

REPORT OF MARVIN J. HUBERMAN, OMBUDSMAN DATED JUNE 29, 2018, TO NIAGARA REGIONAL COUNCIL

OMBUDSMAN JURISDICTION

- [1] On April 12, 2018, the Niagara Regional Council, the governing body of the Regional Municipality of Niagara in Ontario, passed a motion that:
1. Council request an independent third party investigation into the 2016 hiring process of the Chief Administrative Officer;
 2. The review be facilitated by the Acting Regional Clerk, Ann-Marie Norio and that all departments be directed to provide unfettered cooperation for the investigation;
 3. The independent third party report be delivered directly to a quorum of Regional Council only before the end of June, 2018;
 4. Council approve ADR Chambers to undertake an unfettered third party investigation with all the power of a municipal ombudsman pursuant to Sections 223.13 to 223.18 of the *Municipal Act*; ¹ and
 5. All members of Council and Regional Staff be required to retain all records including emails, memos, letters and other documents in their possession pending the investigation.
- [2] On April 16, 2018, I was appointed, through ADR Chambers, as an Ombudsman and undertook an independent third party investigation into the 2016 hiring process of the Chief Administrative Officer with all the powers and duties under Sections 223.13 to 223.18 of the *Municipal Act*.

¹ *Municipal Act, 2001*, S.O. 2001, Chapter 25, as amended (the “*Municipal Act*”).

Role of an Ombudsman

[3] The Supreme Court of Canada described the role of an Ombudsman as follows:

Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in the proprietary functions that fifty years ago would have been unthinkable.

As a side effect of these changes, and the profusion of boards, agencies and public corporations necessary to achieve them, has come the increased exposure to maladministration, abuse of authority and official insensitivity.

...

The traditional controls over the implementation and administration of governmental policies and programs - namely, the legislature, executive and the courts - are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed.

...

The limitations of courts are also well-known. Litigation can be slow and costly. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases.

...

The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial...Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed.²

² *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] S.C.J. No. 50, [1984] 2 S.C.R. 447 at 459-61 (S.C.C.).

THE CONCERNS

[4] In an article written by reporter and columnist Grant LaFleche, and published in the St. Catharines Standard (“The Standard”) on April 6, 2018, and in subsequent articles, following The Standard’s months-long investigation, concerns were expressed about the 2016 Niagara Region Chief Administrative Officer (“CAO”) hiring process, among them that:

1. The hiring of Carmen D’Angelo, Niagara Region’s CAO, was tainted by back-room dealing and the violation of critical confidentiality rules;
2. The names and biographies of candidates for the \$230,000-a-year job were leaked in a memo sent to D’Angelo – while he himself was a candidate for the position – from Regional Chair Alan Caslin’s office during the selection process;
3. The document was created by Rob D’Amboise, policy director for Regional Chair Alan Caslin, in late September 2016. D’Angelo’s final interview for the job was October 12, 2016, and Council voted to hire him as the Region’s top bureaucrat on October 31, 2016;
4. The information about candidates is supposed to be confidential and not shared with other candidates for the CAO position;
5. To protect candidates from potential professional blowback, their identities are kept confidential by selection committee members, and those not involved in the process should not have candidate information. The Phelps group, appointed Councillors, the heads of the Region’s legal department and Human Resources, and the Regional Clerk were named to the committee. But since Caslin’s policy director, who created the memo, was not appointed to the committee but yet attended meetings early in the process, he should not have had candidate information;
6. Three weeks before D’Angelo’s final interview and six weeks before Regional Council would vote to hire him, senior Regional officials were told the decision was predetermined;

7. There were internal efforts at the Region to clear a path for D'Angelo, who at the time was the CAO of Niagara Peninsula Conservation Authority and a private consultant hired by Regionally funded agencies;
8. Key members of the selection committee were, in effect, D'Angelo's current or recent employers and in a departure from past hiring practices, the municipality's Human Resources department was removed from the process, despite being named to the committee by its terms of reference; and
9. On October 12, 2016, D'Angelo was interviewed for the position, and during a hastily scheduled midday meeting on October 31, 2016, Regional Council voted on a motion from the CAO selection committee to hire him.

[5] According to The Standard, it discovered the behind-the-scenes maneuvering during the CAO selection by examining secret and confidential documents and interviewing 10 former and current Regional officials who spoke on condition of anonymity for fear of professional reprisals if they spoke openly.

[6] During my investigation, further concerns in relation to or arising out of the 2016 hiring process were raised by Regional Councillors, staff, and members of the public, including that:

1. Due process was not followed;
2. Members of Council released confidential information in contravention of the Code of Conduct For Members of Council;
3. Members of Council failed to avoid and declare conflicts of interest;
4. Councillors used personal email accounts for Regional business;
5. Morale of Regional Staff was low arising from their working environment and stressful interactions with some councillors;
6. Some Councillors treated other Councillors and Regional Staff inappropriately and with insensitivity, cynicism, nastiness, bullying and intimidation;
7. There was a pervasive fear among some Councillors and Regional Staff of taking risks and repercussions for speaking out; and

8. There was a lack of accountability, transparency and integrity in respect of the hiring process.

INVESTIGATION PROCESS

[7] As part of my investigation into the 2016 hiring process of the CAO, I obtained and reviewed more than 200,000 documents, including copies of all records, emails, texts, memos, letters, handwritten notes, calendars, and other documents (including paper and electronic documents in whatever format and wherever they may be stored), for the period of time from April 28, 2016 to October 31, 2016, that may be relevant to the investigation, in the possession or control of all Members of Council and Regional Staff, and others who were involved in the hiring process.

[8] I interviewed 16 individuals. They are:

1. Jason Burgess, former Acting Commissioner, Corporate Services;
2. Frank Campion, Regional Council Member (Mayor-Welland);
3. Regional Chair, Alan Caslin;
4. Robert D'Amboise, Chair's Office Policy Director;
5. Carmen D'Angelo, Chief Administrative Officer;
6. Sandra Easton, Regional Council Member (Mayor-Lincoln);
7. Bob Gale, Regional Council Member (Niagara Falls);
8. Joan Green, Senior Public Sector Consultant, Phelpsgroup;
9. Brian Heit, Regional Council Member (St. Catharines);
10. Kelly Lotimer, Administrative Assistant to Regional Clerk;
11. Frank Marcel, Senior Consultant, Phelpsgroup;
12. Jeffrey Mulligan, Manager Purchasing Services;
13. David Oakes, Director, Economic Development;
14. Jayson Phelps, Partner, Phelpsgroup;

15. Jason Tamming, Director, Strategic Communications & Public Affairs; and

16. Tony Quirk, Regional Council Member (Grimsby).

[9] Grant LaFleche did not respond to an interview request made on my behalf on May 29, 2018.

[10] I received full cooperation with my investigation from the Acting Regional Clerk, Ann-Marie Norio, and from those individuals who attended interviews and/or provided me with information and documentation which I requested.

THE ISSUES

[11] There are two main issues:

1. Whether the 2016 hiring process of the CAO:

(a) appears to have been contrary to law;

(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;

(c) was based wholly or partly on a mistake of law or fact; or

(d) was wrong.³

2. Whether there are recommendations that should be made to address the concerns identified in my investigation.⁴

A Note of Caution

[12] In a report made following a complaint against then-Premier Michael Harris by an opposition MPP, David Ramsay, The Honourable Gregory T. Evans, stated the following regarding the use of newspaper and other media reports to support complaints made

³ Cf. subsection 21(1) of the *Ombudsman Act*, R.S.O. 1990, c. O.6; and section 6 of General Rules, R.R.O. 1990, Regulation 865.

⁴ Cf. subsection 21(3) of the *Ombudsman Act*, R.S.O. 1990, c. O.6; and section 6 of General Rules, R.R.O. 1990, Regulation 865.

under the *Members' Integrity Act*, 1994, under which the Integrity Commissioner provides conflict of interest advice to Ontario's 124 Members of Provincial Parliament:

Much of the material presented by Ramsay to support the allegations that Harris contravened the *Members' Integrity Act* consists of newspaper and other media reports. While the material may be informative, it is hearsay and lacking in evidentiary value.

... A term applied to that species of testimony who relates, not what he knows personally, but what others have told him or what he has heard said by others.

Such testimony is generally inadmissible. The very nature of the evidence shows its weakness. The reasoning for such exclusion is that the statement being offered as an assertion to show the truth of matters asserted therein, depends for its value, upon the veracity and competency of others.⁵

- [13] I concur with Commissioner Evans, especially given the serious consequences which can result from my investigation to the reputation of the Regional Municipality of Niagara, Regional Council, Regional Councillors, Regional Staff, and members of the public. Great care must be taken to ensure that an Ombudsman's investigation and recommendations are supported by information and documentation which is reliable and capable of being assessed.

Standard of Proof

- [14] The standard of proof is on a balance of probabilities in respect of this civil matter. As the Supreme Court of Canada clearly stated in *F. H. v. McDougall*, "...there is only one civil standard of proof at common law and that is proof on a balance of probabilities..."⁶

Credibility Assessments

- [15] Regarding the statements of the individuals interviewed, I have considered the generally accepted factors in assessing their credibility in this case including their demeanour, ability and opportunity to observe, power of recollection, interest, bias, prejudice,

⁵ Report re: The Honourable Michael D. Harris, Premier of Ontario, May 16, 2001, at p. 10; and *Members' Integrity Act*, 1994, S.O. 1994, c. 38.

⁶ *F.H. v. McDougall*, [2008] S.C.J. No. 54 at para. 40.

sincerity, inconsistency, and the reasonableness of their testimony when considered in the light of all of the evidence.⁷

- [16] John Sopinka, in his text, *The Trial of an Action* (1981, Toronto, Ontario: Butterworths), wrote of the role of the assessment of credibility through probabilities, at p. 77, as follows:

Probability is the great touch-stone of all evidence. A witness whose testimony strays from the truth will often have built into it some inherent improbability.

As the British Columbia Court of Appeal stated in *Faryna v. Chorny*:⁸

...the real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

THE FACTS

The Regional Municipality of Niagara

- [17] The Regional Municipality of Niagara is a regional municipality, a type of Canadian municipal government, comprised of 12 Southern Ontario municipalities: Fort Erie, Grimsby, Lincoln, Niagara Falls, Niagara-on-the-Lake, Pelham, Port Colborne, St. Catharines, Thorold, Wainfleet, Welland and West Lincoln. The regional seat is in Thorold. With a population of over 447,000 residents and over 12 million visitors each year, Niagara Region is one of Canada's fastest-growing regions.

Niagara Regional Council

- [18] The Niagara Regional Council (the "Regional Council"), the governing body of the Regional Municipality of Niagara, consists of a Regional Chair elected by Regional Council, the Mayors of the 12 Niagara Regional municipalities, and 18 Regional Councillors elected by regional residents to represent their municipalities. Regional

⁷ *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at pp. 356-8, per O'Halloran, J.A. (B.C.C.A.).

⁸ *Ibid.*

Councillors serve four-year terms, with the next municipal election to held in October 2018.

The CAO Recruitment Committee (“CAORC”)

[19] On April 28, 2016, Regional Council passed a motion that:

1. A Chief Administrative Officer (CAO) Recruitment Committee be formed;
2. The Chief Administrative Officer (CAO) Recruitment Committee be authorized to proceed with the recruitment of the CAO, as per the draft Terms of Reference (TOR) outlined in Appendix A to Report CHR 02-2016;
3. The rules of procedure be suspended to permit Regional Chair Caslin to hold the position of Committee Chair of the CAO Recruitment Committee;
4. The process for selecting members to serve on the CAO Recruitment Committee be conducted at this time; and
5. The Goals/Purpose subsection 1b) “Engagement of an External Executive Search Firm” in the draft Terms of Reference be amended as follows:

b. External executive search firm to develop the key CAO character traits and competencies required, in consultation with all members of Regional Council and other stakeholders, to drive results forward in Niagara and be approved by Regional Council prior to the search phase of the recruitment process.

[20] Ten members of Regional Council put their names forward for consideration to sit on the CAORC. Voting by open ballots resulted in Regional Councillors Campion, Easton, Gale and Quirk receiving the most votes. Following a motion that passed, they were appointed to the CAORC.

[21] Under the CAORC Terms of Reference, the mandate of the committee was to facilitate the recruitment process for the CAO and recommend to Regional Council a preferred candidate for the role of CAO.

[22] The Goals/Purposes of the CAORC were as follows:

1. Engagement of an External Executive Search Firm

- (a) CAO Recruitment Committee to select external search firm, as per the Niagara Region Procurement By-law
- (b) External executive search firm to develop the key CAO character traits and competencies required, in consultation with all members of Regional Council and other stakeholders, to drive results forward in Niagara and be approved by Regional Council prior to the search phase of the recruitment process. External firm to undertake national candidate search with active engagement of the CAO Recruitment Committee

2. CAO Selection Process

- (a) CAO Recruitment Committee members actively participate in a transparent, competitive, and comprehensive recruitment process, while holding in strict confidence all confidential information concerning matters dealt with by the Committee
- (b) Upon completion of the recruitment process, CAO Recruitment Committee to recommend to Regional Council for approval a preferred candidate along with terms for a conditional offer of employment
- (c) Upon Council's approval of the Committee's recommendations, Council delegates to the Committee authority to extend the approved terms of employment to the preferred candidate, in form satisfactory to the Director Legal and Court Services in consultation with the Director People Services and Organizational Development.

The External Executive Search Firm

- [23] On May 10, 2016, at its first meeting, the CAORC discussed several procurement options and timelines for the selection of an external executive search firm. A motion was passed that the Committee CAORC select Option 1 of CAORC- C 1-2016 (a modified single source method) as the preferred procurement option.
- [24] At its June 13, 2016 meeting, the CAORC discussed updates on the procurement and selection of the external executive search firm, including that:

1. CAORC selected Modified Single Source procurement option for External Executive Search Firm (ESF) and directed staff accordingly
2. Staff, in partnership with the Office of the Regional Chair, confirmed scope of formal request to be distributed to ESF
3. Human Resources staff contacted local, provincial and national ESF's (n=13) and requested responses (based on scope) by Wednesday, May 25 @ 5:00 p.m.
4. Total of 6 firms responded by the deadline with the requested information; ESF responses summarized by HR staff for review by CAORC
5. CAORC to select ESF based on submissions and to provide direction to staff to enter into and conclude negotiations, as per Procurement By-law.

[25] Also at its June 13, 2016 meeting, the CAORC passed a motion that:

1. Staff be authorized to complete due diligence on the selected executive search firm and, upon completion of these due diligence activities, the name of the firm be publicly released.
2. This Committee delegate authority to the Regional Chair to be liaison in the hiring process in conjunction with the Director of People Services and Organizational Development and the selected executive search firm; and
3. The direction to staff from Closed Session be implemented by the Regional Chair and the Director of People Services and Organizational Development.

[26] At its June 22, 2016 meeting, following the staff direction given during the closed session portion of the June 13, 2016 CAORC meeting, the CAORC was introduced to Executive Search Firm Lead Consultant, Jayson Phelps, Partner, Phelpsgroup.

[27] Phelpsgroup is a Canadian executive search firm with 30 years of senior and executive recruitment and talent management experience within the not-for-profit and broader public sector, including municipal and provincial governments, universities, colleges, school boards, hospitals, crown corporations, regulatory bodies, and related professional associations.

- [28] At this meeting, the Committee also reviewed and considered a Search Process and Timeline (CAORC-C 3 2016), prepared by Phelpsgroup, and a Memorandum, dated June 22, 2016 (CAORC-C 4 2016), prepared by Fiona Peaceful, Director, People Services and Organizational Development, regarding the Consultation Process, Niagara CAO Traits and Competencies. The Memorandum states, in part, that:

The search for a new Chief Administrative Officer (CAO) for the Niagara Region has begun.

We have partnered with executive search firm Phelpsgroup.

As part of this process, we have asked Jayson Phelps, Partner, and Joan Green, Principal, Phelpsgroup to obtain input for the position/candidate profile. Through a combination of in-person and telephone discussions, we will be seeking advice on the role and mandate for the new CAO as well as the competencies, traits, values and attributes we should look for in candidates. In addition, an electronic survey will be created for those individuals who prefer to provide their input through an alternative method.

The key areas of the consultation include the following:

1. The role and mandate for a new CAO;
2. Key challenges and opportunities to be addressed by the new CAO;
3. Organizational assets that will help a new CAO be successful;
4. Values/culture of the Niagara Region;
5. Values and traits that candidates should bring to align with the Niagara Region culture to ensure fit;
6. Competencies that are essential to ensure conditions for success for a new CAO;
7. How you would measure her/his success after 12-18 months; and
8. The desired characteristics of the successful candidate.

Our goal is to have Regional Council's endorsement on the stakeholder group and consultation process by June 30, 2016 and a review of stakeholder feedback and confirmed mandate by July 21, 2016. Pending these approvals from Regional Council, the formal outreach/recruitment for a Niagara Region CAO will commence.

Therefore, we are seeking endorsement from the CAORC on the following three items:

1. Methods used to seek input on the CAO traits and competencies:
 - a. In-person meetings;
 - b. Telephone discussions; and,
 - c. Electronic Survey.
2. General Approach to the consultation process, as per the key consultation areas noted on page 1 of this memo.
3. Identification of internal and external stakeholders, with the following industries/groups as targeted within this strategy:
 - a. Regional Council;
 - b. Corporate Leadership Team;
 - c. Local area municipalities;
 - d. Government (provincial and federal);
 - e. Education;
 - f. Not-for-Profit;
 - g. Business;
 - h. Industry;
 - i. Health; and
 - j. Others to be identified by the CAORC.

In light of existing consultation processes, Niagara Region has a fulsome list of partners to contact for participation in this consultation process. It is our intention to ensure representation from across Niagara, and beyond, in the CAO consultation process to ensure we develop a comprehensive and accurate picture of the required traits and competencies to guide a productive CAO recruitment process.

[29] On June 30, 2016, Niagara Regional Council passed a motion that:

1. Report CHR 03-2016, dated June 30, 2016, respecting Chief Administrative Officer Recruitment, Timelines and Consultation Process be received and the following recommendations be approved;

2. The timelines for the recruitment of a Chief Administrative Officer (CAO) be endorsed; and
3. The CAO traits and competencies consultation methodology, in support of the CAO recruitment, be approved.

[30] At its July 20, 2016 meeting, the CAORC passed a motion that CAORC-C 6-2016 being the Phelps group Consultation Summary be received and that the following character traits and competencies be adopted:

Character Traits:

1. Respect and ability to carry out the direction of Council and execute
2. Open door to Chair
3. High emotional intelligence
4. Relationship builder
5. A leader who can follow
6. Understand the role of CAO, Chair and Council
7. Strategic Thinker

Experience and Credentials:

1. Senior administrative experience within a large organization such as a municipality
2. Experience working with the municipal sector
3. Relevant post graduate degree would be considered an asset
4. Experience working within a regulatory or legislative framework
5. Business acumen and/or private sector experience

[31] On July 21, 2016, Niagara Regional Council passed a motion that CAORC-C 7-2016, being a memorandum from A. Caslin, Regional Chair, dated July 20, 2016, respecting CAORC Recommendation be received and the following recommendation be approved:

That CAORC-C 6-2016 being the Phelps group Consultation Summary be received and that the following CAO character traits and competencies identified be adopted:

Character Traits:

1. Respect and ability to carry out the direction of Council and execute
2. Open door between the Chair, Council and CAO
3. High emotional intelligence
4. Relationship builder
5. A leader who can follow
6. Understand the role of CAO, Chair and Council
7. Strategic thinker

Experience and Credentials:

1. Senior administrative experience within a large organization such as a municipality
2. Experience working with and/or in the municipal sector
3. Relevant post graduate degree would be considered an asset
4. Experience working within a regulatory or legislative framework
5. Business acumen and/or private sector experience

[32] In a Memorandum dated August 22, 2016, Alan Caslin, Regional Chair, gave the following CAO recruitment process progress update provided by Phelps group to Members of Regional Council:

Progress Report on Search for Chief Administrative Officer of Niagara Region

Mandate:

To source, engage and screen suitable and qualified candidates for Niagara Region's Selection Committee to interview and select a strong qualified candidate in whom Council will have trust in leading the administrative function for the Region going forward.

Timeline:

Expected start date for successful candidate is 1/12/2016

Milestones completed to date:

1. Engagement of Phelpsgroup
- 6/16/2016
2. Commencement of search and determination of priorities at an initial meeting of the Selection Committee
- 6/22/2016
3. Extensive interviews with internal and external stakeholders to seek advice on development of the Opportunity Brief
- 7/20/2016
4. Opportunity Brief approved and distributed
- 8/8/2016
5. Posting of job advertisement
- 8/9/2016
6. Commencement of candidate outreach
- week of 8/8/2016

Documents (attached):

1. Search Process and Timeline
2. Phelpsgroup Consultation Report to Selection Committee
3. Chair's Report to Council
- 7/20/2016
4. Council's Motion on key attributes for a successful candidate
- 7/21/2016
5. Phelpsgroup Opportunity Brief
6. Advertisement

Search Progress Metrics to date:

1. Number of Regional Councillors surveyed for the consultation
- Total input: 26
2. Number of staff surveyed for the consultation:
- Total input: 20
3. Number of external individuals and local municipal CAOs surveyed for the consultation

- Total input: 19
- 4. Number of candidates and applicants (after 4 business days; competition closes on 9/4)
 - 108 candidates on the outreach list being pursued
 - 29 applications received
 - 8-12 potential candidates currently considering the opportunity

Recent Developments

Post the development of the Opportunity Brief, with the Chair's participation, we completed stakeholder interviews with the Presidents of Brock University and of Niagara College.

We have begun our research efforts, focusing on medium and large single tier and regional municipalities across Canada, Municipal Affairs related ministries within provincial governments and individuals with a combination of experience in private and public sectors (municipally related).

At this early stage, there are a number of potential candidates currently considering the role.

Here are some of their profiles:

1. Current CAO of municipality in Western Canada with previous experience as a Deputy Minister of Economic as well as leadership in private sector organizations
2. CFO of Ontario Single Tier municipality
3. Deputy Minister with experience overseeing several portfolios including Infrastructure and Tourism and Culture
4. Senior leader of one the largest Ontario Single Tier municipalities
5. CAO of an Ontario single tier municipality

Next Steps:

We are on schedule for our longlist presentation in mid-September, with Selection Committee interviews scheduled for late September or early October. Second interviews will be held in mid-October and contract negotiations will follow immediately with an anticipated start date of early December.

- [33] At its September 23, 2016 meeting, the CAORC passed a motion that CAORC-C 8-2016 being the Non-Disclosure Agreement [supplied by Phelpsgroup concerning confidential information relating to the Niagara Region's CAO recruitment process] be received and be signed by all members present.
- [34] At this meeting, a motion was also passed that the CAORC move into Closed Session for the purpose of receiving information of a confidential nature regarding matters respecting identifiable individuals. A further motion was passed that Confidential Memorandums CAORC-C 9-2016, dated September 20, 2016 and CAORC-C 10-2016, dated September 21, 2016, regarding matters respecting identifiable individuals be received and the Phelpsgroup proceed as directed in Closed Session.
- [35] At its October 4, 2016 meeting, the CAORC passed a motion that the CAORC move into Closed Session for the purposes of receiving information of a confidential nature regarding a matter respecting identifiable individuals. A further motion was passed that Confidential Memorandum CAORC-C 11-2016, dated October 3, 2016, regarding a matter respecting identifiable individuals be received and that Phelpsgroup proceed as directed in Closed Session.
- [36] At its October 12, 2016 meeting, the CAORC passed a motion that the CAORC move into Closed Session for the purposes of receiving information of a confidential nature regarding a matter respecting identifiable individuals. A further motion was passed in open session that Phelpsgroup proceed as directed in Closed Session.
- [37] In its October 27, 2016 meeting, the CAORC passed a motion that the CAORC move into Closed Session for the purposes of receiving information of a confidential nature regarding a matter respecting identifiable individuals. A further motion was passed that the CAORC hold a meeting on Friday, October 28, 2016 at noon in Committee Room 4.
- [38] On October 28, 2016, the CAORC passed a motion that the CAORC move into Closed Session for the purposes of receiving information of a confidential nature regarding a matter respecting individuals. A further motion was passed in Open Session that this Committee confirm the direction to the Regional Chairman given in Closed Session.

[39] At a Special Regional Council meeting on October 31, 2016, Regional Council passed a motion that:

1. Confidential Memorandum CAORC-C 12-2016, dated October 31, 2016, respecting Matters related to Personal Matters about Identifiable Individual(s) – Chief Administrative Officer Recruitment Committee Recommendation(s) be received;
2. Carmen D'Angelo be appointed as the Chief Administrative Officer for The Regional Municipality of Niagara with the terms and conditions outlined in memorandum CAORC-C 12-2016; and
3. By the end of the 1st quarter of 2017, the Chief Administrative Officer will meet with Council and jointly develop and document his performance objectives for the following 12-months, many of which will be directly related to the Strategic Priorities.

[40] Memorandum CAORC-C 12-2016, dated October 31, 2016, from Alan Caslin, Regional Chair, to Members of Regional Council, reads as follows:

Members of Council,

On October 27 and 28, 2016 the CAORC considered a preferred candidate and conditional draft terms of employment. Approved unanimously by CAORC, I am pleased to convey the following recommendation to Regional Council:

That Carmen D'Angelo BE **APPOINTED** as the Chief Administrative Officer for the Regional Municipality of Niagara with the terms and conditions outlined in memorandum CAORC-C 12-2016;

The terms of employment for Carmen D'Angelo received unanimous approval by the CAORC.

Those terms and conditions are:

- \$230,000 annual wage
- 3 year contract term with a 2 year option for renewal
- Standard contract full-time non-union benefits plan
- 6 weeks of annual vacation per calendar year
- \$800 monthly car allowance

These terms and conditions have been agreed upon in principle by Carmen D'Angelo after negotiations occurring between the retained consultants Phelpsgroup, Carmen D'Angelo and I with support provided by the Niagara Region's Director of People Services and Organizational Development, the Director of Court and Legal Services and external legal counsel.

CAORC unanimously supported the offer of a 3 year contract term with an option to extend the contract by 2 years. This direction diverts from past practice at the Niagara Region, including the most recent Chief Administrative Officer (CAO) by not offering a full time employee opportunity for the CAO position. This is to allow for maximum flexibility in the short to medium term. The remaining terms listed above are consistent with the terms offered to Niagara Region's previous CAO.

This recommendation provided to Regional Council is as a result of the hiring process undertaken by CAORC in collaboration with Phelpsgroup. This process included:

- A nation-wide search for candidates by Phelpsgroup
- A Phelpsgroup review, vetting and shortlisting process of all received applicants
- CAORC selection of candidates for interview from Phelpsgroup applicant shortlist
- A two round interview process of selected candidates
- Identification of a preferred candidate
- Extensive reference checks conducted on preferred candidate

All candidates identified through this process by any CAORC member were granted at least one interview.

Committee received and reviewed a total of 10 references provided by Carmen D'Angelo. The comments were positive with common themes including being able to strategically orient an organization towards results, strong communication skills, and the ability to develop relationships with both elected officials and staff.

Also submitted was a written letter of support provided by the Rt. Honourable John N. Turner, former Prime Minister of Canada. His comments regarding Carmen D'Angelo included:

“He is an accomplished public servant with many years of experience in difficult situations. His focus on human resources and his tireless advocacy for fairness is unparalleled. It is my strong belief that he will bring his boundless energy, his understanding of municipal process and his integrity to the Region of Niagara.”

This process is the result of report CHR 02-2016 being approved as amended by Regional Council on April 28, 2016. All CAORC meetings (including the candidate interview process) have met the open meeting requirements of the *Municipal Act*. As part of the approved recruitment process, Phelps group conducted a broad stakeholder consultation that resulted in Regional Council unanimously approving the following CAO character traits and competencies:

Character Traits

- Respect and ability to carry out the direction of Council and execute
- Open door policy between the Chair, Council and CAO
- High emotional intelligence
- Relationship builder
- A leader who can follow
- Understand the role of CAO, Chair and Council
- Strategic Thinker

Experience and Credentials

- Senior administrative experience within a large organization such as a municipality
- Experience working with and/or in the municipal sector
- Relevant post-graduate degree would be considered an asset
- Experience working within a regulatory or legislative framework
- Business acumen and/or private sector experience

These character traits and competencies were used to guide CAORC during the search and candidate shortlisting process. Carmen D’Angelo was identified as the candidate that best fit Regional Council’s criteria in a balanced

fashion across all areas. In addition, the recommended candidate meets many of the consistent themes found across each of the stakeholder groups within the consultation summary report provided to Regional Council on July 21, 2016:

Regional Council Feedback

- *“Hit the Ground Running”*
- *“Moves fluently among municipalities”*

Local Area Municipal CAO Feedback

- *“Advocacy Skills”*
- *“Maintain the collaboration among the local municipalities with the Region as a service provider and not big brother”*

Regional Staff Feedback

- *“Political Acumen”*
- *“Enthusiasm/energy”*
- *“A leader, motivated by the success of Council”*

External Stakeholder Feedback

- *“Understanding his/her role as an implementer of policy set by Council”*
- *“Visionary with ability to create a plan to grow the Region”*
- *“Strong support of industry”*

On behalf of CAORC, I would request Regional Council’s due consideration of the committee’s unanimous recommendation for the next CAO of the Niagara Region.

Sincerely,

Alan Caslin, BSc, MSc
Regional Chair, Niagara Region...

[41] On October 31, 2016, Alan Caslin, Regional Chair, on behalf of Regional Council, announced the appointment of Carmen D’Angelo as the new CAO, effective October 31, 2016.

ANALYSIS, CONCLUSIONS, AND RECOMMENDATIONS

[42] Having thoroughly reviewed and carefully considered the information and documentation obtained in the course of my investigation (collectively, “the evidence”), I conclude that the 2016 hiring process of the CAO:

1. Does not appear to have been contrary to law;
2. Was not unreasonable, unjust, oppressive, or improperly discriminatory, nor was it in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
3. Was not based wholly or partly on a mistake of law or fact; nor
4. Was it wrong.

[43] I am supported in this conclusion by the Supreme Court of Canada which stated in *C. (R.) v. McDougall*⁹ that “evidence must always be sufficiently clear, convincing and cogent.”

[44] In the present matter, some of the concerns raised in relation to or arising out of the 2016 CAO hiring process are based on:

- (a) Rumour, gossip, innuendo, or hearsay of doubtful veracity or accuracy;
- (b) Misinformation (seen as simply false) or disinformation (seen as deliberately false);
- (c) Speculation or conjecture based on hypothetical facts; or
- (d) An improper disregard for clear and cogent evidence that is relevant - logically probative to a material issue in this investigation.

[45] Accordingly, to the extent that the expressed concerns about the 2016 CAO hiring process are based on unfounded, incomplete, inaccurate and unconvincing evidence, I accord no weight to them.

[46] That stated, based on the preponderance of the evidence which deserves weight, I am able to draw the conclusions and make the recommendations that follow below.

⁹ *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (SCC) at para. 40.

CONCLUSIONS

The CAORC

- [47] The Committee was formed, and it was authorized to proceed with the recruitment of the CAO, as per the Terms of Reference, by Regional Council.
- [48] The rules of procedure were suspended to permit Regional Chair Caslin to hold the position of Committee Chair of the CAORC.
- [49] Regional Councillors Campion, Gale, Easton and Quirk were appointed to serve as members of the CAORC by Regional Council.
- [50] The CAORC fulfilled its mandate by facilitating the recruitment process for the CAO and recommending to Regional Council a preferred candidate, Carmen D'Angelo, for the role of CAO.
- [51] The Committee achieved its goals/purposes, namely:

- 1. Engagement of an External Executive Search Firm

- (a) The Committee selected Phelpsgroup, an external executive search firm, as per the Niagara Region Procurement By-law.¹⁰

Phelpsgroup is an executive search firm with over 30 years of successful retained search experience.

Phelpsgroup's team of partners is comprised of experienced public sector leaders and search professionals who have demonstrated an extensive and comprehensive understanding of all aspects of municipal government, including Clerks, community services, corporate services, emergency and fire services, engineering and building services, finance, legal services, and operations.

They have worked extensively across the municipal sector and have completed several Chief Administrative Officer/City Manager searches, including appointments of the City Manager for the City of Regina; City Manager and two Deputy City Managers for the City of Toronto; the Chief Administrative Officer

¹⁰ The Regional Municipality of Niagara, By-Law No. 02-2016 (the "Niagara Region Procurement By-law").

for the Regional Municipality of Niagara, Regional Municipality of York, City of Kitchener, City of Cornwall, City of Mississauga, and Municipality of Wawa. They have also placed Commissioners, General Managers, and Directors in municipalities across the country.

Two Phelpsgroup Partners/Senior Consultants are generally assigned to each executive search based on their experience and qualifications so that their clients can feel confident that each recruitment will be in capable, committed hands. They also have an in-house research team that is well-versed in government and public policy and works closely with project leads throughout each engagement to identify and locate all key candidates.

Phelpsgroup assigned Jayson Phelps, Partner, Joan Green, Senior Public Sector Consultant, and Frank Markel, Senior Consultant, to work with the CAORC.

- (b) Phelpsgroup developed the key CAO character traits and competencies required, in consultation with all members of Regional Council and other stakeholders, to drive results forward in Niagara, and those traits and competencies were approved by Regional Council prior to the search phase of the recruitment process.
- (c) Phelpsgroup undertook a national candidate search, with active engagement of the CAORC.

Phelpsgroup developed a strong, transparent process for the CAO recruitment. Its staged decision making process was designed to ensure that the CAORC based its final decision on the criteria established at the beginning of the process. These criteria address the core competencies, the leadership profile, experience, and character traits necessary to meet the challenges of the CAO position for which the recruitment was being undertaken.

Before commencing the search for CAO candidates, Phelpsgroup conducted a thorough and extensive **consultation process** which involved key stakeholders identified by the CAORC. They interviewed stakeholders to gain an understanding of the central priorities and challenges of the CAO role, the

attributes and characteristics of the ideal candidate and success factors that are essential to meeting the expectations of the role and accomplishing the outcomes that define the leadership position.

Phelpsgroup interviewed Regional Councillors, senior management team members and other external stakeholders.

Following the consultation process, Phelpsgroup aggregated the information obtained and presented an overview of a draft mandate and candidate profile to Regional Council as a whole. This allowed the full Regional Council to discuss and endorse the messaging that Phelpsgroup used in preparing the advertisement for the CAO position and an Opportunity Brief describing the Region and the CAO role, for Phelpsgroup to use in its outreach to candidates across Canada.

Phelpsgroup verified with the CAORC that it was in agreement with the key CAO character traits and competencies required.

Phelpsgroup clarified the process of the national candidate search for a CAO with the CAORC, with a special focus on:

- the requirement that CAORC members **participate in all stages** of the interviewing process in order to be part of the determination of the successful candidate.
- the **absolute necessity of confidentiality** regarding the identity of CAO candidates in order to protect the privacy of candidates and their current employment status and to preserve the reputation of the client and the search consultants who guarantee confidentiality to candidates.
- requiring members of the CAORC, including its Chair, Regional Chair, Alan Caslin, to sign a Confidentiality Agreement, in which they committed to uphold the highest standards of confidentiality with respect to the CAORC's activities, including candidate and applicant information.
- **commitment to utilization of the established and agreed upon criteria** on which to judge CAO candidates.

- Insistence that all candidates be asked the **same questions** to ensure common areas of exploration with each CAO candidate and an ability to rate candidates equally.

In conjunction with its partners, Phelpsgroup's experienced research team conducted a **widespread outreach and used the agreed upon mandate for the role and candidate profile** to approach suitable CAO candidates to gauge their interest in the leadership opportunity. Qualified individuals who were engaged through this outreach as well as candidates who matched the profile and who sent applications in response to the advertisement were **screened by at least two Phelpsgroup consultants** to ensure multiple perspectives on the candidates' alignment to the role.

From this focused screening process which includes all CAO candidates completing a **detailed self-assessment based on the mandate and required criteria**, Phelpsgroup consultants developed a **long list of qualified candidates** and presented it to the CAORC for the development of a **short list of candidates** to be interviewed by the CAORC.

The agreed upon profile and required criteria were used to help guide the CAORC's consideration of CAO candidates' written applications, self-assessments and screening interview results to determine who should be on the shortlist for interview by the CAORC.

Phelpsgroup narrowed the broader pool of CAO candidates to a long list of the top qualified candidates based on the criteria established and presented this to the CAORC with an overview of each candidate.

Once the short list of CAO candidates was determined, the Phelpsgroup worked with the CAORC to develop **probing questions and a presentation topic** for the first interview of shortlisted candidates. These questions, like the other steps in the process, were based on the mandate and the established criteria for the CAO role.

Phelpsgroup facilitated the interviews with all shortlisted CAO candidates and ensured that the same questions were asked of all candidates. During the assessment of candidates' presentation and responses, Phelpsgroup endeavoured to **ensure that the CAORC considered the mandate and the required criteria in its deliberations.**

Phelpsgroup then facilitated a **second interview** for the CAO candidates who the CAORC wished to see again before a final decision was made.

Once a preferred candidate was identified by the CAORC, Phelpsgroup conducted **a full 360 reference check** and asked the same questions about the candidate (rooted again in the mandate and the required criteria) of each referee. **A Reference Report** was presented to the CAORC for its consideration before an offer of employment was made.

Phelpsgroup agreed to assist in **the transition of the successful candidate** to the CAO role, help the CAORC outline expectations, and support the new CAO through periodic **follow-up** in the first year.

2. CAO Selection Process

- (a) CAORC members actively participated in a transparent, competitive, and comprehensive recruitment process, and held in strict confidence all confidential information concerning matters dealt with by the CAORC.
- (b) Upon completion of the recruitment process, the CAORC recommended to Regional Council for approval a preferred candidate, namely, Carmen D'Angelo, along with terms for a conditional offer of employment.
- (c) Upon Council's approval of the CAORC's recommendations, Council delegated to the Committee authority to extend the approved terms of employment to the preferred candidate, Carmen D'Angelo, in a form satisfactory to the Director Legal and Court Services in consultation with the Director People Services and Organizational Development.

Privacy Considerations

- [52] The CAORC complied with all open meeting provisions.
- [53] Under section 239 of the *Municipal Act*, all meetings shall be open to the public, except as provided in that section. Subsection 239(2)(b) provides that a meeting or part of a meeting may be closed to the public if the subject matter being considered is personal matters about an identifiable individual, including municipal or local board employees.
- [54] Section 9.1 of *The Regional Municipality of Niagara Procedural By-law* provides that all Meetings shall be open to the public, except as otherwise in this Section.¹¹
- [55] Under Section 9.7(b) of the *Procedural By-law*, a Meeting or part of a Meeting may be closed to the public if the subject matter being considered is personal matters about an identifiable individual, including Regional employees.
- [56] Section 9.21 of the *Procedural By-law* states:
- All deliberations while in Closed Session shall remain confidential unless otherwise agreed upon by a Majority vote of Council. Only the final results of deliberations may be made public when such disclosure is authorized by Council.
- [57] The CAORC conducted its meetings and the parts of its meetings which were open or closed to the public in accordance with the *Municipal Act* and the *Procedural By-law*.
- [58] Disclosure of the confidential deliberations of the CAORC while in Closed Sessions was not authorized by Regional Council.
- [59] As I concluded above, the CAORC held in strict confidence all confidential information concerning matters dealt with by the CAORC.
- [60] Concerns, however, were raised by newspaper and other media reports, and others, about whether certain information provided to the CAORC was kept in confidence, specifically that:
1. The names and biographies of candidates for the CAO position, which were supposed to be confidential, were leaked in a memo created in late September 2016 by Rob

¹¹ The Regional Municipality of Niagara Procedural By-law, By-law No. 120-2010 (the “Procedural By-law”).

D'Amboise, policy director for Regional Chair, Alan Caslin, and sent to Carmen D'Angelo - while he was a candidate for the position - from Regional Chair Alan Caslin's office during the selection process; and

2. Since Rob D'Amboise was not appointed to the CAORC, he should not have attended CAORC meetings early in the process, nor should he have had candidate information.

[61] In my opinion, these specific concerns as they relate to whether the names and biographies of candidates for the CAO position were kept in confidence by the CAORC, including its Chair, Regional Chair Caslin, and by Rob D'Amboise, are not sufficiently supported by the evidence.

[62] To the contrary, the weight of the evidence establishes that:

1. Rob D'Amboise, although not appointed as a member of the CAORC, was permitted as the Regional Chair's Office Policy Director to attend CAORC meetings early in the process, and to have confidential information about candidates for the CAO position; and
2. The confidential names and biographies of candidates for the CAO position were not leaked in a memo created in late September 2016 by Rob D'Amboise, and sent to Carmen D'Angelo - while he was a candidate for the position - from Regional Chair Alan Caslin's office during the selection process.

[63] Rob D'Amboise, as a Regional Staff member, made a confidentiality commitment that he would not, either during or after his employment with Niagara Region, and without due authority, disclose, discuss or make known to any third party any matter that would not normally be disclosed to the public except where required by law.

[64] As the Regional Chair's Office Policy Director, and as part of his job description, Rob D'Amboise provides executive level assistance to the office of the Regional Chair. He represents the Regional Chair as designated by the Regional Chair. He develops, disseminates, and collects information for the Regional Chair's office. He facilitates co-operation and teamwork between the offices of the Chair, Council, Regional Departments and Community Groups. It is also his responsibility to provide research, briefings and follow-up on problems and issues raised by Regional Council and the private sector

where applicable; co-ordinate the professional activities of the Regional Chair, prepare and brief the Regional Chair for meetings by research/drafting/coordinating required reports, responses and/or presentations/speeches; identify key players and issues; manage all logistics associated with attendance at special events in conjunction with the Administrative Assistant, and accompany the Regional Chair when requested.

[65] These roles of a Regional Chair's Office Policy Director are neither new nor without precedent.

[66] In their paper, "The Evolving Role of City Managers and Chief Administrative Officers", Michael Fenn and David Siegel write:

Many municipalities, both large and small, are considering the need for more political management of the municipal corporation's affairs.

In larger municipalities, publicly paid political staff members are increasingly common, drawing from the provincial experience, with chiefs of staff for the head of council and policy advisor positions supporting councillors. As long as political staff members remain as constituency assistants and political advisors, they can play a valuable role.¹²

[67] In his interview with me, Rob D'Amboise stated that, as part of his job responsibilities as the Regional Chair's Office Policy Director, he received confidential information and documentation pertaining to candidates for the CAO position. He attended meetings in Closed Session of Regional Council and the CAORC as requested. And given that the Regional Chair was the liaison in the CAO hiring process in conjunction with the Director of People Services and Organizational Development and Phelpsgroup, Rob D'Amboise received confidential materials directly from Phelpsgroup including the names, biographies, and work experience of candidates for the CAO position.

[68] Rob D'Amboise further stated that he maintained his confidentiality commitment to Niagara Region and complied with his obligations regarding the communication of confidential and sensitive information obtained during his employment, including

¹² Michael Fenn and David Siegel, "The Evolving Role of City Managers and Chief Administrative Officers", IMFG Papers On Municipal Finance And Governance, No. 31, 2017, at p. 24, University of Toronto, IMFG, Institute on Municipal Finance & Governance, Munk School of Global Affairs.

information about candidates for the CAO position. He did not disclose, discuss or make known to any third party any matter that would normally be disclosed to the public in violation of his duties and responsibilities. He shared confidential information only with those individuals who were appropriate and authorized to receive the information.

- [69] In September 2016, Rob D'Amboise was asked by Regional Chair Caslin to conduct research on the backgrounds, competencies and character traits of several candidates for the CAO position, and to brief the Regional Chair on those candidates.
- [70] As requested, Rob D'Amboise conducted the research and prepared two pages of personal notes or talking points for himself so that he could brief Regional Chair Caslin on research results. This document (the "Talking Points") was not intended to be given - nor was it given - to Regional Chair Caslin or to anyone else by Rob D'Amboise.
- [71] Rob D'Amboise met privately with Regional Chair Caslin in the latter's office and they discussed the results of the research conducted by Rob D'Amboise on the backgrounds, competencies and character traits of several candidates for the CAO position. A copy of the Talking Points was not left with or provided to Regional Chair Caslin by Rob D'Amboise. Nor did Rob D'Amboise give, send or distribute the Talking Points to anyone else, including Carmen D'Angelo. As far as Rob D'Amboise is aware, Carmen D'Angelo did not receive a copy of the Talking Notes. Rob D'Amboise does not know how Grant LaFleche and the St. Catharines Standard obtained a copy of the Talking Notes, which they incorrectly refer to as a "memo".
- [72] After briefing the Regional Chair, Rob D'Amboise returned to his own office and shredded the Talking Points given its confidential nature.
- [73] Regional Chair Caslin, in his interview with me, confirmed the substance of Rob D'Amboise's statements which I have outlined above. He stated that he did not send, or direct anybody to send, nor to his knowledge did Rob D'Amboise send, the Talking Points to Carmen D'Angelo. He does not know whether the Talking Points or the memo referred to by Grant LaFleche, The Standard, or other media, was ever given or leaked to Carmen D'Angelo; nor does he know - if it was - who gave or leaked it to him, why and when it was given or leaked to him, if at all.

[74] Carmen D'Angelo, in his interview with me, stated that as far as he knows, is aware, and can recall, he did not receive the Talking Points or the memo referred to by Grant LaFleche, The Standard, or other media, containing a list of CAO candidate names and biographical information, in September 2016 from Rob D'Amboise. His recollection was affected by two important events that occurred in October 2016. First, Carmen D'Angelo was engaged at that time in a recruitment process for a CAO for Niagara-on-the-Lake, and received a lot of documents, including briefing documents and briefing opportunity packages, containing names and biographies of candidates for that position. Second, because his cellphone was stolen in October 2016, despite his due diligence, Carmen D'Angelo was unable to check his emails to find out what candidate information and documentation, if any, he received in respect of the CAO hiring process for Niagara Region.

[75] While common sense may suggest that Carmen D'Angelo's statements above are improbable answers,, I am nonetheless unable to conclude that his statements are not credible or reliable given that they are not inconsistent with other statements made by him; nor are there contradictory statements made by other interviewees or contained in the documentation which I reviewed. I am therefore hesitant to devalue Carmen D'Angelo's statements based on perceived inconsistencies or suspicion alone.¹³

[76] Accordingly, based on the weight of the evidence, I conclude that:

1. Rob D'Amboise, although not appointed as a member of the CAORC, was permitted as the Regional Chair's Office Policy Director to attend CAORC meetings early in the process, and to have confidential information about candidates for the CAO position; and
2. The confidential names and biographies of candidates for the CAO position were not leaked in a memo created in late September 2016 by Rob D'Amboise, and sent to Carmen D'Angelo - while he was a candidate for the position - from Regional Chair Alan Caslin's office during the selection process.

¹³ *R. v. A.F.*, 2010 ONSC 5824 (CanLII), at para. 87; *R. v. Tran* (1994), 1994 CanLII 56 (S.C.C.), at p. 248.

ATTENDANCE

- [77] All CAO candidates were interviewed by a consistent interview panel, in support of a fair, transparent, and comprehensive recruitment process. Members of the CAORC, with the exception of a few absences by some CAORC members, actively participated in all stages of the CAO recruitment process, including attending CAO interviews.

Staff Support to Committee

- [78] The Director, People Services and Organizational Development, Director, Legal and Court Services, and the Regional Clerk functioned in an advisory capacity to the CAORC, and Phelps group.

Frequency of Reporting

- [79] Regular updates to Regional Council were provided, through the Regional Chair, as significant progression of the CAORC was realized, including the Memorandum, dated August 22, 2016, from Alan Caslin, Regional Chair to Members of Regional Council.

Termination of CAO Recruitment Committee

- [80] The CAORC ceased at the conclusion of the successful recruitment of Carmen D'Angelo, the new CAO.

Meetings

- [81] Meetings of the CAORC were governed and conducted in accordance with the *Procedural By-law*.

Conflicts of Interest

- [82] Under the Code of Conduct for Members of Council (the "Code of Conduct"),¹⁴ Members of Council of Niagara Region shall avoid conflict of interest or unethical behavior.

¹⁴ CODE OF CONDUCT FOR MEMBERS OF COUNCIL, Appendix "A" to the Procedural By-law.

[83] Concerns were expressed during my investigation about possible conflicts of interest arising from the facts that before Carmen D'Angelo was hired as the new CAO of Niagara Region:

1. He worked closely with Niagara's 12 municipalities and surrounding areas as CAO of the Niagara Peninsula Conservation Authority ("NPCA"); and
2. Mr. D'Angelo developed excellent working relationships with many members of Regional Council, some of whom were also members of the CAORC, that sit on the NPCA board, who may be viewed as D'Angelo's current or recent employers.

[84] Broadly defined, a conflict of interest is a personal interest in a matter that goes beyond the interests of other members of the community, and might reasonably be expected to influence the elected official's performance of his or her duties.¹⁵

[85] In my view, these concerns do not constitute a conflict of interest or unethical behavior on the part of Members of Council of Niagara Region within the meaning of the Code of Conduct. Moreover, the evidence does not support a conclusion that members of the CAORC contravened the conflict of interest provisions in the Code of Conduct, or otherwise, especially since the CAORC's membership was approved by Regional Council.

The CAO Hiring Decision Was Not Predetermined

[86] In the newspaper and other media reports, a concern was expressed that three weeks before Carmen D'Angelo's final interview and six weeks before Region Council would vote to hire him, senior regional officials were told the decision was predetermined.

[87] This concern is founded primarily on a statement allegedly made on September 20, 2016 by Jason Burgess, then the Acting Commissioner of Corporate Services for Niagara Region, to Regional Staff that he was withdrawing his application for CAO because Carmen D'Angelo had the job.

¹⁵ Johnson, Peter, "Conflict of Interest, Confidentiality and Liability: What Every Elected Official Needs to Know", presentation, January 2012, <http://lgla.ca/wp-content/uploads/2012/11/LGLA_EOS_2012_Presentation_29_Johnson.pdf>.

- [88] In his interview with me, Jason Burgess stated that on or about September 20, 2016, a regularly scheduled meeting of the Corporate Leadership Team (“CLT”) was held. Informal discussions took place among those in attendance, including the Commissioners, the Acting CAO, and other key management personnel, about the CAO hiring process during which Mr. Burgess commented that “the votes are there, Carmen D’Angelo is in.”
- [89] Jason Burgess further stated in his interview with me that at the time his comment was made, no formal business of the CLT was being conducted. His comment was not intended as a factual statement but as a joke. It was shop talk. The CAORC had not yet conducted interviews of the candidates for the CAO position. It was his opinion that Carmen D’Angelo had the job, based on rumours and conversations with Councillors. It was forceful speculation, a sort of guess as to who was going to be the new CAO. His comment was not part of any official mandate and it was certainly not authorized by Regional Council or the CAORC.
- [90] Regional Chair Caslin, in his interview with me, stated that the decision to hire Carmen D’Angelo as the new CAO was absolutely not predetermined.
- [91] In my view, the concern that the decision to hire Carmen D’Angelo as the new CAO was predetermined deserves - and I give it - no weight because it is primarily based upon:
1. Rumour, gossip, innuendo, or hearsay of doubtful veracity or accuracy;
 2. Misinformation (seen as simply false) or disinformation (seen as deliberately false);
 3. Speculation or conjecture based on hypothetical facts; or
 4. An improper disregard for clear and cogent evidence that is relevant - logically probative to a material issue in this investigation.
- [92] Based on the overall weight of the evidence, which is in harmony with the “preponderance of probabilities which a practical and informed person would recognize as reasonable in the subject circumstances”, I am of the opinion, and conclude, that the decision to hire Carmen D’Angelo as the new CAO was not predetermined by Regional Council or the CAORC.

Taking A Closer Look

[93] While I have determined that the 2016 CAO hiring process was not, among other things, unlawful, that does not end the analysis.

[94] A closer examination of the evidence reveals several serious concerns in relation to or arising from the 2016 hiring process, chief among them:

1. Confidential information about applicants and candidates for the CAO position, including Carmen D'Angelo, was wrongfully disclosed to members of the public, including the newspaper and other media;
2. Regional Council does not operate with transparency, that is in an accessible, open and visible manner, which is clear to the public; and
3. Some members of Regional Council treat members of the public, other Regional Councillors, and Regional Staff inappropriately, with a lack of respect, mutual support and understanding, and with abuse, bullying or intimidation.

[95] In my view, these concerns are sufficiently supported by the evidence and I give them significant weight. They are also solidly supported by the *Municipal Act*, the Code of Conduct, the *Procedural By-law*, and Niagara Region's own mission statement, vision, and corporate values, as follows:

1. The *Municipal Act*, Section 224

Municipal Organization and Administration

Role of council

224 It is the role of council,

- (a) to represent the public and to consider the well-being and interests of the municipality;
- (b) to develop and evaluate the policies and programs of the municipality;
- (c) to determine which services the municipality provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;

(d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act.

2. The *Municipal Act*, Section 227

Municipal administration

227 It is the role of the officers and employees of the municipality,

(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any Act and other duties assigned by the municipality.

3. The Code of Conduct

CODE OF CONDUCT FOR MEMBERS OF COUNCIL

Purpose of the Code of Conduct

The Niagara Region is well respected by the general public, clients, employees, elected officials, suppliers, communities, and governments due to its excellent track record of ethical conduct and high integrity. The purpose of this Code of Conduct is to outline the responsibilities and procedures to be followed.

Scope of the Code of Conduct

This Code of Conduct applies to every member of Council of Niagara Region. Members of Council are encouraged to discuss any situations of concern or doubt regarding the code with the Regional Chair. The Code of Conduct helps to ensure that the members of Regional Council share a common basis for acceptable conduct. These standards are designed to provide a reference guide and a supplement to the legislative parameters within which the members of Council must operate. These standards should serve to enhance public confidence that Regional Municipality of

Niagara's elected representatives operate from a base of integrity, justice and courtesy.

The Code of Conduct is a general standard that augments the provincial laws and Regional by-laws that govern the conduct. It is not intended to replace personal ethics.

General Principles

All members of Council shall observe the highest standard of ethical conduct. They are expected to act honestly, independently, impartially, with discretion and without regard to self-interest and to avoid any situation liable to give rise to a conflict of interest. They are expected to be mindful of the importance of their duties and responsibilities, to take into account the public character of their function and to conduct themselves in a way that maintains and promotes the public's trust in the Regional Municipality of Niagara. All members of Council have a duty to act honestly, in good faith and in best interests of the Regional Municipality of Niagara. All members shall serve their constituents in a conscientious and diligent manner. No member shall use the influence of office for any purpose other than the exercise of his or her official duties.

4. The Procedural By-law, Section 3

ROLE OF COUNCIL

3.1 It is the role of Council:

- (a) to represent the public and to consider the well-being and interests of the Region;
- (b) to develop and evaluate the policies and programs of the Region;
- (c) to determine which services the Region provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of Council;
- (e) to ensure the accountability and transparency of the operations of the Region, including the activities of the senior management of the Region;
- (f) to maintain the financial integrity of the Region; and
- (g) to carry out the duties of Council under the Act or any other statute.

5. Niagara Region's Mission, Vision and Corporate Values (niagararegion.ca)

Our Mission in Niagara

Niagara Region will serve its residents, businesses and visitors through leadership, partnership and the provision of effective and community focused services.

Our Vision of Niagara

Niagara Region is a unified community of communities with diverse opportunities and qualities - together we strive for a better tomorrow.

Corporate Values

These values guide our decision-making and actions everyday:

We Show Respect

We treat everyone equitably with compassion, sensitivity and respect.

We Serve Niagara

We serve Niagara with pride, care and excellence.

We Value Honesty

We value honesty, integrity and trust.

We Promote Choice

We believe in social, environmental and economic choices that support our diverse community.

We Foster Partnerships

We foster collaboration and value partnerships.

[96] The concern that Regional Council does not operate with transparency is based in large measure on the fact that some Regional Councillors used personal email accounts for Regional business and engaged in private or behind-the-scenes discussions in relation to the 2016 CAO hiring process.

[97] I am mindful, however, of the comments made by André Marin, Ombudsman of Ontario in his Ombudsman Report, in June 2015, that:

39 There is no absolute ban on council members sharing information informally, either in person or via email. As I noted in my 2014 report "Turning Tables" [4]:

The *Municipal Act*, 2001 does not prohibit members of council, committees and local boards from ever discussing city business outside of a formal meeting. It is expected that some informal conversations about municipal business will take place amongst individual members of such bodies, and as I observed in In the Back Room [5]:

It is a healthy thing in a democracy for government officials to share information informally before making policy decisions. I agree that to expect council members never to talk to one another outside of a public meeting is unrealistic and would have the effect of unnecessarily chilling speech.

However, municipal officials must be cautious to ensure that informal private discussions do not transform into improper meetings. It is of particular concern when a quorum of a body is involved.¹⁶

[98] I am also cognizant of the challenges that Regional Council faced before and during the six-month CAO recruitment period (May – October, 2016), which affected its ability to effectively advance and achieve Regional Council’s Strategic Plan and its key priorities, among them:

1. Fostering an environment of respect, teamwork, unity, and collaboration;
2. Creating a trusting atmosphere where decisions are effectively implemented and strategic innovation is encouraged;
3. Regional Staff living through hiring and termination of staff, uncertainty and change of leadership;
4. Regional Councillors treating other Councillors and Regional Staff inappropriately and with insensitivity, cynicism, nastiness, bullying and intimidation; and
5. Regional Councillors and Regional Staff being afraid of taking risks and repercussions for speaking out.

[99] Nonetheless, members of Regional Council must comply with the requirements set out in the *Municipal Act*, 2001, the Code of Conduct, and the *Procedural By-law*.

¹⁶ Ombudsman Report, Investigation into whether Council for the Township of Leeds and the Thousand Islands held illegal closed meetings to discuss Council’s Code of Conduct (HTML | PDF), André Marin Ombudsman of Ontario, June 2015, p. 9 at para. 39.

- [100] In the light of my conclusions above, Regional Council should now take appropriate steps to improve its governance process and its practices, specifically with respect to: (1) Confidentiality; (2) Transparency; and (3) Acceptable conduct.
- [101] I urge Regional Councillors, individually and collectively, to adopt a governance process and practices that serve to instill public confidence in the transparency and accountability of their process and practices.
- [102] Regional Council and Regional Staff need to better understand the issues and standards of good governance, and implement best practices in Niagara Region. These will be key determinants of Regional Council's success.

THE RECOMMENDATIONS

- [103] To address the concerns that I have identified in my investigation, I make the following recommendations to assist Regional Council in fulfilling its obligations under the *Municipal Act*, the Code of Conduct, and the *Procedural By-law*, and improving its good governance and practices with respect to confidentiality, transparency, and acceptable conduct:

- 1. All members of Niagara Regional Council should be vigilant in adhering to their individual and collective obligation to ensure that Regional Council complies with its responsibilities under the *Municipal Act*, the Code of Conduct, and the *Procedural By-law*.**
- 2. Regional Council should consider engaging an independent external governance auditor to evaluate its existing governance framework, identify specific issues and concerns, and provide recommendations for customized solutions to achieve desired outcomes, in a written report to be completed by December 31, 2018.**
- 3. Regional Council should consider developing and offering, as a best practice, its own educational, training, and reference materials regarding the roles, responsibilities and relations of Regional Council, Regional Councillors, Regional Staff, local area municipalities, and**

members of the public, to facilitate their understanding of and compliance with the *Municipal Act*, the Code of Conduct, the *Procedural By-law*, and related policies and practices.

[104] These recommendations have found support from individuals whom I interviewed in my investigation, Regional Councillors, Regional Staff, and members of the public.

[105] I hope that these recommendations will be accepted and acted upon so that the concerns raised in my investigation will not only be addressed but also be seen to be addressed by Regional Council.

REPORT

[106] My report should be shared with every member of Regional Council and be made available to the public as soon as possible, and no later than Niagara Region's next Regional Council meeting.

Date: June 29, 2018

A handwritten signature in cursive script, reading "M. J. Huberman", written in black ink over a horizontal line.

Marvin J. Huberman, Ombudsman