

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N :

The CORPORATION OF THE TOWNSHIP OF EMO
and HAROLD McQUAKER

Applicants

- and -

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

Respondents

**FACTUM OF THE RESPONDENT,
DOUGLAS W. JUDSON**

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PART I – OVERVIEW

1. The respondent, Douglas W. Judson, wholly adopts and agrees with the submissions of the respondent, Borderland Pride, on this application for judicial review.
2. The purpose of this factum is to assist the court by expanding on the underlying issues in the application relating to the governance structure of the municipality, the service at issue attracting the protection of the *Human Rights Code* [**“Code”**],¹ and the jurisdiction of the Human Rights Tribunal of Ontario [**“Tribunal”**] to make the orders which are the subject of this judicial review commenced by the applicants, the Corporation of the Township of Emo [**“Township”**] and its mayor, Harold McQuaker [together, **“Applicants”**].
3. To this end, Mr. Judson makes the following submissions:
 - a. Mayor McQuaker occupies a distinctive statutory role as chief executive officer [**“CEO”**] and head of council which attached to him the discriminatory conduct in a manner legally distinct from the other members of council;
 - b. The proclamation requested by Borderland Pride constituted a “service” within the broad meaning of section 1 of the *Code*, and the failure to provide it on a non-discriminatory basis falls squarely within the Tribunal’s jurisdiction; and
 - c. the discriminatory conduct of Mayor McQuaker was done in bad faith, meaning that he is not entitled to the statutory immunity afforded by section 448 of the *Municipal Act, 2001* [**“MA”**].²
4. As a preliminary issue, it is submitted that the application for judicial review is premature as the Applicants failed to request reconsideration of the underlying decision at the Tribunal.

¹ *Human Rights Code*, R.S.O. 1990, c. H.19 [**“Code”**].

² *Municipal Act, 2001*, S.O. 2001, c. 25 [**“MA”**], at s. [448](#).

5. On the basis of these submissions, the application for judicial review ought to be dismissed, with costs payable by the Applicants. While Mr. Judson – as an applicant in the underlying Tribunal proceeding – was denied relief by the Tribunal, he makes no cross-application to overturn or vary that decision.

PART II – THE FACTS

6. Mr. Judson adopts the facts as outlined in the factum of Borderland Pride and supplements those recitals with the particulars which follow.

7. First, the meetings of council where Borderland Pride’s proclamation request was considered in May 2020 were presided over by Mayor McQuaker, in his statutory role as chair of council.³ This statutory duty is endowed with the further statutory functions of

- a. “foster[ing] activities that enhance the [...] social [...] well-being of the municipality and its residents”;⁴
- b. “uphold[ing] and promot[ing] the purposes of the municipality”, which are statutorily defined as exercising “power and duties under [the *MA*] and many other Acts”, including the *Code*, “for the purpose of providing good governance”;⁵ and
- c. “provid[ing...] recommendations to the council with respect to the role of council”, which is statutorily defined as “to consider the well-being and interests of the municipality” and “to carry out the duties of council under [the *MA*] or any other Act”, including the *Code*.⁶

³ *MA* at s. [225](#).

⁴ *MA* at s. [226.1\(d\)](#).

⁵ *MA* at ss. [2](#) and [226.1\(a\)](#).

⁶ *MA* at ss. [224\(a\) and \(f\)](#) and [225\(c.1\)](#).

8. Second, in their evidence before the Tribunal, each of the individual respondents (Mayor McQuaker and councillors Harrold Boven and Warren Toles) stated that they declined to support Borderland Pride's proclamation request because the proclamation, as submitted, was not supported by some members of their community. They asserted that they had an obligation to represent the voices of those who did not want the proclamation to be made. Specifically, in his evidence, Mayor McQuaker said:

[4] In the role of representative, a municipal councillor represents the views of their constituents while also having a broader understanding of the issues that impact the municipality as a whole. A municipal councillor must consider conflicting interests and make decisions that not everyone will agree on.

[...]

[15] I believe that most of our community members of Emo did not want the lengthy proclamation, Council to make a Pride proclamation, or to fly a Pride flag. I also believe that all members of our community have a voice and must be treated fairly and equally.

[...]

[24] I had the same concerns over the 2020 Borderland Pride Proclamation Request that I did over the 2019 Borderland Pride Proclamation Request. Specifically, I was concerned that while some members of our community wanted the 2020 Borderland Pride Proclamation Request, other members of our community did not want this proclamation to be made. I similarly had concerns about flying a Pride flag and believed that there was division in the community with both support and opposition to a Pride flag being flown.⁷

9. Similar comments were made by Councillor Boven⁸ and Councillor Toles.⁹ Notably, there were no material differences between the version of the proclamation submitted in 2020 and the one endorsed by the previous council in 2018.¹⁰

10. At the Tribunal hearing, and in their materials, each of the 3 members of council presented their decision to oppose the proclamation as a benign and good faith exercise of their representative duties. Yet, in support of this assertion, their evidence included as exhibit material

⁷ Witness Statement of Harold McQuaker ["**McQuaker WS**"] at paras. 4, 15, and 24, Application Record of the Applicants ["**AR**"], Vol. 4 at Tab MB (pp. 1251, 1253, and 1255).

⁸ Witness Statement of Harrold Boven ["**Boven WS**"] at paras. 4 and 24, AR, Vol. 4 at Tab MA (pp. 1124 and 1127-1128).

⁹ Witness Statement of Warren Toles ["**Toles WS**"] at paras 4, 15, 18, and 25, AR, Vol. 4 at Tab MC (pp. 1321-1325).

¹⁰ Witness Statement of Douglas W. Judson ["**Judson WS**"] at Exs. "12" and "18", AR, Vol. 3, at Tab KA (pp. 448 and 477).

a series of patently hateful, homophobic, and transphobic statements, which were said to be the opinions upon which their decisions to oppose the request were based. These were the only documentary supports of their evidence that they desired to represent the views of constituents.

The statements to which they referred included the following:

- a. "It's interesting how the charter of rights and freedoms guarantees me the freedom of beliefs but as soon as I dont [sic] agree with [a] group suddenly they label me a bigot." ¹¹
- b. "...this pride crap is getting out of hand." ¹²
- c. "Straight bullshit. Just be careful they don't stop to try and recruit you. Gonna [sic] have a queen contest won't that be awesome for all the little kids to see." ¹³
- d. "They are offering to toss ur [sic] salad and throw their hotdog down ur [sic] hallway as part of special events. Sick bunch of cock suckers." ¹⁴
- e. "Enough of shoving the bullshit down our throats." ¹⁵
- f. "what the fuck is wrong with you.. [sic] Do what you want in your own home [...] do not share your immoral ideas and beliefs where it is not wanted." ¹⁶
- g. "Pathetic. We get it, you're queer [...] people wonder why there's discrimination? Probably because they don't know when to stop." ¹⁷

¹¹ Boven WS at Ex "8", AR, Vol. 4 at Tab MA (p. 1171).

¹² *Ibid.* at p. 1172.

¹³ *Ibid.* at p. 1173.

¹⁴ *Ibid.* at p. 1174.

¹⁵ *Ibid.* at p. 1175.

¹⁶ *Ibid.* at p. 1179.

¹⁷ *Ibid.* at p. 1180.

- h. “Pride and proud fine with me so go to the closet where you belong!”¹⁸
 - i. “The attack on people who view [the LGBTQ] lifestyle as unnatural or sinful is an attack on free speech and free thought. [...] The lifestyle choices of any particular group should not be promoted over any other group.”¹⁹
11. The same, or similar, comments were included in the witness statements of Mayor McQuaker²⁰ and Councillor Toles.²¹
12. Mayor McQuaker made his own, further homophobic and transphobic comments, before, during, and after the vote at the council meeting:
- a. During the meeting, he claimed that it was not fair to celebrate “one side of the coin without celebrating the other,” that he voted his conscience – “there’s no flags being flown for the straight people” – and used the “majority rules” principle and the Christian values of his constituents to justify his actions.²²
 - b. Upon being asked to reconsider his position, he denied the existence of anti-2SLGBTQIA+ discrimination in his community, saying that “if they were being discriminated against, it would be different. But there’s no discrimination here – none whatsoever.”²³
 - c. Sometime prior to the vote, he wrote letters to the editor of the local newspaper, complaining that “we have all kinds of cash to spend on same-sex crap...which will hurt our nation,” and that “homosexual marriage legislation [ought to be defeated because “if morals were brought back into the school systems and the majority,

¹⁸ *Ibid.* at p. 1181.

¹⁹ *Ibid.* at p. 1191.

²⁰ McQuaker WS at Ex. “6”, AR, Vol. 4 at Tab MB (p. 1286).

²¹ Toles WS at Ex “6”, AR, Vol. 4 at Tab MC (p. 1356).

²² Judson WS at Ex. “25”, AR, Vol. 3 at Tab KA (p. 575).

²³ Judson WS at Ex. “27”, AR, Vol. 3 at Tab KA (p. 583).

not the minority ruled the country, a lot of stupidity and ignorance that gets passed into law would go by the wayside and Canada once again would be the great country it was and should be.”²⁴

13. Third, the Township and Mayor McQuaker continue to assert that the requested proclamation *required* the flying of a Pride flag by the municipality. This is false, as the wording of the request clearly indicated that there was an option to simply “display” a Pride flag, which was intended to reflect available local infrastructure.²⁵ Regardless, the adoption of the resolution and decision to fly or display a flag could be severed.

14. Finally, the Applicants failed to request reconsideration of the Tribunal’s decision prior to commencing their application for judicial review.

PART III – THE ISSUES

15. Mr. Judson adopts and agrees with the statement of the issues set out in the factum of Borderland Pride.

16. However, it is submitted that addressing the issues in this application for judicial review requires consideration of the statutory architecture of the municipality and the office of the mayor, the nature of the service that was requested, and the jurisdiction of the Tribunal to make the disputed orders concerning Mayor McQuaker – that is, to impose personal liability on Mayor McQuaker. The discussion below chiefly relates to those topics.

17. Mr. Judson also submits, as a preliminary issue, that the judicial review is premature as the Applicants have failed to exhaust the procedures of the Tribunal by requesting reconsideration and have identified no exceptional circumstance to depart from this requirement.

²⁴ Judson WS at Ex. “31”, AR, Vol. 3 at Tab KA (p. 600).

²⁵ Judson WS at Ex. “18”, AR, Vol. 3 at Tab KA (p. 476).

PART IV – LAW AND ARGUMENT

A. The Applicants' Judicial Review is Premature

18. The Applicants' application for judicial review is premature as the Applicants have not exhausted the procedures of the Tribunal; namely, by requesting reconsideration of the Tribunal's decision in accordance with its rules of procedure.

19. Section 45.7(1) of the *Code* provides that "[a]ny party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules."²⁶ Rule 26 of the *Human Rights Tribunal of Ontario Rules of Procedure* governing reconsideration provides that a request for reconsideration is to be made within 30 days of the date of the decision – a deadline elapsing almost 2 years ago.²⁷

20. The Divisional Court has stated that seeking reconsideration by the Tribunal is not optional because the test for reconsideration is distinct from the test for judicial review:

[O]nce proceedings before the Board are completed, either party may seek reconsideration of the Board's decision. We do not agree that reconsideration is optional because the grounds for reconsideration (Human Rights Tribunal, Rule 26.5) are different than the grounds for judicial review (s.45.8 of the Human Rights Code).²⁸

21. The Divisional Court has also expressed, on numerous occasions, the importance of the parties exhausting their alternative routes for reconsideration and appeal before turning to judicial review. For example, in *Mansuri*, the Divisional Court stated:

This court has repeatedly held that absent exceptional circumstances, applications for judicial review of decisions of administrative bodies should not be brought until the end of the tribunal's proceedings and after the party seeking review has exhausted all available effective remedies within the administrative scheme[.]²⁹

²⁶ *Code* at s. [45.7\(1\)](#).

²⁷ *Human Rights Tribunal of Ontario Rules of Procedure*, at rule [26](#).

²⁸ *Jones Lang Lasalle Real Estate Services Inc. v. Human Rights Tribunal of Ontario and Brian Graff*, 2015 ONSC 4005, at para. [4](#).

²⁹ *Mansuri v. Dominion of Canada General Insurance Company*, 2023 ONSC 5764 (Div. Ct.), at para. [29](#).

22. In *Cura*, the Divisional Court further stated as follows:

Put another way, **absent exceptional circumstances**, courts should not interfere with ongoing administrative processes until after they are completed, or until available, effective remedies are exhausted.

This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. Further, only at the end of the administrative process will a review in court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge [emphasis added].³⁰

23. The court has been consistent that early judicial review “is **the rare exception, not the rule**, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion”.³¹

24. The Applicants made no request for reconsideration. Furthermore, it is submitted that no such “exceptional circumstances” have been identified by the Applicants that would justify this circumvention of the *Code* and the Tribunal's rules of procedure.

B. The Mayor is the Statutory Representative of Council with Legal Duties

25. The statutory role and duties of Mayor McQuaker, as head of council, distinguish his office in the provision of services of the municipality from that of other members of council and form an appropriate basis for the Tribunal to attach liability to him in his official capacity. This is apparent from the governance scheme of the *MA* itself, which provides the head of council with unique responsibilities in council proceedings and as orator of the municipality's positions.

³⁰ *Cura v. Aviva Insurance Canada*, [2021 ONSC 2290](#) (Div. Ct.), at para. 30 (emphasis added), quoting *Volochay v. College of Massage Therapists of Ontario*, [2012 ONCA 541](#), at para. 69, quoting *Canada (Border Services Agency) v. CB Powell Limited*, [2010 FCA 61](#), at paras. 31-32.

³¹ *Lourenco v. Hegedus*, 2017 ONSC 3872 (Div. Ct.), at para. 6 (emphasis added).

26. The *MA* sets out the governance framework for municipalities in Ontario. It states that the municipality is the incorporation of the *inhabitants* of a geographic area.³² The municipal corporation's "powers" are exercised by a council.³³ Council is mandated, among other things, "to determine which services the municipality provides" and "to consider the well-being and interests of the municipality".³⁴

27. Section 225 of the *MA* sets out the role of the head of council (in this case, the office is styled as that of the "mayor", being Mayor McQuaker). The *MA* codifies a leadership role for the mayor with respect to the functions of council, and confirms the role of the mayor in presiding over council proceedings and as a public representative of the municipal corporation:

225 It is the role of the head of council,

- (a) to act as chief executive officer of the municipality;
- (b) to preside over council meetings so that its business can be carried out efficiently and effectively;
- (c) to provide leadership to the council;
- (c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);
- (d) to represent the municipality at official functions; and
- (e) to carry out the duties of the head of council under this or any other Act.³⁵

28. Section 226.1 expands on and further particularizes the duties of the mayor as CEO of the municipality (from subsection (a), above). This section underscores the mayor's capacity as spokesperson for the decisions of council, as the governing body of the municipality:

226.1 As chief executive officer of a municipality, the head of council shall,

- (a) uphold and promote the purposes of the municipality;
- (b) promote public involvement in the municipality's activities;

³² *MA* at s. [1\(1\)](#).

³³ *MA* at s. [5\(1\)](#).

³⁴ *MA* at s. [224](#).

³⁵ *MA* at s. [225](#).

(c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and

(d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.³⁶

29. In a 2020 judicial inquiry for the Town of Collingwood, Marrocco ACJ clarified that the CEO section of the *MA* is not analogous to that of a corporate CEO, but rather that “the head of [c]ouncil [is] a trustee in the public interest”.³⁷

30. The “purposes” of the municipality (referred to in section 226.1(a), above) are defined in section 2 of the *MA*. They include “providing good governance” and discharging the statutory “duties” of the municipality:

2 Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.³⁸

31. The statutory duties of the municipality necessarily include compliance with the *Code*, which is an “other Act” within the meaning of sections 2 and 224(f) of the *MA*. Section 47(2) of the *Code* confirms that the *Code* has *primacy* over all other acts of the Legislature unless specifically provided for.³⁹ The *Code* is not even mentioned in the *MA*, and consequently, there is no carve-out excepting the municipality, council, or the mayor from their obligation to comply with the *Code* or to discharge their statutory functions commensurate with the *Code*.

³⁶ *MA* at s. [226.1](#).

³⁷ Marrocco A.C.J., [Report on the Collingwood Judicial Inquiry](#) (2020) at pp. 18-19.

³⁸ *MA* at s. [2](#).

³⁹ *Code* at s. [47\(2\)](#).

32. Moreover, as an *officer* of the municipality, the head of council (and CEO) is also subject to section 227 of the *MA*, which provides that “[i]ts is the role of the officers [...] of the municipality [...] (c) to carry out other duties required under this or any Act [...]”.⁴⁰ The *Code* is one such Act.

33. Notably, unlike the head of council, the role of municipal councillors is not defined in the *MA* – only that of council as a whole. This distinguishes the liability attaching to Councillor Boven and Councillor Toles, as neither of the councillors have a statutory role in the delivery of services or functions of the municipality under the provisions of *MA*.

34. This contrasts sharply with Mayor McQuaker, who had several relevant duties and roles in respect of the provision of the service of municipal proclamations. For instance:

- a. he had a duty to ensure that Borderland Pride’s request was considered “effectively” by council, in his capacity as chair;⁴¹
- b. he had a duty to promote the public interest “purposes” of the municipality when the request was before council and his related public commentary, as representative of the municipality;⁴²
- c. he had a duty to provide leadership and recommendations to council, during its deliberations, on the need to ensure that its response to Borderland Pride’s request complied with the municipality’s legal duties under the *Code*;⁴³
- d. he had a duty to ensure that the services of the municipality – which had a history of providing proclamations to requesting organizations, including Borderland Pride – were provided commensurate with the *Code*;⁴⁴ and

⁴⁰ *MA* at s. [227](#).

⁴¹ *MA* at s. [225\(b\)](#).

⁴² *MA* at s. [226.1\(a\)](#).

⁴³ *MA* at ss. [2](#), [225\(c\)](#) and [\(c.1\)](#), and [226.1\(a\)](#) and [\(d\)](#).

⁴⁴ *MA* at ss. [2](#) and [226.1\(a\)](#) and [\(d\)](#).

- e. he had a duty to responsibly communicate the decisions of council to the public in order to promote public involvement in the municipality's activities and activities that support the social well-being of the municipality's residents, including its 2SLGBTQIA+ inhabitants.⁴⁵

35. Rather than fulfill those duties, Mayor McQuaker instead elected to engage in discriminatory commentary about the nature of the request and to make dismissive and insensitive remarks about the *Code*-protected group that had sought routine recognition by the municipality. The discriminatory sting of council's failure to provide the requested service largely turned on his characterization of their request and dismissal of the needs of a vulnerable group in the community. These actions were directly at odds with the letter and spirit of his statutory role as head of council.

C. Both the Decision to Provide the Service and its Delivery are Code-Protected

36. At issue in some submissions made in this application is the nature of a "service" within the meaning of the *Code* and whether the request made by Borderland Pride amounted to a service. However, it is important to note at the outset that all parties, including the Applicants, agreed at the Tribunal hearing that issuing proclamations was a service the Township had provided for several years.⁴⁶

37. Within the meaning of section 1 of the *Code*, the definition of a "service" is broad and expansive.⁴⁷ The Supreme Court of Canada has maintained, in numerous decisions, that "a broad, policy-based and liberal interpretation must be given to human rights legislation and the

⁴⁵ MA at ss. [225\(c\)](#) and [226.1\(b\), \(c, and \(d\)](#)

⁴⁶ *Borderland Pride et al v Emo (Township)*, 2020 HRT0 1651, at para. [38](#).

⁴⁷ *Code* at s. [1](#) ("Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.").

policies behind such legislation” and that when the legislature intends to limit the scope of a statutory provision, it must say so clearly.⁴⁸

38. Tribunal jurisprudence has followed suit, stating that “‘service’ must mean something which is of benefit that is provided by one person to another or to the public”.⁴⁹ The Tribunal has acknowledged that the legislative debate leading to the enactment of the *Code* is replete with indications that lawmakers intended that services “should have very broad application”.⁵⁰

39. The Supreme Court has also maintained that actions made by statutory decision-makers are within the ambit of “services”.⁵¹ Council and the head of council are statutory actors. Unlike in other cities that may offer similar services, the service of issuing proclamations for special events, organizations, and causes within the Township has not been delegated to any other office of the municipality by by-law.⁵²

40. The requesting of a municipal proclamation has been recognized to be a “service” within the meaning of the *Code* for over 30 years. In *Oliver v. Hamilton*, the first such case before this Tribunal (the Board of Inquiry, as it was then known), it was concluded that:

Issuing a proclamation is a service because it is generally perceived in the community as being a benefit to the groups that seek it and therefore it should be seen as a legitimate privilege to which citizens have access without fear of discrimination. ...

⁴⁸ *Doppelhamer v. Workplace Safety and Insurance Board*, 2010 HRTO 765 [“*Doppelhamer*”], at paras. [26-27](#), citing *Canadian National Railway Co. v. Canada (Human Rights Comm.) and Action travail des femmes*, [1987 CanLII 109 \(SCC\)](#); *Québec (Comm. des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000 SCC 27](#); *B. v. Ontario (Human Rights Comm.)*, [2002 SCC 66](#), at para. 44; *Pharmascience Inc. v. Binet*, [2006 SCC 48](#); *Glykis v. Hydro-Québec*, [2004 SCC 60](#), at para. 13; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005 SCC 70](#), at para. 3.

⁴⁹ *Braithwaite v. Ontario (Attorney General)*, [2005 HRTO 31](#), at para. 22, aff’d 2007 CanLII 56481 (Ont. Div. Ct.) at para. [40](#).

⁵⁰ *Doppelhamer* at para. [25](#).

⁵¹ *Doppelhamer* at paras. [29-32](#), citing *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999 CanLII 646 \(S.C.C.\)](#); *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006 SCC 14](#); *Ontario (Human Rights Comm.) v. Ontario* [1994 CanLII 1590 \(Ont. C.A.\)](#); *Peel Board of Education v. Ontario (Human Rights Comm.)*, [1990 CanLII 6605 \(Ont. Div. Ct.\)](#).

⁵² *MA* at s. [23.1\(1\)](#). This is council’s general power to delegate.

The intent of this ruling is to assure the citizens of Ontario that issuing proclamations is like any other service and their rights in gaining access to that service are protected.⁵³

41. Similarly, in *Hudler v. London*, in 1997, the Board of Inquiry set aside several arguments raised by the respondent mayor and city, which both tried to argue that civic recognition of special days was not a service under the *Code*.⁵⁴ In doing so, the Board of Inquiry made the following observations:

- a. “[t]he fact that [civic recognition of special days] is discretionary in nature and can neither be compelled nor prohibited does not take it outside of the ambit of the *Code*”,⁵⁵
- b. even if the authority to make proclamations is unclear, a municipality in Ontario that chooses to act must do so lawfully in accordance with the *Code*,⁵⁶ and
- c. “[i]nterpreting ‘services’ to require that in, municipalities where statements of civic recognition of special days are available, they be made available on a non-discriminatory basis does not directly prohibit or compel speech. To so interpret ‘services’ does not trench on s. 2(b) rights at all.”⁵⁷

42. In the Township, the power to provide the service continues to reside with council itself. Proclamations could be enacted by resolution at a meeting. In fact, up to the events at issue in 2020, this service had been performed on request for Borderland Pride and various other requesters and organizations without issue.⁵⁸

⁵³ *Oliver v. Hamilton*, [1995 CanLII 18157](#) (Ont. Board of Inquiry), at paras. 32 and 58.

⁵⁴ *Hudler v. London (City)*, [1997 CanLII 24809](#) (Ont. Board of Inquiry) [“*Hudler*”], at paras [52-75](#).

⁵⁵ *Hudler* at para. 60.

⁵⁶ *Hudler* at para. 62.

⁵⁷ *Hudler* at para. 68.

⁵⁸ Judson WS at Ex. “5”, AR, Vol. 3 at Tab KA (p. 381).

43. In this case, the nature of the specific service that was requested from the Township implicated both the Township and Mayor McQuaker, not just through the decision-making process of council, but in the failed delivery of the proclamation itself.

44. In this case, Mayor McQuaker – who is one such statutory office-holder – took actions which infringed the *Code*. He failed in at least three respects.

- a. First, as the presiding officer of council, he failed to ensure that Borderland Pride's request was given fair and effective consideration, allowing his personal views to infect the conduct of the meeting itself.
- b. Second, as the municipality's CEO and public representative – the individual whose words carry institutional weight and who would be understood to be the statutory orator of official declarations of the Township – he used his platform to characterize the request in discriminatory terms.
- c. Third, when asked to reconsider council's initial refusal, he used his chair and representative role again to deny that any discrimination had occurred in the community at all.

45. Mayor McQuaker's failure to discharge each of his duties, and his active use of each to advance discriminatory objectives, distinguishes his conduct from that of the other councillors and independently grounds the Tribunal's finding of liability against him.

46. Importantly, the framing of section 1 of the *Code* itself attaches to persons situated like Mayor McQuaker in relation to the municipal service. This section prohibits discrimination "with respect to services". In interpreting similar statutory language, the Supreme Court has stated:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The

phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.⁵⁹

47. From this, it is apparent that an officer such as the head of council need not be the service provider themselves, as the *Code* prohibits discriminatory conduct that is *connected* to the service.

48. Likewise, the jurisdiction of the *Code* is broadly framed to make remedial orders. Under section 45.2, the Tribunal is empowered to make an order directing "the party who infringed the right" to pay compensation or to do "anything, that in the opinion of the Tribunal, the party ought to do to promote compliance with the [*Code*]".

49. This section does not limit itself – it does not refer to the "respondent" or the "service providers" as the only persons who can be the subject of remedial orders. Its drafting refers to the party that infringed the *Code*-protected right. For the reasons indicated, this includes discrimination *with respect* to services. It includes Mayor McQuaker.

D. The Discriminatory Conduct was Done in Bad Faith

50. The Applicants submit that their actions are protected by section 448 of the *MA*,⁶⁰ which operates to insulate individual councillors for acts undertaken in the good faith performance of their duties. With respect, no such good faith basis exists for these actions.

51. In exercising their duties in a manner that was attuned to the interests of certain community members and personal or religious beliefs, the Applicants have fallen within the definition of bad faith as outlined by the Court of Appeal in *Equity Waste Management of Canada v. Panorama Investment Group Ltd.*:

⁵⁹ *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, cited in *Doppelhamer* at para. 33.

⁶⁰ *MA* at s. 448.

Bad faith by a municipality connotes a lack of candour, 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.⁶¹

52. The Supreme Court has also endorsed a similarly broad understanding of bad faith in similar municipal contexts:

...the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.⁶²

53. The conduct in this case satisfies these standards: Mayor McQuaker did not merely cast a mistaken vote on a contested question – he publicly dismissed the legitimacy of the *Code*-protected group's request by invoking the preferences of “straight people”, denied the existence of any discrimination in his community when invited to reconsider, and expressed views in the local press that characterized equal rights for same-sex couples as “crap”.

54. Each of those acts occurred in the exercise of his statutory duties as head of council and CEO of the municipality. A mayor who acts in that manner cannot be said to have performed his duties in good faith within the meaning of s. 448(1), regardless of whether a technical breach of the *Code* would on its own suffice.

55. The Applicants argue that Mayor McQuaker did not act in bad faith because he did not act with “fraud, oppression, or improper motives”. With respect, discrimination is an “improper motive”, and acting in a discriminatory manner is “oppressive”.

56. Although municipal councillors ought to be given some room for mistakes and missteps, this is not such a case. Mayor McQuaker acted to protect and defend discriminatory views at the expense of a *Code*-protected community, and when asked to reconsider – after being provided

⁶¹ *Equity Waste Management of Canada v. Panorama Investment Group Ltd.*, [1997 ONCA 2742](#). NB: paragraphs are not numbered in this decision, however, the precise quote can be located [here](#).

⁶² *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004 SCC 61](#), at para. 26.

with clear information from Borderland Pride highlighting the *Code* liability attaching to council's initial decision – he denied the existence of any discrimination in his community. This is not a case of a technical breach, an honest mistake or misunderstanding, nor is this a case in which reasonable disagreement exists as to whether the conduct met the applicable standard.

57. In underscoring the importance of section 448 of the *MA*, the Applicants note the chilling and negative effect on municipal government, free speech, and qualified privilege if individuals are permitted to bring a human rights application against a councillor each time they do not fully support an application made.

58. However, the Applicants ignore the gravity of the discriminatory and homophobic conduct that the *Code* and Tribunal are mandated to protect. The conduct in question (i.e., publicly denigrating the request of a *Code*-protected group and denying the existence of discrimination against them) is precisely the kind of conduct that section 448(1) was not designed to shield, as it cannot be characterized as an act done “in good faith in the performance of a duty.” There is also nothing in the *MA* to suggest that section 448(1) is exempt from the primacy provision of the *Code*.

59. The cases relied on by the Applicants can also be distinguished from the present case:

- a. With respect to those cases relied upon by the Township, *Compagnion v. Misek-Evans*, *JB v Catholic Children's Aid Society of Toronto* and *Saxon v. Amherstburg*, were duty to accommodate cases.⁶³ In those types of cases, the decision-maker must try to find a reasonable way to meet a person's needs, unless doing so would cause “undue hardship.” That analysis often involves balancing competing considerations and, in some cases, conflicting evidence. This case is different: it does not involve a question of how best to accommodate someone but, rather, a

⁶³ *Compagnion v. Misek-Evans*, [2019 HRTO 521](#); *JB v. Catholic Children's Aid Society of Toronto*, [2009 HRTO 2098](#); *Saxon v. Amherstburg*, [2011 HRTO 960](#).

straightforward decision to deny a Pride proclamation, which the Tribunal found to be discriminatory.

- b. With respect to those cases relied upon by Mayor McQuaker, *Sequin (Township) v. Hamer* was about a by-law prohibiting individuals from feeding local bears, *Barrett v. Watson* was a costs decision in a family law proceeding, *The Fit Effect v. Brant County Board of Health* was a decision regarding COVID-19 regulations, and *Thirsty's Bar & Grill v. Waterloo* was about an anti-smoking by-law. None of those cases engaged section 448.⁶⁴

60. The Applicants have not identified a single case where a member of counsel was immunized from the consequences of making homophobic comments pursuant to the immunity provisions of section 448.

PART V – ORDER REQUESTED

61. For all of the above reasons, and relying on the submissions of Borderland Pride, Mr. Judson submits that the application for judicial review ought to be dismissed, with costs payable by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2026.



Tracey Rynard / Timothy Phelan
Cambridge LLP

Lawyers for the Respondent,
Douglas W. Judson

⁶⁴ *Sequin (Township) v. Hamer*, [2014 ONCA 108](#); *Barrett v. Watson*, [2024 ONSC 1118](#); *The Fit Effect v. Brant County Board of Health*, [2021 ONSC 3651](#); *Thirsty's Bar & Grill v. Waterloo*, 2020 CarswellOnt 2585.

CERTIFICATE

Pursuant to rule 61.12(3)(f), we certify as follows:

1. An order under rule 61.09(2) (regarding the original record and exhibits) is not required;
2. A total of thirty minutes is required for the Respondent, Douglas W. Judson's oral argument;
3. The factum complies with rule 61.12(5.1), Parts I-V of which is 5, 561 words; and
4. We are satisfied as to the authenticity of every authority cited in the factum, per rule 4.06.1.

DATED this 30th day of April, 2026.



Tracey Rynard / Timothy Phelan
Cambridge LLP

Lawyers for the Respondent,
Douglas W. Judson

SCHEDULE “A” – LIST OF AUTHORITIES

Statutes and Regulations

Courts of Justice Act, [R.S.O. 1990, c. C.43](#)
Human Rights Code, [R.S.O. 1990, c. H.19](#)
[*Human Rights Tribunal of Ontario Rules of Procedure*](#)
Municipal Act, 2001, [S.O. 2001, c. 25](#)
Judicial Review Procedure Act, [R.S.O. 1990, c. J.1](#)
Rules of Civil Procedure, [R.R.O. 1990, Reg. 194](#)

Jurisprudence

B. v. Ontario (Human Rights Comm.), [2002 SCC 66](#)
Barrett v Watson, [2024 ONSC 1118](#)
Borderland Pride et al v Emo (Township), [2020 HRT0 1651](#)
Braithwaite v. Ontario (Attorney General), [2005 HRT0 31](#), aff'd [2007 CanLII 56481](#) (Ont. Div. Ct.)
Canada (Border Services Agency) v. CB Powell Limited, [2010 FCA 61](#)
Compagnion v Misek-Evans, [2019 HRT0 521](#)
Cura v. Aviva Insurance Canada, [2021 ONSC 2290](#) (Div. Ct.)
Doppelhamer v. Workplace Safety and Insurance Board, [2010 HRT0 765](#)
Entreprises Sibeca Inc. v. Frelighsburg (Municipality), [2004 SCC 61](#)
Equity Waste Management of Canada v. Panorama Investment Group Ltd., [1997 ONCA 2742](#)
Glykis v. Hydro-Québec, [2004 SCC 60](#)
Hudler v. London (City), [1997 CanLII 24809](#) (Ont. Board of Inquiry)
JB v. Catholic Children's Aid Society of Toronto, [2009 HRT0 2098](#)
Jones Lang Lasalle Real Estate Services Inc. v. Human Rights Tribunal of Ontario and Brian Graff, [2015 ONSC 4005](#)
Lourenco v. Hegedus, [2017 ONSC 3872](#) (Div. Ct.)
Mansuri v. Dominion of Canada General Insurance Company, [2023 ONSC 5764](#) (Div. Ct.)
Marrocco A.C.J., [Report on the Collingwood Judicial Inquiry](#) (2020)
Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, [2005 SCC 70](#).
Nowegijick v. The Queen, [\[1983\] 1 S.C.R. 29](#)
Oliver v. Hamilton, [1995 CanLII 18157](#) (Ont. Board of Inquiry)
Ontario (Human Rights Comm.) v. Ontario [1994 CanLII 1590](#) (Ont. C.A.)
Peel Board of Education v. Ontario (Human Rights Comm.), [1990 CanLII 6605](#) (Ont. Div. Ct.)
Pharmascience Inc. v. Binet, [2006 SCC 48](#)

Québec (Comm. des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000 SCC 27](#)

Saxon v Amherstburg, [2011 HRTO 960](#)

Sequin (Township) v. Hamer, [2014 ONCA 108](#)

The Fit Effect v. Brant County Board of Health, [2021 ONSC 3651](#)

Thirsty's Bar & Grill v. Waterloo, 2020 CarswellOnt 2585

Tranchemontagne v. Ontario (Director, Disability Support Program), [2006 SCC 14](#)

Volochay v. College of Massage Therapists of Ontario, [2012 ONCA 541](#)

SCHEDULE “B” – TEXT OF STATUTES AND REGULATIONS

Municipal Act, 2001, [SO 2001, c. 25](#)

Interpretation

1 (1) In this Act,

[...]

“municipality” means a geographic area whose inhabitants are incorporated; (“municipalité”)

[...]

Purposes

2 Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.

[...]

Powers exercised by council

5 (1) The powers of a municipality shall be exercised by its council.

[...]

General power to delegate

23.1 (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to delegate its powers and duties under this or any other Act to a person or body subject to the restrictions set out in this Part.

[...]

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.

Role of head of council

225 It is the role of the head of council,

- (a) to act as chief executive officer of the municipality;
- (b) to preside over council meetings so that its business can be carried out efficiently and effectively;

- (c) to provide leadership to the council;
- (c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);
- (d) to represent the municipality at official functions; and
- (e) to carry out the duties of the head of council under this or any other Act.

[...]

Head of council as chief executive officer

226.1 As chief executive officer of a municipality, the head of council shall,

- (a) uphold and promote the purposes of the municipality;
- (b) promote public involvement in the municipality's activities;
- (c) act as the representative of the municipality both within and outside the municipality, and promote the municipality locally, nationally and internationally; and
- (d) participate in and foster activities that enhance the economic, social and environmental well-being of the municipality and its residents.

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.

[...]

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).

Liability for torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. 2001, c. 25, s. 448 (2).

Human Rights Code, [RSO 1990, c. H.19](#)

Services

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed,

sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[...]

Infringement prohibited

9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

[...]

Powers of Tribunal

39 The Tribunal has the jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any application before it.

Disposition of applications

40 The Tribunal shall dispose of applications made under this Part by adopting the procedures and practices provided for in its rules or otherwise available to the Tribunal which, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the applications.

Interpretation of Part and rules

41 This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it.

[...]

Tribunal rules

43 (1) The Tribunal may make rules governing the practice and procedure before it.

[...]

Reconsideration of Tribunal decision

45.7 (1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules.

Same

(2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules.

Decisions final

45.8 Subject to section 45.7 of this Act, section 21.1 of the Statutory Powers Procedure Act and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

[...]

Act has primacy over other Acts

47 (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

Human Rights Tribunal of Ontario Rules of Procedure

RULE 26 REQUEST FOR RECONSIDERATION

26.1 Any party may request reconsideration of a final decision of the Tribunal within 30 days from the date of the decision.

26.2 A Request for Reconsideration must be made in Form 20 and be delivered to all parties and filed with the Tribunal.

26.3 A Request for Reconsideration must include:

- a. reasons for the request, including the basis upon which the Tribunal is asked to grant the request for reconsideration;
- b. submissions in support of the request; and,
- c. remedy or relief sought.

26.4 A party who has been served with a Request for Reconsideration need not file a response with the Tribunal unless the Tribunal directs that a response is required. Where a party is directed to file a response to the request, it must be in Form 21, Response to Request for Reconsideration, and must include complete written submissions in support of its position.

26.5 A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:

- a. there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or
- b. the party seeking reconsideration was entitled to but, through no fault of its own, did not receive notice of the proceeding or a hearing; or
- c. the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
- d. other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

26.5.1 A Request for Reconsideration made more than 30 days following the Decision will not be granted unless the Tribunal determines that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

26.6 The Tribunal shall not grant a Request for Reconsideration without providing the parties an opportunity to make submissions.

26.7 The determination of the Request for Reconsideration shall be conducted by written submissions unless the Tribunal decides otherwise.

26.7.1 Where a Request for Reconsideration has been determined, the Tribunal will not consider a subsequent Request for Reconsideration of the same decision, absent exceptional circumstances. The Tribunal need not give reasons for a decision not to consider a subsequent Request.

Where Reconsideration Request Granted

26.8 Where the Tribunal considers it appropriate to reconsider its decision it may:

- a. make a decision on the substance of the Request without further submissions from the parties, or
- b. determine a procedure for rehearing all or part of the matter.

Reconsideration at the Initiative of the Tribunal

26.9 The Tribunal may reconsider a decision on its own initiative where it considers it advisable and appropriate to do so.

26.10 Where the Tribunal decides to reconsider a decision on its own initiative, it will determine a procedure for rehearing all or part of the matter, which will include an opportunity for the parties to make submissions.

EMO (TOWNSHIP) et al v. BORDERLAND PRIDE et al
Applicants *Respondents*

Court File No. DC-24-00000016-00JR

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Proceedings Commenced at Thunder Bay

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