



OFFICE OF THE
INTEGRITY COMMISSIONER
FOR THE CITY OF VANCOUVER

CITY OF VANCOUVER
REPORT TO
CITY OF VANCOUVER COUNCIL, COMPLAINANT AND RESPONDENT

In this matter of

AN INTEGRITY COMMISSIONER INVESTIGATION
ALLEGATIONS, FINDINGS & DECISIONS

Submitted by Lisa Southern,
Integrity Commissioner
City of Vancouver (the “Commissioner”)

February 17, 2023

Background

On June 16, 2022, a member of the public (the “Complainant”) brought forward to the Integrity Commissioner a *Code of Conduct By-Law No. 12886* (the “Code of Conduct”) complaint against Councillor Sarah Kirby-Yung (“Cllr. Kirby-Yung”) regarding a “*Conflict of Interest*” (the “Complaint”).

The Complaint alleged that Cllr. Kirby-Yung’s participation during a June 8, 2022 City of Vancouver Council meeting (the “Council Meeting”) and related discussions about the adoption of the Chinatown Heritage Asset Management Plan (“CHAMP”) for the City of Vancouver’s Chinatown was a conflict of interest, given that Cllr. Kirby-Yung’s husband, Terry Yung, was the Chair of the Board of Directors for the Dr. Sun Yat-Sen Classical Chinese Garden (the “Garden”), an organization impacted by the CHAMP.

I examined the Complaint in the context of the Code of Conduct and the law.

This report is issued in accordance with section 6.32 of the Code of Conduct. In this report, I provide a summary of process and a summary of the evidence, make findings of fact with respect to the allegations set out in the Complaint, and conclude that there has not been a breach of the Code of Conduct.

Process

A preliminary assessment of the Complaint was conducted, and it was determined that the allegations set out in the Complaint, if true, may constitute a violation of the Code of Conduct. Accordingly, on July 5, 2022, Cllr. Kirby-Yung was provided with notice of the Complaint.

From the outset, the Complainant requested they remain anonymous, as they are both a member of the public and an employee of the City of Vancouver. The Complainant expressed concern that there may be negative repercussions to them in their work if their identity was disclosed. In my view, nothing in the Code of Conduct mandates that the name of a complainant be provided to a respondent. To the contrary, section 6.38 requires that the Integrity Commissioner “*must make all reasonable efforts to investigate complaints in confidence.*” However, the Integrity Commissioner is mandated, under section 6.28, to investigate in compliance with the rules of procedural fairness and natural justice “*applicable in the circumstances.*”

In this case, the Complaint relates to proceedings that were public and captured on video. The basis on which the Complaint was brought is a matter of record. In these circumstances, the name of the Complainant related to these proceedings is not required in order for Cllr. Kirby-Yung to know the nature of the Complaint and the basis on which the Complaint was made, and to provide an answer to the Complaint. In short, procedural fairness and natural justice obligations are met in the absence of disclosure of the name of the Complainant. I have assessed the request for anonymity, including the

reasons given for the request, against the nature of the Complaint and public nature of the evidence, and granted the Complainant's request. Accordingly, I have not disclosed the name of the Complainant.

Cllr. Kirby-Yung provided a written response to the Complaint on July 22, 2022 in which she denied she had breached the Code of Conduct.

Between July 22, 2022 and September 21, 2022, the Office of the Integrity Commissioner explored whether the Complainant and Cllr. Kirby-Yung were amenable with engaging in an Informal Resolution Process to address the Complaint (see sections 6.17–6.23 of the Code of Conduct), but ultimately I determined an informal resolution was not possible and the matter should proceed to a Formal Resolution process (i.e., an investigation; see sections 6.24–6.28 of the Code of Conduct). I suspended the investigation pursuant to section 6.11 of the Code of Conduct given the proximity to the Municipal Election. Given that Cllr. Kirby-Yung was re-elected, I resumed the investigation on October 21, 2022.

I held meetings via videoconference with the Complainant and Cllr. Kirby-Yung. Cllr. Kirby-Yung was provided the opportunity to make further written submissions, which she did through legal counsel on January 3, 2023. The Complainant was then given an opportunity to provide a response to those submissions, which they did in writing on January 29, 2023. Final submissions were requested from Cllr. Kirby-Yung, which she provided through her legal counsel on February 10, 2023.

Summary of the Complaint

The Complainant expressed concern that Cllr. Kirby-Yung's actions during the Council Meeting resulted in a conflict of interest because she provided what they perceived to be advantages to the Garden that were not given to other stakeholders. The Complainant said that in various actions, Cllr. Kirby-Yung demonstrated bias and favouritism towards the Garden. The Complainant framed the concern in the following terms:

Throughout the Council meeting, Kirby-Yung repeatedly [took] a position to call for special consultation with the organization that her husband is the board chair for, despite the fact they were already highly involved in the process.

Issue

The issue that must be decided is whether Cllr. Kirby-Yung contravened the Code of Conduct when she participated in, made an amendment to a motion, and voted on discussions during the Council Meeting about the adoption of the CHAMP given that her husband was the Chair of the Board of Directors for the Garden, which was directly impacted by the CHAMP.

The following facts are a matter of public record:

- Cllr. Kirby-Yung’s husband is the Chair of the Board of Directors for the Garden;
- On June 8, 2022, the Council Meeting was held during which the “*Chinatown Transformation: Cultural Heritage Assets management Plan (CHAMP) Strategic Framework and UNESCO World Heritage Site Process*” was discussed and voted upon;
- During the Council Meeting, Cllr. Kirby-Yung did not disclose that her husband was the Chair of the Board of Directors for the Garden, nor did she recuse herself from any discussions or subsequent votes on matters affecting the Garden;
- During the Council Meeting, Cllr. Kirby-Yung actively participated in discussions and votes pertaining to the CHAMP, including the following amendment moved by Cllr. Kirby-Yung:

THAT, in A, the word “adopt” be struck and replaced with the word “refer”;

FUTHER THAT the following be added to the end of A:

“to staff for further consultation and engagement on the framework with anchor and legacy Chinese cultural organizations including for example, the Chinatown BIA, Chinese Cultural Centre, Vancouver Chinatown Foundation, Vancouver Chinese Benevolent Association, Vancouver Chinatown Merchants Association and the Dr. Sun Yat-Sen Classical Chinese Garden and report back by September 2022 or as soon as feasible”; and

- The final motion as approved by Council included, *inter alia*, the following:

B. THAT staff and the co-chairs of Legacy Stewardship Group (LSG) consult with the Chinese Cultural Centre, Vancouver Chinatown BIA, Vancouver Chinatown Merchants Association, Chinatown Benevolent Association, Dr. Sun Yat-Sen Classical Chinese Garden Society, and the Vancouver Chinatown Foundation to gather their feedback about the framework and Phase I engagement, and incorporate feedback into the framework and their ideas on how to adjust the engagement process moving forward, and consider that feedback in the design of engagement for Phase 2, Implementation Plan Development. This consultation and resulting discussion by and with LSG should happen by end of August, 2022.

Summary of Complainant Submissions

The Complainant expressed concern that during the Council Meeting, Cllr. Kirby-Yung provided advantages to the Garden that were not given to other stakeholders. They said that she demonstrated bias and favouritism towards the Garden by advocating for additional and special consultation with the Garden and other “*legacy Chinese cultural organizations,*” and that such favouritism could risk undermining the lengthy and inclusive consultation processes that had already occurred with a broad and inclusive group of stakeholders. The Complainant said their concerns about bias or favouritism to the Garden were demonstrated by the motions and amendments pertaining to the Garden (and other “*legacy Chinese Cultural organizations*”) put forward, and voted upon, by Cllr. Kirby-Yung, as well as the questions

asked by Cllr. Kirby-Yung to members of the public who spoke during the Council Meeting, which they described as “*leading questions that [gave] the Garden the opportunity to further espouse their position*” with respect to the CHAMP consultation process.

Summary of Respondent Submissions

Cllr. Kirby-Yung denied she was in a conflict of interest.

Cllr. Kirby-Yung initially submitted that the CHAMP did not provide recommendations for support of specific organizations, or financial grants or benefits, but was “*intended to present a cohesive collective vision for ensuring this historic neighbourhood is not lost, as such ensuring all relevant organizations are represented is fundamental to the work.*” Later, through legal counsel, Cllr. Kirby-Yung submitted that:

The “matter” in this case concerned discussion of a Plan applicable to a particular Vancouver neighbourhood, including many iconic cultural or legacy institutions. The Garden is among the members of the Legacy Stewardship Group, referenced below, but was not the recipient of a benefit, and was not independently the focus of the Councillor’s participation or vote. There is no basis in fact for the supposition that Councillor Kirby-Yung’s participation resulted in “rights or opportunities for the Garden that differ from other stakeholders.” These mischaracterize the matter.

Cllr. Kirby-Yung explained the amendment she made during the Council Meeting:

... simply provides the opportunity for a diverse and comprehensive group of stakeholders, not any one person or organization, to have further dialogue and engagement; it does not propose any pecuniary or specific benefits to any organization.

Cllr. Kirby-Yung said there needed to be evidence of an “*actual connection between the elected official and the matter to be voted on, and that such a connection cannot be inferred merely by the presence of a familial relationship.*” She said that in this instance, “*any connection is absent entirely.*”

Cllr. Kirby-Yung also put forward the following evidence:

1. All communication between the Garden and Cllr. Kirby-Yung on the subject of the CHAMP took place on a group call which included the Executive Director of the Garden, and other community stakeholders;
2. Cllr. Kirby-Yung did not discuss the matter or related matters with her husband;
3. Cllr. Kirby-Yung was aware the Garden was a governance board, and there was no reasonable basis upon which she ought to have taken precautions (such as declare a conflict) as the Garden was squarely represented by its Executive Director without any direct involvement of the board; and

4. Cllr. Kirby-Yung's husband did not direct, request nor participate in any direction to representatives of the Garden, nor was there any reasonable expectation in the circumstances that he might have.

Cllr. Kirby-Yung's overall position was that:

There is no suggestion in the present matter that Councillor Kirby-Yung undertook to vote or participate for any reason other than what she believed to be the best interests of her community. In this matter, the issue before Council was a strategic framework (e.g. the implementation of the Plan [CHAMP] under discussion would follow later). The vote in question did not assign any value to particular entities, nor provide benefits or preferential treatment.

Nor is it even suggested that Councillor Kirby-Yung had any personal interest in the matter.

Speaking or arguing in favour of a proposal is not a disqualifying action. Rather, it is argued that Councillor Kirby-Yung by virtue of her marriage, was precluded from speaking to the Plan, or using the Garden as an example (among several example organizations) of the types of institutions that deserved better consultation due to the communities they represent. In the circumstances this is not an interest in the matter ...

Assessment of Credibility

The material facts are not in dispute. The sole question is whether Cllr. Kirby-Yung's failure to disclose her husband's role as Chair of the Board of Directors for the Garden, and her subsequent participation during the Council Meeting, contravened the Code of Conduct because it was a conflict of interest.

The entirety of the Council Meeting was recorded for the public record, and may be accessed here: <https://www.youtube.com/watch?v=tkPSrQZteN8> [youtube.com]

Analysis

The Complaint was regarding Cllr. Kirby-Yung's close familial relationship with the Chair of the Board of Directors for the Garden and her participation in discussion and votes about the CHAMP process and rights or opportunities for the Garden, in a way that differed from her participation with respect to other stakeholders.

The applicable sections of the Code of Conduct are found in Part 4 – Conflicts of Interest, sections 4.1 and 4.8, which state:

4.1 A Council Member must comply with the conflict of interest requirements set out in section 145.2 to 145.911 of the Vancouver Charter.

...

4.8 A member must be independent and impartial, and must not provide preferential treatment to any person or organization except as warranted by the ordinary and lawful discharge of their duties.

In addition to Part 4 of the Code of Conduct, Part 2 – Standards and Values is also applicable, including section 2(c):

(c) integrity: a member must avoid improper use of influence and avoid all conflicts of interest, both apparent and real;

Section 4.1 of the Code of Conduct

As is made clear in section 4.1 of the Code of Conduct, Council Members must conduct themselves in accordance with sections 145.2 to 145.911 of the *Vancouver Charter*. While I have considered each of the relevant provisions of the *Vancouver Charter*, the provision for the purposes of this investigation is section 145.2, which states:

145.2 *(2) If a Council member attending a meeting considers that the member is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has*

(a) a direct or indirect pecuniary interest in the matter, or

(b) another interest in the matter that constitutes a conflict of interest,

The member must declare this and state in general terms the reason why the member considers this to be the case.

(3) After making a declaration under subsection (2), the Council member must not do anything referred to in section 145.3(2) [restrictions on participation].

The *Vancouver Charter* does not limit conflicts to direct or indirect pecuniary interests; it also includes “another interest in the matter that constitutes a conflict of interest,” which is a non-pecuniary interest. However, under section 145.3(1) of the *Vancouver Charter*, only if a Council Member has a direct or indirect pecuniary interest must the Council Member disqualify themselves from attending or participating in a meeting where their conflict is discussed or voted on.

The test for a conflict of interest, pecuniary or non-pecuniary, is set out by the Supreme Court of Canada in *Old St. Boniface Residents Association Inc. v Winnipeg (City) et al.*, [1990] 3 SCR 1170 (“*Boniface*”). There must be a personal or other interest and that interest must be so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty (at para 55).

In *Boniface*, a councillor voted on a development application when, prior to public hearings on the application for rezoning, the councillor was personally involved in the planning of the proposed

development and had advocated for the application at in-camera meetings of the finance committee. However, there was no conflict of interest because there was nothing to suggest his support for the development application was motivated by some relationship with, or interest in, the developer rather than in the development (at 1197–1198). There was no suggestion he did what he did for any reason other than what he believed to be in the best interests of his community, or that he had any personal interest in the success of the application. The Supreme Court of Canada said a personal interest in the development could have been pecuniary or by reason of a relationship with the developer, but there was no such interest in that case (at 1198):

*55 I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. [page1197] See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, *supra*; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.*

*56 Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest. See *Blustein and Moll*, *supra*. In Manitoba, the relevant provisions are found in the *Municipal Council Conflict of Interest Act*, R.S.M. 1987, c. 255, ss. 4, 5 and 8. No reference is made to these sections in this appeal nor is there any suggestion that they have been contravened.*

Consequently, to have breached section 145.2 of the *Vancouver Charter* and thus section 4.1 of the Code of Conduct:

1. Cllr. Kirby-Yung must have had a personal or other interest in the outcome of the Council discussion and vote on the CHAMP; and
2. That interest must have been so related to her duties as Councillor that a well-informed person would consider her interest might have had an influence on her exercise of public duty.

Turning first to whether Cllr. Kirby-Yung had a personal or other interest, I conclude she did have such an interest, given her spousal relationship with the Chair of the Board of Directors for the Garden. The

Garden, along with other Chinatown entities, was likely to be impacted by the CHAMP, which was presumably why Cllr. Kirby-Yung made the amendment to refer the CHAMP back to staff and the Co-Chairs of the Legacy Stewardship Group (“LSG”) for further consultations with several named Chinatown organizations, including the Garden. The motion ultimately approved at the Council Meeting was the result of Cllr. Kirby-Yung’s amendment. These facts support my finding that Cllr. Kirby-Yung had a personal interest in the Council discussion and vote on the CHAMP beyond the interest she had in common with other citizens in the City of Vancouver.

A personal interest can include a relationship with a person or an entity with an interest in the outcome of the discussion and/or vote: *Boniface* at 1197–1198; *Schlenker v Torgrimson*, 2012 BCSC 41 (“*Schlenker v Torgrimson*”) at paras 48–73, rev’d 2013 BCCA 9 (on the pecuniary interest issue but the non-pecuniary interest issue was not appealed); *Godfrey et al. v Bird and District of North Saanich*, 2005 BCSC 626 at paras 42, 49, 76; *Waste Management of Canada Corporation v Thorhild (County)*, 2008 ABQB 762 at paras 63–65.

A personal interest is particular to the Councillor and not something held in common with other citizens in the electoral area or other persons of like opinion: *Boniface* at 1196; *Watson v Burnaby (City)*, [1994] BCJ No 1413 (SC) (“*Watson*”) at paras 50–51; *Schlenker v Torgrimson* at paras 56, 58, 61–62, 66; *re L’Abbé and the Corporation of Blind River*, [1904] OJ No 130 (Div Ct), 7 OLR 230 at 233–234, cited in *Schlenker v Torgrimson* at para 60 and in *Watson* at paras 47, 50–53; *Calgary Roman Catholic Separate School District No. 1 v O’Malley*, 2007 ABQB 574 at paras 96–99.

Given that Cllr. Kirby-Yung did have a personal interest in this matter, the question then narrows to whether that personal interest was substantial enough to give rise to a conflict of interest. The decision in *Watson* provides a useful example of where there was insufficient personal interest to give rise to a conflict of interest. In *Watson*, a Masonic councillor was alleged to have acted in a conflict of interest when he voted to grant funds to a replica of a Masonic lodge for a local outdoor village museum in Burnaby. The replica was proposed by a Masonic historical society. The British Columbia Supreme Court determined there was no conflict of interest because there were no “*personal ends to be gained*” by the councillor “*over and above the benefits to his fellow citizens*” (para 56). In reaching that decision, the British Columbia Supreme Court provided helpful elaboration on the findings from *Boniface* and older decisions, stating that:

I return therefore to make some observations on the L’Abbé and Old St. Boniface cases. I draw from L’Abbé that the non-pecuniary interest required to warrant disqualification from voting must be a “substantial interest.” This, I note, would eliminate interests that are remote or of little consequence. I draw from both L’Abbé and Old St. Boniface that the councillor’s interest in the subject matter of the vote must go beyond that which he or she may have in common with other members of the community; it must be an interest which is peculiar to the councillor, in effect, something that will serve his or her own personal ends.

Finally, I draw from Old St. Boniface that where there is such an interest it must be so related to the subject matter of the vote that a reasonably well-informed person would conclude that the interest may well influence the councillor's vote.

I have considered the unique facts in these circumstances. I understand why the Complainant took issue with Cllr. Kirby-Yung's participation and actions given her relationship to Mr. Yung, and his relationship to one of the stakeholders. On first blush, the Complaint is logical, and it is rational that one may question Cllr. Kirby-Yung's participation given her husband's role. A perception of a conflict of interest arises based on their familial relationship. However, relationship alone does not determine if there is a conflict of interest under the Code of Conduct. I must consider the significance or magnitude of her interest. The question is whether there was a 'substantial interest'?

Cllr. Kirby-Yung's amendment to the motion was to refer the CHAMP back to staff and the LSG for further consultations with a number of organizations. While the Garden was included in that list, it was only one of several organizations. Further, the right conferred was for more consultation, and consultation does not necessarily confer any additional benefits on the Garden. In these circumstances, I conclude that Cllr. Kirby-Yung's personal interest was not substantial enough to give rise to a conflict of interest. I make this finding on the basis of the nature of the benefit conferred on the Garden.

In *Schlenker v Torgrimson*, the British Columbia Supreme Court found that a non pecuniary conflict of interest did not exist when three Island Trust trustees voted to provide money to non-profit societies of which they were directors and members.¹ At para 73, the chambers judge stated:

In short, a non-pecuniary conflict of interest must go beyond that which elected officials may have in common with other members of the community; it must be a substantial interest peculiar to their personal interest that will serve his or her own needs. [emphasis added]

On the facts before me, I cannot conclude that Cllr. Kirby-Yung had a substantial interest in this matter that was peculiar to her personal interests and was such that it served her own needs as opposed to serving what she believed to be the best interests of her community.

I have also considered whether, in the circumstances, Cllr. Kirby-Yung's interest was so related to her duties as Councillor that "a reasonably well-informed person" would consider her interest to have had an influence on her exercise of her public duty. I find a reasonably well-informed person would not consider Cllr. Kirby-Yung's interest, that is her marriage to Mr. Yung, influenced her exercise of her duty as Councillor in this matter. I make this finding on the basis of the following facts that go beyond simply her relationship with Mr. Yung:

¹ On appeal, the Chambers Judge's conclusion that there was no direct or indirect pecuniary interest was overturned; the non-pecuniary interest issue was not appealed.

1. Cllr. Kirby-Yung's amendment to, and vote on, the motion about the CHAMP was for referral back to staff and the LSG for further consultation with several organizations affected by the CHAMP, not just the Garden;
2. The amended motion only resulted in more consultation without any specific benefit to the Garden;
3. The amended motion did not result in personal benefits or gains by either Cllr. Kirby-Yung or Mr. Yung;
4. The Garden's Executive Director did not engage with Mr. Yung, nor were they aware of Mr. Yung participating in any direction to representatives of the Garden, regarding the CHAMP. The CHAMP was the responsibility of the Garden's Executive Director; and
5. Cllr. Kirby-Yung said she did not discuss the CHAMP vote or related matters with Mr. Yung.

Section 4.8 of the Code of Conduct

I find there is no basis to conclude that Cllr. Kirby-Yung's actions breached section 4.8 of the Code of Conduct. I find that there was no preferential treatment on these facts. As noted above, the Garden was one of a list of organizations to be consulted with on the amended motion. Consultation itself does not necessarily confer any additional benefits on the Garden or the other organizations.

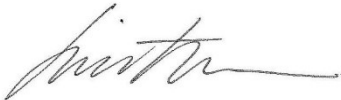
Part 2 – Standards and Values of the Code of Conduct

Part 2 of the Code of Conduct expresses the Standards and Values expected of Council Members. However, conflicts of interest, "*apparent or real*," must be understood in light of the law. Section 2(c) of the Code of Conduct does not alter the requirements under section 4.1, and therefore, my analysis of whether Cllr. Kirby-Yung engaged in a conflict of interest remains unchanged.

Conclusion

A close familial connection to a matter before Council is no doubt cause for concern. It is a common-sense notion that family members of Council Members should not be given special advantages in matters before Council. It is unsurprising that there was a perception of bias or unfairness raised, and I understand why the Complainant brought the Complaint.

However, the legal question of whether Cllr. Kirby-Yung's actions breached the Code of Conduct is a more complicated question than simply an assessment of perception. For the reasons set out above, I have determined that, in these circumstances, she did not have "*personal ends to be gained ... over and above the benefits to h[er] fellow citizens.*" I conclude that Cllr. Kirby-Yung has not violated the Code of Conduct.

A handwritten signature in black ink, appearing to read "Lisa Southern".

Lisa Southern*

Integrity Commissioner for the City of
Vancouver Dated: February 17, 2023

*Law Corporation