

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

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,
HUMAN RIGHTS TRIBUNAL OF ONTARIO, HARROLD
BOVEN, and WARREN TOLES

Respondents

FACTUM OF THE INTERVENOR, the
CANADIAN CONSTITUTION FOUNDATION

May 14, 2026

CANADIAN CONSTITUTION FOUNDATION

6025 - 12 St. SE, Suite 215
Calgary, Alta. T2H 2K1

Joshua David Dehaas

LSO #86888I

Tel: 647-385-6064

E-mail: jdehaas@theccf.ca

Lawyer for the Canadian Constitution Foundation

TO: McKitrick's Law Office
17 Cumberland St. S.
Thunder Bay, Ontario, P7B 2T3

Allan D. McKitrick (LSO #31974W)
mckits@tbaytel.net
Tel: 807-345-1251

Candace L. Hilchuk (LSO #83317C)
mckits@tbaytel.net
Tel: 807-345-1251

Lawyers for the Applicant, The Corporation of the Township of EMO

AND TO: Wishart Law Firm
Barristers and Solicitors 390 Bay Street., Suite 500
Sault Ste. Marie, ON P6A 1X2

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

Brittany Hollingsworth (LSO #84912T)
bhollingsworth@wishartlaw.com
Tel: 705-949-6700

Lawyers for the Applicant, Harold McQuaker

AND TO: Goldblatt Partners LLP
Char Wiseman
Tel: 416-979-4232
cwiseman@goldblattpartners.com

Karin Galldin
Tel: 613-482-2467
kgalldin@goldblattpartners.com

Melanie Anderson
Tel: 416-979-4386
manderson@goldblattpartners.com

Lawyers for the Respondent, Borderland Pride

AND TO: Cambridge LLP

31 Nova Scotia Walk, Unit 307
Elliot Lake, ON P5A 1Y9

Tracey Rynard (LSO #49664P)
Tel: 705.705-300-7834
Email: trynard@cambridgellp.com

Timothy Phelan (LSO #81550K)
Tel: 705-587-5080 ext. 203
Email: tphelan@cambridgellp.com

Lawyers for the Respondent, Northern Ontario Pride Network, Douglas W. Judson

Human Rights Tribunal of Ontario

655 Bay St. #14
Toronto, ON M7A 2A3

Maija-lisa Robinson Counsel,
Tribunals Ontario
Tel: 437-980-8774
Email: Maija-lisa.Robinson@ontario.ca

Counsel for the Human Rights Tribunal of Ontario

AND TO: Kaster Ko LLP

55 University Ave, Suite 1800
Toronto, ON M5J 2H7

Gregory Ko (LSO #62244E)
Tel: 416-655-3044 ext. 809
gko@kastnerko.com

Lawyers for the intervenor Fierte Canada Pride

AND TO Justice for Children and Youth

55 University Avenue, Suite 1500
Toronto, ON M5J 2H7
Tel: 416-920-1633

Allie McMillan (LSO #92728R)
Email: allie.mcmillan@jfcy.clcj.ca

Emily Chan (LSO #45352P)
Email : emily.chan@jfcy.clcj.ca

Lawyers for the intervenor Justice for Children and Youth

PART I – OVERVIEW

1. Mayors and councilors are entitled to freedom of expression in council meetings.
2. Indeed, they are conduits for their constituents and have a duty to express a range of views. They also cannot be compelled to speak words that they do not wish to speak.
3. In this case, the Ontario Human Rights Tribunal (the “Tribunal”) was required to proportionately balance the freedom of expression rights of the Township of Emo’s mayor with the equality objectives of the Ontario *Human Rights Code*¹ (the “Code”).
4. Freedom of expression and equality are two aspects of human dignity that must be balanced using a version of the test laid down in *Ward*², which incorporates certain principles from *Whatcott*³: namely (1) the test for whether speech has discriminatory effects is objective, (2) offensive ideas are not sufficient to ground a justification for infringing on freedom of expression, and (3) limits on expression will be justified where the effects of the speech on its audience are likely to incite hatred or discriminatory treatment or other harmful conduct towards the protected group.
5. The Tribunal was required to apply the following proportionate balancing test. First, the Tribunal would ask whether a reasonable person, aware of the relevant context and circumstances, would view the expression as targeting an individual or group as inciting others to vilify them or detest them on the basis of a prohibited ground of discrimination. Second, the Tribunal would ask whether a reasonable person would view the expression, considered in context, as likely to lead to discriminatory effects. If the answer at either step is “no,” there cannot be a finding of discrimination.

¹ RSO 1990, c H.19 [the [Code](#)].

² *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 [[Ward](#)].

³ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [[Whatcott](#)].

6. PART II – FACTS

7. On December 19, 2024, the Township of Emo (the “Township”) and Mayor Harold McQuaker, (the “Mayor”) brought an application for judicial review of a November 20, 2024 decision⁴ (the “Decision”) by the Tribunal.
8. The Decision found that the Mayor⁵ and the Township⁶ contravened the *Code* by discriminating against Borderland Pride, a not-for-profit corporation and LGBTQ advocacy organization in a region including the Township.
9. That finding followed the Township’s 3-2 vote against making a proclamation in respect of Pride Month at a May 12, 2020 meeting.⁷ The discrimination was inferred from a remark made by the Mayor, who was the deciding vote. That remark, made during discussion over whether to raise a Pride flag, was: “There’s no flag being flown for the other side of the coin ... there’s no flags being flown for the straight people.”⁸
10. The close proximity of the comment to the vote led the Tribunal to conclude that discrimination was at least one reason for the 3-2 vote against the proclamation.⁹
11. The Mayor has stated that his reasons for rejecting the proclamation request included that he was concerned that it contained “subjective values and statements that were not shared by all community members”, that a wording used the year before “better served the community” and was “more inclusive because it recognizes everyone as equal”, that he believed the proclamation required a Pride flag to be flown despite “division” on that request, and that he desired not to have “anybody to be, or feel, excluded.”¹⁰

⁴ *Borderland Pride v Corporation of the Township of Emo*, 2024 HRTO 1651 [[Borderland Pride](#)].

⁵ *Ibid*, [para 52](#).

⁶ *Ibid*, [para 51](#).

⁷ *Borderland Pride*, *supra* note 4, [para 41](#).

⁸ *Borderland Pride*, *supra* note 4, [para 43](#).

⁹ *Borderland Pride*, *supra* note 4, [para 52](#).

¹⁰ Witness statement of Harold McQuaker, Amended Record of Proceedings of the Human Rights Tribunal of Ontario (Volume 3 of 3) at 1152 (PDF page 350).

12. The Tribunal ordered the Township to pay \$10,000 and ordered the Mayor to pay \$5,000 to the Corporation for injury to the Corporation’s dignity, feelings, and self-respect, and human rights training for the Township’s CEO and the Mayor.¹¹
13. In the Decision, the words “freedom of expression” appear only once. This single mention was not in the context of any explicit balancing of the Mayor’s expressive rights against the objectives of the Code when determining whether the Mayor’s comment was discriminatory, but as a reason why the adjudicator refused to order as a remedy that the Township proclaim June as “Pride Month”.¹² The decision does not mention “freedom of thought,” “freedom of belief”, or “freedom of opinion.”
14. In their applications for judicial review, the Mayor and Township submitted that the Decision is incorrect in law and unreasonable, including on grounds that the Tribunal failed to explain in its reasons why it did not accept an alternative interpretation of the Mayor’s statements (i.e., that the Mayor sought to be inclusive)¹³, and that the Tribunal failed to consider the Mayor’s right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).¹⁴

PART III – LAW AND ARGUMENT

Mayors and councilors are entitled to freedom of expression when speaking in council meetings

15. Section 2(b) of the *Charter* guarantees everyone “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹⁵

¹¹ *Borderland Pride*, *supra* note 4, [paras 83-85](#).

¹² *Borderland Pride*, *supra* note 4, [para 81](#).

¹³ Notice of Application of The Corporation of the Township of Emo and Harold McQuaker, (December 19, 2024) at 11.

¹⁴ Notice of Application of The Corporation of the Township of Emo and Harold McQuaker, (December 19, 2024) at 13.

¹⁵ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [\[the Charter\]](#).

16. The Supreme Court noted in *Irwin Toy*¹⁶ that freedom of expression is protected “so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.”¹⁷
17. Freedom of expression is considered “fundamental ... because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.”¹⁸ Simply put, there is value in allowing people with minority viewpoints to express themselves because it is through the free exchange of ideas that we are able to make progress, including toward greater LGBTQ inclusion.
18. Section 2(b) protects any activity that attempts to convey meaning.¹⁹ Violent forms of expression are excluded.²⁰ If the government restricts expression in purpose or effect, and the form is not excluded, the state must justify the limit under section 1 of the *Charter*.²¹
19. Section 2(b) also protects against compelled speech. As the Supreme Court put it in *Slaight*²²: “Freedom of expression necessarily entails the right to say nothing or the right not to say certain things.”²³ Section 2(b) therefore protects the freedom of mayors and councilors when they express objections to, and indeed vote against, proposed proclamations made in their names when those proclamations would compel them to endorse ideas they do not support. Requiring a Mayor to make a proclamation using words he does not choose is compelled speech even if proclamations are a service.
20. In addition to being individuals with freedom of expression rights of their own, mayors

¹⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989 CanLII 87 \(SCC\)](#), [1989] 1 SCR 927 [*Irwin Toy*].

¹⁷ *Ibid*, para 42.

¹⁸ *Ibid*, para 42.

¹⁹ *Ibid*, para 42.

²⁰ *Ibid*, para 43.

²¹ *Ibid*, paras 56-57.

²² *Slaight Communications Inc. v. Davidson*, [1989 CanLII 92 \(SCC\)](#), [1989] 1 SCR 1038 [*Slaight*].

²³ *Ibid*, para 95.

and councilors also listen to constituents and try to convey their opinions and beliefs during debates at council meetings. As the Supreme Court recognized in *Prud'homme*²⁴, in which it upheld dismissal of a defamation action against a city councilor:

...Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievances to municipal government and they also inform them about the state of that government. Their right to speak cannot be limited without negative impact on the vitality of municipal democracy...²⁵

21. The mayor was not only entitled to express his views, but also to reflect the views of constituents who would have preferred a differently-worded proclamation and no Pride flag displayed. Finding his words discriminatory would limit his section 2(b) rights.

Tribunal was required to proportionately balance Mayor's expression with equality objectives

22. Under *Doré*²⁶ review, this Court must ask whether the Tribunal proportionately balanced the Mayor's freedom of expression with the statutory objectives of the *Code* when determining whether the Mayor's words were discriminatory. The purpose of *Doré* review is to ensure that, even when the *Oakes* test is unworkable, the decisionmaker interferes with *Charter* rights and values no more than necessary.²⁷

23. The Supreme Court said in *Trinity Western*²⁸ that *Doré* balancing is a two-step process.²⁹ The preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections—both rights and values.³⁰ If *Charter* protections are engaged, the second question is “whether, in assessing the impact of the relevant *Charter*

²⁴ *Prud'homme v. Prud'homme*, 2002 SCC 85 [[Prud'homme](#)].

²⁵ *Ibid*, [para 42](#) (emphasis added).

²⁶ *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII) [[Doré](#)].

²⁷ *Ibid*, [para 7](#).

²⁸ *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 (CanLII), [2018] 2 SCR 453 [[Trinity Western](#)].

²⁹ *Ibid*, [para 31](#).

³⁰ *Ibid*, citing *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII) [[Loyola](#)].

protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.”³¹

24. As this Court explained in *CHP*³², where a decisionmaker fails to consider *Charter* rights in a case where they arise, the decision cannot be reasonable.³³

25. In *CSFTNO*,³⁴ the Supreme Court of Canada clarified that this is true whenever *Charter* rights and values are engaged.³⁵ This means the Tribunal must consider rights and values whenever there is a link between the value and the matter under consideration, regardless of whether it was raised before the administrative decisionmaker.³⁶

26. The preliminary question is therefore whether the Tribunal recognized the *Charter* rights and values that arose from the facts, namely the Mayor’s freedom of expression, opinion and belief rights, and balanced these against the equality values that the *Code* seeks to protect, which its preamble states include recognizing the inherent dignity and equality of all people and the provision of equal rights and opportunities without discrimination.³⁷

27. On the second question (whether the decision reflects a proportionate balancing), the Supreme Court clarified in *Loyola* that, even though the proportionate balancing that administrative decisionmakers must undertake is not the same as in *Oakes*, it is a “robust” form of review designed to “work the same justificatory muscles”, including the requirement that *Charter*-protected rights are “affected as little as reasonably possible”.³⁸

³¹ *Ibid*, citing *Loyola*, *supra* note 30, [para 39](#), *Doré*, *supra* note 26, [para 57](#).

³² *Christian Heritage Party of Canada et al v City of Hamilton*, 2018 ONSC 3690 (Div Ct) [[CHP](#)].

³³ *Ibid*, [para 57](#).

³⁴ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [[CSFTNO](#)].

³⁵ *Ibid*, [para 64](#), citing *Doré*, *supra* note 26, [para 35](#).

³⁶ *Ibid*, [para 66](#).

³⁷ *Code*, *supra* note 1 (see: preamble).

³⁸ *Loyola*, *supra* note 30, [para 40](#), citing *Doré*, *supra* note 26, [para 5](#).

28. In *Guelph*,³⁹ this Court found that the City of Guelph had failed to proportionately balance the objectives of its transit advertising policy against the expressive freedoms of an advertiser. The Court suggested that what the *Doré* balancing requires is “an actual balancing and minimal impairment analysis.”⁴⁰ This Court was clear that: “Simply acknowledging or mentioning the applicant’s Charter rights is not sufficient.”⁴¹ This Court must ask whether the decision minimally impairs freedom of expression.
29. *Vavilov*⁴² instructs that the Tribunal was required to show its work through a justified, intelligible and transparent decision or it will not be reasonable.⁴³ Two types of fundamental flaws may render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.⁴⁴ The relevant legal constraints here plainly include the *Charter*, including the Mayor’s right to freedom of expression.
30. When assessing whether a decision is reasonable, the institutional context is relevant.⁴⁵ Part of the institutional context is that the Tribunal has specialized expertise, which deserves respectful attention by a reviewing court.⁴⁶ At the same time, the Tribunal is a sophisticated body whose decisions reflect the fundamental values of our society and have a broad impact, such that its analysis *must always be clear and precise*.⁴⁷
31. This is not the first matter in which the Tribunal has been required to balance expressive

³⁹ *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 [[Guelph](#)].

⁴⁰ *Ibid*, [para 61](#).

⁴¹ *Ibid*, [para 87](#).

⁴² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [[Vavilov](#)].

⁴³ *Ibid*, [para 86](#).

⁴⁴ *Ibid*, [para 101](#).

⁴⁵ *Ibid*, [para 91](#).

⁴⁶ *Ibid*, [para 93](#).

⁴⁷ *Imperial Oil Limited v. Haseeb*, 2021 ONSC 3868, [para 25](#), citing *Vavilov*, *supra* note 42, [para 96](#).

rights and values against the objectives of the Code, although it may be the first time it has done so since the Supreme Court decided *Ward*, which is discussed in detail below.

32. In several pre-*Ward* decisions, the Tribunal emphasized that ambiguity in the scope of Code rights should be resolved in favour of protecting matters at the core of the rights and freedoms of the *Charter*,⁴⁸ including freedom of expression. For example, in *Taylor-Baptiste*, the Tribunal was required to balance freedom of expression and gender equality. There, a jail manager complained to the Tribunal that the union local president's sexist blog postings constituted discrimination with respect to employment on the basis of sex, contrary to section 5 of the Code.⁴⁹ The Tribunal found that the provision had to be interpreted in light of the union local president's freedom of expression and association,⁵⁰ and balanced against the Code's anti-discrimination objective.⁵¹ After weighing those rights against the Code's equality-enhancing objectives, the Tribunal had found that the union local president had not contravened the Code.⁵² This Court⁵³ and the Court of Appeal upheld the Tribunal.⁵⁴ Leave to appeal to the Supreme Court was denied.⁵⁵
33. In previous Board of Inquiry decisions in which boards found that municipalities had discriminated because they refused to make Pride declarations, the Boards of Inquiry explicitly grappled with the freedom of expression rights of the mayors involved.⁵⁶ They

⁴⁸ *McKenzie v Isla*, 2012 HRT0 1908, [para 33](#), citing *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2012 HRT0 1393 [[Taylor-Baptiste](#)]; *Dallaire v. Les Chevaliers de Colomb*, 2011 HRT0 639 [[Dallaire](#)]; and *Whiteley v. Osprey Media Publishing*, 2010 HRT0 2152 [[Whiteley](#)].

⁴⁹ *Taylor-Baptiste*, *supra* note 48, [paras 1-3](#).

⁵⁰ *Ibid*, [para 4](#).

⁵¹ *Ibid*, [para 30](#).

⁵² *Ibid*, [para 29](#).

⁵³ *Taylor-Baptiste v. O.P.S.E.U.*, 2014 ONSC 2169 [[Taylor-Baptiste Div Ct](#)].

⁵⁴ *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 [[Taylor-Baptiste ONCA](#)].

⁵⁵ *Mariann Taylor-Baptiste, et al. v. Ontario Public Service Employees Union, et al.*, 2016 CanLII 34004 [[Taylor-Baptiste SCC](#)].

⁵⁶ *Hudler v. London (City)*, 1997 CanLII 24809 (ON HRT) [[Hudler](#)], [paras 64-74](#), *Oliver v. Hamilton (City) (No. 2)*, 1995 CanLII 18157 (ON HRT) [[Oliver](#)], [para 25](#).

offered clear and precise reasons for why the equality objectives overtook expression.

These decisions pre-date the decision in *Ward*, so they may be decided differently today.

Tribunal was required to balance equality and expression using modified version of Ward test

34. The Decision appears to be the Tribunal's first since *Ward* was decided in late 2021 that required balancing freedom of expression against the equality objectives of the *Code*.

35. The Tribunal was required to undertake that balancing by applying a version of the test from *Ward*, which incorporates the principles from *Whatcott* for balancing expressive rights against equality values to maximize the protection of human dignity, modified to take into account the different *means* of protecting human dignity employed by *Code*.

36. In *Ward*, the majority stated that the Tribunal and courts below had erred in excluding *Whatcott* from their reasoning.⁵⁷ This was because all human rights statutes are presumed to have the same *purpose* even though they employ different *terminology* and different *means*.⁵⁸ That purpose is to uphold human dignity,⁵⁹ the *Charter* value underpinning both the guarantees of freedom of expression and equality found in human rights instruments.

37. In *Ward*, the majority explained that the *Charter* value of human dignity as reflected in Quebec's right to the safeguard of dignity protects against "interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself".⁶⁰ Put differently, dignity is the idea that all humans have an equal status, and thus are entitled to an equal social standing.⁶¹ Dignity is broader than equality,

⁵⁷ *Ward*, *supra* note 2, [para 71](#).

⁵⁸ *Ward*, *supra* note 2, [para 68-69](#).

⁵⁹ *Ward*, *supra* note 2, [para 69](#).

⁶⁰ *Ward*, *supra* note 2, [para 56](#), citing *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [para 105](#).

⁶¹ Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press (2012), at 60 [Waldron].

but the norm of equality “flows *from* dignity”, such that dignity “is always more or less affected when equality is denied.”⁶² Freedom of expression *also* flows from human dignity.⁶³ As the majority reasoned, “human beings are equal in worth and dignity”, and “this equality would be hollow if some people were silenced because of their opinions.”⁶⁴

38. Therefore, in *Ward*, the Tribunal was required to uphold not only the human dignity of the person whose social standing may be jeopardized by the expression of another person, but also the dignity of that person who wishes to “manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.”⁶⁵ This was achieved by adhering to the principles from *Whatcott* when proportionately balancing the equality values against expressive rights.
39. In *Ward*, the Supreme Court overturned a decision by Quebec’s human rights tribunal to order a comedian to pay damages to a person with a disability for jokes that the tribunal had found violated the applicant’s right to “full and equal recognition” of his right to the “safeguard of his dignity,” contrary to sections 4 and 10 of the *Quebec Charter*.⁶⁶ In that case, the conflict at the tribunal was between the applicant’s equal right to the safeguard of dignity and the respondent’s right to freedom of expression,⁶⁷ protected by section 3⁶⁸.
40. In *Whatcott*, the Court upheld Saskatchewan’s ban on publishing or displaying any representation that “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited

⁶² *Ward*, *supra* note 2, [para 53](#).

⁶³ *Ward*, *supra* note 2, [para 69](#).

⁶⁴ *Ward*, *supra* note 2, [para 59](#).

⁶⁵ *Ward*, *supra* note 2, [para 59](#), citing *Irwin Toy*, *supra* note 16.

⁶⁶ *Charter of Human Rights and Freedoms*, CQLR, c. C-12 [the *Quebec Charter*].

⁶⁷ *Ward*, *supra* note 2, [para 43](#).

⁶⁸ *Quebec Charter*, *supra* note 66, [s 3](#).

ground”⁶⁹ after severing “ridicules, belittles or otherwise affronts the dignity”.⁷⁰

41. These provisions were simply different *means* of protecting human dignity. In *Ward*, the majority was clear: “differences in terminology between the Saskatchewan Human Rights Code and the *Quebec Charter* in no way diminish(ed) the importance of the principles enunciated in *Whatcott* in deciding the issue raised in this case.”⁷¹ The same is true here: the wording of the *Code* is different, and the means it employs to protect human dignity are different, but the principles for balancing expression and equality are the same.
42. The first principle from *Whatcott* is that the test for whether speech has discriminatory effects is objective. That is, it must be determined on a reasonable person standard.⁷²
43. The second principle from *Whatcott* applied in *Ward* is that “offensive ideas are not sufficient to ground a justification for infringing on freedom of expression.”⁷³
44. The third principle laid down in *Whatcott* and *Ward* is that tribunals must focus their analysis on the *effects* of the expression. Limits on expression will be justified where the effects of the speech on its audience are serious enough that they can incite “hatred or discriminatory treatment or other harmful conduct towards the protected group.”⁷⁴
45. In *Whatcott*, Justice Rothstein applied these principles and identified the following test for whether representations were likely to expose a person to hatred. First, the decisionmaker must determine whether “a reasonable person, aware of the relevant context and circumstances, would view the representations as exposing or likely to expose a person or class of persons to detestation or vilification on the basis of a

⁶⁹ *Whatcott*, *supra* note 3, [para 3](#).

⁷⁰ *Whatcott*, *supra* note 3, [paras 89-94](#).

⁷¹ *Ward*, *supra* note 2, [paras 65-66](#), citing *Whatcott*, *supra* note 3, [para 66](#).

⁷² *Ward*, *supra* note 2, [para 73](#), citing *Whatcott*, *supra* note 3, [paras 52, 56 and 59](#).

⁷³ *Whatcott*, *supra* note 2, [para 90](#). See also *Ward*, *supra* note 2, [para 73](#).

⁷⁴ *Whatcott*, *supra* note 3, [para 58](#).

prohibited ground of discrimination”, and second, they must determine whether the expression “when viewed objectively and in its context, has the potential to lead to discriminatory treatment of the targeted group.”⁷⁵

46. This led the Court to sever the words “ridicules, belittles or affronts dignity”.⁷⁶

Although such expressions may be “derogatory and insensitive,” a “democratic society concerned about preserving freedom of expression must make space for that kind of discourse given that it typically does not lead to the systemic discrimination against vulnerable groups that the legislature was seeking to eradicate.”⁷⁷

47. In *Whatcott*, the effects of speech were only severe enough to limit where the expression constituted “the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground”.⁷⁸ This included speech that constitutes “hatred”, defined as “those extreme manifestations of the emotion described by “detestation” and “vilification.”⁷⁹

48. In *Ward*, the court noted that limits on freedom of expression are also justified “where it is used to disseminate expression that, even if it does not fully meet the definition of “hatred” set out in *Whatcott*, nonetheless forces certain persons to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.”⁸⁰ The majority quoted the scholar Jeremy Waldron, who has explained why such limits may be justified:

[A] person [must be able] to walk down the street without fear of insult or humiliation, to find the shops and exchanges open to him, and to proceed with an implicit assurance of being able to interact with others

⁷⁵ *Ward*, *supra* note 2, [para 75](#), citing *Whatcott*, *supra* note 3, paras [178](#) and [191](#).

⁷⁶ *Whatcott*, *supra* note 3, [para 91](#).

⁷⁷ *Ward*, *supra* note 2, [para 74](#), citing *Whatcott*, *supra* note 3, paras [89-92](#) and [109](#).

⁷⁸ *Ward*, *supra* note 2, [para 73](#), citing *Whatcott*, *supra* note 3, [para 48](#).

⁷⁹ *Whatcott*, *supra* note 3, [para 57](#).

⁸⁰ *Ward*, *supra* note 2, [para 63](#), citing *Whatcott*, *supra* note 3, [para 48](#).

without being treated as a pariah. [p. 220]⁸¹

49. The majority in *Ward* applied these principles and modified the test from *Whatcott* to create a test to balance the safeguard of human dignity by an individual who may face discrimination against the speaker's freedom of expression, taking into account the *Quebec Charter's* different means of protecting human dignity.
50. The Quebec tribunal was required to first determine whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting an individual or group as inciting others to vilify them or detest their humanity on the basis of a prohibited ground of discrimination.⁸² Second, the tribunal was required to ask whether a reasonable person would view the expression, considered in context, as likely to lead to discriminatory treatment of the person targeted.⁸³
51. The Court noted that "...in general, expression that appeals to an audience's reason or to emotions free of any real motivating force will be unlikely to lead to discriminatory treatment of the targeted individual or group."⁸⁴
52. In *Ward*, the first step of the test was nearly the same as in *Whatcott*. Focusing on whether the words can incite vilification and detestation accounts not only for "hate speech within the meaning of *Whatcott*", but also "expression that has the same effects on personal dignity without meeting the definition of hatred given in that case."⁸⁵
53. The second step was modified to recognize that the *means* employed by section 10 of the *Quebec Charter* for protecting human dignity are slightly different: i.e., the *Quebec Charter* aims to prevent "differential treatment that affects an individual's

⁸¹ *Ibid*, citing Waldron, *supra* note 61 at 220.

⁸² *Ward*, *supra* note 2, [para 83](#).

⁸³ *Ward*, *supra* note 2, [para 84](#).

⁸⁴ *Ward*, *supra* note 2, [para 85](#).

⁸⁵ *Ward*, *supra* note 2, [para 83](#).

social acceptance”⁸⁶ through upholding a “right to safeguard dignity” rather than preventing discriminatory effects by limiting “exposure to hatred” generally.

54. Taking into account the principles from *Whatcott*, and the test from *Ward*, the Tribunal was required to apply a similarly-modified test for determining whether the speech is discriminatory. The CCF submits the test is as follows. First, the Tribunal would ask whether a reasonable person, aware of the relevant context and circumstances, would view the Mayor’s expression as targeting an individual or group as inciting others to vilify them or detest them on the basis of a prohibited ground of discrimination. Second, the Tribunal would ask whether a reasonable person would view the expression, considered in context, as likely to lead to the discriminatory effects the legislature seeks to prevent. These are the denial of inherent dignity and equality in the provision of equal rights and opportunities, without discrimination, in services.
55. In other words, the first question the Tribunal would ask is whether a reasonable person, aware of the context and circumstances, would view the words “[t]here’s no flag being flown for the other side of the coin... there’s no flags being flown for the straight people” as *inciting others* to vilify or detest the humanity of LGBTQ people on the basis of their sexual orientations, gender identities, and/or gender expressions. The question is not whether such words *offended* LGBTQ people, or even ridiculed, belittled or affronted their dignity, because a “democratic society concerned about preserving freedom of expression must make space for that kind of discourse...”⁸⁷ The context here would include that this comment was made by a Mayor who opposed displaying a Pride flag, but who supported a proclamation with a wording he believed

⁸⁶ *Ward*, *supra* note 2, [para 83](#) (underline added).

⁸⁷ *Whatcott*, *supra* note 3, [paras 89-90](#).

would better uphold equality and balance the different viewpoints in the community.

56. Second, the Tribunal would ask whether a reasonable person would view the expression, considered in context, as likely to lead to the discriminatory effects the *Code* seeks to prevent. To determine this, the Tribunal would ask, for example: would the Mayor’s comment mean that an LGBTQ person could no longer walk down the street without fear of insult or humiliation, find the shops and exchanges open, and proceed with an implicit assurance of being able to interact with others without being treated as a pariah? Did the expression contain enough motivating force to inspire discrimination in services or did it appeal to an audience’s reason free of emotions?
57. If the answer to the question at either step is “no”, there was no discrimination. To find otherwise would require the Tribunal to ignore the principles laid down in *Whatcott* and affirmed in *Ward* for balancing expression and equality values to best respect the human dignity of the speaker and the people who may face discriminatory effects.

PART IV – ORDER REQUESTED

58. The CCF takes no position on the outcome of this judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 14th day of May, 2026

A handwritten signature in black ink, appearing to read 'JD Dehaas', is written over a horizontal line.

**Joshua David Dehaas Counsel, Canadian
Constitution Foundation**

PART V – AUTHORITIES

Schedule A

1. [*Ward v Quebec \(Commission des droits de la personne et des droits de la jeunesse\)*](#), 2021 SCC 43, [2021] 3 SCR 176
2. [*Borderland Pride v Corporation of the Township of Emo*](#), 2024 HRT0 1651
3. [*Canadian Charter of Rights and Freedoms*](#), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
4. [*Irwin Toy Ltd v Quebec \(Attorney General\)*](#), 1989 CanLII 87, [1989] 1 SCR 927
5. [*Slaight Communications Inc v Davidson*](#), 1989 CanLII 92 (SCC), [1989] 1 SCR 1038
6. [*Prud'homme v Prud'homme*](#), 2002 SCC 85 (CanLII), 2002 SCC 85
7. [*Doré v Barreau du Québec*](#), 2012 SCC 12 (CanLII), [2012] 1 SCR 395
8. [*Trinity Western University v Law Society of Upper Canada*](#), 2018 SCC 33 (CanLII), [2018] 2 SCR 453
9. [*Loyola High School v Quebec \(Attorney General\)*](#), 2015 SCC 12 (CanLII), [2015] 1 SCR 613
10. [*Christian Heritage Party of Canada et al v City of Hamilton*](#), 2018 ONSC 3690 (Div Ct)
11. [*Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories \(Education, Culture and Employment\)*](#), 2023 SCC 31
12. [*Human Rights Code*](#), RSO 1990, c H.19
13. [*Guelph and Area Right to Life v City of Guelph*](#), 2022 ONSC 43
14. [*Canada \(Minister of Citizenship and Immigration\) v Vavilov*](#), 2019 SCC 65
15. [*Imperial Oil Limited v. Haseeb*](#), 2021 ONSC 3868
16. [*McKenzie v Isla*](#), 2012 HRT0 1908
17. [*Taylor-Baptiste v Ontario Public Service Employees Union*](#), 2012 HRT0 1393
18. [*Dallaire v Les Chevaliers de Colomb*](#), 2011 HRT0 639
19. [*Whiteley v Osprey Media Publishing*](#), 2010 HRT0 2152
20. [*Taylor-Baptiste v OPSEU*](#), 2014 ONSC 2169

21. [*Taylor-Baptiste v Ontario Public Service Employees Union*](#), 2015 ONCA 495
22. [*Mariann Taylor-Baptiste, et al v Ontario Public Service Employees Union, et al*](#), 2016 CanLII 34004
23. [*Hudler v London \(City\)*](#), 1997 CanLII 24809 (ON HRT)
24. [*Oliver v Hamilton \(City\) \(No 2\)*](#), 1995 CanLII 18157 (ON HRT)
25. [*Saskatchewan \(Human Rights Commission\) v Whatcott*](#), 2013 SCC 11, [2013] 1 SCR 467
26. [*Charter of Human Rights and Freedoms*](#), CQLR, c C-12
27. Jeremy Waldron, *The Harm in Hate Speech*, Harvard University Press (2012), at 60.
28. [*Quebec \(Public Curator\) v Syndicat national des employés de l'hôpital St-Ferdinand*](#), 1996 CanLII 172 (SCC), [1996] 3 SCR 211

Schedule B

Human Rights Code, R.S.O. 1990, CHAPTER H.19

Preamble

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I

FREEDOM FROM DISCRIMINATION

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. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1); 2012, c. 7, s. 1.

CONSTITUTION ACT, 1982

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- **(a)** freedom of conscience and religion;
- **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- **(c)** freedom of peaceful assembly; and
- **(d)** freedom of association.

Charter of Human Rights and Freedoms, CQLR c C-12

PART I

HUMAN RIGHTS AND FREEDOMS

CHAPTER I

FUNDAMENTAL FREEDOMS AND RIGHTS

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

CHAPTER I.1

RIGHT TO EQUAL RECOGNITION AND EXERCISE OF RIGHTS AND FREEDOMS

1982, c. 61, s. 2.

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

THE CORPORATION OF THE TOWNSHIP OF EMO
and HAROLD MCQUAKER

- and -

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

Applicants

Respondents

IN THE ONTARIO SUPERIOR COURT OF JUSTICE (DIVISIONAL COURT)

FACTUM OF THE INTERVENOR

CANADIAN CONSTITUTION FOUNDATION
6025 - 12 ST SE, SUITE 215
CALGARY, AB T2H 2K1

Joshua David Dehaas

LSO # 868881

Tel:

647-385-6064

E-mail: jdehaas@theccf.ca

Lawyer for the Intervenor Canadian Constitution
Foundation