

**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 APPLICANT
THE CORPORATION OF THE TOWNSHIP OF EMO**

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**FACTUM OF THE APPLICANT
THE CORPORATION OF THE TOWNSHIP OF EMO**

PART I – OVERVIEW

1. This is an application for judicial review of the decision and the related orders of the Ontario Human Rights Tribunal of Ontario (“HRTO”), dated November 20, 2024, (the “Decision”) that were made against the Applicants and a non-party, being Crystal Gray, the Township’s current Chief Administrative Officer (“CAO”), respecting the human rights application commenced by Borderland Pride and others under Tribunal File Number 2020-41858-I.
2. The issues involve important matters of law and statutory interpretation, most of which are beyond the general expertise of the Tribunal, such as matters involving municipal law and the interpretation and application of municipal law

and other statutes. The Decision has implications beyond human rights law and is a matter of importance to persons beyond the parties to this application. The advancement of the law in the public interest would benefit from the Divisional Court making determinations on the issues in this application. These issues include:

- i. the HRTO adjudicator's determination that the Township discriminated against Borderland Pride solely based on what she described as a "remark" made by one of its five councillors after a vote on a Pride Proclamation had taken place;
- ii. whether the HRTO adjudicator did not consider important and relevant municipal law principles and legislation, including section 245 of the *Municipal Act*, S.O. 2001, c. 25 ("*Municipal Act, 2001*") that governs voting;
- iii. the interpretation of section 448 of the *Municipal Act, 2001*, and its application to the facts of this case, and whether the HRTO adjudicator incorrectly or unreasonably narrowed the protection afforded to municipal councillors and employees generally under this provision; particularly in the context of section 224 of the *Municipal Act, 2001* and other important legal issues and principles, including matters of absolute or qualified privilege afforded to councillors speaking at Council Meetings and freedom of

expression rights and protections under the *Canadian Charter of Rights and Freedoms*;

- iv. the reasonableness of the HRTO adjudicator's determination that the Mayor was disentitled to statutory immunity under section 448 of the *Municipal Act, 2001* after determining that it serves an important public purpose not only to individual councillors but to the functioning of municipal government generally, solely based on one comment made by the Mayor at a Council meeting after a vote on a matter had concluded, and without consideration of his other statements and conduct at the meeting as a whole and his privilege and expression rights;
- v. the HRTO adjudicator's interpretation of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*") and determination that Borderland Pride, a corporation, has human rights in its own right under the *Code*, and is entitled to receive compensation for injury to its dignity, feelings and self respect; and matters of procedural fairness in regard to how she determined this issue;
- vi. procedural fairness and reasonableness issues respecting the HRTO adjudicator's Order made without notice solely against one employee, namely the Township's Chief Administrative Officer, a non-party who received no notice that any Orders may be made

against her; and who was ordered to take human rights training that she was not given an opportunity to inform the Tribunal that she had already taken that was the same or substantially similar; such Order being based on a statement made by the Mayor at a Council meeting before the CAO was employed by the Township;

- vii. the reasonableness and fairness of the HRTO adjudicator's determination that the above-noted comment made by the Township's Mayor was, without considering other statements made by him at the meeting or other mitigating factors, so egregious that he was disentitled to statutory immunity and must pay Borderland Pride damages in an amount that is more than half of how much the Mayor is paid annually by the Township, but then determining that a serious breach of the HRTO Rules on confidentiality and the confidentiality rights of the Mayor and the Township by a director of Borderland Pride, a person who she described as "an experienced lawyer", was, though disappointing, not one that needed to be sanctioned at all.

Reference: App. Record, Vol 1, Corrected Tribunal Reasons, pp. 0030-0031; Vol. 5, RODP, Tabs 1-7, pp. 1571-1586

PART II – STATEMENT OF FACTS

3. The Applicants consist of The Corporation of the Township of Emo (the "Township"), as well as its Mayor, Harold McQuaker (also referred to as the

“Mayor”). 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 council is comprised of one Mayor and four councillors.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0917

4. 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. Section 448 of the *Municipal Act, 2001* plays an important role in achieving the objectives of section 224 - a fear of personal lawsuits for considering public issues would hinder the purpose of s. 224.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0919

5. A municipal council acts as a body and it is a well-settled general principle of municipal law that the Township is not responsible for the acts, statements or views of council's individual members.
6. The financial remuneration paid to councillors is low; the abuse taken (especially in a world of electronic communication) is high; and the risks and burdens to themselves and their families, financially and otherwise, for agreeing to serve their communities are ever increasing. A number of persons are acclaimed to council positions in the Rainy River District - this includes the Township Mayor in the last election. As the HRTO adjudicator noted at paragraph 59 of her Reasons, “without this [section 448 statutory immunity] protection, few would be willing to run for municipal council.”

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0919-0920;
Vol 1, Corrected Tribunal Reasons, pp. 0039

7. With respect to the Township, the Mayor receives \$9,000.00 per annum for serving as mayor, and the other councillors receive \$6,000.00 per annum to serve as councillors. The monetary amount that was sought by the Applicants from the individual councillors in their human rights application was more than half of what the councillors make for serving as councillors for their entire four year term on council.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0920; Vol 5, RODP, pp. 1519

Borderland Pride's Human Rights Application

8. The events that led to Borderland Pride commencing the Human Rights Application took place in May of 2020; following Borderland Pride's request for a proclamation resolution in the exact wording drafted by Borderland Pride.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0925-0928
Exhibit "F" pp. 0956 - 0958

9. At the May 12, 2020 council meeting, preliminary discussions took place regarding how to deal with the matter procedurally, including discussions about what to do if Council preferred to make a proclamation resolution which was supportive of Borderland Pride, but not in the exact wording provided to it by Borderland Pride. Though not mentioned in the HRTTO adjudicator's Reasons, the Mayor agreed at this meeting that he would consider making a

proclamation supportive of Borderland Pride but in different wording than was presented by Borderland Pride.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0926-0928
Exhibits "G", "H" pp. 0960-0968

10. Two of the Township's councillors stated that they wanted to pass a resolution in the exact wording presented to Council by Borderland Pride and they put a motion on the floor in that respect. Of the remaining three councillors, two, including the Mayor, stated that they were amenable to making a supportive proclamation but in wording similar to the one made the year before (2019), and the third stated that he did not want to proceed with consideration of this matter at this Council Meeting as he stated that he first needed further information and thought it unwise to proceed without such further information. However, the two councillors that moved and seconded the initial motion noted that there was no motion on the floor to make a proclamation resolution in the new wording being suggested and that their proposed resolution needed to be considered first. Council then voted on the resolution for a proclamation exactly in the wording drafted by Borderland Pride and the motion was lost by a 3-2 vote.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0926-0928
Exhibits "G", "H", "T" pp. 0960-0968, 1108

11. After the vote, the Mayor expressed the view that the flying of the Pride flag was not something that he thought needed to occur. With respect to the flag flying request, he made the comments that are central to this human rights application and which are referred to in the HRTO's decision, namely: "There's

no flag being flown for the other side of the coin...there's no flags being flown for the straight people."

Reference: 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

12. The Mayor's expression of the view noted above is the reason for the HRTO adjudicator's determination of liability of both the Mayor and the Township and for all of the orders that she made. The HRTO adjudicator determined that none of the other councillors discriminated against Borderland Pride but that such viewpoint expressed by the Mayor was so egregious that not only was the Mayor denied his statutory immunity, but the Township was also found to have discriminated against Borderland Pride.

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

13. It is further noted that at the Council Meeting, also after the vote, when an alternative proclamation in support of Borderland Pride was again suggested and read out by Councillor Toles, which, among other things, proclaimed June as Pride Month, the Mayor responded by saying "nicely put" [approx. 1:02:14 of the audio of the meeting]. This statement was not considered by the HRTO adjudicator.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp. 0928 Exhibit "H" pp. 0968

14. The meeting occurred in the early stages of the COVID pandemic. The use of the Zoom platform for meetings was very new in May of 2020 and issues respecting matters of order and procedure are clearly evident by simply listening to the audio of the meeting.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp 0928

15. On May 16, 2020, a director of Borderland Pride and a Respondent on this application for judicial review, who is a lawyer as well as a former municipal councillor in the neighbouring Town of Fort Frances, being the largest municipality in the Rainy River District, sent an email to the Township. In this email, it was asserted that Council's decision was a "settled matter" and that the Township must now treat the matter as a reconsideration matter, which would make it harder for the Township to pass a Pride proclamation.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp 0929-0930, Exhibits "J" "K" pp. 0973-0987

16. Shortly thereafter, on May 21, 2020, a request that Council reconsider its decision was made by Borderland Pride by way of a letter. In this letter, it was stated by Borderland Pride that passing the requested Pride proclamation alone was no longer an option to resolve the matter. Now to resolve the matter, all of the following "corrective actions" would be required to satisfy Borderland Pride:

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

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp 0930-0931, Exhibit "L" pp. 0989

17. The communications in the above two paragraphs from Borderland Pride were not considered by the HRT0 adjudicator in her Reasons.

18. In order to deal with the matter as a reconsideration matter following the process as asserted to it by the above-noted human rights Applicant, four of the five Council Members would have to agree to reconsider the matter. On May 26, 2020, at its Council meeting, Council decided not to reconsider the matter and Borderland Pride subsequently commenced the human rights application that is the subject of this judicial review.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp 0929-0931, Exhibits "K", "L", "N" pp. 0976 – 1057, 1056

19. On September 13, 2022, the Township passed a Declaration of Equality resolution which, among other things expressly acknowledged the LGBTQ2+ community and the valuable contributions made by this community in the Township of Emo. This Declaration was not considered by the HRT0 adjudicator in the making of her Reasons or in the making of her Orders.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray, pp 0932-0933, Exhibits "P", "Q", pp. 1077-1089

PART III - ISSUES

20. The issues in this proceeding can be broken down into five questions:

i. What is the appropriate standard of review?

- ii. did the HRTO adjudicator err by incorrectly and unreasonably interpreting important municipal law principles and legislation respecting the HRTO adjudicator's determination that the Township as a whole discriminated against Borderland Pride, based on a view that was expressed by a single member of council after a vote took place; and when the HRTO adjudicator found that none of the other four councillors discriminated against the HRTO applicants when considering or voting on the matter?;
- iii. did the HRTO adjudicator incorrectly and unreasonably interpret and apply the legal test to determine bad faith and immunity entitlement under section 448 of the *Municipal Act, 2001*; and in doing so, did the HRTO adjudicator fail to consider other important legal issues, such as matters of absolute or qualified privilege afforded to councillors together with freedom of expression rights and protections under the *Canadian Charter of Rights and Freedoms*?;
- iv. did the HRTO adjudicator act unfairly and unreasonably and err in her determination that Borderland Pride, a corporation, may bring a human rights application in its own right under the *Human Rights Code*, and is entitled to receive compensation for injury to its

dignity, feelings and self respect?; and

- v. did the HRTO adjudicator deny the Township's Chief Administrative Officer, a non-party, procedural fairness and act unreasonably in the making of an order directly against her?

Issue #1: Standard of Review

21. The Township submits that the appropriate standard of review is the standard of correctness on the interpretation of municipal legislation and other municipal law issues and on the interpretation of the definition of "person" in the *Human Rights Code* and the *Legislation Act, 2006*. These are general questions of law of central importance to the legal system as a whole and the functioning of municipal government and are questions where courts and administrative bodies have concurrent first instance jurisdiction over the legal issues involved. These questions must be answered the same way because the answers have implications across the justice system. The correctness standard is also applicable to all constitutional questions raised in this proceeding, including questions involving freedom of expression rights.
22. With respect to the other issues, the Township submits that the appropriate standard of review is the reasonableness standard as established in the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]. To be a reasonable decision, a decision must be rational and logical and must be justified in relation to the

facts and law that constrain the decision maker. Failures in these regards may lead to a reviewing court concluding that a decision must be set aside.

Reference: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] (CanLII) paras 85, 102
<<https://canlii.ca/t/j46kb>>

23. In *Vavilov*, the Supreme Court of Canada stated that a reviewing court will exercise deference when a decision is made within the Tribunal's area of expertise, and has specialized knowledge and expertise, as demonstrated by their reasons. However, it is submitted that deference is not applicable in a circumstance where an HRTO Tribunal is interpreting and applying municipal law or any other laws that are outside of any specified knowledge or expertise that it may have. This is especially so respecting decisions which have implications beyond human rights law.

Reference: *Vavilov* at paras 93, 105-109 <<https://canlii.ca/t/j46kb>>

24. It is further noted that in the Ontario Court of Appeal Decisions of *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 and *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, the Court conducted its own analysis and did not defer to the HRTO's legal interpretation of s. 45.8 of the *Code* in those two cases.

Reference: *Imperial Oil Limited v. Haseeb*, 2023 ONCA 364 (CanLII), <<https://canlii.ca/t/uf00c>> 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

Issue #2: Is the Tribunal's Decision that the Township Discriminated Against Borderland Pride Incorrect and Unreasonable?

25. In her Decision, the HRT0 adjudicator dismissed the application brought against Councillors' Harrold Boven and Warren Toles. This dismissal meant that, of the Township's five Council Members, only Mayor Harold McQuaker was found by her to have discriminated against Borderland Pride when he voted against the requested proclamation. The HRT0 adjudicator's reasoning for finding that the Township also discriminated against Borderland Pride is found in paragraphs 49 and 53 of its Decision, which states:

[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 the 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.** [emphasis added]

...

[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*. [emphasis added]

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

26. It is respectfully submitted that such reasoning is incorrect and unreasonable. In finding that the Township was also liable for the statement, the HRT0 adjudicator determined that because the vote on the proclamation resolution was a 3-2 vote, the Mayor's vote, which she determined was tainted by discrimination, determined the outcome. Respectfully, it did not.

27. The HRT0 adjudicator determined that none of the other four councillors discriminated against Borderland Pride in their voting and consideration of the matter and, if the Mayor's vote was discounted or had the Mayor abstained from voting, the outcome of the vote would be 2-2, which, pursuant to section 245 of the *Municipal Act, 2001* and the Township's Procedure By-law, would mean that the resolution would still not be carried. Even if one accepted that there were grounds to discount the Mayor's vote, discounting his vote does not in any reasonable or logical way support a finding of a breach of the *Human Rights Code* on the part of the Township.
28. More particularly, 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." 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."
- Reference:** Section 245 of the *Municipal Act, 2001*; App. Record, Vol.4, Wit. Statement of C. Gray, Exhibit "K" p. 0985
29. Relative to the HRT0 adjudicator's determination of Township liability for the Mayor's expression of his viewpoint, the Township also relies on the Ontario Superior Court's decision of *Toronto Taxi Alliance Inc. v. City of Toronto*, [2015 ONSC 685](#), in which the Court outlined the approach taken in situations such as this:

Moreover, to find that Council as a whole acted in bad faith on the basis of a few Councillors' words about possible legal challenges would involve

taking these comments as reflecting the view of the entire Council. The courts have been clear that this is an **improper approach**: “A court should not be quick to find bad faith because members of a municipal council ... express strong views” against a project. See: *Equity Waste Management*, at para 69 [emphasis added]

Reference: *Toronto Taxi Alliance Inc. v. City of Toronto*, 2015 ONSC 685, para 108 <<https://canlii.ca/t/gg40t>>

Issue #3: Is the Tribunal’s Decision to Deny the Mayor Statutory Immunity Incorrect and Unreasonable?

30. On this issue, the HRTO adjudicator:

a) stated that:

“section 448(1) serves an important public policy purpose. It allows municipal councillors to consider matters that come before them and debate matters in council chambers without putting their own assets at risk. Without this protection, few would be willing to run for municipal council. (para 59);

b) considered case law in which courts have dealt with what constitutes “bad faith” by a municipality but did not consider case law as to what constitutes bad faith by an individual with statutory immunity protection; (paras 61, 62 and 63)

c) applied case law that states that to constitute bad faith more than unreasonable conduct is required (para 61); and determined that municipal councillors have the right to be wrong; (para 63);

d) determined that there may be circumstances in which a breach of the *Code* may occur in good faith and not disentitle a councillor to indemnity but that this was not such a case; (para 65) and

- e) found that the Mayor acted in bad faith, based on a “demonstrated lack of understanding of the importance to Borderland Pride and other members of the community of the Pride Flag” when he made the after the vote statement referred to earlier in this factum [emphasis added]; (para 51)

Reference: App. Record, Vol 1, Corrected Tribunal Reasons, pp 0039, 0040, 0037

31. It is submitted that this decision is incorrect and unreasonable and, if permitted to stand, substantially lowers the protection afforded by section 448, which is important not only to individual councillors, but also to municipalities which desire to see candidates from all walks of life and of all degrees of financial wealth run for office and which desire to see councillors make decisions on sometimes difficult publicly charged and controversial issues without fear of financial harm, which in some cases, could be financial ruin.
32. The decision in the within human rights application departs from decisions made in three other HRTO matters. In these three other HRTO decisions, the HRTO adjudicator applied the immunity provision in issue to protect the person entitled to such statutory immunity and, in fact, summarily dismissed the related human rights applications without the need for hearings, with it noted in the *J. B. v. Catholic Children’s Aid Society of Toronto* case cited below that such statutory immunity provisions support an important policy purpose.

Reference: *Compagnion v. Misk-Evans*, 2019 HRTO 521 (CanLII), <<https://canlii.ca/t/hz9bk>>, at paras 8, 9, 10; *J. B. v. Catholic Children's Aid Society of Toronto*, 2009 HRTO 2098 (CanLII), <<https://canlii.ca/t/2755g>>, at paras 49, 50; *Saxon v. Amherstburg (Town)*, 2011 HRTO 960 (CanLII), <https://canlii.ca/t/flj4f> at para 6, 7

33. Section 448 of the *Municipal Act, 2001* exists not only to protect municipal councillors from financial hardship or ruin, but to ensure that, rightly or for wrongly, they make decisions that they believe are in the best interest of the community, free from outside pressure.

Reference: App. Record, Vol 2, The Township's Form 2 Response, pp 0132

34. Municipal Councillors have a special dependence on this statutory immunity, which has been, and will continue to be, applied in various types of legal challenges and claims; including claims brought alleging municipal by-laws were passed in bad faith; defamation claims brought against councillors individually as well as council as a whole; and misfeasance in public office claims.

Reference: *Hotspot Auto Parts v. Thompson*, 2022 ONSC 3637 (CanLII), <<https://canlii.ca/t/jpvhv>> at paras 37, 48-51; *McLaughlin v. Maynard*, 2018 ONSC 3605 (CanLII), <<https://canlii.ca/t/hsqbm>> at paras 23 -26; *1631651 Ontario Inc v. City of Toronto*, 2022 ONSC 4197 (CanLII), <<https://canlii.ca/t/jqzlb>> at paras 112-116, 121-134

35. In cases alleging bad faith in the context of municipal by-laws being passed in bad faith, as noted in an Ontario Superior Court decision of *Middlesex-London H. U. and Middlesex County v. I.F. Propco*, 2018 ONSC 3229: "[T]he standard to establish bad faith on the part of a municipal council is high, because there is a presumption of good faith that must be overcome."

Reference: *Middlesex-London H. U. and Middlesex County v. I.F. Propco*, 2018 ONSC 3229 (CanLII), <<https://canlii.ca/t/hs6kp>> at paras 116-118;

Kuttschrutter v. Corporation of the Town of St Marys et al., 2023 ONSC 4543 (CanLII), <https://canlii.ca/t/zjrm> at para 14;

36. In regard to determining when one is acting in bad faith, the courts have found 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.”

Reference: *Seguin (Township) v. Hamer*, 2014 ONCA 108 (CanLII), <https://canlii.ca/t/q3156> at para 5;

37. The Township submits that while the HRTO adjudicator considered case law respecting the high threshold of what constitutes bad faith when a party being accused of it is the Municipality itself, which the Township accepts merits consideration, the HRTO adjudicator should have also considered what constitutes bad faith in the context of an individual councillor essentially looking for insurance coverage, which it is submitted has a very high threshold, especially when considered in the context of a statutory immunity provision.
38. Relative to the above, though not itself a human rights case, it is submitted that, the following definition at paragraph 13 of the *Barrett v. Watson*, 2024 ONSC 1118 <https://canlii.ca/t/k30zh> decision (which was presented to the HRTO adjudicator in the within application) is of guidance in cases involving the acts of an individual:

[13] There is a difference between bad faith and unreasonable behaviour. Bad faith is a high threshold. It is not synonymous with bad judgment or negligence; rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation: see: *Scipione v Scipione*, 2015 ONSC 5982, at para. 96

39. It is submitted that it was incorrect and unreasonable for the HRTO adjudicator to correctly state in the within human rights application that:

... section 448(1) serves an important public policy purpose. It allows municipal councillors to consider matters that come before them and debate matters in council chambers without putting their own assets at risk. Without this protection, few would be willing to run for municipal council. (para 59)

and then proceed to disentitle the Mayor to indemnity solely based on one remark made at a Zoom council meeting that the HRTO adjudicator determined was made based on a “lack of understanding”.

Reference: App. Record, Vol 1, Corrected Tribunal Reasons, pp 0037, 0039

40. In the within human rights application, the HRTO adjudicator did not provide reasons on how the presumption of good faith referred to above in *Middlesex County* was overcome, which is especially important in a case where she correctly determined that not all breaches of the *Code* constitute bad faith and when the conduct that she determined constituted bad faith conduct was not found to have been made maliciously, an important factor referred to in the case of *1631651 Ontario Inc. v. City of Toronto* (para. 133) noted above, but rather was based on “a lack of understanding”.
41. Further, the HRTO adjudicator did not consider the Mayor’s statement at the subject council meeting that he would consider passing a supportive Pride resolution but in different wording. In addition, the HRTO adjudicator, despite receiving submissions in this regard, gave no consideration to the protections

afforded to municipal councillors, such as the defence of qualified privilege, as well as freedom of expression rights.

42. Qualified privilege serves an importance public policy purpose for municipal officials. In the Ontario Court of Appeal decision *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96 the court summarized and applied the basic principles of the defence of qualified privilege, as set out by the Supreme Court of Canada in *Bent v. Platnick*, 2020 SCC 23 at paras 121-122.

Reference: *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96 (CanLII) <https://canlii.ca/t/vfth> at paras 55, 56, 58; *Bent v. Platnick*, 2020 SCC 23 (CanLII) <https://canlii.ca/t/j9kiw> at paras 121-122.

43. The Township further relies on the determination of the Ontario Superior Court in *Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6528 at para 3 that:

“...the *Human Rights Code* does not prohibit public discussion of anything”.

Reference: *Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6528 <https://canlii.ca/t/k707v>; aff'd in 2024 ONCA 811 (CanLII), <https://canlii.ca/t/k7nq6>

Issue #4: Is the Determination that Corporations, including Borderland Pride, Have Human Rights in their own Right Incorrect and Unreasonable?

Procedural Fairness Denied in Consideration of this Issue

44. During a prehearing videoconference on October 23, 2023, the HRTO adjudicator, at the start of the conference, immediately denied the request for summary dismissal of the human rights applications of the corporate applicants and she refused to hear any submissions on the subject. Instead, at

the outset of the video conference, the HRTO adjudicator referred the parties to the case of *Pride Hamilton v. Hamilton Police Services Board*, 2022 HRTO 1427, a case determined by her, which, among other things, held that a corporation was permitted to bring a human rights complaint. The HRTO adjudicator provided no written reasons for such decision in the Case Assessment Direction, dated November 2, 2023 that she made following this prehearing conference.

Reference: App. Record, Vol 2, Amended Record of Proceedings, pp. 0252-0254

45. It was not until the commencement of the merits hearing in June 2024, after the Township and its Mayor raised procedural fairness concerns when she initially again refused to hear submissions on the issue, that the HRTO adjudicator reconsidered and decided to allow the parties to make submissions on whether a corporation has rights under the *Human Rights Code*. She then heard those submissions and then subsequently confirmed her original decision.

Reference: App. Record, Vol 1, Corrected Tribunal Reasons, pp 0028

The Interpretation of the Statute is Incorrect and Unreasonable

46. In interpreting legislation, the modern approach governs, namely that the words of an Act are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Reference: *Sapershteyn et al v. 1821317 Ontario Limited et al*, 2023 ONSC 5977 <https://canlii.ca/t/k0vxk> at para 20

47. The HRT0 adjudicator found that Borderland Pride, a corporation, could bring a human rights application in its own right, in addition to advancing an application under s. 34(5) of the *Code* as a representative of others, because she found that Borderland Pride has a separate legal personality from its members, officers or directors (para 14) and is identified by the enumerated grounds of sexual orientation, gender identity and gender expression of the sexual minorities that it represents and supports (para 34) and because:

... 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. (para 10)

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

48. It is respectfully submitted that such interpretation is incorrect and unreasonable for a number of reasons. The leading authority relied upon by the HRT0 adjudicator (*Brockie v. Brillinger (No. 2)*, 2002 CanLII 63866 [*Brockie*]) was decided in 2002, before the *Human Rights Code* was amended in 2006 to add section 34(5). More particularly, in 2006, the *Code* was amended by adding section 34(5), demonstrating an intention on the part of the Legislature to provide a corporation with a limited avenue to commence an application on behalf of a "another person" and not in its own right. By way of this amendment, the Legislature set out the way in which persons, including corporations, could advance applications on behalf of members of the human family with rights under Part 1 of the *Code*. For reference and review purposes, it is noted that subsection 34(5) was applied by the Tribunal in the

case of *Association of Ontario Midwives v. Ontario (Health and Long-Term Care)*, 2020 HRT0 165 <https://canlii.ca/t/j5f8b> at paras 74-79.

49. For the above and other reasons, which will be elaborated on, there was no need for the Legislature to amend the definition of “person”. Read harmoniously, section 34 sets out the complete code for making applications. Pursuant to subsection 34(1) “a person that believes that any of his or her rights under Part I have been infringed may apply to the Tribunal for an Order under section 45.2” [emphasis added]. The use of the words “his or her”, together with a reading of the Preamble and Part 1, make it clear that this section does not apply to corporations.

50. As amended post *Brockie*, subsections 34(5) and (6) make it clear that persons beyond individuals can bring applications on behalf of persons with rights under Part 1 of the *Code* and may participate in proceedings, provided the requirements of these sections are met (which did not occur in the within application). Paragraph 34(5)(a) also makes clear that not all “persons” have rights to bring human rights applications. This paragraph only permits an application to be made on behalf of another person if the other person would have been entitled to bring such application on such person’s own. More particularly, these provisions provide as follows:

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 if the other person,

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

(b) consents to the application.

(6) If a **person or organization** makes an application on behalf of another person, the person or organization may participate in the proceeding in accordance with the Tribunal rules. [emphasis added].

51. In addition to the above submissions, it is clear from a reading of the *Code* as a whole that not all references to a “person” in the *Code* are intended to apply to a corporation and it is noted that section 47 of the *Legislation Act, 2006* makes clear that the definition of person in section 87 of the *Legislation Act, 2006* (which is referred to in section 46 of the *Code*) is not intended to apply in all cases. More particularly, such definition does not apply:

a) “where a contrary intention appears”; or (b) “its application would give to a term or provision a meaning that is inconsistent with the context”.

52. The following are examples from the *Code* where the use of the word “person” in a section was not intended to include a corporation:

a) the Preamble, among other things, references the “equal and inalienable rights of all members of the human family”;

b) it is clear from a reading of Part I that rights of a persons in that Part were only intended to refer to the rights of humans; subsection 34(1) expressly states that an application may be brought for a Part 1 *Code* infringement if a person believes that “his or her” rights have been infringed;

- c) subsection 18.1 references the solemnization of marriage by a person;
- d) subsection 20(4) deals with smoking by young persons;
- e) the shared accommodation provision in Part 1 may be applicable where the person owns or “his or her” family resides in the dwelling;
- f) subsection 27(3) of the *Code* provides that “every person appointed to the Commission shall have knowledge, experience or training with respect to human rights law and issues”; and
- g) pursuant to subsection 44(1), “at the request of a party to an application under this Part, the Tribunal may appoint a person to conduct an inquiry under this section ...”

53. It is submitted that the specific purpose and context of each provision in the *Code* needs to be considered in order to determine when reference to a “person” is intended to apply to a corporation and when it was not so intended. A definition of person that includes a corporation makes sense in some sections of the *Code*, including when referencing against whom human rights applications may be brought, but not others.

54. It is also noted that section 46 of the *Code* provides an expanded definition of person to include not only persons as defined in Part VI of the *Legislation Act*,

2006, but also includes many others, including a municipality and an employer's association, neither of which one would see as having the right to bring human rights applications in their own right for Part 1 Code infringements or as being eligible for appointment to conduct an HRTO Inquiry.

Reference: *Human Rights Code* at Section 46

Issue #5: Was the Township's Chief Administrative Officer denied procedural fairness from the Tribunal in its Decision

55. The principles regarding the duty of procedural fairness are well settled and are set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at paras 19-28, and summarized in the Ontario Court of Appeal decision of *Clifford v Ontario (Attorney General)*, 2009 ONCA 670.

Reference: *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 (CanLII), <https://canlii.ca/t/25qjr> at paras 20, 21

56. The HRTO adjudicator made an Order without notice solely against one employee, namely the Township's Chief Administrative Officer, a non-party who received no notice that any Orders may be made against her. More particularly, she was ordered to take human rights training and was not given an opportunity to inform the Tribunal that she had already taken the same or similar human rights training, and she was ordered to do so solely based on a statement made by the Mayor at a Council meeting that took place before she was employed by the Township. This Order against her was also made notwithstanding that the human rights applicants expressly sought an order in paragraph 46(b) of their application which would require the "individual

respondents” to take human rights training. The CAO, Crystal Gray, was not an individual respondent.

Reference: App. Record, Vol.4, Wit. Statement of C. Gray pp 0915-0916; Vol.2, ROP, Tab 4A, Form 1 pp. 0098;

57. This is unfair and unreasonable and was made without regard to Crystal Gray’s rights or what impact a decision in a highly public case such as this may have on her and her reputation. It is submitted that this Order should be set aside in the interests of Crystal Gray, personally, and in the public interest. It is not in the public interest to single out one non-party employee who was not involved or associated with the alleged discrimination and subject her to the obligations and consequences of an Order.
58. It is noted that other Tribunal Decisions that have ordered public interest training have done so by ordering whole departments to take it, not singling out one non-party individual; such cases include: *Nakogee v. The Corporation of the City of North Bay o/a North Bay Transit*, 2024 HRTO 1838), <https://canlii.ca/t/k8gsq>, at paras 76, 80; *Butler-Henderson v. 2363647 Ontario Inc. o/a Pentagon Bar & Grill*, 2020 HRTO 686, <https://canlii.ca/t/j960w>, at paras 32, 41. Additionally, in a case where a single individual is referenced, such as in *Kreps v. AHMIC Maintenance & Storage Ltd.*, 2024 HRTO 214, the Tribunal does so because the individual respondent was a party to the Application. In the within application, the Township's CAO was neither a party

to the application nor an employee of the Township at the material time which led to the bringing of the Human Rights Application.

Reference: *Kreps v. AHMIC Maintenance & Storage Ltd.*, 2024 HRTO 214 (CanLII), <https://canlii.ca/t/k300t> at paras 2, 152, 157

PART IV – REQUESTED ORDER

59. The Applicant Township 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. 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. 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
- v. such further and other relief as counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATE: March 27, 2026



Allan D. McKitrick

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The Corporation of the
Township of Emo

LAWYER'S CERTIFICATE

I, Allan D. McKitrick, lawyer for the Applicant Township, certify that:

- a) I estimate that 1 hour will be needed for the Applicant Township'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 27, 2026



Allan D. McKitrick

SCHEDULE “A”

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, <https://canlii.ca/t/j46kb>

Imperial Oil Limited v. Haseeb, 2023 ONCA 364 (CanLII), <https://canlii.ca/t/jx9x2>

Ontario (Health) v. Association of Ontario Midwives, 2022 ONCA 458 (CanLII), <https://canlii.ca/t/jprf6>

Toronto Taxi Alliance Inc. v. City of Toronto, 2015 ONSC 685 (CanLII), <https://canlii.ca/t/gg40t>

Compagnion v. Misek-Evans, 2019 HRT0 521 (CanLII), <https://canlii.ca/t/hz9bk>

J. B. v. Catholic Children’s Aid Society of Toronto, 2009 HRT0 2098 (CanLII), <https://canlii.ca/t/2755g>

Saxon v. Amherstburg (Town), 2011 HRT0 960 (CanLII), <https://canlii.ca/t/flj4f>

Hotspot Auto Parts v. Thompson, 2022 ONSC 3637 (CanLII), <https://canlii.ca/t/jpvhv>

McLaughlin v. Maynard, 2018 ONSC 3605 (CanLII), <https://canlii.ca/t/hsgbm>

1631651 Ontario Inc v. City of Toronto, 2022 ONSC 4197 (CanLII), <https://canlii.ca/t/jqzlb>

Middlesex-London H. U. and Middlesex County v. I.F. Propco, 2018 ONSC 3229 (CanLII), <https://canlii.ca/t/hs6kp>

Kuttschutter v. Corporation of the Town of St Marys et al., 2023 ONSC 4543 (CanLII), <https://canlii.ca/t/zjimm>

Seguin (Township) v. Hamer, 2014 ONCA 108 (CanLII), <https://canlii.ca/t/g3156>

Barrett v. Watson, 2024 ONSC 1118 (CanLII), <https://canlii.ca/t/k30zh>

Thatcher-Craig v. Clearview (Township), 2023 ONCA 96 (CanLII), <https://canlii.ca/t/jvfth>

Bent v. Platnick, 2020 SCC 23 (CanLII), [2020] 2 SCR 645, <https://canlii.ca/t/j9kjlw>

Burjoski v. Waterloo Region District School Board, 2023 ONSC 6528 (CanLII), <https://canlii.ca/t/k707v>

Burjoski v. Waterloo Region District School Board, 2024 ONCA 811 (CanLII),
<https://canlii.ca/t/k7nq6>

Pride Hamilton v. Hamilton Police Services Board, 2022 HRT0 1427 (CanLII),
<https://canlii.ca/t/jtfqx>

Sapershteyn et al v. 1821317 Ontario Limited et al, 2023 ONSC 5977
<https://canlii.ca/t/k0vxk>

Brockie v. Brillinger (No. 2), 2002 CanLII 63866 (ON SCDC), <https://canlii.ca/t/q9p1z>

Association of Ontario Midwives v. Ontario (Health and Long-Term Care), 2020 HRT0 165
 (CanLII), <https://canlii.ca/t/j5f8b>

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC),
 [1999] 2 SCR 817, <https://canlii.ca/t/1fqjk>

Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670 (CanLII),
<https://canlii.ca/t/25qjr>

Nakogee v. The Corporation of the City of North Bay o/a North Bay Transit, 2024 HRT0
 1838 (CanLII), <https://canlii.ca/t/k8qsg>

Butler-Henderson v. 2363647 Ontario Inc. o/a Pentagon Bar & Grill, 2020 HRT0 686
 (CanLII), <https://canlii.ca/t/j960w>

Kreps v. AHMIC Maintenance & Storage Ltd., 2024 HRT0 214 (CanLII),
<https://canlii.ca/t/k300t>

SCHEDULE “B”

Municipal Act, 2001

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.

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

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.

The Corporation of the Township of Emo - By-law No. 2020-06, Being a by-law to amend By-law No. 2019-04, the Procedural By-law

15.0 Motions/Resolutions

11. A tie vote shall be declared a lost vote.

Legislation Act, 2006

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.

Definitions

87 In every Act and regulation,

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

Human Rights Code, R.S.O. 1990

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:

18.1 (1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20.1 or section 20.3 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to solemnize the marriage, allow the sacred place to be used or otherwise assist would be contrary to,

(a) the person's religious beliefs; or

(b) the doctrines, rites, usages or customs of the religious body to which the person belongs.

Young persons and certain products

20(4) The right under section 1 to equal treatment with respect to goods without discrimination because of age is not infringed by the provisions of the *Smoke-Free Ontario Act, 2017* and the regulations under it relating to selling or supplying anything to which that Act applies to persons who are, or who appear to be, under the age of 19 years or 25 years, as the case may be.

Appointment

27(3) Every person appointed to the Commission shall have knowledge, experience or training with respect to human rights law and issues.

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.

Application on behalf of another

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 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.

Participation in proceedings

34(6) If a person or organization makes an application on behalf of another person, the person or organization may participate in the proceeding in accordance with the Tribunal rules.

Tribunal inquiry

44 (1) At the request of a party to an application under this Part, the Tribunal may appoint a person to conduct an inquiry under this section if the Tribunal is satisfied that,

- (a) an inquiry is required in order to obtain evidence;
- (b) the evidence obtained may assist in achieving a fair, just and expeditious resolution of the merits of the application; and
- (c) it is appropriate to do so in the circumstances.

Definitions, general

46 In this Act,

“person” in addition to the extended meaning given it by Part VI (Interpretation) of the *Legislation Act, 2006*, includes an employment agency, an employers’ organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality, a board of police commissioners established under the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, and a police service board established under the *Community Safety and Policing Act, 2019*; (“personne”)

Human Rights Tribunal of Ontario Rules of Procedure

Confidentiality of Documents Disclosed Under These Rules

3.3 Parties and their representatives may not use documents obtained under these Rules for any purpose other than in the proceeding before the Tribunal.

**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,
HARROLD BOVEN, and WARREN TOLES**

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

Applicants

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

Proceeding Commenced at
Thunder Bay, Ontario

**FACTUM OF THE APPLICANT
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