities has a number of different funders and partners, including corporate groups.⁴ Vancouver is the only member of organization in BC; the City is not a member.

23. On February 19, 2024, the Complainants filed the Complaint.

24. In April 2024, the City announced that it was one of six Canadian cities that would receive funding and technical assistance from the Bloomberg Philanthropies Youth Action Climate Fund.⁵

V. POSITIONS OF THE PARTIES

A. *Position of the Complainants*

25. The Complainants assert that the Respondent breached the Code of Conduct and section 105 of the *Community Charter* by "knowingly accepting an extravagant gift from a third party organization." The Complainants say that the trip was a "gift" and not compensation as defined under section 105(2)(b) or "sponsorship".

26. The Complainants note that the trip was not managed or facilitated by the City's staff and that costs were covered by a third party.

27. They state that the gift is "outside the bounds of what could normally be considered as "an incident of the protocol or social obligations that normally accompany the responsibilities of the office".

28. While all members of Council have a travel budget, use of which does not require approval by Council, these funds were received outside of that budget from an organization that the Complainants allege has as one of its stated goals to lobby elected officials.

29. The Complainants note that the City does not have a "sponsorship policy".

30. The Complainants allege that the Respondent has been able to use his trip for personal political gain through his social media posts. They assert that the Respondent's posts communicate to residents that the Respondent was at the conference on a sanctioned trip, representing the City in a formal capacity.

³ <https://www.c40.org/>

⁴ <https://www.c40.org/funders-partners/>

⁵ <https://www.newwestcity.ca/2024/04/22/bloomberg-philanthropies-funds-climate-action-by-new-westminster-youth.php>

31. The Complainants allege that the Respondent's conduct undermines certain principles in the Code of Conduct:

- (a) Openness: accepting the trip in his capacity as Mayor but neglecting to inform Council and the public undermined conducting one's duties in an open and transparent manner.
- (b) Leadership: the secrecy surrounding the gift received did not inspire and build the public's trust and confidence in the City.
- (c) Integrity: an unvetted trip paid by a lobbyist third party raised concerns that the trip was not free from undue influence.

B. Position of the Respondent

32. The Respondent submits that the Complaint is unfounded and based on two false assertions: that he breached the *Community Charter* and, in turn, the Code of Conduct, and that he failed to follow policies and procedures, which could not be a Code of Conduct issue.

33. The Respondent asserts that the language and allegations used by the Complainants are intended to cast aspersions on his character and integrity, which he believes to be the goal of the Complainants. The Respondent asserts that the Complaint is vexatious.

34. In substance, the Respondent relies on the advice received from both internal and external counsel that his conduct did not breach the *Community Charter*. He notes that internal counsel advised that the sponsorship would not typically be considered a gift or personal benefit. He states further that if it was a gift or personal benefit, it falls within the exception in section 105(2)(a) and required only timely disclosure. He asserts that his disclosure statement was timely in the circumstances.

35. With respect to the specific allegations made by the Complainants, he notes first that there is no policy or procedure requiring notice to Council of attendance at a conference to represent the City. Council members are only required to do so where attendance at a conference will result in the Council member exceeding their expense limit.

36. In response to the assertion that it could not be a sponsorship because the City has not sponsorship policy, the Respondent notes that the City receives many sponsorships, and the lack of a policy does not prevent sponsorships from occurring.

37. He noted further that there was no obligation to report to Council or the public on his participation in a conference. In particular, he asserted that both Complainants have attended conferences without making reports back to Council or the public. The Respondent noted his public blog posts regarding the conference.

38. With respect to the assertion that if the Respondent accepted compensation in his official capacity, Council's approval would have been required, the Respondent noted that there is no policy or practice consistent with the Complainants' assertion.

39. The Respondent stated further:

According to the Government of BC, and under the Community Charter, the Mayor must "reflect the will of council and carry out other duties on behalf of council, such as attending

ceremonies and meetings of other bodies.” (<https://www2.gov.bc.ca/gov/content/governments/local-governments/governance-powers/councils-boards/municipal-council-organization/mayor-councillors>). This is a Council that has repeatedly and firmly asserted that Climate Action is a priority for the City, and that we are a Council that wants to lead, and be seen leading, on Climate Action. New Westminster’s participation in the LCAS and COP28 is not only a demonstration of this leadership, it was an opportunity to give staff the tools they need to do their work. Nothing in the Charter requires my seeking further approval from Council to do the work charged of me by Council.

40. In response to the allegation that he has used the trip for personal gain, the Respondent stated that he attended the conference in his role as Mayor of a City that prioritizes climate action. He noted that the majority of Council supports that work and included it in the Council Strategic Priorities Plan and said that the community supports Council in doing that work.

41. He noted that the Complainants have voted against measures taken by Council to address climate action and questioned whether the Complaint was driven by their opposition to the position taken by the majority of Council on climate action.

C. Reply of the Complainants

42. In reply, the Complainants make the following points, while re-affirming their original Complaint:

- (a) The Respondent had ample opportunity after November 14, when he made the decision to attend, to call a special meeting of Council to seek approval to receive the funds;
- (b) The Respondent’s social media account is not an official correspondence from the City and is not a substitute for formal communication to other members of Council;
- (c) The City’s internal counsel is not responsible for making a determination as to whether the Respondent was provided with a gift; that determination is the responsibility of the Respondent; and
- (d) The Respondent should have advised Council and sought approval to accept the funds and disclosed same to the public.

VI. LEGAL PRINCIPLES

43. The *Community Charter* provides powers and obligations to municipal governments. Section 3 of the act provides that its purpose is as follows:

3 The purposes of this Act are to provide municipalities and their councils with

- (a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,
- (b) the authority and discretion to address existing and future community needs, and
- (c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.

44. Section 4 of the *Community Charter* provides that the powers conferred on municipalities and their Councils must be interpreted broadly in accordance with the purpose of the Act.

45. Division 6 of the *Community Charter* addresses conflicts of interest. Sections 105 and 106 deal specifically with gifts.

Restrictions on accepting gifts

105(1) A council member must not, directly or indirectly, accept a fee, gift or personal benefit that is connected with the member's performance of the duties of office.

(2) Subsection (1) does not apply to

(a) a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office,

(b) compensation authorized by law, or

(c) a lawful contribution made to a member who is a candidate for election to a local government.

(3) A person who contravenes this section is disqualified from holding office as described in section 108.1 [*disqualification for contravening conflict rules*] unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Disclosure of gifts

106(1) This section applies if

(a) a council member receives a gift or personal benefit referred to in section 105
(2) (a) that exceeds \$250 in value, or

(b) the total value of such gifts and benefits, received directly or indirectly from one source in any 12 month period, exceeds \$250.

(2) In the circumstances described in subsection (1), the council member must file with the corporate officer, as soon as reasonably practicable, a disclosure statement indicating

(a) the nature of the gift or benefit,

(b) its source, including, if it is from a corporation, the full names and addresses of at least 2 individuals who are directors of the corporation,

(c) when it was received, and

(d) the circumstances under which it was given and accepted.

(3) A person who contravenes this section is disqualified from holding office as described in section 108.1 [*disqualification for contravening conflict rules*] unless the contravention was done inadvertently or because of an error in judgment made in good faith.

46. Sections 28 and 29 of the Code of Conduct provide that Council members will abide by sections 105 and 106 of the *Community Charter*.

47. The Code of Conduct's purpose and interpretation provisions provide in part as follows:

The purpose of this Bylaw is not to stifle Council Members or to limit their ability to fully perform the governmental advocacy functions that their position entails, with all the vigour flair and freedom that is typical of a well-functioning democratic institution, but instead to guide the Council Members to undertake those functions in a manner that accords with sound ethical principles.

48. There is a dearth of decisions that deal directly with sections 105 and 106 of the *Community Charter*, and so it is useful to consider analogous provisions and their interpretations.

49. The *Member's Conflict of Interest Act*, R.S.B.C. 1996, c. 287, which applies to Members of the Provincial Legislature, contains similar provisions to the *Community Charter*.

Accepting extra benefits

7(1) A member must not accept a fee, gift or personal benefit, except compensation authorized by law, that is connected directly or indirectly with the performance of the member's duties of office.

(2) Subsection (1) does not apply to a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office.

(3) If a gift or personal benefit referred to in subsection (2) exceeds \$250 in value, or if the total value received directly or indirectly from one source in any 12 month period exceeds \$250, the member must immediately file with the commissioner a disclosure statement, in the form prescribed by the regulations, indicating

(a) the nature of the gift or benefit,

(b) its source, and

(c) the circumstances under which it was given and accepted.

50. The BC Office of the Conflict of Interest Commissioner ("COIBC") provides guidance to elected officials in the BC Legislative Assembly.⁶ As the *Member's Conflict of Interest Act* contains similar provisions to the *Community Charter*, its guidance is informative.

51. The COIBC defines sponsored travel as follows:⁷

"Sponsored travel" means travel on a commercial, non-commercial or private aircraft and includes any other travel-related expenses (e.g. tax, accommodation) paid for in the whole or in part by a third party".

52. In its Sponsored Travel Bulletin, the COIBC further indicates the following:⁸

Acceptable sponsored travel includes taking part in a genuine fact-finding tour, or speaking at conferences, public events, forums and the like, where the Members' experience as elected official would offer valuable perspectives. A genuine fact-finding tour or event is one which allows the Member to become better informed regarding subject matters closely

⁶ <https://coibc.ca/>

⁷ <https://coibc.ca/wp-content/uploads/2020/12/Sponsored-travel-bulletin-Nov-2020.pdf>

⁸ *Ibid.*

related to their official duties. The Member's participation should serve as a public purpose rather than a private one.

53. The bulletin also provides that sponsored travel is considered a gift "unless given as an incident of protocol or social obligation". The COIBC is of the view that before accepting sponsored travel, members should consult with the commissioner, who will consider the following factors in determining whether the trip is appropriate: (1) the donor; (2) any educational purpose; (3) whether the subject matter of the tour is directly linked to the member's duties of office; (4) educational activities/opportunities; and (5) how the public interest is served.

54. The COIBC has also published a Gift Guide.⁹ The Gift Guide states that meals, hospitality, and sponsored travel all qualify as gifts. It provides further examples of appropriate and inappropriate sponsored travel. These examples include the following:

You have been invited to attend an economic development conference in Calgary that will be attended by elected representatives from across the country and companies from a variety of sectors. A large multi-national company has offered you a seat on a flight from Vancouver to Calgary on its corporate jet.

You may not accept the private flight. There are many commercial transportation options available. If you wish to attend the conference you should go through the regular government or constituency approval process for claiming business travel expenses.

55. The Gift Guide also indicates that accepting an invitation to a holiday party by a large corporation regulated by the province is not acceptable as:

...attending private corporate events is not considered part of your social obligations of office. Moreover, given the donor's dealings with the government, the gift could be seen as an opportunity to lobby or attempt to influence you in some future decision you may be called upon to make.

56. The Gift Guide further discusses attendance at charity and sporting events. It provides, amongst others, that:

- (a) Accepting a VIP pass to a sporting event for which the Province has provided some funding is acceptable as part of the social obligations of the office. However, accepting box tickets to the event from a corporation is not acceptable, as the level of luxury and exclusivity suggests attendance is more of a perk than the *bona fide* fulfillment of a social obligation.
- (b) Accepting an entrance fee from a corporate sponsor for a charity golf event is not acceptable, but accepting entrance from the charity itself is acceptable.

57. The Alberta Ethics Commissioner's Guide to Gifts provides the following description of "protocol" and "social obligation":¹⁰

Gifts that are an incident of protocol are gifts offered that have a special cultural or historic meaning to the person or group offering the gift and that are commonly given by that person or group to honour or thank someone. Gifts that are of the social obligation that normally accompany the Member's office are gifts that are offered as a matter of gratitude or

⁹ <https://coibc.ca/wp-content/uploads/2020/06/Gift-Guide-June-for-website.pdf>

¹⁰ <https://www.ethicscommissioner.ab.ca/media/3326/guide-to-gifts-april-2024.pdf>

courtesy appropriate to an occasion, typically when a Member is attending an event in the Member's official capacity.

58. It further states:

If a conference relates to a Minister's portfolio or a Member has an expertise or sufficient interest in the conference matter, a waiver of the attendance fee may be considered a social obligation that normally accompanies the Member's office. When a Member is invited to speak at a conference or bring greetings on behalf of the Province, it is typically acceptable within the social obligation exception for the Member's attendance fees for the conference to be waived. A waiver of attendance fees for a conference or meeting of substantial importance or interest to the Province may also fit within the social obligation exception.

[...]

For tickets, invitations, attendance fees and travel expenses offered by lobbyists, Members must consider whether the offered gift is an incident of protocol or social obligation and whether the gift, if given, would place the Member in a conflict of interest. Members should also consider the public perception of accepting such gifts.

59. With respect to the purpose of the *Community Charter*, the BC Court of Appeal has indicated that the powers of municipal governments to address their community's needs should be interpreted broadly:¹¹

[37] The *Community Charter* provides municipalities and their councils with the legal framework for the powers, duties and functions required to fulfill their purposes, the authority to address their community's needs, and the flexibility necessary to respond to those needs. These powers are to be interpreted broadly, in accordance with the *Community Charter*, the *Local Government Act*, and municipal purposes: ss. 3 and 4, *Community Charter*. The SRD Code of Conduct Bylaw also establishes "principles and guidelines for the conduct of directors in providing good government to the Regional District".

60. The general procedure for determining conflicts of interest was outlined by Justice Winteringham in *Gisborne v. qathet (Regional District)*, [2022] B.C.J. No. 1670 ("*Gisborne*"). That decision dealt with a pecuniary interest related to a property owned by an elected official, however, the same considerations with respect to procedure apply.

61. First it must be established that the councillor in issue had a conflict, and then once established, whether one of the exceptions to the conflict apply. The Court noted that the conflict of interest provisions must be construed broadly and in a manner consistent with their purpose:

[44] In *Redmond v. Wiebe*, 2022 BCCA 244, Chief Justice Baumann confirmed the two-stage approach for assessing alleged violations of the conflict-of-interest restrictions. He wrote, at para. 45:

... At the first stage, the petitioners must demonstrate that Councillor Wiebe in fact had a conflict of interest arising from a direct or indirect pecuniary interest and that, despite the conflict, he improperly participated in council or committee proceedings. At the second stage, the burden shifts to Councillor Wiebe to prove either: (1) that he acted inadvertently

¹¹ *Anderson v. Strathcona Regional District*, 2024 BCCA 23

or made an error of judgment in good faith; or (2) his pecuniary interest is excused by an exception listed under s. 145.6(1) of the *Vancouver Charter*. See generally: *Fairbrass v. Hansma*, 2009 BCSC 878 at paras. 17-20 [Fairbrass SC], aff'd 2010 BCCA 319 [Fairbrass CA]; *Allan v. Froese*, 2021 BCSC 28 at paras. 26-27 (but not for its position on onus at para. 28). I note the question of onus was an issue on appeal, which I discuss below at paras. 67-69.

[45] For the most part, the parties agreed on the governing legal principles relating to conflicts of interest and the court's interpretation of such statutory provisions. I agree with the petitioners' characterization of the court's obligation in this regard. That is, the *Interpretation Act*, R.S.B.C. 1996, c. 238 and jurisprudence provide that the conflict of interest provisions in the *Community Charter* must be construed broadly and in a manner consistent with their purpose -- the purpose being to prevent elected representatives with a declared pecuniary interest in a bylaw from attempting to influence the voting: see *Redmond v. Wiebe*, 2021 BCSC 1405 at para. 90; *Schlenker v. Torgrimson*, 2013 BCCA 9, at paras. 35-41.

[emphasis added]

62. Under the common law, a conflict can be defined as an incompatibility between one's private interests and one's public or fiduciary duties:¹²

[44] If one looks to the same authority as the Ethics Counsellor, that is, the seventh edition of *Black's Law Dictionary*, "conflict of interest" is defined as follows:

conflict of interest. 1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 2. ...

[45] As this brief survey demonstrates, the idea of conflict of interest is intimately bound to the problem of divided loyalties or conflicting obligations. While the specific facts giving rise to a conflict of interest will vary from one profession to another, that which leads to the conclusion that a person is subject to a conflict of interest is the presence of a tension between the person's duty and some other interest or obligation.

63. As part of its provisions regulating conflicts of interest, the *Community Charter* contains restrictions on accepting gifts, fees, or personal benefits that are connected to a councillor's performance of their duties of office.

64. In *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, [2019] F.C.J. No. 527, the Federal Court of Appeal provided the following commentary regarding the meaning of the term benefit:

[98] As broad as the term "benefit" may be, it cannot be interpreted in such an all-encompassing manner as to overshoot its ordinary meaning, or as bearing no relationship with the underlying purpose of the Act. A "benefit" must be something that gives an advantage to or profits the person upon whom it is conferred. To receive a benefit, a recipient must be put in a better position than he or she would otherwise have been without the benefit.

¹² *Democracy Watch v. Campbell*, [2009] F.C.J. No. 327

65. The prohibition on accepting gifts and personal benefits does not apply to gifts of personal benefits that are “received as an incident of the protocol or social obligations that normally accompany the responsibilities of office” (*Community Charter*, section 105(2)(a)).

66. The meaning of the phrase “protocol or social obligations that normally accompany the responsibilities of the office” was discussed in detail by the Office of the Registrar of Lobbyists in *Ranalletta (Re)*, 2024 BCORL 1. The *Lobbyists Transparency Act* contains a gift-giving prohibition at section 2.4, which provides that the prohibition of gifts does not apply if:

The gift or benefit is given or promised to be given under the protocol or social obligations that normally accompany the duties or responsibilities of office of the public office holder.

67. At issue in that decision was an invitation to the CUPE BC Annual Convention Welcome Reception, which included food and refreshments (a total value of \$65.14 per person). The convention was described as a democratic forum where union members receive union-wide reports on union affairs, finances and budgets, elected executive officers, debate and vote on policy and priorities.

68. In coming to a decision that the gift fell under the exception, the Registrar’s Delegate referred to many of the same guides referenced above. He defined protocol and social obligations as follows:

[53] For the exception to apply, the gift must be given under the protocol or social obligations that normally accompany the duties or responsibilities of the office of the POH.

[54] Protocol is defined as “a system of rules and acceptable behaviour used at official ceremonies and occasions.” Black’s Law Dictionary defines protocol as “the rules of diplomatic etiquette; the practices that nations observe in the course of their contacts with one another.” Diplomatic is defined as “...the management of relationships between countries,” usually involving diplomats.

[55] Social is defined as “a social gathering or party, especially of or as given by an organized group.” *Black’s Law Dictionary* defines “obligation” as “legal or moral duty to do or not do something [...] whether imposed by law, contract, promise, social relations, courtesy, kindness, or morality.” A social obligation implies something mandatory or at least strongly encouraged by the mostly unwritten rules of human relationships. “Normally” is defined as “conforming to a type, standard, or regular pattern characterised by that which is considered usual, typical or routine.” The word “accompany” is defined in *Black’s Law Dictionary* as “to go along with.” Put together, the terms “normally accompany” creates an objective standard of what social obligations are expected for a PHO.

[56] I accept these definitions and will use them to determine if the gift was given under either a protocol or social obligation, which would normally accompany the duties or responsibilities of the office of the POHs who attended the CUPE BC Annual Convention Welcome Reception.

69. The Registrar’s Delegate found that the gift did not fall under the protocol exception, but that it did fall under the social obligations exception, noting that MLAs have an obligation to meet with constituents and attend community meetings or gatherings by organized groups to listen to questions and concerns:

[57] The CUPE BC Annual Convention Welcome Reception was not a diplomatic event, it was not an official ceremony or occasion between nations, or governments, for the purpose

of managing relationships. I am of the view that the gift given at the CUPE BC Annual Convention Welcome Reception was not given under a protocol.

[...]

[63] There is an obligation, a duty imposed by the members' guide, that MLAs meet with constituents or attend community meetings, or social gatherings or events, organized by groups and listen to questions and concerns. These are actions that conform to standards, or regular patterns of activity, which are typical or routine, in other words, activities that normally accompany the duties or responsibilities of the office of an MLA. In my view, the gift was given under a social obligation that normally accompanies the duties or responsibilities of an MLA's office.

[64] I accept the gift given to the attending MLAs was provided as a courtesy encouraged by the unwritten rules of human or social relationships, and consider it was a gift given under a social obligation that normally accompanies the duties or responsibilities of an MLA's office, therefore, s. 2.4(2)(a) applies here.

70. The *Community Charter* further provides that if a gift is received in accordance with section 105(2)(a) disclosure of the gift must be made as soon as practicable if it exceeds \$250 in value. The definition of "as soon as practicable" was discussed in *R. v. Theosanamorthy*, [1997] O.J. No. 6175:

[10] Black's Law Dictionary (Sixth Edition) 1990 Centennial Edition (1891-1991) at page 122 defines and interprets:

"As soon as practicable": Means reasonable time. These words are not synonymous with "as soon as possible"; they mean ordinarily as soon as reasonably can be expected in the particular circumstances; or "in due time

"as soon as practicable" means within reasonable time in view of all the facts and circumstances of each particular case. ...

[11] Lord Reid in *Inland Revenue Commissioners v. Hinchy* [1960] A.C. 748 at 766 (1960) 1 All E.R. 505 (H.L.) said:

"It is no doubt true that every act should be read as a whole, but that is, I think, because one assumes that in drafting one clause of a Bill, the draftsman had in mind the language and substances of other clauses, and attributes to Parliament a comprehension of the whole Act."

[12] In view of the fact that the words "as soon as practicable" had been given the meaning "as soon as reasonably can be expected in the particular circumstances" in Black's and no other interpretation had been shown to exist and or apply, Court is of opinion that the contention of Mr. Thompson cannot succeed in the circumstances in the first instance.

71. If a gift was accepted contrary to the *Community Charter*, then the legislation's exculpatory provisions must be examined. They provide that the council member may be excused from disqualification if the contravention was done "inadvertently or because of an error of judgment made in good faith".

72. In *Holat v. Wettlaufer*, [2014] B.C.J. No. 453, Justice Funt defined good faith as follows:

[51] As noted above, “good faith” is defined to mean something “done honestly, whether negligently or not”. There is no question that Mr. Robson acted honestly and accordingly the definition of “good faith” is satisfied.

73. When determining whether the good faith exception applied, Justice Winteringham in *Gisborne* took into account past patterns of compliance and the councillor’s subjective views:

[93] This pattern of compliance with the statutory requirements is relevant to my finding that Mr. Brander demonstrated good faith and any error on Mr. Brander’s part, if there was one, was inadvertent. Mr. Brander described his commitment to civic duty, including engaging in the public process. I accept his evidence that he viewed his attendance at the public sessions as an important reflection of his commitment to community engagement.

[...]

[94] In conclusion, I am not satisfied that the petitioners have established that Mr. Brander violated the *Community Charter* as alleged. If I am incorrect in this determination, I am satisfied that Mr. Brander’s declaration of conflict of interest regarding the Douglas Bay Zoning Bylaw demonstrates his good faith and any error was inadvertent. He explained why he attended the public engagement sessions and he explained his belief that the zoning bylaw and censure and/or sanction process were distinct. I accept his explanations as sincere.

74. Good faith may be demonstrated by seeking advice from other city staff or a solicitor prior to making a decision, even if the decision or advice was ultimately incorrect.¹³

[59] In the case at bar, had I found that s. 191 was engaged, I would have exercised my discretion to decline the relief sought. I have found that the respondents acted in good faith and in reliance on advice from City staff and from the municipal solicitor. Further, the unauthorized loans have been rescinded and the monies repaid. In short, there is no valid purpose to be served by granting the relief.

75. Inadvertent has been judicially considered to mean:¹⁴

[41] The word “inadvertent” as used in s. 201(7) means:

Not properly attentive; inobservant; negligent; heedless ... characterized by want of attention; hence, unintentional: Shorter Oxford English Dictionary, p. 1040.

Inadvertence: Heedlessness; lack of attention; want of care; carelessness; failure of a person to pay careful and prudent attention (where) rights may be affected: Black’s Law Dictionary, 6th Ed. p. 759

¹³ *Orchiston v. Formosa*, 2014 BCSC 108

¹⁴ *King v. Nanaimo (City of)*, 1999 CanLII 6667

VII. ANALYSIS

76. In their Complaint, the Complainants point to a lack of policies or procedures to suggest that the Respondent's actions were improper and suggest that the Respondent should have taken various steps, such as reporting to Council. The Respondent replies these are not valid issues for decision.

77. My jurisdiction is limited to interpreting and applying the Code of Conduct. While there may be circumstances where a breach of a policy may give rise to a breach of the Code of Conduct, that is not the issue before me here.

78. I make no findings about whether the City should have policies related to sponsorship or gifts, or whether the Respondent should have sought the permission of Council. These are not matters that fall under the Code of Conduct.

79. The only issue to be decided here is whether there has been a breach of the Code of Conduct through a breach of section 105 or 106 of the *Community Charter*.

A. Did the Respondent Receive a Gift or Personal Benefit?

80. C40 Cities provided the Respondent with paid travel, lodging, and meals to attend the LCAS taking place during COP28. To the extent that there were fees associated with conference attendance, those fees were waived for the Respondent.

81. As set out above, section 105 of the *Community Charter* stipulates that a council member must not accept a fee, gift, or personal benefit that is connected with the member's performance of the duties of office.

82. The travel, meals, lodging, and conference attendance were plainly connected with the Respondent's performance of his duties of office. The Respondent was invited to attend, and did attend, in his capacity as Mayor of the City.

83. I find, in light of the legal principles set out above and for the reasons set out below, that the travel, meals, lodging, and conference attendance constituted a gift or personal benefit.

84. The Respondent received an all expenses paid trip to Dubai to attend a conference. He did not provide any consideration in exchange for the trip. The trip qualifies as a gift that falls under the ambit of section 105 of the *Community Charter*.

85. As the travel qualifies as a gift under the *Community Charter*, it is not necessary to evaluate whether it also meets the definition of a personal benefit. However, for the sake of completeness, it is my view that it would also meet the definition of a personal benefit.

86. In *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95 the Federal Court of Appeal opined that a benefit is something that "gives an advantage to" the person to whom it is conferred, and that to qualify as a benefit "a recipient must be put in a better position than he or she would otherwise have been without the benefit".¹⁵

¹⁵ At para. 98

87. Through the gifted travel, the Respondent was able to attend a prestigious conference, visit Dubai, and receive free meals and lodging throughout. I also note that the Respondent has written extensively about his attendance at the conference on his personal blog. The same information was not shared on any official City resources.

88. The publication of this information on a personal blog has the potential to personally benefit the Respondent as increasing his stature within the climate action community.

89. The fact that COP28 may have been attended by other Canadian politicians does not negate the character of the trip as gift or personal benefit. While the trip may have been beneficial to both the Respondent and the City, that does not mean it is exempt from the definition of a gift or personal benefit under the *Community Charter*. Similarly, the fact that the funds were received from an organization that has views that are aligned with the City's goals in reducing global emissions does not change the character of the gift.

90. I find that the conference attendance, including travel, lodging, and meals, provided by C40 Cities to the Respondent falls under the definition of gifts or personal benefits outlined in section 105(1) of the *Community Charter*.

B. Was the Gift or Personal Benefit Received as an Incident of the Protocol or Social Obligations that Normally Accompany the Responsibilities of Office?

91. Section 105(2)(a) of the *Community Charter* provides that the prohibition on the receipt of gifts outlined in section 105(1) does not apply if the gift or benefit is received as an incident of the protocol or social obligations that normally accompany the responsibilities of the office.

92. As noted above, there is limited jurisprudence that addresses the definition of protocol or social obligations normally accompanying the responsibilities of office. However, the decision from the Office of the Registrar of Lobbyists in *Ranalletta (Re)* is informative.

93. In that decision, the Registrar held that protocol is defined as “a system of rules and acceptable behaviour used at official ceremonies and occasions”¹⁶ typically regarding the management of relationships. The Registrar ultimately determined that an invitation for MLAs to attend a union's annual reception, which included free appetizers and refreshments, did not fall under this definition as it was “not an official ceremony or occasions between nations, or government for the purpose of managing relationships”.¹⁷

94. In the case at hand, COP28 and the LCAS are a conference involving multiple nations and governments, arguably for the purpose of managing or establishing relationships which will further climate goals. However, the Respondent was only attending the conference. He was not a member of an official delegation, he was not invited as a guest presenter, and he had no previous relationship with C40 Cities. The City is not a member of C40 Cities. He was under no obligation to accept the invitation, and had he declined it, there was no risk that he would damage a relationship. As a result, there was no protocol or occasion that would qualify under this exception.

95. In *Ranalleta (Re)*, the Registrar's Delegate went on to define a “social obligation” as something that is strongly encouraged by the unwritten rules of human relationships, opining that

¹⁶ At para. 54

¹⁷ At para. 57

it typically involves a behaviour that is consider “usual, typical or routine”. Based on this definition, the Registrar’s Delegate found that it was appropriate for an MLA to be offered and to accept an invitation to a union’s annual reception, which included a gift of free appetizers and refreshments. The Registrar’s Delegate noted that MLAs have a duty to meet with constituents, attend community meetings or social gathering organized by groups, and listen to questions or concerns. The Registrar found that these activities are typical or routine and normally accompany the duties and responsibilities of the office.

96. While not directly addressing the definition of the term “social obligations that normally accompany the responsibilities of the office”, the COIBC and the Ethics Commissioner of Alberta have provided further applicable guidance on types of sponsored travel that are acceptable.¹⁸ Examples they provide include:

- (a) Taking part in a genuine fact-finding tour, which the COIBC defines as one that allows the member to become better informed regarding subject matters closely related to their official duties. The member’s participation should serve a public purpose rather than a private one.
- (b) Speaking at conferences, public events, forums and the like, where the member’s experience as an elected official would offer valuable perspective.
- (c) Accepting a VIP pass to a sporting event for which the Province has provided funding. However, they note that accepting box office tickets to the event from a corporation is not acceptable.
- (d) Waiver of attendance fees for a conference or meeting of substantial importance or interest to the province.

97. Examples provided of gifts/sponsored travel that would not be acceptable include:

- (a) Accepting travel from a corporate group on a private plane to an economic development conference that will be attended by elected representatives and companies from a variety of sectors.
- (b) Accepting an invitation to a holiday party by a large corporation regulated by the Province, particularly as the gift could be seen as an opportunity to lobby or attempt to influence the member.
- (c) Accepting a ticket to a charity golf tournament from a corporate sponsor. However, the Commissioner notes that a complementary ticket from the charity itself would be acceptable.

98. The Alberta Ethics Commissioner’s guidance suggests that social obligations may be more broadly interpreted than the definition outlined by the Registrar of Lobbyists in *Ranalleta (Re)*.

¹⁸ <https://coibc.ca/wp-content/uploads/2020/12/Sponsored-travel-bulletin-Nov-2020.pdf>;
<https://coibc.ca/wp-content/uploads/2020/06/Gift-Guide-June-for-website.pdf>;
<https://www.ethicscommissioner.ab.ca/media/3326/guide-to-gifts-april-2024.pdf>.

99. In considering whether the gift or benefit fell within the scope of the exclusion in section 105(2)(a), it is also relevant to consider the duties of the Respondent under the *Community Charter*.

100. Section 115 sets out the duties of all council members:

115 Every council member has the following responsibilities:

- (a) to consider the well-being and interests of the municipality and its community;
- (b) to contribute to the development and evaluation of the policies and programs of the municipality respecting its services and other activities;
- (c) to participate in council meetings, committee meetings and meetings of other bodies to which the member is appointed;
- (d) to carry out other duties assigned by the council;
- (e) to carry out other duties assigned under this or any other Act.

101. Section 116 sets out the particular duties of mayors:

116(1) The mayor is the head and chief executive officer of the municipality.

(2) In addition to the mayor's responsibilities as a member of council, the mayor has the following responsibilities:

- (a) to provide leadership to the council, including by recommending bylaws, resolutions and other measures that, in the mayor's opinion, may assist the peace, order and good government of the municipality;
- (b) to communicate information to the council;
- (c) to preside at council meetings when in attendance;
- (d) to provide, on behalf of the council, general direction to municipal officers respecting implementation of municipal policies, programs and other directions of the council;
- (e) to establish standing committees in accordance with section 141;
- (f) to suspend municipal officers and employees in accordance with section 151;
- (g) to reflect the will of council and to carry out other duties on behalf of the council;
- (h) to carry out other duties assigned under this or any other Act.

102. In the case at hand, COP28 and the LCAS may be of importance or interest to the City. The City has declared a climate crisis and implemented various goals and policies to try and reduce greenhouse gas emissions.

103. I accept that the Respondent's attendance at the conference was a genuine fact-finding mission to become better informed about subject matter that is closely related to a public duty.

The Respondent's attendance at the conference was consistent with taking action in furtherance of the City's 2019 declaration and commitment.

104. I separate, however, the Respondent's attendance at the conference (and any associated waiver of conference fees) from the meals, travel, and lodging associated with attending at the conference.

105. While the Respondent's attendance at the conference was, I find, a gift or personal benefit received as an incident of the social obligations that accompany the office of Mayor and consistent with his duties, I reach a different decision regarding the meals, travel, and accommodations provided to the Respondent to facilitate that attendance. I find that the travel and accommodations provided to the Respondent do not fall within the exception in section 105(2)(a).

106. In this respect, I note that the Respondent was provided with luxury travel (business class flights) and accommodations. As noted by the COIBC, the level of luxury suggests that attendance was more of a personal benefit than the fulfillment of a social obligation.

107. As was discussed in *Gisborne*, the conflict of interest provisions must be interpreted broadly and in connection with the purpose of the *Community Charter*.

108. C40 Cities have the stated goal of "influencing the Global Agenda". While they may not be lobbyists in the traditional sense, particularly as it is reportedly a global network of mayors, they have the stated goal of influencing government policies. The fact that its goals align with the City's current stated objectives does not remove this potential conflict. Public perception, rightly or wrongly, may be that by accepting the trip, the Respondent could be more easily influenced to implement climate change initiatives if approached by C40 Cities.

109. For the reasons set out above, I accept that attendance at this conference was consistent with the Respondent's social obligations that accompany the office of Mayor where the City has made commitments to climate action.

110. Receiving luxury travel, accommodation, and meal expenses to attend an international conference, however, is outside the scope of the ordinary social obligations that accompany the office. The language of section 105(2)(a) refers to what may "normally" accompany the office. There is no evidence before me to suggest that the travel and accommodation package provided to the Respondent here falls within the scope of what would "normally" be provided to attend a conference of an organization of which the City is not a member. Unlike attendance at the conference, these gifts lack a connection to the Respondent's duties as a member of council and Mayor.

111. I find that the travel package provided to the Respondent here was not "normal" and therefore the travel, accommodation, and meals were gifts or personal benefits that are not covered by the exclusion in section 105(2)(a) of the *Community Charter*.

C. *Did the Respondent Act Inadvertently or Because of an Error in Judgment Made in Good Faith?*

112. If the gift does not fall under the 105(2)(a) exception of the *Community Charter*, then the Respondent will not be disqualified from office if the decision to accept the gift was done inadvertently, or because of an error in judgment made in good faith.

113. Good faith has been interpreted to mean something done honestly even if the actions were negligent. Factors that can indicate good faith include acting on erroneous advice. Similarly, the definition of “inadvertent” includes not properly attentive, negligent, heedless, or the failure of an individual to pay careful and prudent attention.

114. I find that the Respondent here acted in good faith. Upon receiving the invitation, he took steps to investigate whether the conference would provide a benefit to the City, and was satisfied that it would provide such a benefit. He informed the CAO and Acting Mayor of his intention to attend.

115. The Respondent did not try to hide his acceptance of the gift. He posted publicly about the trip to his Instagram page on December 3, 2023. He further posted about the trip on his blog beginning December 21, 2023. Although these communications are not official City communications, they do evidence an intention to share the learnings from the conference.

116. He also spoke about the conference with Council while he was attending the conference.

117. Notwithstanding the allegations of the Complainants, I find that the Respondent was motivated in his acceptance of the gift to further the City’s goals relating to climate action.

118. Once the Respondent became aware that other councillors were concerned about the trip, he sought legal advice, first from the City’s internal counsel and then from external counsel. He was initially advised that the trip likely did not constitute a gift or personal benefit. He was later advised that it likely did constitute a gift or personal benefit but fell within the exception in section 105(2)(a). Upon receiving advice to file a disclosure statement, he immediately did so.

119. Although I have reached a different conclusion than the advice received by the Respondent, there was no reason for the Respondent to doubt the soundness of the advice that he received. It was reasonable for him to act in accordance with that advice.

120. I also find that although the Respondent did not seek legal advice until after he had accepted the gift, he nonetheless acted in good faith and his breach was inadvertent, as he did seek advice and information regarding the conference and its benefit to the City and informed the CAO of the offer.

121. I find that the Respondent acted in good faith in his acceptance of the gift, and that his breach of section 105 of the *Community Charter* was occasioned out of inadvertence.

D. If the Gift did fall under 105(2)(a) of the Community Charter was the Disclosure Statement Filed as soon as Reasonably Practicable?

122. As set out above, I have found that a portion of the gift – the conference attendance itself – fell within the scope of section 105(2)(a) of the *Community Charter*. As such, the Respondent was required to file a disclosure statement if the value of that attendance exceeded \$250. Although there is no evidence regarding the value, if any, of the conference attendance, for the sake of completeness, I will consider this issue.

123. The Respondent received the email with the offer to attend the LCAS on November 6, 2023. He confirmed his acceptance of the invitation on November 14, 2023. On December 21, he filed a disclosure statement regarding the gift, without prejudice to his ability to later claim the travel was not a gift under section 105 of the *Community Charter*.

124. Under section 106 of the *Community Charter*, if a councillor receives a gift under section 105(2)(a) with a value which exceeds \$250 in value, they must file a disclosure statement with the city's corporate officer "as soon as reasonably practicable". As soon as practicable is not synonymous with as soon as possible. It means "within a reasonable time in view of all the facts and circumstances".

125. The Respondent filed his statement several days after returning from the conference, approximately one-month after accepting the invitation. I find that this passage of time was due to him not realizing that the offer may constitute a gift for which disclosure was necessary. It was only after he realized other councillors took issue with the trip and he sought legal advice regarding his obligations that the disclosure statement was filed. He filed a disclosure statement one day after being advised by his counsel that he should do so.

126. In the circumstances, I find that the disclosure statement was filed in a timely manner, and the requirements of section 106 of the *Community Charter* were met.

E. If the Disclosure Statement was Not Filed as Soon as Reasonably Practicable, was the Contravention Inadvertent or done in Good Faith?

127. As a result of my finding above, I do not need to determine whether the disclosure statement was filed late out of inadvertence or good faith. Had such a finding been necessary, however, I would have determined that the Respondent acted in good faith.

128. In this respect, I note that the Respondent filed the disclosure statement within one day of receiving advice that he should file such a statement out of an abundance of caution. Prior to that time, the Respondent was acting on advice, as set out above, that he had not received a gift or personal benefit within the meaning of the *Community Charter*.

VIII. RECOMMENDATIONS

129. Pursuant to section 74 of the Code of Conduct, having found that the Respondent breached the Code of Conduct, I am required to make recommendations as to appropriate sanctions.

130. Although under section 74(a)(iv), having found above that the Respondent's acted in good faith, I may determine that no sanctions are appropriate, in these circumstances, I find that it is appropriate to make a recommendation.

131. It was apparent from the submissions that there is not a clear understanding of the limitations imposed by section 105 of the *Community Charter*. In the circumstances, I recommend that the Respondent receive training or coaching in the relevant provisions of the *Community Charter*. Such training or coaching should include identifying when an offer may constitute a gift or personal benefit and what gifts or personal benefits may fall within the exclusions of section 105.

132. Council may determine that such training would be beneficial for all Council members in order to avoid any similar issues in the future.

IX. CONCLUSION

133. I find that the Respondent received gifts or personal benefits connected with the performance of the duties of his office, including attendance at the COP28 conference, travel, accommodations, and meals, within the meaning of section 105 of the *Community Charter*.

134. I find further that the only portion of this gift that falls within the exception in section 105(2)(a) is the conference attendance. The travel, accommodations, and meals were not “received as an incident of the protocol or social obligations that normally accompany the responsibilities of office”.

135. I find that the Respondent’s contravention of section 105 was inadvertent and the result of an error in judgment made in good faith.

136. To the extent that the Respondent was required to file a disclosure statement under section 106 of the *Community Charter*, I find that he met those requirements and did not breach section 106.

137. Although I have found that the Respondent acted in good faith and out of inadvertence, I recommend that the Respondent receive coaching or training regarding section 105 of the *Community Charter*.



Jennifer Devins
Ethics Commissioner
City of New Westminster

September 23, 2024