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C H A M B E R S

Integrity Commissioner Office
for the City of Brantford

Marvin J. Huberman, LL.B., LL.M. (ADR), FCIARB
Integrity Commissioner
Email: mhuberman@adr.ca

September 11, 2020

Sent by email to:

The Complainant, Ms. Jillian Laskey

The Respondent, Councillor Dan McCreary

Re: Code of Conduct Complaint – IC-212-0620 (Laskey/McCreary)

Dear Ms. Laskey and Councillor McCreary:

Investigative Powers

I, Marvin J. Huberman, have exercised the powers and performed the duties of the Integrity Commissioner for the City of Brantford to inquire into, investigate, and prepare a report with respect to the Complaint described herein, pursuant to section 223.3 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended.

Introduction

On June 16, 2020, Jillian Laskey, a Brantford resident and a member of the public (the “Complainant”), filed a complaint about whether Ward 3 Councillor Dan McCreary (the “Respondent”), a member of Brantford City Council, has contravened the Code of Conduct applicable to the member, being Chapter 16 of the Code of Conduct for Members of the Council of the Corporation of the City of Brantford and of its Local Boards (the “Code of Conduct”).

The Complainant states that she has reasonable grounds to believe that the Respondent contravened Section 16.2.2 (Respectful Conduct) and Section 16.2.3 (Respect for Human Rights) of the Code of Conduct arising from a post made on June 3, 2020 by the Respondent on his Facebook page that read: “I’ve just been told by a constituent that he saw a group of a half dozen migrant farm workers heading to Walmart yesterday evening at 7 p.m. Unmasked. Wondering what the odds are that these folks are not among the group quarantined at the Best Western Brantford.”

Investigative Process

Having exercised the powers and performed the duties of the Integrity Commissioner for the City of Brantford pursuant to section 223.3 of the *Municipal Act, 2001*, as part of my investigation of this formal complaint, I reviewed:

- The Complainant’s Code of Conduct - Formal Complaint Form and Affidavit, received on June 16, 2020;
- The response of the Respondent to the Complaint, received on June 29, 2020;
- The Complainant’s reply to the response of the Respondent, received on June 29, 2020; and
- Additional documentation and information from the Complainant and the Respondent, received on July 30 and August 5, 2020.

I interviewed the Complainant via teleconference on July 30, 2020, and I interviewed the Respondent via teleconference on August 5, 2020.

I received full cooperation with my investigation from the Complainant and Respondent both of whom provided me with the documentation and information I requested.

The Complaint

Schedule A attached to the Affidavit of Complainant, sworn/affirmed by the Complainant on June 16, 2020, sets out the following particulars relied on by the Complainant in support of her complaint.

“On June 3, 2020, at approximately 11:30 am, Councillor Dan McCreary posted the following on his Facebook account

"www.facebook.com/CouncillorDan". The screenshot is attached. The post was made public, thereby anyone could view it and comment on it. The account is clearly marked as Mr. McCreary's Councillor account.

"I've just been told by a constituent that he saw a group of a half dozen migrant farm workers heading to Walmart yesterday evening at 7PM. Unmasked. Wondering what the odds are that these folks are not among the group quarantined at the Best Western Brantford."

There are several issues in this statement:

1. Mr. McCreary refers to group of people as "migrant workers". He did not see them, did not speak to them, therefore has identified a group of "non-white" people, given that the majority of the population identifies as caucasian. This contravenes Article 16.2.3 Respect for Human Rights, a member of Council shall not: (a) make racial, homophobic, sexist or ethnic slurs.
2. Mr. McCreary then incites anger and harassment towards this group, citing that they are unmasked. There is no bylaw or law requiring the wearing of a mask. This contravenes Article 16.2.2 Respectful Conduct (b) make written or verbal abuse or threats.
3. Mr. McCreary makes a condescending statement, insinuating that these people are spreading disease by being unmasked, and that they should be quarantined for COVID-19. This contravenes Article 16.2.2 Respectful Conduct (a) engage in a course of conduct consisting of patronizing or condescending comments or behaviour.

At this time of a global pandemic due to COVID-19, following the proper channels for reporting violations is key, and spreading rumours and second-hand information is downright dangerous.

In addition, the civil unrest across the globe in relation the death of George Floyd creates a dangerous environment of hostility. Discriminatory statements against visible minorities can easily be construed as a call to action by people of like mind. Community leaders must be more responsible and aware of their interactions on social media.

One comment by a facebook user replied that her children matched this description, and thus, subject to discrimination and harassment.

Mr. McCreary should immediately resign from his position.”

The Response

The Respondent takes the position that he did not contravene the Code of Conduct because:

“With respect to the first claim:

There was no contravention of 16.2.3 as my comment contained neither racial, homophobic, sexist or ethnic slurs.

I repeated an observation by a constituent well known to me whom I trust implicitly. My commentary was made believing (then and now) that it was entirely true and in the interest of public health and safety.

There was no contravention of 16.2.2 as my comment contained no verbal or written abuse or threats.

Additionally my comments were not of a patronizing or condescending nature.

This complaint is part of an ongoing pattern of harassment by this complainant.

She has additionally made slanderous public statements, has created an online petition and continues to attack me on social media.”

The Reply

In her reply to the response of the Respondent, the Complainant states:

“The act of referencing the group as “migrant workers” is racial profiling. The definition of racial profiling, as per the Ontario Human Rights Commission, is as follows “Ontario Human Rights Commission’s Terms of Reference define racial profiling more broadly to include any action undertaken for reasons of safety, security or public

protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment.”

Source: <http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/what-racial-profiling>

Based on this definition, we can therefore conclude that the use of the term “migrant workers” is a racial and ethnic slur. There is no other value in the use of this term in the statement made by Mr. McCreary other than to single out a group of people for greater scrutiny or different treatment through racial profiling. Identifying the people as “migrant workers”, has no context in this statement other than to visually identify non-white people, therefore, is a derogatory comment related to the ethnic origin, and status in Canada, of the people in question.

Mr. McCreary explains that he repeated an observation by a constituent. As such, Mr. McCreary has no way of a) confirming that this group was a group of “migrant workers”, b) that the group were the same group that were in quarantine, and c) that they were not just members of the Brantford community. In fact, the group in question was already quarantined, and according to several sources, the group never left the premises (statement below). Therefore, we can infer that Mr. McCreary had no knowledge of who this group of people were, whether they were temporary foreign workers, and whether they were under quarantine order.

“But Scott Biddle, president of Scotlynn Farms Group in Vittoria where the isolated workers are employed, said there were translators on site, and the workers were visited daily by the Haldimand-Norfolk Health Unit.

“There was security on site 24 hours a day so no workers were even allowed in the hallways or common areas,” said Biddle. “No one left the premises let alone going shopping at a retail store.”

Dr. Elizabeth Urbantke, Brant’s acting medical officer of health, said that both before and upon their arrival in Brantford, the Haldimand-Norfolk Health Unit ensured all workers got written and verbal instruc-

tions about the isolation protocol in their native language or through a translator.

“All workers respected and fully complied with safe isolation protocols while quarantined in area hotels,” said Urbantke, noting that while the workers were fully the responsibility of the Haldimand-Norfolk Health Unit, the Brant County Health Unit supported the process and was communicating with its sister health unit several times a day.”

Source: <https://www.brantfordexpositor.ca/news/local-news/social-media-post-prompts-complaint-against-councillor>

The use of the term “migrant worker”, in this context is a racial slur. It has no other use in the statement made by Mr. McCreary except to identify the ethnic origins of the observed group. As such, it is a racially motivated statement in calling the group “migrant workers” and can be construed as a racial slur or ethnic slur in this context.

Third party observations cannot be construed as “entirely true”. It is also impossible to understand how the statement was made “in the interest of public health and safety” when the statement was made 12 hours after the group was observed, and after the actual group of quarantined workers were secured in Brantford. As a city councillor, Mr. McCreary had knowledge of the quarantine order prior to it being released to the public a short time later by the City of Brantford. If the group was quarantined, with 24 hour security and concierge, any violations to the quarantine order should be reported to the Public Health Unit and the police. They, in turn, would release any statement regarding public health and safety. Statements made to social media, 12+ hours after the fact, have no value as a public health and safety measure. An appropriate measure to ensure public health and safety is to contact the Public Health Unit. Statements made on social media can therefore be construed as a racial and ethnic slur towards minority groups in the City of Brantford.

Mr. McCreary identifies the group of “migrant workers” as “unmasked” and insinuates that this group may be the group of temporary farm workers that are quarantined. The purpose of this statement can be understood to be written abuse, accusing the group of intentionally

spreading disease despite quarantine measures in place. This statement is known, or should ought to be known, as unwanted. This is the definition of abuse. There is simply no proof that this group was COVID-19 positive and that they were disobeying the Quarantine Act. Furthermore, one understands this statement as a call to action to the public to discriminate or harass this group or groups appearing to be “migrant workers”, as there is no other explanation for the reason behind the comment.

The comments by Mr. McCreary are patronizing and condescending. The definition of patronizing is “to behave as if one is conscious of descending from a superior position, rank, or dignity.” As a city councillor, statements referring to “migrant workers”, without permanent residence status in Canada, are patronizing and condescending. Temporary Foreign Workers in Canada experience precarious unstable working conditions, unsafe and substandard living conditions, are often forced to work while sick or suffer the threat of being returned to their country of origin. As non-permanent residents in Canada, they are perceived to have fewer rights, and a city councillor is clearly in a position of power to change the bylaws regarding the treatment of Temporary Foreign Workers.

The Code of Conduct for the City of Brantford Members of Council includes a policy for Reprisals. Constituents are able to make a complaint without fear of reprisal. Threatening that this complaint is a “on-going pattern of harassment” is in fact another violation of the Code of Conduct. The complainant has the right to make the complaint, and has the right to assert their opinion on the interpretation of the statement made by Mr. McCreary. Please advise if a new complaint should be submitted based on the Article for Reprisals or if this new statement will be investigated as part of this investigation. Any statements made by this constituent are fact, including the original screenshot of the statement or social media post by Mr. McCreary. By definition, this is not slander. Therefore, threatening slander and harassment is in fact an act of reprisal, and as such, should be investigated as an additional complaint against Mr. McCreary. Please advise if a new complaint should be submitted based on the Article for Reprisals or if this new statement will be investigated as part of this investigation.”

Relevant Provisions of the Code of Conduct

Section 16.2.2 of the Code of Conduct provides:

“16.2.2 Respectful Conduct

In all of their interactions with one another, Municipal Staff, Local Board Staff, Officers, and members of the public, in connection with their duties as a member of Council or of a Local Board, as the case may be, members of Council and Local Boards shall interact with and treat every person with dignity, respect and equality. Without limiting the generality of the foregoing, members of Council and Local Boards shall not:

- (a) engage in a course of conduct consisting of patronizing or condescending comments or behaviour;
- (b) make written or verbal abuse or threats;
- (c) make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander; or
- (d) engage in Workplace Harassment or Workplace Violence.”

Section 16.2.3 of the Code of Conduct provides:

“16.2.3 Respect for Human Rights

In all of their interactions with one another, Municipal Staff, Local Board Staff, Officers and members of the public, in connection with their duties as a member of Council or a Local Board, as the case may be, all members of Council and Local Boards shall refrain from Harassing or Discriminating against any person or otherwise contravening the requirements of the *Ontario Human Rights Code*. Without limiting the generality of the foregoing, a member of Council or a Local Board shall not:

- (a) make racial, homophobic, sexist or ethnic slurs;
- (b) display pornographic, homophobic, sexist or racist material; or

(c) make Leering or offensive gestures that would constitute an infringement of the *Ontario Human Rights Code*.”

Analysis, Findings, Conclusions and Recommendations

Did the Respondent contravene Sections 16.2.2 and 16.2.3 of the Code of Conduct by posting on June 3, 2020 a comment on his Facebook page that read: “I’ve just been told by a constituent that he saw a group of a half dozen migrant farm workers heading to Walmart yesterday evening at 7 p.m. Unmasked. Wondering what the odds are that these folks are not among the group quarantined at the Best Western Brantford” (the “Respondent’s Facebook comment”)?

This issue raises a matter of statutory interpretation given that the Code of Conduct was enacted by by-law pursuant to the *Municipal Act, 2001* (the “Act”).

Principles of Statutory Interpretation

In *Rizzo & Rizzo Shoes Ltd.*¹, the Supreme Court of Canada adopted the modern principle of statutory interpretation, which requires courts today to interpret a provision by considering it in its entire context and by both:

1. Looking at its ordinary and grammatical meaning, in line with the plain meaning rule; and
2. Ensuring that the interpretation is in harmony with:
 - a. The scheme of the statute as a whole;
 - b. The object of the Act; and
 - c. The intention of the legislature.

This approach takes a more “holistic view” of statutory interpretation, encouraging courts to look at context.²

¹ *Rizzo & Rizzo Shoes Ltd.*, Re, 1998 CarswellOnt 1 (S.C.C.) at para. 21.

Application of Principles

As a matter of statutory interpretation, the Complainant contends that the Respondent by posting the Respondent's Facebook comment: (a) failed to "interact with and treat every person with dignity, respect and equality"; (b) "engaged in a course of conduct consisting of patronizing or condescending comments or behaviour"; (c) made "written or verbal abuse or threats"; (d) engaged in "Harassing or Discriminating against any person or otherwise contravened the requirements of the *Ontario Human Rights Code*; and (e) made "racial, homophobic, sexist or ethnic slurs, in contravention of Sections 16.2.2 and 16.2.3 of the Code of Conduct.

I do not agree with the Complainant's argument.

In my view, on their proper construction, the relevant words in Sections 16.2.2 and 16.2.3 of the Code of Conduct, are not to be defined as contended by the Complainant. Her construction is not based on the ordinary and grammatical meaning of those words, nor does it take into account the context. Rather, her approach to the interpretive exercise is as Doherty J.A. described in *Glimmer Resources Inc. v. Exall Resources Ltd.*³ – it gives meaning to the relevant words in the Code of Conduct by impermissibly looking at them under an "interpretive microscope in isolation."

The Context

Context is paramount.

Pursuant to section 224 (a) of the *Municipal Act, 2001*, "It is the role of Council...to represent the public and to consider the well-being and interests of the municipality."

As explained in The Ontario Municipal Councillors Guide 2018,⁴ the representative role of Council involves representing the views of constituents when dealing with issues that come before Council. It also involves having

² *Rooney v. ArcelorMittal S.A.*, 2016 CarswellOnt 13026 (Ont. C.A.) at para. 13.

³ *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999) 119 O.A.C. 78 (C.A.) at para. 17

⁴ www.ontario.ca/document/ontario-municipal-councillors-guide-2018, at p. 4 of 111

a broader understanding of the issues impacting the municipality as a whole; and considering conflicting interests and making decisions that will not be popular with everyone, by taking into account all available information when making evidence-based decisions. While disagreements are common among council members, it is important to remember that councillors are working toward a common goal, and that there is no single, correct approach to the representative role.

Indeed, elected Members of Council are entitled to take different approaches and positions on issues and to disagree with others, even with the majority on an issue. As the Supreme Court of Canada stated: “In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens...A public officer may in good faith make a decision that he or she knows to be adverse to interests of certain members of the public...”.⁵

Members of Council, under the democratic process, are entitled to form views, hold views, express views, change views, and give effect to views, as to matters of public policy affecting the municipality.⁶

It is not the role of an Integrity Commissioner to restrain or prevent Members of Council from exercising their fundamental freedom to express themselves and manifest their thoughts, beliefs, and opinions, including freedom of the press and other media of communications as to matters of public policy affecting the well-being and interests of the municipality.

As Integrity Commissioner Donald Cameron stated in his 2012 Report:⁷

“I cannot and will not be a referee of free speech in a political arena provided it stays within the bounds of s. 2.1 [now Rules Nos. 14 and 15] of the Code”.

Investigator, Randy Pepper, the delegate of Integrity Commissioner Cameron, subsequently expanded on this principle as follows:⁸

⁵ *Odhavji v. Woodhouse*, 2003 SCC 69 (CanLII) at para. 28

⁶ *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1973 CanLII 818 (ONSC), 1 O.R. (2d) 20 at para. 43, cited in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC).

⁷ City of Brampton, Report No. BIC 030-192, December 4, 2012.

Freedom of expression is a fundamental right in Canada so the Code must be interpreted in a manner consistent with this fundamental right. Based on the law set out below, I cannot find that the Code should be interpreted to appoint the Integrity Commissioner as a speech referee in the political arena.

As the Supreme Court of Canada noted in *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139:

Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure. As expressed by Jackson J., in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at p. 642, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”. Robert J. Sharpe explains the futility of basing this axiom merely upon some yearning for ultimate truth, in “Commercial Expression and the Charter” (1987), 37U.T.L.J. 229, at p. 236:

The essence of the market-place of ideas argument is that control and regulation of expression is intolerable because we can trust no government to know the truth. Those who purport to legislate the truth invariably turn out to be tyrants. The market-place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth. Hence the justification for the widest freedom of political speech stems not only from some abstract search for truth, but also from the tangible goal of preserving democracy.

In a defamation context, the Supreme Court noted more recently in *WIC Radio Ltd. V. Simpson*, 2008 SCC 40 (CanLII), [2008] 2 SCR 420 at para. 2,

⁸ City of Brampton, Report No. BIC-32-1112, December 18, 2012, Randy Pepper, Delegate of the Integrity Commissioner.

An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest.

In view of the above law, I find that the Integrity Commissioner has a very limited role in relation to the "freewheeling debate on matters of public interest" which is not engaged by Councillor Palleschi's reported comments. I have therefore concluded that the allegations of the BSO/Mr. Todd against Councillor Palleschi do not require further investigation and the complaint should be dismissed."

I agree with the above statements and analysis of Integrity Commissioner Cameron and Investigator Pepper concerning the role of the Integrity Commissioner as a speech referee in the political arena, and I adopt them for purposes of the present Complaint.

In my view, the relevant words in Sections 16.2.2 and 16.2.3 of the Code of Conduct must be interpreted in light of and in harmony with this context and consistent with the Respondent's representative roles and democratic rights; his fundamental freedom to express himself and manifest his thoughts, beliefs, and opinions, including freedom of the press and other media of communications as to matters of public policy affecting the well-being and interests of the municipality.

Findings

Having thoroughly reviewed and carefully considered the documentation and information obtained in the course of my investigation (collectively, the "evidence"), I find that the Respondent's Facebook comment involved matters of public policy, including the Covid-19 pandemic and migrant workers/temporary foreign workers,⁹ affecting the well-being and interests of the

⁹ See <https://www.brantfordexpositor.ca/news/local-news/social-media-post-prompts-complaint-against-councillor>

municipality, and manifested the Respondent's thoughts, beliefs, opinions, and/or expressions, as to those matters.

I further find on the evidence that the Respondent repeated in the Respondent's Facebook comment an observation made by a constituent well-known to the Respondent whom he trusted implicitly. The Respondent's Facebook comment was made by the Respondent believing (then and now) that it was entirely true and relevant to public health and safety.

Based on the evidence, I find that the Respondent by posting the Respondent's Facebook comment did not: (a) fail to "interact with and treat every person with dignity, respect and equality"; (b) "engage in a course of conduct consisting of patronizing or condescending comments or behaviour"; (c) make "written or verbal abuse or threats"; (d) engage in "Harassing or Discriminating against any person or otherwise contravene the requirements of the *Ontario Human Rights Code*; nor (e) make "racial, homophobic, sexist or ethnic slurs, in contravention of Sections 16.2.2 and 16.2.3 of the Code of Conduct.

I agree with the Respondent, and find on the evidence, that his Facebook comment, properly construed, did not consist of patronizing or condescending comments, nor did it contain any written or verbal abuse or threats.

I disagree with the Complainant that "...As a city councillor, statements referring to "migrant workers", without permanent residence status in Canada, are patronizing and condescending..."

In and of themselves, and devoid of context, the words "migrant workers" are not patronizing or condescending.

According to Wikipedia:¹⁰

"A **migrant worker** is a person who either migrates within their home country or outside it to pursue work. Migrant workers usually do not have the intention to stay permanently in the country or region in which they work.

¹⁰https://en.wikipedia.org/wiki/Migrant_worker

Migrant workers who work outside their home country are also called foreign workers. They may also be called expatriates or guest workers, especially when they have been sent for or invited to work in the host country before leaving the home country.”

In my view, the words “migrant (farm) workers” used in the Respondent’s Facebook comment convey the same meaning, which is neither patronizing nor condescending, in the context of the present complaint.

I further disagree with the Complainant that the Respondent by merely referring to the “migrant workers” as “unmasked” engaged in a course of conduct consisting of patronizing or condescending comments or behaviour, incited anger and harassment toward this group, accused the group of intentionally spreading disease despite quarantine measures in place, and made written or verbal abuse or threats. In my view, this conclusion does not logically follow from the stated premises - there are major gaps in the reasoning chain - nor is it supported by the evidence in the circumstances of the present complaint. I reject this contention.

I find on the evidence that the Respondent by posting his Facebook comment did not engage in “Harassing or Discriminating against any person or otherwise contravene the requirements of the *Ontario Human Rights Code*; nor did he make “racial, homophobic, sexist or ethnic slurs, in contravention of Sections 16.2.2 and 16.2.3 of the Code of Conduct.

Section 16.1.4 of the Code of Conduct defines “Harassing” to mean “practicing a form of harassment as defined in and prohibited under the *Human Rights Code*, as amended.”

Subsection 10(1) of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 (the “*Human Rights Code*”) defines “harassment” as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”

In *Peplinski (Re)*¹¹, Integrity Commissioner, Guy Giorno, stated:

¹¹ *Peplinski (Re)*, 2018 ONMIC 12 (Canlii) at para. 53

“53. I observed in *Moore v. Maika* that, as the definition [of “harassment”] indicates, typically harassment involves a *course of conduct* or a pattern. Unless the incident is severe,[26] a single incident does not amount to a course of conduct and therefore is not harassment.[27]”

Having taken into account all the circumstances of the present complaint, I find that the Respondent’s Facebook comment does not constitute a form of harassment as defined in and prohibited under the *Human Rights Code*. It was a single comment only. The comment is not severe. It does not amount to a vexatious comment or course of conduct and therefore is not harassment.

I further find on the evidence that the Respondent did not make racial or ethnic slurs by posting his Facebook comment, in contravention of Sections 16.2.2 and 16.2.3 of the Code of Conduct.

Section 16.1.3 of the Code of Conduct defines “Discriminating” to mean “practicing a form of discrimination prohibited under the *Human Rights Code*, as amended.”

Contrary to the Complaint’s submission, the Respondent’s Facebook comment did not “identify a group of “non-white” people”, nor was “the use of the term “migrant worker” in this context a racial slur” or “racial profiling”.

I find on the evidence that that the Respondent’s Facebook comment was not made to harass or discriminate against the “migrant workers” because of their perceived race or ethnic origin, or because of things related to these characteristics, contrary to the *Human Rights Code*. Neither does the Facebook comment have the effect of singling out persons who comprise the group “migrant workers” based on their race or ethnic origin, and imposing burdens on them and not on others, or withholding or limiting access to benefits available to other members of society, in areas covered by the *Human Rights Code*, such as at work, at school, in rental housing, or in services, which include stores and malls, hotels, hospitals, recreational facilities and schools.¹²

¹²http://www3.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf

I further find on the evidence that the Respondent's Facebook comment was not racial profiling because it was not "undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment"¹³, contrary to the *Human Rights Code*.

Finally, I do not find on the evidence that:

- This "complaint is part of an ongoing pattern of harassment by the Complainant and that she has additionally made slanderous public statements, has created an online petition and continues to attack me [the Respondent] on social media", as contended by the Respondent; and
- That "threatening slander and harassment is in fact an act of reprisal, and as such, should be investigated as an additional complaint against Mr. McCreary", as contended by the Complainant, under Section 16.2.11 (No reprisal) of the Code of Conduct or Section 8 of the *Human Rights Code*.

Conclusions

For the reasons stated above, I conclude that the Respondent did not contravene Sections 16.2.2 and 16.2.3 of the Code of Conduct by posting on June 3, 2020 a comment on his Facebook page that read: "I've just been told by a constituent that he saw a group of a half dozen migrant farm workers heading to Walmart yesterday evening at 7 p.m. Unmasked. Wondering what the odds are that these folks are not among the group quarantined at the Best Western Brantford".

Recommendation

Although I have determined that the Respondent has not contravened the Code of Conduct, the circumstances and analysis of this Complaint may be of interest and importance to Council and the public.

I accept the Complainant's statements that:

¹³<http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/what-racial-profiling>

“At this time of a global pandemic due to COVID-19, following the proper channels for reporting violations is key, and spreading rumours and second-hand information is downright dangerous. In addition, the civil unrest across the globe in relation the death of George Floyd creates a dangerous environment of hostility. Discriminatory statements against visible minorities can easily be construed as a call to action by people of like mind. Community leaders must be more responsible and aware of their interactions on social media. One comment by a facebook user replied that her children matched this description, and thus, subject to discrimination and harassment.”

I also accept the Respondent’s statements that:

“My intent was to inform people what’s going on in our community. A few people in the community were genuinely hurt and I feel badly for them. The vast majority of people are sensitive to issues like this. There is a small cadre who are militant”, and that “I have always acted in the best interests, health and welfare of my constituents and will continue to do so. I never have and never will be cowed by the political correctness crowd.”

We should not lose sight of the fact that freedom of expression is a fundamental human right. While it is not an absolute right, it does enjoy robust legal protection even if the expression is unpopular, distasteful, disturbing, or offensive to some members of the public. The tests for restricting freedom of expression are therefore demanding.

But we should also take to heart that Members of Council can and should use social media, including platforms such as Facebook, Twitter, Instagram, and Snapshot, among many others, in ways which demonstrate the quality of their service, can be used to build goodwill among citizens and Members of Council, and focus on engaging in constructive discussion or debate, in accordance with the applicable Code of Conduct.

I recommend that Council receive this report which finds no contravention of Sections 16.2.2 and 16.2.3 of the Code of Conduct.

Respectfully submitted this 11th day of September, 2020,

A handwritten signature in black ink, appearing to read "MJ Huberman". The signature is written in a cursive, slightly slanted style.

Marvin J. Huberman, LL.B., LL.M.(ADR), FCI Arb
Integrity Commissioner, City of Brantford
c/o ADR Chambers Inc., Office of the Integrity Commissioner