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PRIDE AND PREJUDICE: HOW A PROCLAMATION REQUEST BECAME A HUMAN RIGHTS DISPUTE

by Rebecca Hines

INTRODUCTION

While municipalities are not legally required to issue proclamations or formally recognize community events or celebrations, many choose to do so as a discretionary public service. These gestures, such as proclamations or flag displays, may be initiated by the municipality or requested by community members or groups. However, when a municipality denies such a request, especially when similar ones have been granted in the past or the requesting party belongs to a marginalized group, questions may arise about whether the decision was made in a manner that was fair, equitable, and lawful.

In *Borderland Pride v. Corporation of the Township of Emo*,¹ the Human Rights Tribunal of Ontario considered whether a municipality's refusal to grant a local organization's request to issue a Pride Month proclamation and display an LGBTQ2 flag constituted discrimination contrary to the Ontario *Human Rights Code*.² Despite having granted similar requests in the past, in 2020, the Township of Emo denied Borderland Pride's proclamation request, leading to a

human rights complaint alleging discrimination in services based on sexual orientation, gender identity, and gender expression. The Tribunal found that the Township and its Mayor had engaged in discriminatory conduct, ordering \$15,000 in damages and requiring human rights training. Notably, the Tribunal also ruled that the Mayor could not claim immunity under subsection 448(1) of the *Municipal Act*, 2001,³ which protects municipal officials from liability for actions taken in good faith.

The Tribunal's decision in *Borderland Pride v. Emo* highlights the legal and ethical complexities that can arise when a municipality's provision of symbolic public services intersects with human rights obligations.

This article provides an overview of the Tribunal's ruling and explores its broader legal implications for municipalities and elected officials. It also offers guidance on best practices in public administration to help ensure that discretionary public services are provided in a manner that is fair, equitable, and legally compliant.

²Human Rights Code, R.S.O. 1990, c. H.19.

³Municipal Act, 2001, S.O. 2001, c. 25.



¹Borderland Pride v. Corporation of the Township of Emo, 2024 CarswellOnt 18150 ("Borderland Pride v. Emo").

FACTS

The Parties

The Township of Emo is a small municipality in Northwestern Ontario. The Township's municipal council consists of a mayor and four councillors. There were four applicants in this case: Borderland Pride, a not-for-profit corporation dedicated to LGBTQ2 advocacy; two individuals, Douglas Judson and Kathryn Shoemaker; and Northern Ontario Pride Network, another LGBTQ2 advocacy group. The respondents were the Township itself and three members of its council: Mayor Harold McQuaker, Councillor Harrold Boven, and Councillor Warren Toles.

Borderland Pride's Proclamation and Flag Requests

In 2020, Borderland Pride made the following requests of the Township:

This year, we have two requests of your organization:

First, we ask that your council adopt or enact the attached resolution or proclamation, declaring the month of June as "Pride Month" (as it is designated around the world) and affirming your community as a place of welcome, inclusion, and safety for LGBTQ2 people. Please email us a copy of your proclamation or resolution once adopted and signed.

Second, we ask that your organization fly or display an LGBTQ2 rainbow flag for a week of your choosing in the month of June. We once again welcome photos of your flag on display or with representatives of your community for use on social media. We note that Pride flags have been distributed in previous years, but we can provide you with a new one if requested. [Emphasis in original]⁴

Borderland Pride's 2020 proclamation and flag requests were similar to requests it had made in the past. As with prior requests, the 2020 proclamation request was submitted with a draft proclamation. The draft proclamation included a preamble which contained statements about LGBTQ2 rights and inclusion. In 2018, the Township issued Borderland Pride's draft proclamation without amendment, but in 2019, the Township unanimously resolved to issue an amended proclamation that omitted the preamble.

Councillor Boven had raised the need for a flags and proclamations policy following Borderland Pride's 2019 requests and the issuance of the amended proclamation, with the intention of having the policy in place prior to Borderland Pride's 2020 requests. While the flags and proclamations policy was placed on the agenda for the council meeting on 2

November 19, 2019, no policy was adopted prior to receipt of Borderland Pride's 2020 requests.

Council's Consideration of the 2020 Requests

Borderland Pride's 2020 proclamation and flag requests were considered at the council meeting on May 12, 2020.

(a) Proclamation Request

A resolution proclaiming Pride Month was tabled by Councillor Lincoln Dunn. During discussion, all three individual respondents expressed the view that the vote should be delayed until there was a flags and proclamations policy in place. Councillor Boven attempted to move to delay the vote until that policy was in place, but the vote on the resolution was called. The resolution proclaiming Pride Month was defeated by a vote of 3-2. The three individual respondents voted against the resolution. The result was reflected in the minutes of the council meeting on May 12, 2020, submitted as evidence and relied on by all parties.

Shortly after the proclamation vote, Mayor McQuaker remarked, "There's no flag being flown for the other side of the coin . . . there's no flags being flown for the straight people."⁵ This comment would become central to the Tribunal's findings.

Later in the meeting, Councillor Toles submitted a resolution proclaiming Pride Month in similar language to the 2019 proclamation that was passed unanimously. Councillor Toles' resolution was not seconded by any member of council.

(b) Flag Request

Borderland Pride's request that the Township fly or display the Pride flag was not included in the resolution tabled by Councillor Dunn and was not considered separately. Councillor Dunn stated during discussion of the proclamation that the Township did not have a flagpole.

(c) Reconsideration of Votes

Borderland Pride's proclamation request was discussed again at the council meeting on May 26, 2020. There was significant confusion among the members of council as to the procedure for the reconsideration of its votes on May 12, 2020. Ultimately, the votes were not reconsidered.

THE APPLICATION

In response to the above, Borderland Pride, Mr. Judson, Ms. Shoemaker, and Northern Ontario Pride Network filed an application with the Tribunal alleging discrimination in the provision of services on the basis of sexual orientation, gen-

⁴Borderland Pride v. Emo, supra note 1, at para. 36.

⁵Borderland Pride v. Emo, supra note 1, at para. 43.

der identity, and gender expression,⁶ contrary to the *Human Rights Code*.

PRELIMINARY ISSUES

Standing of the Applicants

(a) Borderland Pride

At the beginning of the hearing, the Tribunal heard submissions from the parties on whether Borderland Pride, a corporation, had standing to bring an application under subsection 34(1) of the *Human Rights Code*.⁷ This issue arose because the *Human Rights Code* states that only a "person" who believes their rights have been infringed may file an application, and the respondents argued that Borderland Pride, as a corporate entity, did not qualify.

To resolve this issue, the Tribunal relied on its previous ruling in *Pride Hamilton v. Hamilton Police Services Board*,⁸ discussed below, as well as the Ontario Divisional Court's ruling in *Brockie v. Brillinger (No. 2)*.⁹ In *Brockie*, the Ontario Divisional Court upheld the finding that a corporation could be a complainant under the *Human Rights Code*, as the definition of "person" explicitly includes corporations. The Tribunal adopted this reasoning in its decision in *Pride Hamilton*, whereby it found that a corporation had standing to commence an application under subsection 34(1) of the *Human Rights Code*.

Based on these precedents, the Tribunal found that Borderland Pride had standing to bring the application.

(b) Individuals and Northern Ontario Pride Network

The parties also made submissions on whether the Tribunal had jurisdiction to consider the application as brought by Mr. Judson and Ms. Shoemaker in their personal capacities and Northern Ontario Pride Network.

The Tribunal explained that it did not have jurisdiction over general allegations of unfairness. There needed to be an established service relationship between the parties, and the unfairness needed to be connected, in whole or in part, to one of the protected characteristics specifically set out in Part I of the *Human Rights Code* (discussed below).

In this case, the application did not identify any specific acts of discrimination within the meaning of the *Human Rights Code* that had allegedly been committed by the respondents against these applicants. The Tribunal found that Mr. Judson, Ms. Shoemaker, and Northern Ontario Pride Network lacked standing to bring the application as they had not personally made the proclamation and flag requests. As Borderland Pride, a legally distinct entity, was the sole entity that submitted the requests, no service relationship existed between the other applicants and the respondents.

The application as filed by the other applicants was therefore dismissed.

Disclosure of Documents

The Tribunal also addressed an issue concerning the public disclosure of documents that had been filed in the proceeding. The respondents raised concerns that witness statements and other materials had been posted on Borderland Pride's website, allegedly in violation of Rule 3.3 of the Tribunal's *Rules of Procedure*, which limits the use of disclosed documents to the specific proceeding. The applicants acknowledged that the materials had been posted without their counsel's knowledge and that Mr. Judson had mistakenly believed that Tribunal filings were public.

While the Tribunal found that the disclosure had breached Rule 3.3, it declined the respondents' request to dismiss the application on this basis, finding that such a remedy would be disproportionate, as there was no evidence of bad faith on the part of the applicants and they had promptly removed the documents upon request once the mistake had been brought to their attention.

Application by person

⁶The application also alleged discrimination in services based on creed and family status; however, the decision does not address these allegations.

⁷Subsection 34(1) of the *Human Rights Code* provides in relevant part as follows:

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 [of the *Human Rights Code*] . . .

⁸Pride Hamilton v. Hamilton Police Services Board, 2022 CarswellOnt 17769 ("Pride Hamilton").

⁹*Brockie v. Brillinger (No. 2)*, 2002 CarswellOnt 2518 (Ont. Div. Ct.) ("*Brockie*"). In this case, the Divisional Court determined that the Board of Inquiry, the predecessor to the Tribunal, did not have jurisdiction to add a corporation as an applicant to the proceeding before it. However, the Divisional Court made clear that that did not mean a corporation could not bring an application under the *Human Rights Code*, stating as follows (at para. 26):

The Appellants argue that all the grounds of discrimination in s. 1 are characteristics which can only attach to human beings, and cannot attach to corporations. Accordingly, they suggest that the context requires that the definition of person be limited to humans and that Archives could have no rights under s. 1 of the *Code*. We disagree. The definition of "person" in s. 46 of the *Code* specifically refers to "the extended meaning given it by the *Interpretation Act*" and goes on to include other kinds of organizations of human beings, including some which could be incorporated, either with or without share capital or under special statutes. The word "person" is used many times in the Act without limitation when referring to the object of the discrimination as opposed to the discriminator. In addition, the social purposes of the *Code* expressed in its terms and its preamble dictate a purposive as opposed to a restrictive definition of "person".

THE DECISION

Evidence and Witnesses

The Tribunal received documentary evidence and heard testimony from several witnesses, including Mr. Judson, Ms. Shoemaker, the three individual respondents and the Township's Chief Administrative Officer (the "CAO").

In addition, Dr. Emily Saewyc was qualified as an expert on the LGBTQ2 community and the impact of discrimination on that community. Dr. Saewyc testified on behalf of the applicants.

Discrimination under the Human Rights Code

(a) Sections 1 and 9

The main issue in this case was whether the Township or the individual respondents had discriminated against Borderland Pride contrary to the *Human Rights Code* in refusing Borderland Pride's 2020 proclamation request.

Section 1 of the Human Rights Code provides as follows:

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.

This establishes the legal right of every person in Ontario to equal treatment with respect to services without discrimination because of the above enumerated protected characteristics. Section 9 of the *Human Rights Code* provides that "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."¹⁰ In other words, section 9 makes it unlawful for a person to infringe another person's rights under section 1.

(b) The Service

Dr. Saewyc testified that Pride celebrations, including proclamations and flag displays, are widely recognized across cities worldwide as affirmations of LGBTQ2 rights and inclusion. Her evidence was unchallenged by the respondents.

It was agreed by the parties that issuing proclamations was a service the Township had offered for several years. Mayor McQuaker testified on cross-examination that he was not aware of any request for a declaration or flag display that had been turned down by council. The CAO also agreed on cross-examination that there was nothing in the record before the Tribunal to suggest any proclamation request had ever been refused by council prior to the request in 2020 from Borderland Pride.¹¹

(c) The "Person" and their Protected Characteristics

As noted above, the Tribunal had made a preliminary finding that Borderland Pride was a "person" within the meaning of the *Human Rights Code*.

It was undisputed that Borderland Pride's mission and activities focused on supporting and promoting the LGBTQ2 community in a geographical region that included the Township. The Tribunal found that Borderland Pride was identified by the sexual orientation, gender identity, and gender expression of the community it represented.

Accordingly, Borderland Pride had a legal right to equal treatment with respect to services - in this case, the issuance of a proclamation - without discrimination based on sexual orientation, gender identity, or gender expression.

(d) Test for Establishing Discrimination

To successfully establish discrimination, an applicant must prove on a balance of probabilities that their protected characteristic was a factor in the respondent's actions. A balance of probabilities means that the Tribunal must determine whether it is more likely than not that the violations of the *Human Rights Code* alleged by the applicant occurred.¹²

The Tribunal emphasized that the protected characteristic need not be the sole or primary reason - only that it played a role.

(e) Analysis re Flag Request

As noted above, Borderland Pride's flag request was never formally considered at the council meeting on May 12, 2020 as no motion was tabled and no vote took place. Councillor Bovin had raised the need for a flags and proclamations policy following Borderland Pride's 2019 requests. However, no such policy was adopted.

The Tribunal determined that council's failure to consider the 2020 flag request was not based on discriminatory intent. Rather, it was based on a desire for a flags and proclamations policy, and a misunderstanding about whether the Township could display a flag without a flagpole. Because no evidence demonstrated that Borderland Pride's protected characteristics influenced this decision, the Tribunal found that the Township's failure to deal with the flag request did not amount to discrimination.

¹⁰Sections 1 and 9 are both under Part I of the Human Rights Code, "Freedom from Discrimination".

¹¹That being said, the evidence also demonstrated that the Township did not receive many requests for declarations or proclamations or requests for the display of a flag. In fact, it received only four such requests between April 2019 and April 2020, including Borderland Pride's 2019 and 2020 requests.

¹²Borderland Pride v. Emo, supra note 1, at para. 46, citing: Peel Law Association v. Pieters, 2013 CarswellOnt 7881 (Ont. C.A.); and Ontario (Disability Support Program) v. Tranchemontagne, 2010 CarswellOnt 6821 (Ont. C.A.).

(f) Analysis re Proclamation Request

As detailed above, Borderland Pride's 2020 proclamation request was denied. The central question was whether this denial was motivated, in whole or in part, by Borderland Pride's protected characteristics.

Unlike the flag request, the Tribunal found that discriminatory reasoning had influenced the council's denial of the Pride Month proclamation. As noted above, Mayor Mc-Quaker had stated: "There's no flag being flown for the other side of the coin . . . there's no flags being flown for the straight people." The Tribunal found this statement to be dismissive and trivializing of the Pride flag's significance. Crucially, the Tribunal determined that the proximity of the Mayor's comment to the proclamation vote established a direct link between the discriminatory remark and the Mayor's nay vote on the proclamation request.

In summary, the Tribunal found that Borderland Pride's protected characteristics were a factor in the Mayor's decision to vote against the proclamation request. This constituted unlawful discrimination under the *Human Rights Code*.

By contrast, Councillors Boven and Toles were not found to have acted in a discriminatory manner. Both had expressed procedural concerns about adopting a formal proclamations policy before granting any requests. Furthermore, Councillor Toles later attempted to introduce an alternative proclamation, reinforcing the Tribunal's finding that his opposition was not motivated by discrimination. As no evidence linked their votes to Borderland Pride's protected characteristics, the Tribunal dismissed the application against them.

(g) Township's Involvement

The Tribunal acknowledged that, in accordance with subsections 5(1) and 5(3) of the *Municipal Act, 2001*, a municipal corporation (i.e. a municipality) acts through its bylaws and the resolutions of its council. The municipality and its council members must also comply with the *Human Rights Code*. The Tribunal therefore found that if a municipality's council members vote against a resolution for a discriminatory reason, and their votes determine the outcome, then the outcome itself is discriminatory. In other words, the municipality's decision would be tainted by the discriminatory vote.

Since the Mayor's discriminatory vote influenced the result in this case, the Tribunal ruled that the Township, through the actions of its Mayor, had also violated the *Human Rights Code*, and was also liable to the applicant.

Immunity under the Municipal Act, 2001

(a) Subsection 448(1)

The Tribunal went on to examine whether the Mayor was entitled to immunity under subsection 448(1) of the *Municipal Act*, 2001. Subsection 448(1) provides as follows:

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.

This provision shields council members from legal proceedings in relation to actions taken in good faith while performing their official duties. The Mayor sought to rely on this provision to avoid personal liability.

The Tribunal acknowledged that subsection 448(1) serves an important public policy purpose, "as it allows council members 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 office."¹³

It was not disputed that in voting on Borderland Pride's requests, the Mayor was performing a duty or authority under the *Municipal Act*, 2001. Whether he could claim the benefit of subsection 448(1) therefore turned on whether he acted in "good faith" or with an "absence of bad faith."¹⁴ The Tribunal relied on precedent case law to determine this question.

(b) Bad Faith in Municipal Decision-Making

In *Grosvenor v. East Luther Grant Valley (Township)*, the Ontario Court of Appeal held that for a municipality to act in "bad faith" was to say it acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required.¹⁵

Similarly, in *Equity Waste Management of Canada v. Panorama Investment Group Ltd.*, the Court of Appeal held that bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.¹⁶

¹³Borderland Pride v. Emo, supra note 1, at para. 59.

 $^{^{14}}Ibid$ at para. 60.

¹⁵*Ibid* at para. 61, citing *Grosvenor v. East Luther Grant Valley (Township)*, 2007 CarswellOnt 337, 32 M.P.L.R. (4th) 1 (Ont. C.A.). ¹⁶*Ibid* at para. 62, citing *Equity Waste Management of Canada v. Panorama Investment Group Ltd.* (1997), 1997 CarswellOnt 3270, 40 M.P.L.R. (2d) 107 (Ont. C.A.).

(c) "The Right to be Wrong"

The Tribunal also considered *Kuttschrutter v. The Corporation of the Town of St. Marys et al.*, where the Ontario Superior Court of Justice emphasized that municipal councillors have "the right to be wrong," and an applicant's subjective perception that certain actions were malicious to the point of *mala fides* or bad faith will not suffice to establish bad faith.¹⁷

(d) The Mayor's Conduct

Applying the above principles, the Tribunal found that the Mayor had acted in bad faith when he voted against Borderland Pride's 2020 proclamation request. Borderland Pride's protected characteristics under the *Human Rights Code* had influenced the Mayor's nay vote, as demonstrated by his discriminatory remarks about the Pride flag and the proximity of those remarks to the vote on the proclamation request.

In addition, the Tribunal provided as follows:

I have found that Mayor McQuaker discriminated against Borderland Pride. Discrimination is by definition arbitrary, unreasonable, partial and unfair. While Mayor McQuaker had the "right to be wrong," he did not have the right to act in bad faith and breach the *Code*. In the circumstances of this case, given the actions of this particular individual respondent, I find he did not act in good faith in voting against Borderland Pride's requested proclamation. I therefore find that Mayor McQuaker's actions constituted bad faith and that they are accordingly not entitled to the protection of section 448(1) of the *Municipal Act, 2001*. To hold otherwise would, in this case, undermine the protections afforded by the *Code* and be contrary to the public interest.¹⁸

Consequently, the Mayor was not entitled to immunity under subsection 448(1) of the *Municipal Act*, 2001.

REMEDIES

The Tribunal awarded both monetary and non-monetary remedies in this case.

The Tribunal ordered the Township to pay Borderland Pride \$10,000 and Mayor McQuaker to personally pay \$5,000 as compensation for injury to dignity, feelings, and self-respect. The Tribunal also directed both the Mayor and the CAO to complete the Ontario Human Rights Commission's eLearning Module titled *Human Rights 101* within 30 days of the decision.

Borderland Pride also requested orders that the Township proclaim June of 2020 and subsequent years as Pride Month and that the Township fly, raise or display the rainbow flag at its offices on a week chosen by Borderland Pride. The Tribunal declined to make these orders on the basis that: the municipality could not observe a week in honour of a community when that week had already passed into history; and requiring the municipality to make future proclamations could raise potential freedom of expression concerns.¹⁹

KEY TAKEAWAYS

This case offers several important insights for municipalities and elected officials:

• Discretionary services must align with human rights obligations – When municipalities choose to offer discretionary services, such as proclamations or flag displays, they must do so in a manner that is fair, equitable, and compliant with the *Human Rights Code*. These services cannot be denied on the basis of protected characteristics, including sexual orientation, gender identity, or gender expression.

• Clear policies promote fair and consistent decisionmaking – Establishing well-defined policies for proclamations and other symbolic actions can enhance transparency, ensure consistency in decision-making, and help municipalities meet their legal obligations.

• A discriminatory vote can affect the legality of a municipal decision – If a council member casts a decisive vote based on discriminatory reasoning, the resulting decision may be found to violate human rights law.

• Elected officials may be personally liable for discriminatory conduct – Municipal officials will not have immunity under the *Municipal Act*, 2001 if they are found to have acted in bad faith. If a decision is found to be discriminatory, personal liability may arise.

• Legal and financial risks for municipalities – Noncompliance with human rights obligations can lead to legal challenges and financial penalties. Municipalities can mitigate these risks by adopting clear policies, seeking legal guidance, and implementing proactive human rights training.

• **Inclusive governance fosters public trust** – Beyond legal considerations, municipalities that engage meaningfully with diverse community groups and uphold principles of fairness and inclusion can build stronger relationships with residents and enhance public confidence in local government.

¹⁷*Ibid* at para. 63, citing *Kuttschrutter v. The Corporation of the Town of St Marys et al.*, 2023 CarswellOnt 12087 (Ont. S.C.J.). ¹⁸*Ibid* at para. 64.

¹⁹In December 2024, the Township and Mayor McQuaker filed an application for judicial review to overturn the Tribunal's decision in this case. The judicial review application challenges the Tribunal's findings and its remedies, arguing that the Tribunal's decision was unreasonable and incorrect. As of the date of writing, the application remains pending.

CONCLUSIONS

The decision in *Borderland Pride v. Emo* serves as an important reminder of the responsibilities municipalities carry when engaging with their communities through symbolic gestures such as proclamations and flag displays. While these actions may be discretionary, they play a meaningful role in fostering inclusivity and demonstrating municipal support for all residents, particularly those from historically marginalized groups. This case illustrates how the principles of fairness, transparency, and adherence to human rights laws must guide municipal decision-making, even in matters that may seem largely symbolic.

The decision also reinforces the importance of providing human rights training for elected officials and public servants. Through education and training, municipal leaders can better understand their obligations under the *Human Rights Code* and how their actions, even in voting on seemingly routine matters, can have a significant impact. In doing so, municipalities not only mitigate legal risks but also demonstrate a commitment to fostering diverse and inclusive communities. Ultimately, *Borderland Pride v. Emo* is a case that extends beyond legal principles. It speaks to the broader values of equality, representation, and the role of local governments in shaping inclusive communities. It presents an opportunity for municipalities to reflect on their own practices and consider how they can actively contribute to creating environments where all individuals, regardless of their background, feel acknowledged and valued. By establishing policies and practices that are fair and equitable, municipalities can reinforce their role as champions of diversity and human rights in the communities they serve.

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