



Fall 2023 Charter Challenge
Ray Sinclair v. Missinaba Regional Municipality



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Ray Sinclair was employed as a City Planner at the Missinaba Regional Municipality (the “**Municipality**”) in Wawanosh, Ontario. In July 2022, Ray was terminated from his employment for non-compliance with the Municipality’s remote working policy. Shortly after, Ray brought an application to challenge the policy under which his employment was terminated. Ray claimed that the policy infringed his rights to life, liberty, security of the person, and equality under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”).

In March 2022, the Council of the Municipality approved the *Flexible Work Arrangements Policy* (the “**Policy**”) to set minimum standards for municipal employees regarding flexible working arrangements. The relevant portions of the Policy are set out in **Schedule “A”** to the Problem.

Following his termination, Ray commenced an application in the Supreme Court of Ontario, seeking:

- (a) a declaration that the Policy infringes his rights to life, liberty and security of the person under section 7 of the *Charter*;
- (b) a declaration that the Policy infringes his equality rights under section 15 of the *Charter*;
- (c) a declaration that the infringements of sections 7 and 15 of the *Charter* do not represent reasonable limitations on these rights; and
- (d) an order under section 24(1) of the *Charter* awarding damages for the breach of his *Charter* rights.

Ray’s application was heard by Justice Demoe in August 2022. The Court accepted the following facts:

1. Ray was born in May 1994 and grew up in Fresno, Ontario. He is a cisgender East Asian man and identifies as gay. Ray is an only child and does not have any meaningful relationships with his extended family, who do not live in Ontario.
2. Ray left home to attend Robson University after having achieved strong grades in high school. Ray struggled during his first two years of university, finding the transition to living away from his parents, to whom he had always been close, to be very difficult. Ray also found that he was having difficulty focusing and was prone to periods of extreme restlessness and loneliness.

3. After being placed on academic probation after his second year in university, Ray's parents insisted he attend counselling. Ray began seeing a psychiatrist on campus, who diagnosed him with attention deficit hyperactivity disorder ("**ADHD**") and prescribed medication to help treat it. After commencing therapy and taking medication to treat his ADHD, Ray's grades improved and he began forming strong friendships on campus.
4. In October 2016, after graduating from university, Ray was hired as a Records Clerk at the Planning Department of the Municipality in Wissanotti, Ontario, where he worked full time in person. All positions in the Planning Department are non-unionized.
5. Ray rented a small house when he moved to Wissanotti. Between 2018 and 2019, his boyfriend, Rohan Shaw, moved into the house with him, but they ended their relationship in November 2019. Ray continued to live in the house by himself.
6. When he moved to Wissanotti, Ray also began seeing a therapist, Zahra'a Smith, who was recommended by Robson's Student Psychiatric Services department. Ray continued to take medication for his ADHD, now prescribed through his family physician, Dr. Manuel Plotnik.
7. In March 2020, at the onset of the COVID-19 pandemic, Ray and all other employees in the Planning Department began working remotely. Ray was issued a work laptop to facilitate this. He found that he could easily do his work remotely and continued to receive strong performance reviews.
8. On March 22, 2020, the Ontario provincial government declared a state of emergency due to the pandemic. Among other things, the province prohibited social gatherings of more than five people (whether indoors or outdoors) and all indoor social gatherings with individuals other than those in one's one immediate household. Most non-essential businesses were also required to close.
9. Effective May 1, 2022, the provincial government loosened the restrictions on social gatherings by implementing an "immediate household bubble" policy, permitting members

of two households to exclusively “bubble” with one another and to gather indoors despite social distancing restrictions.¹

10. Ray made efforts to stay in touch with friends on outdoor walks and on Zoom calls. After the provincial government implemented its “immediate household bubble” policy, he bubbled with his parents, despite the distance. He was usually able to visit with them in person once per week. However, Ray began to feel increasingly lonely and isolated.
11. In August 2020, Dr. Smith retired from practice. Ray made some efforts to find a new therapist, but there was significant new demand for counselling and therapy during the pandemic and despite referrals from Dr. Plotnik, Ray was unable to find a practitioner who was accepting new patients. Ray found himself growing increasingly depressed. By October 2020, Ray had stopped taking his ADHD medication regularly. Dr. Plotnik referred Ray to an online group therapy program, but Ray was uncomfortable with the virtual format and did not return after attending two sessions.
12. Ray’s performance at work began to decline. The Director of Human Resources for the Planning Department, Simbra Gomer, became concerned with Ray’s performance and asked to meet with Ray in mid-November 2020. Up to that point, Ray had not disclosed his ADHD diagnosis with his employer as he felt uncomfortable discussing it. In his meeting with Simbra, Ray became emotional and blurted out that he was struggling with his ADHD and other personal issues. He said that he was finding it very difficult to work and wanted to take a leave of absence. Simbra was supportive and agreed that Ray could take leave from his job for as long as he needed to.
13. Ray’s leave began in December 2020. His parents suggested that he move back into their home in Fresno while he got back on his feet, which he happily accepted. He found that living with his family had a positive impact on his mood, and his mother helped him find a therapist, who he began seeing weekly. Ray began taking his ADHD medication again. He also reconnected with some friends from high school, who had started a running club.

¹ Participants should not make reference to laws, orders, or government policies imposing restrictions related to the COVID-19 pandemic other than those set out in the Official Problem.

14. In March 2021, Ray told Simbra that he was ready to start work again and intended to stay in Fresno for the foreseeable future. Simbra was glad to welcome Ray back, but mentioned that the Municipality was considering requiring employees to return to work in person in the coming months. Ray said he would prefer to work remotely but would be prepared to discuss returning to Wissanotti if and when the Municipality began its formal return to work process.
15. Ray received two doses of an approved COVID-19 vaccine in May and July 2021.
16. Between June and September 2021, the Ontario government significantly eased many pandemic-related restrictions, including permitting most non-essential businesses to re-open (with capacity limits and masking requirements), and permitting social gatherings of up to 25 people indoors and 50 people outdoors.
17. Ray excelled upon his return to work and was given a promotion to City Planner in September 2021. Ray's new role required him to manage a team of planners, all of whom lived in Wissanotti and were working remotely.
18. Near the end of September 2021, the Municipality began encouraging – but not requiring – employees to return to work in person for one or two days each week. At that time, Simbra contacted Ray to ask when he was planning on moving back to Wissanotti. Ray was non-committal, mentioning that he was comfortable at home and was managing his team effectively while working remotely. Simbra reminded him that while it was not yet a formal requirement to work in person at the office, the Municipality could begin requiring more regular attendance in the office. She also suggested to him that it would set a good example for Ray's team for him, as the team leader, to come into the office from time to time.
19. To placate Simbra, Ray drove to Wissanotti every few weeks to stay in a hotel so that he could work from the office for a couple of days and meet his co-workers in person. He found the 5-hour drive to be very tiring and found that he would fall behind on work on days when he was in the office. When working in person, Ray was frequently interrupted by colleagues, which made it difficult for him to focus. He began to feel anxious on days that he worked in the office.

20. At the onset of the Omicron wave of COVID-19 in December 2021, the Municipality returned to fully remote work. This was a relief to Ray, who felt much more productive at home.
21. In February 2022, both of Ray's parents were tragically killed in a car accident on icy roads not far from their house. Ray was in shock. He inherited his family's house in Fresno as he had no other relatives. Ray took bereavement leave in February and March 2022.
22. In early March 2022, Council of the Municipality adopted the Policy, which effectively required all municipal employees to return to work a minimum of two days a week.
23. Ray returned from bereavement leave at the end of March 2022. The Planning Department's Flexible Work Plan, developed with input from employees during Ray's leave, required employees to work in person at the municipal office two days a week. Ray's position was deemed "in person essential" under the Policy as he was directly managing a team of planners, and it would require him to be in Wissanotti for site visits.
24. However, Simbra agreed that Ray should be given a temporary accommodation because of his recent family tragedy and his ADHD diagnosis. Ray was not required to move to Wissanotti immediately and could work remotely from Fresno for two more months, before being required to move to Wissanotti by the beginning of June. Once settled in Wissanotti, Simbra agreed that Ray would initially only be required to attend the office once a week – on Wednesdays. However, Simbra told Ray that the Municipality's expectation would be that Ray gradually transition to full compliance with the department's flexible work plan, including the requirement that he attend at the office three days per week.
25. Simbra also informed Ray that all employees in the Planning Department were now subject to monitoring while working remotely, and that such monitoring would be restricted to the ability to review work emails and messages sent internally using Google Meet during work hours. Ray did not object to this monitoring.
26. Ray accepted Simbra's offer and began work remotely while he made arrangements to rent out his parents' house in Fresno, and looked for a home in Wissanotti. Ray moved to Wissanotti on June 1, 2022 and began to go to the office every Wednesday as required.

Ray had a difficult time with the adjustment, finding that his anxiety would spike while in the office and he had a very difficult time focusing. He began to arrive late and leave early every Wednesday trying to minimize the time spent in the office.

27. From the time that Ray returned from his bereavement leave, the planners on Ray's team began to complain that they found him difficult to reach to answer their questions or provide input on their projects. They also often found his instructions to be unclear.
28. In mid-June, a pipe broke in his parents' house in Fresno and flooded the basement, causing significant damage. Ray asked Simbra's permission to work entirely remotely for two weeks while dealing with the repairs. Simbra was sympathetic, but expressed her concerns about what she described as Ray's "inconsistent performance" and reluctance to spend time in the office. Ray told Simbra that he had "no choice" but to return home and that in his view, his request fell under the "Family Care" section of the Policy, as he was dealing with his family's house.
29. Simbra replied to Ray that the Policy was not meant to be used in that way and Ray was already receiving "extraordinary" accommodations, not given to other employees. Simbra denied Ray's request for more remote work time and advised him that he was being put on a performance improvement plan. Simbra told Ray he could take a position a Regulatory Specialist in the Planning Department, which was not "in person essential" and would allow him to work remotely full-time. Ray turned down the offer as it would entail a 15% pay cut.
30. Ray's work performance continued to decline. He was forced to drive to Fresno and back every weekend to check in on the repairs, adding to his stress and anxiety. Ray was upset further when he learned that one of his colleagues was allowed to work remotely for a week while visiting his elderly parents in Quebec, and others were able to work remote half-days to look after their children who were not in school for the summer.
31. Effective July 6, 2022, all remaining COVID-19 restrictions were removed in Ontario.
32. Ray grew increasingly frustrated. On Wednesday, July 13, Ray could not focus at the office and left at lunch together with other colleagues who were going home to look after their children. Once at home, Ray sent several angry messages to a colleague over Google Meet, expressing his anger at the Policy and at Simbra personally.

33. On July 18, 2022, Simbra called Ray into a meeting and informed him that he was being terminated, effective immediately, with six months' salary and benefits in lieu of notice. She informed him that the reason for the termination was that Ray was not abiding by the Policy, despite having several accommodations made for him. She told him that she had also made aware of the Meet messages that Ray had sent, and that she was "personally disappointed" by them, although this was not the "primary reason" for the termination.

34. In his affidavit in support of his application, Ray stated:

I felt discriminated against by the Policy, which did not account for people like me and the situations I faced. My ADHD diagnosis meant that it was very difficult for me to focus while working at the office in close proximity to others. It was clear that I thrived while working remotely and I did my best work over the pandemic when I was working from home and able to focus properly. If I was able to work from home effectively for over two years, even getting a promotion during that time, I do not understand why I was being forced back to a working environment where I felt uncomfortable.

Any "accommodations" that Simbra offered to me were of no value. I was still forced to move back to Wissanotti and come to the office every week even though I made it clear that my work performance would suffer. On top of that, I was told that even these "accommodations" were temporary and eventually I would be treated like everyone else. To me, that was effectively no "accommodation" at all.

I also think it was unfair to grant special privileges to other employees who had to look after parents and children, but not grant similar privileges to me just because I am single. Despite the fact that I no longer have a "family" in the traditional sense, I have personal obligations like anyone else. However, the Policy treats those obligations as unworthy of consideration because they do not involve a spouse, children, or parents.

35. Ray also tendered expert opinion evidence from Dr. Rema Singh, a psychiatrist specializing in mental health issues at the workplace. In her affidavit, Dr. Singh's stated, among other things, that:

- a. Over the pandemic, there has been a significant increase in the number of full-time workers who rate their mental health as fair or poor – from 8% in December 2019 to 31% in May 2022.
- b. In a study of 2500 knowledge industry workers published in late 2021, 55% of full-time workers under the age of 40 self-reported greater productivity while working

remotely compared to working in an office. Of those employees, 72% indicated that they “agreed” or “strongly agreed” that remote working arrangements had contributed to an overall improvement in their mental health. Of that same group, 58% reported experiencing feelings of stress, anxiety, or dread about the prospect of returning to working in an office full-time.

- c. Individuals with ADHD have had worse mental health outcomes during the pandemic compared to the general population. Individuals with ADHD are more than three times as likely to report increased anxiety and twice as likely to report feelings of depression since the pandemic began.
- d. Individuals with ADHD have disproportionately benefitted from remote work policies. Compared to the general population, they are more likely to report increased productivity and lessened stress and anxiety when working from home. When returning to the office, individuals with ADHD are significantly more likely to experience performance and productivity declines than the general population.
- e. Workers living alone have faced greater personal demands and stress over the pandemic. On average, single employees living alone are twice as likely to experience burnout compared to employees living with family at home. Dr. Singh attributes this result to the greater support network available to employees living with family.

36. On cross-examination, Dr. Singh conceded that:

- a. Some employees experience productivity increases while working in the office because of increased structure and routine.
- b. She is aware that some individuals with ADHD prefer to work in the office for the same reason and that the outcomes are highly based on individual needs and diagnoses.
- c. Some employees who work exclusively remotely have reported increased feelings of stress and burnout because they experience greater demands on their time and report greater difficulty maintaining a healthy work-life balance.

- d. She is aware of studies that have shown that employees report increased satisfaction with their jobs and stronger connections in the workplace while working in person.
37. Councillor Nat McCrae, who supported the Policy, provided evidence that:
- a. The Municipality experienced an overall employee productivity decline during the pandemic. The productivity decline slowed and reversed as employees returned to work and after remote monitoring software was installed on work computers.
 - b. Employee turnover greatly increased during the pandemic. Employees who left work overwhelmingly reported a decreased motivation to work and feelings of disconnection from their colleagues and supervisors. Employees also felt that they lacked opportunities for professional development, particularly when working in Meet.
 - c. The Municipality carefully reviewed each position and only designated a small number of positions as “in person essential”. These positions all required in-person attendance, either because of team supervision needs or because the nature of the position required personal attendance to effectively perform.
38. On cross-examination, Councillor McCrae conceded that she could not be certain that remote monitoring software directly contributed to increased employee productivity, and that the Municipality Manager had received complaints from some employees who objected to being monitored in this way. Councillor McCrae also admitted that some employees expressed a strong preference for continued remote work and that several employees quit their jobs rather than accept a hybrid working arrangement. Finally, Councillor McCrae conceded that HR directors did not ask for supporting documentation when approving a request for increased flexibility due to family care needs.
39. Simbra stated in an affidavit that Ray’s position as a City Planner required regular site visits to Wissanotti to personally assess building development and infrastructure projects. Ray was aware of these requirements when he accepted the position. Ray delegated a significant number of these tasks to other employees while working remotely, which contributed to his performance issues. Ray’s team felt that there was a lack of

supervision and increased strain on team dynamics while he was working remotely. No other member of Ray's team received individual accommodations under the Policy.

Justice Demoe of the Ontario Superior Court of Justice dismissed Ray's application in September 2022, holding, in part:

The Policy does not violate section 7 or section 15 of the *Charter*. The guarantee of "liberty" in the *Charter* protects basic choices going to the core of what it means to enjoy individual dignity and independence. It does not protect a right to work where and when one chooses without regard to employer needs and the particular demands of the position. To hold otherwise would be to accept that the *Charter* guarantees positive rights. This argument has been considered and rejected in the past, and I am bound by those earlier decisions.

I accept that the guarantee of liberty does protect the right to choose where to make one's home and therefore find that the Policy infringed Mr. Sinclair's right to liberty by requiring him to live within a certain proximity of his office. However, the Policy respects the principles of fundamental justice, and therefore does not violate section 7 of the *Charter*. It is neither arbitrary, overbroad, nor grossly disproportionate. It only applies to employees holding certain essential positions that require in person attendance at the office. The evidence before me is that the Municipality carefully and reasonably assessed which positions required in person attendance and limited the Policy's scope accordingly. Moreover, in this case Mr. Sinclair's individual circumstances were taken into account and accommodated under the Policy.

The Policy does not violate Mr. Sinclair's right to security of the person. Even if I were to agree that the Policy imposed serious physical or psychological suffering on Mr. Sinclair, which I do not, any such imposition occurred in accordance with the principles of fundamental justice. I also reject Mr. Sinclair's alternative argument that this Court ought to recognize that the guarantee of "security of the person" encompasses the right to a basic level of economic security.

I also find that the Policy does not violate section 15 of the *Charter*. While I accept that the Policy creates a distinction on the protected ground of disability, the evidence before me is that the Policy is carefully designed to allow for individual accommodations on the basis. Mr. Sinclair availed himself of these accommodations, and other accommodations that predate the Policy's imposition. I would not accede to his argument that "family status" should be considered an analogous ground of discrimination under section 15.

Because I find that the Policy does not infringe section 7 or section 15 of the *Charter*, I do not need to consider section 1 of the *Charter* or the issue of what remedies are appropriate. With respect to Mr. Sinclair's claim for damages, however, I note that to the extent that he considers severance package offered by the Municipality to be inadequate, the common law provides him with clear recourse.

Ray has been granted leave to appeal the Ontario Superior Court of Justice judgment to the Ontario Court of Appeal on the following issues:²

- (1) Does the Policy infringe Ray Sinclair’s rights to life, liberty, and security of the person under section 7 of the *Charter*?
- (2) Does the Policy infringe Ray Sinclair’s equality rights under section 15 of the *Charter*?
- (3) If the answer to either of questions 1 or 2 is “yes”, is the infringement a reasonable limitation on those rights that is demonstrably justified in a free and democratic society?
- (4) If an infringement is found and cannot be upheld as a reasonable limitation on Ray Sinclair’s *Charter* rights, is this an appropriate case for an award of damages pursuant to section 24(1) of the *Charter*?³

² Note that the Ontario Court of Appeal will not consider any legislative or adjudicative facts other than those found by Justice Demoe.

³ Note that participants are not asked to assess the quantum of damages awarded.

Schedule "A"

Flexible Work Arrangements Policy

1.0 Policy Statement and Purpose:

The Municipality is an organization that supports flexible working arrangements for its employees that take into account different personal needs and preferences. The Municipality also recognizes the need for productive and collaborative offices that requires in person attendance for some employees. This Policy is intended to provide minimum standards for all employees regarding flexible working arrangements that balance remote work and in person attendance at the municipal office.

2.0 Definitions:

In this Policy:

"Director" means the Director of Human Resources of each department in the Municipality;

"employee" means an employee of the Municipality;

"Flexible Work Plan" means a work plan established by the Director in accordance with Section 3.0 of this Policy, including any special accommodations made on an individual basis in accordance with sections 4.0 and 5.0;

"in person essential" means a category of employment where the nature of the employee's responsibilities requires the employee to work in person at the municipal office;

"Municipality" means the Missinaba Regional Municipality;

"municipal office" means the office established by the Municipality for each municipal department;

"workplace" means an employee's place of work and includes, without limitation, home offices and municipal offices.

3.0 Flexible Work Plan:

The Director shall establish a Flexible Work Plan for each employee in the department whose employment is designated as "in person essential". The Flexible Work Plan shall, subject to sections 4.0 and 5.0 of this Policy, include the following standards:

- a) Each employee shall be required to attend in person at the municipal office a minimum of two (2) days a week;

- b) Each employee shall be permitted a minimum of two (2) remote working days a week; and
- c) Each employee shall establish their primary residence within 50 kilometres of the Municipality.

4.0 Family Care:

The Municipality recognizes that employees need to provide support to their families, which may require additional flexibility in working arrangements. Accordingly, the Director may modify a Flexible Work Plan upon consultation with an employee to accommodate time needed for the employee to provide child care, elder care, or other family care.

5.0 Other Accommodations:

The Director may modify a Flexible Work Plan to accommodate other employee needs on a temporary basis, upon being satisfied that the accommodation is necessary for the employee to perform their work effectively.

6.0 Monitoring:

The Director may, upon notification to the employee, install monitoring tools on equipment owned by the Municipality if such tools are necessary to detect employee misconduct at the workplace, including misuse of Municipality-issued technology, and ensure that workplace equipment is used securely.

7.0 Non-compliance and Sanctions

Any breach of this Policy, including non-compliance with a Flexible Work Plan established pursuant to this policy, shall be investigated by the Director and may be sanctioned, with consequences up to and including termination of employment.