

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

THE CORPORATION OF THE TOWNSHIP OF EMO AND HAROLD MCQUAKER

Applicants

-and-

**BORDERLAND PRIDE, the NORTHERN ONTARIO PRIDE NETWORK, DOUGLAS
W. DUGSON, KATHRYN L. SHOEMAKER, HUMAN RIGHTS TRIBUNAL OF
ONTARIO, HAROLD BOVEN, and WARREN TOLES**

Respondents

FACTUM OF THE APPLICANT, HAROLD MCQUAKER

DATE: March 31, 2026

WISHART LAW FIRM LLP

Barristers and Solicitors

390 Bay Street, Suite 500

Sault Ste. Marie, ON P6A 1X2

J. Paul R. Cassan (LSO 38820R)

pcassan@wishartlaw.com

Ph: 705-949-6700

Brittany Hollingsworth (LSO 84912T)

bhollingsworth@wishartlaw.com

Ph: 705-949-6700

Lawyers of Applicant, Harold McQuaker

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PART I – OVERVIEW

1. This Application for judicial review is being brought by The Corporation of the Township of Emo (the “Township”) as well as its Mayor, Harold McQuaker (also referred to as the “Mayor” and “McQuaker”) (together the “Applicants”).
2. The Applicants are seeking judicial review of the Human Rights Tribunal of Ontario (the “HRTO” or “Tribunal”) decision and related orders made against the Applicants and non-party Crystal Gray (“Gray”), the Township’s current Chief Administrative Officer (CAO), dated November 20, 2024, in Tribunal File Number 2020-41858-I (the “Decision”).
3. In its Decision, the Tribunal incorrectly and unreasonably found that McQuaker, acting in his capacity as Mayor, discriminated against the Respondent, Borderland Pride by voting ‘nay’ to making a pride proclamation in the exact wording that Borderland Pride requested the Township make. McQuaker was in favour of making a pride proclamation with different wording.
4. The Tribunal further concluded that because McQuaker was found to have discriminated against Borderland Pride, he acted in bad faith and therefore was not entitled to the statutory immunity afforded under s. 448(1) of the *Municipal Act, 2001, SO. 2001, c. 25* (“*Municipal Act, 2001*”). The Tribunal ordered McQuaker to pay damages to Borderland Pride, a corporation, for injury to the corporation’s dignity, feelings and self-worth.
5. The Tribunal then imputed the finding of discrimination against the Mayor to the Township; finding that the Township also discriminated against Borderland Pride. The Tribunal then proceeded, without notice or warning, to make an order personally against the Township’s CAO, a non-party to the HRTO proceeding.

6. The Decision involves important matters of law and statutory interpretation beyond the expertise of the Tribunal, with implications beyond human rights law. The issues require the Division Court to make determinations on the issues in this application.
7. The Tribunal's findings are unreasonable and incorrect in law. The Tribunal improperly equated the Mayor's concerns with flying a pride flag, after the vote in question, as discrimination, despite McQuaker being supportive of making a pride proclamation. The Tribunal further misapplied the legal test for bad faith, finding that because McQuaker discriminated, he acted in bad faith.
8. The Decision raises serious implications for municipal governance. If upheld, it would permit tribunals to infer discriminatory intent from unrelated or subsequent statements made by council members and expose elected officials to personal liability, absent the high threshold required for bad faith. The Decision further incorrectly and unreasonably imputes discrimination to the Township based on a finding that one member of council discriminated.
9. The Tribunal also erred by allowing a corporation to bring a human rights application on its own behalf, awarding the corporate entity damages for injury to dignity, feelings and self-worth, and in making an order affecting a non-party, in breach of procedural fairness.
10. McQuaker is seeking an order quashing the Tribunal's findings of discrimination and bad faith against him, and a declaration that he is entitled to the protection of s. 448(1) of the *Municipal Act, 2001*. McQuaker further seeks an order quashing the Tribunal's findings that the Township discriminated, that a corporate entity is entitled to bring a human rights claim and receive awards for injury to dignity, feelings and self-worth, and the order made against the Township's CAO, a non-party.

PART II- THE FACTS

11. The Applicants consist of the Township and its Mayor.
12. The Township is a small Ontario municipal corporation located in the Rainy River District in Northwestern Ontario with a population of approximately 1,330. The Township's council is comprised of one Mayor and four councillors.¹
13. McQuaker, is approximately seventy-six (76) years old. McQuaker ran for and was elected as Mayor during the Township's 2018 election. This was McQuaker's first time running in a municipal election in any capacity. As mayor, McQuaker is head of the municipal council, and his role is to act as a representative, policy maker and steward for the community of Emo.²
14. The role of Council is set out in section 224 of the *Municipal Act, 2001*. Among other things, it is the role of Council to represent the public and to consider the well-being and interests of the municipality and to determine which services the municipality provides.³
15. In addition, section 448(1) of the *Municipal Act, 2001* provides statutory immunity to municipal employees and council members, protecting them from personal liability for actions taken in good faith while performing their duties. Section 448(1) of the *Municipal Act, 2001* plays an important role in achieving the objectives of section 224⁴; a fear of personal lawsuits for considering public issues would hinder the purpose of s. 224.
16. In terms of compensation, as mayor, McQuaker receives \$9,000.00 per annum as an honourarium for serving as mayor.⁵

¹ App. Record, Vol.4, Wit. Statement of C. Gray, paras 8, 9, 10, pp. 0917

² App. Record, Vol. 4, Wit. Statement H. McQuaker, paras 1-3, pp 1251

³ App. Record, Vol.4, Wit. Statement of C. Gray, para 16, pp. 0919

⁴ Municipal Act, 2001, S.O. 2001, c. 25 at ss 224, 448(1).

⁵ App. Record, Vol.4, Wit. Statement of C. Gray, para 20, pp. 0920

17. The Respondents, Borderland Pride, Northern Ontario Pride Network, Douglas W. Judson and Kathryn Shoemaker commenced a human rights application before the Tribunal bearing Tribunal File Number 2020-41858-I due to the Township declining to make a pride proclamation in the exact form requested (the “HRT0 Proceeding”).⁶
18. On or about May 2019, the Township received a letter from Borderland Pride providing a draft pride proclamation/resolution. Borderland Pride’s request for a resolution/proclamation was addressed at the Township’s May 14, 2019, meeting and Council made a pride proclamation in its own form. The Township did not use the draft provided by Borderland Pride and provided the following proclamation instead:
- “BE IT RESOLVED, that I, Mayor Harold McQuaker, do hereby proclaim the week of June 2 through 9, 2019 to be Pride Week in the Township of Emo; And further that all citizens are encouraged to reflect and work together on equality, acceptance, and inclusion for all people throughout the year.”⁷
19. About a year later, on April 29, 2020, the Township received another letter from Borderland Pride providing a draft pride proclamation/resolution and requesting, among other things, that the Township adopt or enact the draft proclamation verbatim, which was a page long, with nine (9) recitals. Borderland Pride’s request also included a request to fly a pride flag.⁸
20. Borderland Pride’s request was addressed at the Township’s May 12, 2020, Council meeting. At this meeting McQuaker stated that he was agreeable to making a proclamation in the same language as the pride proclamation made the year prior.

⁶ App. Record, Vol. 2, Application under Section 34, pp 0067

⁷ App. Record, Vol. 4, W. Statement of C. Gray at paras 33-37, pp 0924; W. Statement of C. Gray, Exhibit “E”, pp 0953

⁸ App. Record, Vol 4, W. Statement of C. Gray at para 40, pp 0925; W. Statement H. Boven, para 23, 24 pp 1124-1128; W. Statement of C. Gray, Exhibit “F”, pp 0958

McQuaker additionally agreed with fellow Councilors Harrold Boven and Warren Toles' statements that the matter should be deferred and that Council should wait until a flags and proclamation policy is implemented before making a determination on Borderland Pride's request.⁹

21. Despite three members of Council seeking to postpone the decision on Borderland Pride's request until a policy was in place, the two remaining Councilors, Councilors Lincoln Dunn and Lori-Ann Shortreed, made and seconded a motion to vote on making the Borderland Pride proclamation verbatim.¹⁰

22. The matter being moved and seconded by these two councilors required council to vote on whether council would grant Borderland Pride's request verbatim.

23. Council voted on the request for a proclamation in the exact wording drafted by Borderline Pride. The motion was lost by a 3-2 vote.¹¹

24. After the vote, McQuaker expressed the view that flying a pride flag would not be equal treatment stating: "There's no flag being flown for the other side of the coin...there's no flags being flown for the straight people."¹²

25. McQuaker's concerns about flying a flag for one group but not others demonstrate McQuaker's intention to ensure all people in the community were being treated equally,¹³ and it is submitted, his understanding that everyone must be treated equally to avoid discrimination.

⁹ App. Record, Vol 4, W. Statement of C. Gray, para 44(c), pp 0927; App. Record, Vol 4. W. Statement of H. McQuaker, paras 26, 27, 28, 31, pp 1255-1256

¹⁰ App. Record, Vol 4. W. Statement of H. McQuaker, para 32, 33, pp 1256

¹¹ App. Record, Vol 4, W. Statement of C. Gray at para 44(e), pp 0927-0928

¹² App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0928 Exhibit "H" pp. 0968 beginning at approx. 47:20 (Index p. 7 - Link); Vol. 1, Corrected Tribunal Reasons pp. 0036

¹³ App. Record, Vol 4. W. Statement H. McQuaker, para 16-18, pp 1253

26. McQuaker approved of having a pride proclamation in the same form as the year prior, and when Councilor Toles suggested an alternative proclamation which, among other things, proclaimed June as Pride Month, McQuaker responded by saying “nicely put” [approx. 1:02:14 of the audio of the meeting].¹⁴

27. A few days later on May 16, 2020, the Respondent Douglas W. Judson, a lawyer and former municipal councilor in the Town of Fort Frances, emailed the Township stating that Council’s decision on May 12, 2020, was a settled matter that could only be reconsidered pursuant to the *Municipal Act, 2001*. Pursuant to the Township’s Procedural By-law, it would be more difficult for the Township to revisit Borderland Pride’s proclamation request if it is a reconsideration matter because it would require four (4) Council members to agree to reconsider the resolution.¹⁵

28. Following this, Borderland Pride requested that the Township reconsider its decision on the pride proclamation. However, in its request for reconsideration, Borderland Pride stated that it would not accept the Township simply passing the resolution instead Borderland Pride demanded that the following must also be completed:

- a. Make a public, unreserved apology to their citizens for the homophobic comments and actions taken at their meeting on May 12, 2020;
- b. Require councilors to complete training on topics related to diversity, inclusion, and human rights, with a focus on LGBTQ2 issues; and
- c. Adopt the resolution, as drafted and submitted by Borderland Pride for the May 12, 2020 meeting of Council.¹⁶

29. The Township did not comply with Borderland Pride’s demands and following this, the Respondents, Borderland Pride, Northern Ontario Pride Network, Douglas W. Judson and

¹⁴ App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0928 Exhibit “H” pp. 0968

¹⁵ App. Record, Vol 4, W. Statement of C. Gray at para 49-50, pp 0929

¹⁶ App. Record, Vol.4, Wit. Statement of C. Gray, para 53-55, pp 0930-0931, Exhibit “L” pp. 0989

Kathryn Shoemaker commenced the HRTO Proceeding against the Township, McQuaker and Councilors Bovan and Toles.¹⁷

30. In the HRTO Proceeding, Borderland Pride, Northern Ontario Pride Network, Douglas W. Judson and Kathryn Shoemaker sought \$10,000 in compensation from McQuaker, more than McQuaker's per annum for serving as Mayor. After the evidence was presented in the HRTO Proceeding, but prior to a decision being rendered, Borderland Pride, Northern Ontario Pride Network, Douglas W. Judson and Kathryn Shoemaker sought to amend their claim, to instead seek \$20,000 from the Mayor.¹⁸

31. Prior to the Decision being rendered, McQuaker, along with Councilors Bovan and Toles sought an order dismissing the HRTO Proceeding due to the respondent, Douglas W. Judson breaching confidentiality by posting all materials provided in the course of the HRTO Proceeding on Borderland Pride's public website contrary to the HRTO rules.¹⁹ The HRTO denied this request although it found that Judson did breach the confidentiality rules.

32. In its Decision, the Tribunal determined neither Councilors Bovan or Toles discriminated against Borderland Pride, but that due to McQuaker's concerns about treating groups of people differently by flying a pride flag, McQuaker discriminated against Borderland Pride and that McQuaker's actions were so egregious that he was found to have acted in bad faith and was denied his statutory immunity in 448(1) of the *Municipal Act, 2001*. As such, the Tribunal ordered McQuaker to personally pay \$5000, totaling half of his per

¹⁷ App. Record, Vol. 4, W. Statement of C. Gray, para 57, pp 0931; App Record, Vol. 2, Application under Section 34, pp 0069

¹⁸ App. Record, Vol. 2, Application under Section 34, pp 0078; App Record Vol 5, Request to Amend Application, pp 1514.

¹⁹ App Record, Vol 5, Request for Order to Dismiss, pp 1563

annum to Borderland Pride for injury to the corporation's dignity, feelings and self-respect.²⁰

33. The Tribunal further imputed the discrimination it found by McQuaker to the Township as a whole, finding that the Tribunal also discriminated against Borderland Pride and was similarly ordered to pay Borderland Pride for injury to the corporation's dignity, feelings, and self-worth. The Tribunal further ordered Gray, a non-party, to complete human rights training even though she was not an employee of the Township at the time of the meeting.²¹

PART III – ISSUES

34. The issues on this Application are:

- a. What is the standard of review
- b. Did the Tribunal err by incorrectly and unreasonably finding that Harold McQuaker discriminated against Borderland Pride;
- c. Did the Tribunal err by incorrectly and unreasonably interpreting and applying the legal test to determine bad faith and immunity entitlement pursuant to section 448(1) of the *Municipal Act, 2001* and thereby finding McQuaker acted in bad faith and was not entitled to protection under section 448 of the *Municipal Act, 2001*;
- d. Did the Tribunal err by incorrectly and unreasonably finding that the Township discriminated against Borderland Pride based solely on its finding that McQuaker discriminated against Borderland Pride;

²⁰ App. Record, Vol 1, Corrected Tribunal Reasons, pp 0931-0934

²¹ App. Record, Vol 1, Corrected Tribunal Reasons, pp 0931-0934

- e. Did the Tribunal err by incorrectly and unreasonably determining that Borderland Pride, a corporation, may bring a human rights application for itself, and is entitled to receive compensation for injury to its dignity, feelings and self-respect; and
- f. Did the Tribunal err by denying the Township's Chief Administrative Officer, a non-party to the HRTO Proceeding, procedural fairness by making an order directly against her.

PART IV - LAW AND ARGUMENT

Issue #1: The Standard of Review on Issues of Municipal Law is Correctness

35. There is a presumption that reasonableness is the applicable standard of review whenever a court reviews administrative decisions.²² When performing a reasonableness review, the Courts will intervene in administrative matters where it is necessary to safeguard the legality, rationality and fairness of the administrative process.²³ It remains a robust form of review and is not a “rubber-stamping process or a means of sheltering administrative decision makers from accountability.”²⁴
36. The presumption of a reasonableness standard of review will be rebutted when the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions including general questions of law of central importance to the legal system as a whole.²⁵

²² *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 16

²³ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 13

²⁴ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 13

²⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 17

37. While the Supreme Court of Canada (SCC) in *Canada (Minister of Citizenship and Immigration) v Vavilov* [“*Vavilov*”], noted prior jurisprudence stating that “deference is in order where the Tribunal acts within its specialized area of expertise.”²⁶ A defferential standard of review is not applicable when reviewing the legal correctness of the Tribunal’s interpretation of statute(s) other than the Human Rights Code (‘Code’).²⁷ The Tribunal’s application of the test for bad faith and interpreting the *Municipal Act, 2001*, including whether discrimination by one council member will poison the entirety of council, are outside of the specialized knowledge and experience of the Tribunal and outside of the *Code*.
38. Further, questions about whether the Tribunal has the authority to make orders against non-parties, and whether a corporation is entitled to compensation for injury to dignity, feelings and self-worth are issues of central importance to the legal system as a whole with implications beyond human rights law. This requires rebutting the presumption of a reasonableness standard of review and requiring the Division Court to review based on a standard of correctness.
39. The applicable standard of review for issue (3) the finding of bad faith against McQuaker and whether statutory immunity pursuant to section 448(1) of the *Municipal Act, 2001*, is available is correctness; issue (4) the finding that the vote of one council member poisons a municipal decision whereby the Township is deemed to have discriminated, issue (5) the finding that a corporation is entitled to bring a human rights claim on its own behalf

²⁶ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 222

²⁷ *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 (CanLII), <<https://canlii.ca/t/gf00c>> at paras 40-44; *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458 (CanLII), <<https://canlii.ca/t/jprf6>> at paras 46, 47, 54, 75-83

and can receive awards for injury to its dignity, feelings and self-worth, and issue (6) whether findings can be made against a non-party, is correctness.

Issue 2: The Tribunal's finding that Harold McQuaker Discriminated against Borderland Pride is Unreasonable.

40. McQuaker submits the standard of review on this issue is reasonableness, and that the Tribunal's finding that McQuaker discriminated against Borderland Pride was unreasonable.
41. The Tribunal improperly and unreasonably disregarded evidence that McQuaker supported making a pride proclamation; relied on McQuaker's extraneous comment after the proclamation vote to infer a discriminatory intention; and failed to meaningfully engage with alternative interpretations of the extraneous conduct that the Tribunal relied upon to find discrimination.
42. During the council meeting on May 12, 2020, McQuaker stated that he was agreeable to making a pride proclamation in the same language as the year prior and additionally agreed with councilors Toles and Boven who suggested that the decision on the pride proclamation be deferred pending a flags and proclamation policy. Further, when Councilor Toles suggested an alternative proclamation which, among other things, proclaimed June as Pride Month, McQuaker responded by saying "nicely put" [approx. 1:02:14 of the audio of the meeting].²⁸
43. The Tribunal's finding that McQuaker discriminated is unreasonable and incorrect in law firstly because the Tribunal failed to consider these statements which were made by McQuaker prior to his 'nay' vote for the pride proclamation. The Tribunal disregarded,

²⁸ App Record, Vol 4. W. Statement C. Gray, pp 0927-0928; Exhibit "H" pp. 0968

without explanation, the evidence that McQuaker did agree with making a pride proclamation and that, like Councilors Bovan and Toles, wished to postpone the decision pending a flags and proclamation policy. The Tribunal further failed to address whether the Township was required to make the requested pride proclamation verbatim, or whether it was open to the Township to grant the request by making a pride proclamation in its own wording.

44. Given the evidence that McQuaker was in favour of making a pride proclamation, and wanted to make a pride proclamation in the same format as the year prior, it was unreasonable for the Tribunal to find that McQuaker's 'nay' vote was discriminatory without reconciling this evidence.
45. Secondly the Tribunal's finding is unreasonable and incorrect in law, because the Tribunal relied on statements made by McQuaker, following the closing of the vote, in order to impute a discriminatory intention to the vote itself. The Tribunal disregarded McQuaker's support of making a pride proclamation in the same format as the year prior and instead relied on McQuaker's concerns about flying a pride flag to impute a discriminatory intention to McQuaker's nay vote. In doing so, the Tribunal again fails to reconcile the evidence and consider alternative explanations for those statements.
46. It was unreasonable for the Tribunal to rely on McQuaker's statement that he did not agree with flying a pride flag if there was not also a flag displayed representing other sexual orientations, to find discrimination. This was unreasonable because the Tribunal failed to consider alternative explanations for this comment in a way the reconciles McQuaker's support for making a pride proclamation. The Tribunal failed to consider

that McQuaker was trying to safeguard human rights, not discriminating based on sexual orientation, by ensuring equal treatment for all people.

47. As the SCC stated in *Vavilov*, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.²⁹ The reasonableness of a decision may be jeopardized where the decision maker has failed to account for the evidence before it.³⁰

48. The Tribunal's failure to engage with and reconcile the evidence that showed McQuaker's support for a pride proclamation; the Tribunal's reliance on after the fact conduct to infer a discriminatory intention, and its failure to meaningfully engage with alternative interpretations of the Mayor's statements in order to reconcile the evidence before it, all render this finding unreasonable.

49. Further there are far reaching implications in allowing discrimination to be found based on after-the-fact-conduct including a chilling of freedom of expression and democratic participation by permitting liability to attach not just to the decision itself, but to subsequent commentary. Elected officials will be deterred from speaking openly on matters of public interest for fear their words will be later used to impugn prior decisions.

Issue 3: The Tribunal's finding that Harold McQuaker Acted in Bad Faith and was not Entitled to the Immunity in section 448(1) of the *Municipal Act, 2001* is incorrect in law

50. McQuaker submits that the standard of review on this issue is correctness.

51. Notwithstanding McQuaker's submissions that the Tribunal's finding of discrimination against him was unreasonable and made in error, McQuaker submits that the Tribunal

²⁹ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 85

³⁰ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 126

further erred in law by finding that McQuaker acted in bad faith due to the Tribunal's finding that McQuaker discriminated against Borderland Pride.

52. The legal tests for discrimination and bad faith are distinct. A finding that McQuaker discriminated against Borderland Pride is not in and of itself sufficient to support a finding that McQuaker acted in bad faith. The Tribunal erred by determining that it is.

53. The Tribunal erred by incorrectly applying the test for bad faith and wrongfully equating the finding of discrimination in this case with bad faith.

54. The Ontario Court of Appeal (ONCA) in *Equity Waste Management of Canada Corp v Halton Hills (Town)*, stated that bad faith by a municipality “connotes a lack of candor, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.”³¹ The ONCA cited *Howard v City of Toronto* stating “the powers of the council must be exercised bona fide, and the action of its members must not be founded upon fraud, oppression or improper motives...”³²

55. While the ONCA in *Equity Waste Management of Canada Corp v Halton Hills (Town)*, was considering bad faith by a municipality as a whole, in doing so, it considered whether the individual councilors acted with fraud, oppression or improper motives. In the HRTTO Proceeding, there was no evidence before the Tribunal that McQuaker, in voting ‘nay’, acted with fraud, oppression or improper motives. Instead, McQuaker’s nay

³¹ *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, 1997 CarswellOnt 3270, <<https://canlii.ca/t/6hjd>> at para 61

³² *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, 1997 CarswellOnt 3270, <<https://canlii.ca/t/6hjd>> at para 61; *Howard and City of Toronto*, 1928 CarswellOnt 212, <https://canlii.ca/t/gw8qc> at pp 544-5

vote was based on McQuaker attempting to properly represent all his constituents; constituents whom McQuaker believed would prefer a pride proclamation to be made in the same form as the year prior. Further, McQuaker did support making a pride proclamation.³³

56. The ONCA further stated that “a court should not be quick to find bad faith because members of a municipal council, influenced by their constituents, express strong views against a project.”³⁴ McQuaker expressed strong views, influenced by his constituents, during the voting on the pride proclamation, McQuaker should not be found to have acted in bad faith for doing so, particularly given McQuaker’s support for making a pride proclamation in the same format as the year prior.

57. The Tribunal however failed to consider the evidence that McQuaker was properly representing his constituents during the vote and failed to engage with the evidence that McQuaker supported a pride proclamation being made in the same format as the year prior which he believed would best serve his constituents.

58. The ONCA in *Seguin (Township) v Hamer*, agreed with the application judge’s statements that “the standard to be met in establishing bad faith is high and...courts should be slow to find bad faith in the conduct of democratically elected representatives acting under legislative authority.”³⁵ Similarly the ONSC stated in *Barrett v Watson* that “[b]ad faith is a high threshold. It is not synonymous with bad judgment or negligence; rather, it implies

³³ App Record Vol. 4, W. Statement H. McQuaker, pp 1255

³⁴ *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, 1997 CarswellOnt 3270, <<https://canlii.ca/t/6hjd>> at para 69

³⁵ *Seguin (Township) v. Hamer*, 2014 ONCA 108 (CanLII), <https://canlii.ca/t/g3156> at para 5;

the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation.”³⁶

59. The Tribunal did not engage with the jurisprudence that a high bar is required to prove bad faith, nor provide any reasons or analysis on how this high bar was met.

60. Instead, the Tribunal simply inferred bad faith from its prior finding of discrimination stating that:

“[d]iscrimination is by definition arbitrary, unreasonable, partial and unfair. While Mayor McQuaker had the ‘right to be wrong’, he did not have the right to act in bad faith and breach the code. In the circumstances of this case, given the actions of this particular individual respondent, I find that he did not act in good faith in voting against Borderland Pride’s requested proclamation. I therefore find that Mayor McQuaker’s actions constituted bad faith...”³⁷

61. In its decision the Tribunal is equating discrimination to bad faith, and in doing so the Tribunal erred by failing to properly conduct an analysis of bad faith. Further it is incorrect in law to find that discrimination necessarily equates to bad faith.

62. For public officials, like McQuaker, the standard that a claimant must meet to prove bad faith is a high one,³⁸ and includes acts committed deliberately with intent to harm and conduct so markedly inconsistent with the relevant legislative context that a court cannot conclude that they were performed in good faith.³⁹

63. The ONSC stated that the type of improper motive necessary to amount to bad faith should amount to “corrupt or personal interests of motives.”⁴⁰

64. There was no evidence before the Tribunal that McQuaker acted with intent to harm, engaged in conduct markedly inconsistent with the relevant legislation, or demonstrated

³⁶ *Barrett v Watson*, 2024 ONSC 1118, <<https://canlii.ca/t/k30zh>> at para 13

³⁷ App. Record Vol. 1., Decision pp 0040

³⁸ *The Fit Effect v Brant County Board of Health*, 2021 ONSC 3651, <<https://canlii.ca/t/jg0tv>> at para 55

³⁹ *The Fit Effect v Brant County Board of Health*, 2021 ONSC 3651, <<https://canlii.ca/t/jg0tv>> at para 50

⁴⁰ *Thirsty’s Bar & Grill v Waterloo (Regional Municipality)*, 2000 CarswellOnt 2585 at para 21

corrupt personal interests or motives, that would justify the Tribunal's finding of bad faith. As the HRT0 stated in *Sacon v Amhersburg (Town)* "the mere allegation that an individual has violated the Code, is not in and of itself sufficient to support an allegation that the person failed to act in good faith."⁴¹

65. Due to the Tribunal incorrectly determining that McQuaker acted in bad faith, the Tribunal necessarily erred by determining that McQuaker could not rely on the immunity provision within section 448(1) of the *Municipal Act, 2001*.
66. In denying McQuaker his statutory immunity, the Tribunal departs from the jurisprudence in a way that substantially lowers the protection afforded by section 448(1) of the *Municipal Act, 2001*, and undermines the purpose of the legislation. In *Compagnion v Misek-Evans* for example, the HRT0 dismissed an application against a municipal CAO given the application of s. 448(1) of the *Municipal Act, 2001*.⁴²
67. If the Tribunal's denial of immunity were to stand, this would have far reaching implications for municipal governance and municipal law by exposing municipal officials to routine personal liability for decisions made in the course of their duties.
68. Municipal governance frequently involves balancing competing rights, interests and community perspectives. The risk of personal liability in such circumstances will deter elected officials from participating fully and freely in decision making. This creates a chilling effect on democratic engagement.
69. Elected officials are likely to refrain from expressing their views, asking questions or engaging in debate, or even running for election at all, for fear that their conduct will later

⁴¹ *Saxon v Amherburg (Town)*, 2011 HRT0 960, <<https://canlii.ca/t/flj4f>> at para 6

⁴² *Compagnion v Misek-Evans*, 2019 HRT0 521, <<https://canlii.ca/t/hz9bk>> at para 10

be characterized as bad faith. This undermines the open deliberation that is essential to municipal governance.

Issue 4: The Tribunals Decision that the Township Discriminated against Borderland pride is Incorrect

70. McQuaker submits that the standard of review on this issue is correctness.

71. The Tribunal, in its Decision, found that McQuaker was the only councilor who discriminated against Borderland Pride, and imputed this finding of discrimination to the Township as a whole:

[49] As submitted by the Township and reflected in sections 5(1) and 5(3) of the Municipal Act, 2001, the municipal corporation acts through its bylaws and resolutions of council. The municipal corporation and its councillors must also act in compliance with the code. Therefore if municipal councillors vote against a resolution for a discriminatory reason, and their votes determine the outcome, then the outcome itself is discriminatory.

...

[53] Having found that Mayor McQuaker's nay vote was discriminatory, I must therefore find that council's vote to defeat the resolution proclaiming Pride Month in the language submitted also constituted discrimination under the Code.⁴³

72. This finding by the Tribunal is both unreasonable and incorrect in law.

73. There is no lawful basis for the Tribunal's reasoning that discrimination by one member of council poisons the entirety of council rendering the municipality to have discriminated.

74. The Tribunal provides no authority for this finding, particularly when the Tribunal found only McQuaker's vote, of all the nay votes, to be discriminatory. Instead, the Tribunal reasoned that because McQuaker's vote was discriminatory, and because McQuaker's

⁴³ App. Record, Vol 1, Corrected Tribunal Reasons, pp 0037, 0038

vote was “the determining vote”, then the Township’s decision to not make the pride proclamation, verbatim, was necessarily discriminatory.

75. If the Tribunal’s finding is allowed, this reasoning effectively permits the conduct and comments of a single councillor to poison the debate of the entire council, even where the majority acted lawfully and without discriminatory intent. This collapses the distinction between individual conduct and institutional decision making and undermines the integrity of collective governance.

76. Further, this introduces uncertainty into municipal decision making. Municipalities would be exposed to liability based on the alleged motivations or later statements of individual members. Individuals may be particularly incentivized to focus on isolating and amplifying individual comments as opposed to the decision of the municipal council as a whole.

77. Secondly, McQuaker’s vote was not determinative of the outcome of the vote on the proclamation resolution. Two other councillors voted against the proclamation resolution for reasons that were found to not be discriminatory:

“[55] I am however unable to find, based on the evidence presented, that the nay votes of Mr. Boven and Mr. Toles constituted discrimination under the Code. Both councillors expressed non-discriminatory reasons for their nay votes...”⁴⁴

78. The Tribunal erroneously found, without explanation, that it was McQuaker’s vote that was determinative of the proclamation resolution instead of the nay votes of Councillors Boven or Toles. McQuaker’s vote being the last of the three ‘nay’ votes does not make that ‘nay’ vote the solely determining ‘nay’ vote.

⁴⁴ App. Record, Vol 1, Corrected Tribunal Reasons, pp 0038

79. Further, if McQuaker had abstained from voting, the *Municipal Act, 2001* and the Township's Procedural By-Law provide that the resolution would still have failed.

80. Specifically, section 245 of the *Municipal Act, 2001*, provides that: "[A]ny question on which there is a tie vote shall be deemed to be lost, except where otherwise provided by any Act."⁴⁵, further the Township's Procedural By-law, being By-law 2020-06, and subsection 15.0 (11) thereof also states that: "[A] tie vote shall be declared to be a lost vote."⁴⁶

81. Given this, McQuaker's 'nay' vote was not determinative of the matter, as the matter had already been defeated.

82. The Tribunal's finding that the Township discriminated, based solely on its finding that the Township's mayor discriminated is without precedence and incorrect in law.

Issue 5: The Tribunal's Decision to award Damages for Injury to Dignity to a Corporation is Unreasonable.

83. McQuaker submits that the standard of review on this issue is correctness.

84. The Tribunal erred in concluding that Borderland Pride, a corporation, can bring a human rights application for itself and experience injury to dignity, feelings and self-respect as these are inherently human attributes.

85. Extending such damages to corporations is unreasonable, incorrect in law, and inconsistent with the purpose of human rights legislation. As the SCC stated in *Vavilov*, in interpreting a statutory provision, the words must be read in their entire context and in

⁴⁵ *Municipal Act, 2001*, S.O. 2001, c. 25 at s. 245

⁴⁶ App. Record, Vol.4, Wit. Statement of C. Gray, Exhibit "K" p. 0985

their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁴⁷

86. In its Decision, the Tribunal stated:

“...I am bound by the definition of ‘person’ in the Code and that that definition includes a corporation. I further note that the Legislature did not exclude corporations from the definition of ‘person’ after Brockie, although they had the opportunity to do so.”⁴⁸

87. It was unreasonable and incorrect for the Tribunal to rely on Brockie v Brillinger (No.2) (“*Brockie*”) as precedent for its finding that Borderland Pride could bring its own human rights application given *Brockie* was decided with reference to a prior version of the Code.⁴⁹

88. The Tribunal’s statements, that the Legislature did not intervene following the decision of *Brockie* is incorrect. At the time that *Brockie* was decided in 2002, the Code included the following provision:

“32(1) Where a person believes that a right of a person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission.”⁵⁰

89. This provision remained in force until June 30, 2008, when the Code was amended to instead include the following provision dictating who could bring a human rights complaint:

34(1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2...”

...

34(5) “A person or organization, other than the Commission, may apply on behalf of another person to the Tribunal for an order under section 45.2...”⁵¹

⁴⁷ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>> at para 117

⁴⁸ App. Record, Vol 1, Corrected Tribunal Reasons, pp. 0028, 0034

⁴⁹ *Brockie v Brillinger (No.2)*, 2002 CanLii 63866 (ON SCDC), <<https://canlii.ca/t/g9p1z>>

⁵⁰ Human Rights Code, RSO 1990 [historical Nov 2002-December 2009], c.H.19 at s. 32(1).

⁵¹ Human Rights Code, RSO 1990, c. H. 19 at s. 34(1),(5)

90. The Code differentiates between an organization and a person; in doing so, the Legislature necessarily excludes an organization from the definition of a person. It is clear this was the Legislature's intention. It is equally clear that the Tribunal's statement that the legislature did not intervene, is wrong.

91. Further, when considering the meaning of the words 'person' and 'organization' in their ordinary sense, organizations are consistently used to refer to corporate and institutional actors.

92. This interpretation remains consistent with the *Legislation Act, 2006, S.O. 2006, c. 21, Sched. F* ("*Legislation Act*"). While section 87 of the *Legislation Act* defines person as including a corporation and section 46 states that the definitions included in section 87 applies to every Act and regulation, section 47 states that:

47 Section 46 applies unless,
 (a) A contrary intention appears; or
 (b) Its application would give to a term or provision a meaning that is inconsistent with the context.⁵²

93. It is unreasonable and incorrect to conclude that a corporation would fall under the title of a person as opposed to an organization as this would be contrary to the intention of the Legislature and would be inconsistent with the context and purpose of the Code.

94. The preamble of the Code makes special reference to the inherent dignity, equality and inalienable rights of humans,⁵³ not corporations.

95. There is no precedent for extending awards to a corporation for injury to dignity, feelings and self-worth. A corporation is an artificial legal entity and cannot experience dignity,

⁵² Legislation Act, 2006, S.O. 2006, c. 21, Sched. F, ss. 46, 47, 87

⁵³ Human Rights Code, RSO 1990, c. H. 19, preamble

feelings or self-worth. These concepts are inherently human. Further, a corporation does not have protected grounds; a corporation does not have a sexual orientation.

96. Allowing such claims transforms a personal rights-based regime into one that protects institutional interests in a manner not contemplated by the Code. This would allow a range of organizations, commercial entities, advocacy groups, and public institutions to assert claims based on alleged affronts to their dignity, significantly broadening the scope of potential liability.
97. Allowing corporations to bring human rights claims would further create duplicative and overlapping claims where an organization as well as the individual members allege discrimination, allowing both the corporation and individual to recover for the same alleged harm. This similarly risks overcompensation and increased risks of liability that are not contemplated by the Code.
98. Further, human rights proceedings are designed to address the power imbalances and protect vulnerable individuals. Extending dignity-based remedies to corporate entities, which may possess significant institutional resources, shifts the focus of the human rights regime away from its protective function.

Issue 6: The Tribunals Breach of Procedural Fairness

99. McQuaker submits that the standard of review on this issue is correctness.
100. The Tribunal's implicit finding that it has the authority to make an order against a non-party in the HRTO Proceeding, and subsequent order, is incorrect in law and a breach of procedural fairness.

101. The Tribunal incorrectly exceeded its authority in making an order against a non-party to the HRTO Proceeding when it ordered Gray, the CAO, to complete human rights training:

“[86] Mayor McQuaker and the Township’s current CAO shall complete the OHRC eLearning Module titled ‘Human Rights 101’...”⁵⁴

102. The Tribunal failed to identify any provision within the Code, the *Statutory Powers Procedure Act*, *RSO 1990, c. S. 22* or any other Act that would grant the Tribunal the authority to order Gary to complete human rights training.

103. Further, in doing so, the Tribunal breached procedural fairness by not providing any notice to Gray and denying Gray the opportunity to respond, make submissions, and adduce evidence prior to being subjected to the order.

104. As the SCC noted in *Baker v Canada (Citizenship & Immigration)*, procedural fairness may require that those affected by a decision have the opportunity to put forward their views and evidence fully and have them considered by the decision-maker.⁵⁵

105. The Tribunal cannot avoid the requirement of procedural fairness owed to Gray on the basis that the order was framed as applying to the CAO position. In substance, the Tribunal’s order was directed at a specific, identifiable person, and the obligation to complete the training is personal in nature. Only the CAO was directed to take the training, there were no other positions within the Township that were ordered to take training, and further no direction that the CAO disseminated the information to the Township.

⁵⁴ App. Record Vol. 1. Corrected Decision pp 0045

⁵⁵ *Baker v Canada (Citizenship & Immigration)*, 1999 SCC 699, <<https://canlii.ca/t/1fq1k>>, at para 27

106. There is no meaningful distinction between naming Gray directly or naming her position. The fact that Gray was named by position does not diminish the impact of the order or the entitlement to procedural protections.

PART IV- ORDER REQUESTED

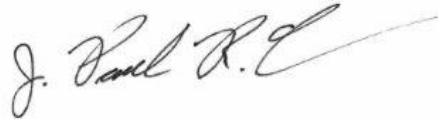
107. McQuaker requests the following Orders:

- i. an Order setting aside or, in the nature of *certiorari*, quashing the Decision and related Orders of the Tribunal on the Human Rights Application made by Borderland Pride in Tribunal File Number 2020-41858-I;
- ii. an Order dismissing the Decision and related Orders of the Human Rights Tribunal of Ontario on the Human Rights Application made by Borderland Pride in Tribunal File Number 2020-41858-I; or, in the alternative, remitting the application of Borderland Pride back to the Tribunal for reconsideration with the benefit of guidance and direction from the Court on the issues before this Honourable Court;
- iii. an Order quashing the Tribunal's finding that Harold McQuaker and The Corporation of the Township of Emo discriminated against the respondent, Borderland Pride, and substituting a finding that Harold McQuaker and The Corporation of the Township of Emo did not discriminate against Borderland Pride;

- iv. an Order quashing the Tribunal's finding that Harold McQuaker acted in bad faith and substituting a finding that Harold McQuaker did not act in bad faith;
- v. an Order quashing the Tribunal's finding that Harold McQuaker is not entitled to the protection of section 448(1) of the Municipal Act, 2001, and substituting a finding that Harold McQuaker is entitled to the protection of section 448(1) of the Municipal Act, 2001;
- vi. costs of this application, plus H.S.T. and interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- vii. such further and other relief as counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2026

WISHART LAW FIRM LLP
Barristers and Solicitors
390 Bay Street, Suite 500
Sault Ste. Marie, ON P6A 1X2
PER:



J. Paul R. Cassan (LSO 38820R)
pcassan@wishartlaw.com
Ph: 705-949-6700
PER:

A handwritten signature in black ink, appearing to read "Brittany Hollingsworth", written over a horizontal line.

Brittany Hollingsworth (LSO 84912T)

bhollingsworth@wishartlaw.com

Ph: 705-949-6700

Lawyers of Applicant, Harold McQuaker

SCHEDULE A

1. *Baker v Canada (Citizenship & Immigration)*, 1999 SCC 699, <<https://canlii.ca/t/1fq1k>>,
2. *Barrett v Watson*, 2024 ONSC 1118, <<https://canlii.ca/t/k30zh>>
3. *Brockie v Brillinger (No.2)*, 2002 CanLii 63866 (ON SCDC), <<https://canlii.ca/t/g9p1z>>
4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, <<https://canlii.ca/t/j46kb>>
5. *Compagnion v Misek-Evans*, 2019 HRT0 521, <<https://canlii.ca/t/hz9bk>>
6. *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*, 1997 CarswellOnt 3270, <<https://canlii.ca/t/6hjd>>
7. *Howard and City of Toronto*, 1928 CarswellOnt 212, <https://canlii.ca/t/gw8qc>
8. *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 (CanLII), <<https://canlii.ca/t/gf00c>>
9. *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458 (CanLII), <<https://canlii.ca/t/jprf6>>
10. *Saxon v Amherburg (Town)*, 2011 HRT0 960, <<https://canlii.ca/t/flj4f>>
11. *Seguin (Township) v. Hamer*, 2014 ONCA 108 (CanLII), <https://canlii.ca/t/g3156>
12. *The Fit Effect v Brant County Board of Health*, 2021 ONSC 3651, <<https://canlii.ca/t/jg0tv>>
13. *Thirsty's Bar & Grill v Waterloo (Regional Municipality)*, 2000 CarswellOnt 2585

SCHEDULE B

Human Rights Code, RSO 1990 [historical Nov 2002-June 29 2008], c.H.19 at s. 32(1).

Complaints

32. (1) Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission. R.S.O. 1990, c. H.19, s. 32 (1). 2009

Human Rights Code, RSO 1990, c. H. 19 at s. 34(1),(5)

Application by person

34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series. 2006, c. 30, s. 5.

...

Application on behalf of another

(5) A person or organization, other than the Commission, may apply on behalf of another person to the Tribunal for an order under section 45.2 if the other person,

(a) would have been entitled to bring an application under subsection (1); and

(b) consents to the application. 2006, c. 30, s. 5.

Legislation Act, 2006, S.O. 2006, c. 21, Sched. F, ss. 46, 47, 87

Application to Acts and regulations

46 Every provision of this Part applies to every Act and regulation. 2006, c. 21, Sched. F, s. 46.

Contrary intention or context requiring otherwise

47 Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context. 2006, c. 21, Sched. F, s. 47.

Definitions

87 In every Act and regulation,

...

“person” includes a corporation; (“personne”)

Municipal Act, 2001, S.O. 2001, c. 25 at ss 224, 245, 448(1).

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. 2001, c. 25, s. 224; 2006, c. 32, Sched. A, s. 99.

Tie votes

245 Any question on which there is a tie vote shall be deemed to be lost, except where otherwise provided by any Act. 2001, c. 25, s. 245.

Immunity

448 (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority. 2001, c. 25, s. 448 (1).

LAWYER'S CERTIFICATE

I, J. Paul R. Cassan, lawyer for the Applicant, Harold McQuaker, certify that:

- a) I estimate that 1 hour will be needed for the Applicant Harold McQuaker's oral argument on this application for judicial review, not including reply; and that
- b) I am satisfied as to the authenticity of every authority cited in this factum.

Date: March 31, 2026

A handwritten signature in black ink, appearing to read 'J. Paul R. Cassan', written over a horizontal line.

J. Paul R. Cassan

THE CORPORATION OF THE TOWNSHIP OF EMO ET AL v. BORDERLAND PRIDE ET AL

Applicant

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
(Proceedings commenced at
Thunder Bay, Ontario)

**FACTUM OF THE APPLICANT,
HAROLD MCQUAKER**

WISHART LAW FIRM LLP
Barristers and Solicitors
390 Bay Street, 5th Floor
Sault Ste. Marie ON P6A 1X2

J. PAUL R. CASSAN
LSO #38820R
pcassan@wishartlaw.com

BRITTANY HOLLINGSWORTH
LSO#84912T
bhollingsworth@wishartlaw.com

Telephone: 705-949-6700
Fax: 705-949-2465
Lawyers for the Applicant, Harold McQuaker