

CITATION: Michalski v. McMaster University, 2022 ONSC 2625  
COURT FILE NO.: 970/21  
DATE: 20220429

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

D.L. Corbett, D. Broad and C. Petersen JJ.

B E T W E E N: )  
)  
ELISE MICHALSKI, PETER MICHALSKI, ) *Jorge Pineda and Rob Kittredge*  
ANA STANCIU and SEAN GLYNN ) for the Applicants  
)  
Applicants )  
)  
-and - )  
)  
MCMASTER UNIVERSITY ) *George Avraam, Ahmed Shafey, Ajanthana*  
) *Anandarajah, and Shyama Talukdar*  
) for the Respondent  
Respondent )  
)  
-and - )  
)  
COUNCIL OF ONTARIO UNIVERSITIES ) *Robert Centa and Charlotté Calon*  
) for the Intervenor  
)  
Intervenor )

REASONS FOR DECISION

Petersen J.:

## **INTRODUCTION**

### ***Overview***

[1] The Applicants are graduate and undergraduate students at McMaster University. They are also devout Christians. Three of them are Roman Catholic and one is Romanian Orthodox Christian.

[2] McMaster has a mandatory COVID-19 vaccination policy. The Applicants each requested an exemption from the vaccine mandate based on creed. They raised a variety of concerns about COVID-19 vaccinations. All of them mentioned (among other things) the use of fetal cell lines in the production or testing of the vaccines as one of the reasons for their objection to being vaccinated. They contend that they hold a sincere belief that taking a COVID-19 vaccine is immoral and contrary to their religious faith.

[3] McMaster denied the Applicants' exemption requests. The university then unenrolled them from their courses and programs until such time as they comply with the vaccination mandate, or the mandatory vaccination policy ceases to apply. The Applicants are seeking a court order quashing the university's decisions and remitting their exemption requests back to McMaster for reconsideration with the benefit of the Court's Reasons.

### ***Nature of the Application***

[4] In their original Notice of Application, the Applicants were seeking a broad range of relief, including declarations that the university's vaccination policy is *ultra vires* McMaster's authority, conflicts with s. 38(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, contravenes ss. 10 and 11 of the *Health Care Consent Act, 1996*, S.O. 1996, c.2, and violates s. 7 of the *Canadian Charter of Rights and Freedoms*. They were also seeking declarations that McMaster's decisions violate their rights under s.1 of the *Human Rights Code*, R.S.O. 1990, c.H.9 and ss. 2, 7 and 15 of the *Charter*. In addition, they were seeking an order quashing the vaccination policy, as well as interlocutory injunctions restraining McMaster from disenrolling them from their courses until the final determination of their claims.

[5] The Applicants did not pursue a motion hearing for injunctive relief. They amended their Notice of Application by removing the *Charter* claims, then subsequently abandoned several other claims and withdrew their requests for declaratory relief. What remains is a narrow application for judicial review of the university's decisions not to grant the exemption requests. The grounds for relief are that: (1) McMaster breached the duty of fairness owed to them and (2) McMaster's decisions were unreasonable.

*Scope of the Evidentiary Record*

[6] The Applicants' abandonment of their *Charter* and *Human Rights Code* claims rendered much of the voluminous Application Record irrelevant and inadmissible.

[7] The Applicants adduced multiple affidavits, including expert opinion evidence on Catholic canon law; the doctrinal status of the Pope's statements about COVID-19 vaccinations; the efficacy of vaccines in preventing infection and reducing the transmissibility of COVID-19; and the risk to students, faculty, and staff of increased exposure to SARS-CoV-2 (the virus that causes COVID-19) from the presence of unvaccinated and asymptomatic students on campus. The university responded with its own affidavits, including expert evidence on the pedagogic advantages of in-person learning; the efficacy of COVID-19 vaccines (and booster shots) in combatting infection and reducing serious illness; the epidemiologic value of vaccine mandates in the post-secondary education context; the health risks posed to students, staff and faculty if unvaccinated students were permitted to attend campus in-person; the source of a human embryonic kidney cell line known as HEK-293 that was used to test COVID-19 vaccines; the widespread global use of HEK-293 in academic, pharmaceutical and biotechnological research and production; the structure and authority of the Roman Catholic Church; and the Pope's statements and Vatican's position on vaccinations.

[8] Many of the deponents, including the Applicants, were cross-examined on their affidavits. Transcripts of the evidence were jointly filed by the parties as part of the Application Record.

[9] The university adduced much of its evidence only because the Applicants were initially pursuing constitutional challenges and seeking declaratory relief. After the scope of the Application was narrowed, McMaster objected to the admissibility of any evidence that was not before the university decision-makers when the Applicants' requests for exemptions were considered and denied. We agree that the evidentiary record on an application for judicial review must be restricted to the evidence that was before the original decision-maker, subject to certain narrow exceptions: *Parent, also known as Murray v. OIPRD*, 2022 ONSC 1308 (Div. Ct.), at para. 18. The Applicants conceded this point, and the Application Record was restricted accordingly.<sup>1</sup>

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<sup>1</sup> Consequently, the evidence in the Application Record consists only of the following: McMaster's *Vaccination Policy: COVID-19 Requirements for Employees and Students*; McMaster's COVID-19 Vaccine Exemption Request: Medical Exemption form and Non-Medical Human Rights Grounds form; each Applicant's completed Vaccine

## SUMMARY AND DISPOSITION

[10] The university was required to develop and implement a process for deciding exemption requests under substantial time and resource limitations, in the context of an ongoing public health crisis that has challenged governments and other public institutions around the world. The Applicants were given an opportunity to make written submissions supporting their requests for an exemption, which each of them did. Their requests were reviewed by equity officers at the university, and they received written reasons explaining why their requests were rejected. While I accept that the interests at stake for the Applicants are important, so too were the interests of the Respondent: implementing a policy to safeguard the health and safety of all students, faculty and staff at the university. I see little merit in the procedural fairness arguments raised by the Applicants. The process reasonably balanced the interests at stake in the difficult context in which the decisions had to be made.

[11] On the merits, as will be discussed in more detail below, the underlying claims turn on an argument that the Respondent breached the Ontario *Human Rights Code* in its interpretation and application of the protection against discrimination on the basis of “creed”. This is a claim that should be made to the Human Rights Tribunal of Ontario at first instance, and not to this court. While this court has jurisdiction to conduct a judicial review of the decisions below, including a substantive review of the decision through the lens of reasonableness, what the Applicants really seek here is a review on a standard of correctness of their discrimination claim. This court, in its supervision of administrative tribunals, should decline to exercise jurisdiction where there is

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Exemption Request form; September 14, 2021 letter signed by Rev. Ene (Anna Stanciu’s Priest); the university’s decision letters regarding each Applicant’s exemption request; the university’s written notice to each Applicant of their withdrawal in good standing; paragraphs 13-23 and 30-36 of the Affidavit of Pilar Michaud sworn February 17, 2022; Chart of Undertakings from the cross-examination of Pilar Michaud held on February 25, 2022; McMaster’s on-line “Vaccination Policy Information for Students: Beyond October 17<sup>th</sup>”; McMaster’s “Vaccination Mandate” webpage; McMaster’s internal *Guideline for Assessing COVID-19 Vaccination Exemption Requests Based on the Human Rights Ground of Creed*, dated September 23, 2021; OHRC *Policy on Preventing Discrimination Based on Creed*, dated September 17, 2015; OHRC *Policy Statement on COVID-19 vaccine mandates and proof of vaccine certificates*, dated September 22, 2021; OHRC webpage on “COVID-19 and Ontario’s Human Rights Code – Questions and Answers”; Letter of instructions issued by the Office of the Chief Medical Officer of Health issued August 30, 2021; McMaster’s decision template for denial of exemption request; McMaster’s *Common Religion/Creed Exemption Denial Rationale* document; McMaster’s Vaccine FAQ; email from Andrea Aitchison to Wanda McKenna (et al.) dated September 30, 2021 re: Non-Medical Exemptions – Next Steps for Review; paragraphs 24 and 26 of the Affidavit of Doug Welsh, sworn February 17, 2022; and paragraph 16 of the Affidavit of Gillian Mulvale sworn February 17, 2022.

another process available to the Applicants that is more appropriate for the adjudication of the claim.

[12] Therefore, for the reasons that follow, the Application is dismissed.

### **FACTS GIVING RISE TO THE APPLICATION**

#### ***Onset of the Pandemic***

[13] When the World Health Organization declared COVID-19 a global pandemic in March 2020, the government of Ontario adopted a range of emergency public health measures and a provincial “lockdown” ensued. McMaster consequently cancelled its in-person classes and transitioned all courses to remote on-line learning. The distance learning model continued throughout the 2020-2021 academic year.

[14] By the summer of 2021, COVID-19 vaccines were widely available to adults in Ontario and the province was incrementally relaxing some of the public health restrictions that had been imposed during the lockdown. The Ontario government loosened social distancing requirements and increased capacity limits within post-secondary educational institutions. McMaster began to plan for a return to in-person learning.

[15] In late summer 2021, McMaster announced that it would require all its employees and students to be vaccinated against COVID-19. Shortly thereafter, the Council of Ontario Medical Officers of Health recommended that all universities implement a mandatory vaccination policy. McMaster’s policy was developed in accordance with instructions subsequently issued by the Chief Medical Officer of Health for Ontario and enforced through s.2(2.2) of Schedule 1 and Schedule 4 of O.Reg. 364/20 under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c.17.

#### ***McMaster’s Vaccination Policy***

[16] The vaccination policy applies to all McMaster faculty, staff, and students. It defines “On-Site Community Members” as employees and students who attend university property. It defines “Off-Site Community Members” as employees and students who regularly work or study at sanctioned off-campus locations and regularly engage in-person with other employees or students in the normal course of their work or studies (such as, for example, students working in university-sanctioned co-op placements and faculty involved in field work). The policy defines

“Fully Vaccinated” to mean that a person has received two COVID-19 vaccines approved by the World Health Organization, with the last dose at least 14 days prior to self-declaration of immunization.<sup>2</sup>

[17] McMaster’s policy requires all Community Members to undergo COVID-19 symptom screening prior to attending university property. The vaccination component of the policy was implemented in two stages. First, from September 7 to October 17, 2021, On-Site Community Members were required to:

- a) provide the University with proof that they are Fully Vaccinated; or
- b) provide proof of a valid negative COVID-19 rapid antigen test; or
- c) obtain an exemption from the University on the basis of a substantiated human rights ground.

[18] Regular rapid antigen testing ceased to be an available alternative to vaccination after October 17, 2021. Effective October 18, 2021, McMaster’s policy required all Community Members (both On-Site and Off-Site) to provide proof that they were Fully Vaccinated. However, the policy states “Individuals who cannot be vaccinated due to a substantiated human rights ground will continue to be provided reasonable accommodations and will be expected to comply with any requirements that the University deems necessary to protect community health and safety.”

[19] McMaster’s Student Wellness Centre posted resources on-line for students who were hesitant to get vaccinated. One of the documents was a Vaccine FAQ, which included the following question: “Do the COVID-19 vaccines contain fetal material?” The Answer provided by the university in the FAQ was:

No, none of the COVID-19 vaccines contain any aborted fetal cells or tissue.

However, fetal cell lines were used in the production and confirmation of some vaccines. Fetal cell lines are replicated

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<sup>2</sup> It should be noted that this was the requirement as of September 2021. Booster vaccinations were not available until later in 2021 and early 2022.

indefinitely from fetal tissue for science, but they are not the original aborted fetal cells or tissue.

Viral vector vaccines are produced using fetal cell lines. After the vaccine is formed, the vaccine is removed from the cells. None of the fetal cells are in the vaccine. After the vaccines are produced, viral vector vaccines and mRNA vaccines use fetal cell lines to confirm the vaccines activate the immune response correctly.

The fetal cell lines used in COVID-19 vaccines are replications of tissue from elective abortions that happened 30 to 60 years ago.<sup>3</sup> These cell lines were chosen because they are safe and reliable for vaccine development.

[20] McMaster's Vaccine FAQ also included the following italicized note:

*Note: None of these fetal cell lines are from recent abortions nor are they supporting abortion clinics today. Several religious organizations have released statements regarding the use of fetal cells for vaccine production and recognition of the importance of vaccines in saving human lives today. Please consult your religious leaders if this is something you are concerned about. If you see something online suggesting that there are fetal tissues or fetal cells in the vaccines themselves, know that this is misinformation.*

[21] All McMaster students and employees were required to submit a Declaration Form with respect to their immunization status. Unvaccinated students and employees were invited to complete a COVID-19 Vaccine Exemption Request form. Requests for exemption could be based on medical grounds or non-medical grounds protected by the *Human Rights Code*.

#### ***McMaster's Process for Assessing Exemption Requests Based on Creed***

[22] The university established teams to evaluate exemption requests. The Human Rights and Dispute Resolution Team within the Equity & Inclusion Office ("the Validation Team") was

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<sup>3</sup> Notwithstanding this statement in McMaster's Vaccine FAQ, the university asserts there is no evidence to prove that HEK-293 is a cell line replicated from tissue derived from an *elective* abortion, as opposed to a therapeutic abortion or spontaneous miscarriage of a foetus. A determination of this issue is not required to decide the Application. Moreover, the evidence relevant to the issue was excised from the Application Record. The Court therefore explicitly declines to make a factual finding on this issue.

tasked with evaluating non-medical requests from students. The Validation Team reviewed the Ontario Human Rights Commission's (OHRC) *Policy on Preventing Discrimination Based on Creed*, as well as the OHRC's *Policy Statement on COVID-19 Vaccine Mandates and Proof of Vaccine Certificates*, and the OHRC's Q&A document on COVID-19. The university provided the Validation Team with additional resources, including an internal document entitled *Guideline for assessing Covid-19 vaccination exemption requests based on the human rights ground of creed* (the "*Guideline*"), prepared with input from McMaster's Chaplaincy Centre, Equity and Inclusion Office and Legal Services Office.

[23] The McMaster *Guideline* instructs the Validation Team to use the OHRC's criteria for what constitutes a "creed" in assessing student requests for exemption from the vaccine mandate. Those criteria are whether the student's professed belief is:

- sincerely, freely and deeply held
- integrally linked to a person's identify, self-definition and fulfillment
- part of a particular and comprehensive, overarching system of belief that governs one's conduct and practices
- addressing ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence
- connected in some way to an organization or community that professes a shared system of belief.

[24] The *Guideline* states, "Personal beliefs and convictions, political positions, concerns about medical science, etc. are not creed and the exemption request should not be approved." It further states, "If we are not clear if the belief is a personal one vs. connected to a creed, we can and should ask for more details."

[25] McMaster also provided the Validation Team with a memorandum prepared by the university's Ecumenical Chaplain, listing a variety of religious faiths and summarizing their historical positions on vaccinations. Of particular relevance to this case, the Validation Team learned that the Russian Orthodox Church has supported and encouraged vaccination. It also learned that the Catholic Pontifical Academy for Life has issued a statement that it is morally permissible to receive vaccines that are developed using morally compromised cell lines (i.e.,



cell lines derived by replicating the cell tissue of aborted fetuses) where no alternative vaccines are available and there is a need to use the vaccines for health reasons.

[26] The Equity and Inclusion Office learned from the Chaplain that certain Protestant sects have a history of refusing vaccines. McMaster's internal *Guideline* therefore instructed the Validation Team to consider whether a claimant has historically refused other vaccinations and provided a *Form 2, Statement of Conscience or Religious Belief* – a declaration that parents of non-immunized school-age children must swear in order for their minor children to attend school in Ontario (pursuant to the *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1).

[27] The Equity and Inclusion Office also learned that the HEK-293 cell line used in the testing of COVID-19 mRNA vaccines has also been widely used in testing various common medications including Tylenol, Advil, Aspirin, Aleve, and Pepto-Bismol. In assessing student exemption requests based on the use of the HEK-293 cell line, the Validation Team was therefore instructed to consider whether the claimant included information showing a history of refusing to use those medications for religious reasons.

[28] McMaster's Office of Legal Services provided the Validation Team with a document entitled, *Common Religion/Creed Exemption Denial Rationale*. It summarizes possible reasons why an exemption request might be denied and provides sample language for the Validation Team to adopt if applicable in the circumstances of a specific request.

[29] Finally, the Validation Team was provided with a template decision letter to use in denying an exemption request. The template references the legal standard for accommodation under the *Ontario Human Rights Code* and the university's obligation to protect the health and safety of students, faculty and staff. It also lists the above-mentioned OHRC criteria for what constitutes a "creed". The template provides space for the Validation Team to insert the specific reason(s) why a particular student's exemption request was denied.

[30] The template was used by the Validation Team to advise the Applicants of the denial of their requests for exemption. Specific reasons were inserted into each Applicant's decision letter. There was overlap in the reasons, as discussed in further detail below.

### **REQUESTS FOR EXEMPTION AND THE UNIVERSITY'S DENIAL LETTERS**

[31] Each Applicant completed an Exemption Request form setting out the reasons why they decided not to be vaccinated against COVID-19 and each submitted supporting materials for the university's consideration. The Applicants cited both scriptural and non-scriptural sources for many of their assertions. The summaries below capture the highlights of the main points that they advanced.

*Elise Michalski (née Desjardins)*

[32] Elise Michalski submitted a letter from her Pastor, confirming that she is a Hamilton Diocese parishioner who regularly attends St. Augustine's church. She also submitted her own five-page letter. She wrote that, as a Christian, she is "required to honour the sanctity of human life, including pre-natal life" and that she therefore refuses "to receive a COVID-19 vaccine that used aborted human fetal cell lines in its production and/or confirmation." She further stated that Christians "are to stand against and reject medical experimentation that directly links to the harming of children, born or unborn." She acknowledged that the Canadian Conference of Catholic Bishops has issued a statement that receiving a COVID-19 vaccine "does not constitute formal cooperation with abortion" but she expressed her view that this statement "contradicts the Catechism of the Catholic Church." She noted that the issue is not settled within Catholic organizations and that individual Catholics must, when faced with a moral choice, decide in accordance with their own conscience.

[33] Ms. Michalski also stated, "As a flawed but sincere follower of Christ, I am required, to the best of my ability, to live a life promoting truth and to bear witness to the truth; I am required *not* to promote or participate in falsehoods." She then wrote several paragraphs about breakthrough infections (i.e., vaccinated persons becoming infected with SARS-CoV-2) and expressed her view that most of the media, government officials and health experts have falsely claimed that full vaccination will prevent the spread of COVID-19. She submitted that there is "ample evidence from multiple countries that someone fully vaccinated can spread the virus," yet the university "is targeting only the unvaccinated", which is "a discriminatory process founded on a falsehood." She also asserted that the university's mandatory vaccination policy infringes ss. 6(2) and 7 of the *Canadian Charter of Rights and Freedoms*.

[34] Finally, Ms. Michalski asserted that individuals of university age have a low risk of severe COVID-19 related illness and death. She maintained that "[i]t is ethically wrong for the University to coerce students to receive a COVID-19 vaccine when the virus poses little to no threat to them." She submitted that the university's vaccine mandate fundamentally contradicts core tenets of her faith because it is coercive. She stated that Christianity, "when rightly aligned with the words and deeds of Christ and when acting in accordance with scriptural mandates – has insisted that men and women be free to choose on matters of conscience without compulsion." She insisted that her faith therefore requires that "every person have the freedom to decline any unwanted or quasi-approved medical treatment or procedure – including vaccination."

[35] Ms. Michalski received a decision letter formulated on the university's template for denials of exemption requests based on creed. The letter contained the following specific reasons why her request was denied:

- Your decision not to be fully vaccinated appears to be a personal decision that is not an explicit requirement of your religious community and/or faith.
- The exemption request does not substantially connect any professed religious belief with an inability to be vaccinated. A belief concerning the mandatory nature of the vaccine policy and personal conscience is not a valid basis for a religious accommodation. An argument concerning the use of fetal cell tissue is also an insufficient basis. No vaccine available contains cells from an aborted fetus.
- Cell line HEK-293 used in testing the Moderna and Pfizer-BioNTech vaccines cannot be scientifically proven to be derived from fetal cell tissue from elective abortion. The cell line may also have been derived from fetal cell tissue from spontaneous miscarriages. The cell line is many generations away from its original source. This cell line is also used widely for testing various medicines and food products, and is not particular to the approved COVID-19 vaccinations. The cell line was also not used in the creation of the vaccines and the vaccines themselves do not contain any aborted cells.
- We do note that the Roman Catholic Church has encouraged members to receive the available COVID-19 vaccines, and that Pope Francis has actively encouraged Catholics to be vaccinated as “an act of love” (citation omitted).
- The exemption request makes extraneous arguments concerning the health risks of COVID-19 and the evidence in support of vaccination.

***Peter Michalski***

[36] Peter Michalski submitted a six-page letter, providing detailed reasons for his request for an exemption from the vaccine mandate on the grounds of both “creed” and “conscience”. He attached a letter from his Pastor, confirming that he is a registered member of a Hamilton Diocese parish and regularly attends St. Augustine’s Church.

[37] Mr. Michalski divided the reasons for his exemption request into three main points. First, he asserted that, “as a disciple of Christ” it is his “duty to live in truth”. He stated, “COVID-19 is not an extremely severe or deadly virus for people under the age of 40” and that the viral variants “do not post a grave danger (i.e. death) to the vast majority of people.” He further

asserted that people who are vaccinated can get and spread COVID-19. He argued that the university's mandatory vaccination policy is therefore unjustified and stated that, as a Christian, he "cannot participate in or comply with falsehoods." He said that he could not comply with the university's vaccine mandate because Christians "are bound to adhere to the truth once they come to know it", citing the Catechism of the Catholic Church. He also argued that the university's vaccine policy violates s. 6(2) of the *Charter* by negatively impacting the employment opportunities of teaching assistants and research assistants.

[38] Mr. Michalski's second point was a "demand to be free from any coercion to receive any vaccine that was derived directly or indirectly from aborted human fetal cell lines." He acknowledged the Vatican's statement that the moral duty to avoid passive cooperation with abortion is not obligatory "if there is a grave danger". He expressed the view that there is "insufficient evidence that COVID-19 is a grave danger to me or to the vast majority of the student population." He also noted that, despite the Vatican's statement, the issue is not settled and remains a contentious topic among Christians. He cited a variety of sources of authority for practicing Catholics, which stand for the principle that "Human life must be respected and protected absolutely from the moment of conception."

[39] Mr. Michalski's third point was that "the belief in man's freedom, granted to him by God" is a fundamental tenet of his faith. He argued that McMaster's policy violates s. 7 of the *Charter* by interfering with a person's autonomy and ability to control his or her own physical integrity. He also argued that COVID-19 vaccines are experimental, were created and tested quickly, and that there is a lack of data regarding long-term effects or potential adverse events for specific population groups. He stated that he has a medical condition that places him at risk of adverse events related to COVID-19 vaccines. He refused to disclose his medical condition because "students should not have to disclose this information in order to be free of coercion."

[40] The university responded to Mr. Michalski's request using the same template letter that was sent to Ms. Michalski. The reasons provided for rejecting his exemption request were identical to those contained in Ms. Michalski's letter, with one exception. The university added the following, "A general belief concerning bodily purity is not a valid basis for a religious accommodation. Moreover, a belief concerning personal choice in medicine is also not a valid basis for a religious accommodation."

### ***Ana Stanciu***

[41] In her request for an exemption, Ana Stanciu asserted a "sincerely, freely and deeply held belief as an Orthodox Christian" that she has "the right to bodily autonomy and the right to make fully informed and consenting decisions regarding my body and health that are free from any

element of force, fraud, duress ... constraint or coercion.” She cited s. 7 of the *Charter* and asserted a constitutional right “to freely choose what does and does not enter my body.” She asserted a religious obligation to view her body as a temple of the Holy Spirit and to not defile it with “neurotoxins, hazardous substances, attenuated viruses, animal cells, foreign DNA, albumin from human blood, carcinogens and chemical waste” or with “human cells and debris in vaccines.”<sup>4</sup>

[42] She stated that, as an Orthodox Christian, she must “live in the light of God’s moral commands” including “resisting oppression and injustice... such as coercive vaccination programs.” She cited a religious obligation to honour the sanctity of human life, including pre-natal human life, and to “protect unborn souls from medical experimentation in the production of some vaccines.” She stated, “I am of the opinion that receiving the vaccines would be participating in the sin of abortion, thereby resulting in my spiritual death which is less desirable than physical death and results in the eternal suffering of our souls.”

[43] Ms. Stanciu submitted a supporting letter from a priest of her Romanian Orthodox Church. In his letter, Rev. Fr. Florian Ene writes, “Vaccines, particularly covid vaccines are intrusive in the eyes of a Christian. As believers, we know that the body is the temple of the Holy Spirit and as such, should not be used for medical experimentation.” He states that it is “an affront to Christianity” to inject one’s body with a man-made substance in an effort to improve one’s God-given immune system. He cites the Social Life document of the Russian Orthodox Church, which condemns medical uses of fetal tissue to treat disease and the harvesting of biological material from an embryo because the subject embryo cannot give informed consent. He also cites numerous synodal and monastic statements that forbid or recommend against COVID-19 vaccines.

[44] In support of Ms. Stanciu’s exemption request, Rev. Ene argues that “believers” who have taken childhood vaccines or even a recent flu vaccine are not being contradictory in their religious objection to COVID-19 vaccines because they may not have been aware that many vaccines “have been cultured in aborted fetal tissue and carry the DNA of a male aborted baby.”<sup>5</sup>

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<sup>4</sup> There is no evidence before the Court that COVID-19 vaccines contain human cells or any of the other substances listed by Ms. Stanciu.

<sup>5</sup> There is no evidence that COVID-19 vaccines or any other vaccines were “cultured in aborted fetal tissue” or “carry the DNA of a male aborted baby.”

[45] Ms. Stanciu also submitted, as part of her exemption request, a document setting out reasons why she believes that her unvaccinated status would not pose a threat to other members of the university community, including: the low mortality rate of the disease; COVID-19 primarily affects the elderly and youth are very marginally affected; asymptomatic transmissions of COVID are too insignificant to warrant the vaccine mandate; among the seriously ill, the vaccine may actually cause more harm than good; in the 12-29 age group, there has been a notable risk of heart inflammation due to the COVID vaccine; the vaccine will go obsolete and will not be effective against future variants of SARS-CoV-2; multiple health authorities from all across the world have warned against the safety and efficacy of coronavirus vaccines; and adverse reactions and death caused by the vaccines are underreported.

[46] The Validation Team responded to Ms. Stanciu's exemption request using the university's template denial letter. The specific reasons inserted for the rejection of her request were as follows:

- The exemption request does not substantially connect any professed religious belief with an inability to be vaccinated. An argument concerning the use of fetal cell tissue is also an insufficient basis. No vaccine available contains cells from an aborted fetus.
- We do note that the Russian Orthodox Church has encouraged members to be vaccinated against COVID-19.

***Sean Glynn***

[47] In his request for an exemption, Sean Glynn states that, as a baptized Roman Catholic, he desires to remain faithful to Church teachings on matters of truth and morality, including the ethical principle that vaccination must be voluntary and free of coercion. He asserts that he cannot be coerced to take an "experimental medical treatment" because he has God-given rights to bodily autonomy and to make judgments for his own medical and therapeutic treatments.

[48] Mr. Glynn also writes that there is a concern among many theologians, clergy and laity that "the times in which we find ourselves have been prophesized in the Bible" and that COVID-19 vaccines and "vaccine passports" are ushering in the "mark of the beast," which Catholics must reject.

[49] Mr. Glynn states that "all the current Health Canada approved COVID-19 vaccines are morally compromised and tainted, having used cell lines originating from aborted fetuses." He adds that "Christians of good will" have a duty to avoid these vaccines and to follow the

Catechism of the Catholic Church, which states that “human life must be respected and protected absolutely from the moment of conception.” He recites a passage from a 2005 publication of the Pontifical Academy for Life, which states that using vaccines whose production is connected with procured abortion constitutes passive cooperation with abortion. He asserts that taking a vaccine that utilized fetal cells from abortion would make him complicit in an action that directly contradicts the doctrines of his faith.

[50] Finally, in his exemption request letter, Mr. Glynn discloses that he has positive SARS-CoV-2 antibodies from previous infection and recovery. He asserts that there is “increasing scientific evidence that natural immunity is much more protective against re-infection (including variants of concern) than vaccination alone.” He expresses his view that, if he masked and maintained social distancing, he “would be no threat to the McMaster community”.

[51] Mr. Glynn attached to his exemption request a certificate confirming his membership in the Confraternity of Our Lady of Fatima and attesting to his religious belief that “the crime of abortion is so monstrous that any kind of concatenation with this crime, even a very remote one, such as vaccines that use aborted fetal cells for the testing or production, is immoral and cannot be accepted under any circumstances by a Catholic.” He also attached a Statement on COVID-19 Vaccine Mandates, produced by the National Catholic Bioethics Centre, which does not endorse mandatory COVID-19 immunization with any of the vaccines authorized by the U.S. Food & Drug Administration.

[52] The university used the template denial letter to respond to Mr. Glynn’s exemption request. The specific reasons provided for rejecting his request mirror the first three reasons set out in Ms. Michalski’s rejection letter.

### *Summary*

[53] The university does not question the devoutness of the Applicants’ Christianity or the sincerity of their religious objection to abortion. However, it found that there is an insufficient nexus between their religious beliefs and their unwillingness to receive a COVID-19 vaccine. In his oral submissions, McMaster’s counsel characterized the content of the Applicants’ exemption requests as “political objections dressed up as religious argument.” The university rejected their requests because it concluded that the real basis for their objection lies in their personal beliefs that the pandemic is not really a grave public health situation and that the available vaccines have not been proven effective and may have unanticipated adverse consequences.

[54] In short, McMaster’s decision-makers concluded that the Applicants are using their sincerely held religious objection to abortion as a pretext to avoid taking vaccines to which they

personally object on non-religious grounds. The fact that the HEK-293 cell line is many generations removed from its original source of fetal tissue, and the uncertainty as to whether the original tissue was derived from an elective abortion, both factored into the Validation Team's decisions. The fact that none of the Applicants submitted evidence that they refrain from taking other vaccines or from using pharmaceutical products that have been tested on HEK-293 cell lines confirmed the Validation Team's suspicion that the Applicants' objection to COVID-19 vaccination is not religiously based (i.e., is not part of an overarching system of belief that governs their conduct and practices).

## **JURISDICTION TO REVIEW THE UNIVERSITY'S DECISIONS**

### ***Source of the Court's Jurisdiction***

[55] A brief discussion of the Court's jurisdiction to hear the Application is in order before addressing the Applicants' grounds for judicial review.

[56] Subsection 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.11 ("JRPA") states:

On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of *mandamus*, prohibition or *certiorari*.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

[57] Subsection 1(1) of the JRPA defines "statutory power of decision" to mean,

a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party; or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not.



[58] The Applicants submit that this Court has jurisdiction under s.2(1)2 of the JRPA to review the Validation Team's decisions to deny them exemptions from the university's mandatory vaccination policy. McMaster disputes that the impugned decisions were an exercise of a statutory power. McMaster does not contest this Court's jurisdiction to review the decisions, but it argues that jurisdiction derives from s.2(1)1 of the JRPA because the decisions are of a kind that is reached by public law and to which a public law remedy can be applied: *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481, at paras. 24 and 32.

[59] The Applicants' submissions on jurisdiction may be summarized as follows. McMaster is a statutory body governed by *An Act Respecting McMaster University (The McMaster University Act, 1976)*, as amended by Bill 173, Chapter 5, S.O. 2016. McMaster developed and adopted its vaccination policy in conformity with instructions issued by Ontario's Chief Medical Officer of Health pursuant to a Regulation under the *Reopening Ontario Act, 2020*. McMaster's President delegated to the Validation Team administrative and decision-making powers with respect to the evaluation of student requests for exemption from the vaccine mandate based on non-medical human rights grounds. The decision-makers who rejected the Applicants' exemption requests were therefore exercising delegated statutory powers when they made decisions about the Applicants' on-campus privileges and eligibility to continue to receive the benefit of their education at McMaster.

[60] This argument is not supported by the jurisprudence on the interpretation of s. 2(1)2 the JRPA. The Court of Appeal for Ontario has ruled that "it is not enough that the impugned decision be made in the exercise of a power conferred by or under a statute; it must be made in the exercise of a 'statutory power of decision'; and ... that must be a specific power or right to make the very decision in issue": *Paine v. University of Toronto* (1982), 34 O.R. (2d) 770 (C.A.) at p.5.

[61] While it is arguable that McMaster's adoption of its mandatory vaccination policy was an exercise of a specific statutory power of decision conferred by Regulation enacted under the *Reopening Ontario Act, 2020*, that issue is not before this Court because the Applicants abandoned their requests for injunctive and declaratory relief, and for an order quashing the policy. Their focus is now on quashing the Validation Team's decisions to deny their exemption requests. They have pointed to no statute (or Regulation) that confers a specific power to make those decisions.

[62] The *McMaster University Act, 1976* grants the university's Board of Governors and Senate broad powers to adopt certain policies. It also grants McMaster's President powers to implement university policies, but it does not explicitly address vaccination policies. Moreover, neither the university's governing statute nor the *Reopening Ontario Act, 2020* (nor any

Regulations enacted pursuant to either of those laws) confers on the President a specific power to make the very decisions at issue in this case, namely whether students have established a creed-based entitlement to an exemption from the vaccine mandate. The Validation Team's impugned decisions therefore do not constitute an exercise of a statutory power delegated from the President.

[63] The Court's jurisdiction to make the requested order quashing the impugned decisions does not, however, depend on the Applicants establishing that the Validation Team exercised a statutory power of decision within the meaning of s. 2(1)2 of the JRPA. We agree with McMaster's submission that the Court can take jurisdiction over the Application and may grant an order quashing the impugned decisions because the judicial review application raises issues of a public nature, and the relief sought (*certiorari*) is one of the prerogative writs set out in s. 2(1)1 of the JRPA. It is unnecessary to review the relevant factors leading to the Court's determination that this matter is sufficiently public in character to bring it within the purview of public law because the parties agree that it has a sufficient public dimension.

[64] The Court therefore has jurisdiction to review the Validation Team's impugned decisions on their merits and to order the relief sought by the Applicants. The exercise of that jurisdiction is, however, within the discretion of the Court. The permissive language in s.2(1)1 of the JRPA ("the court may ... by order grant any relief") continues the longstanding discretionary nature of judicial review and of *certiorari* as a prerogative remedy: *Strickland v. Canada (Attorney-General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at paras. 37-38.

[65] The parties urged this court to exercise its discretionary jurisdiction to review the Validation Team's decisions. For the reasons that follow, I am not persuaded that it is appropriate to do so.

#### ***Discrimination Claim Framed as "Reasonableness" Dispute***

[66] If the court were to exercise its discretion to review the impugned decisions, the applicable standard of review would be reasonableness. "A reasonable decision is one that is based on an internally coherent reasoning and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4<sup>th</sup>) 1, at para. 85.

[67] The Applicants withdrew their claim that the university's denials of their exemption requests violate their rights under s. 1 of the *Human Rights Code*. They now simply assert that the denials are unreasonable. However, an allegation of creed-based discrimination with respect

to services lies at the heart of their arguments about why the impugned decisions are unreasonable.

[68] The Applicants' central argument is that the decisions cannot be justified in light of the legal constraints that bear on them, namely the requirements of the *Human Rights Code*. Their submissions may be summarized as follows. The entire *raison-d'être* for the exemption process under the vaccination policy is to ensure compliance with the *Code*. The *Code* prohibits discrimination based on certain enumerated grounds (including creed) and requires the university to take steps to accommodate students who are unable to be vaccinated for reasons related to those human rights grounds. The university's interpretation of what sorts of beliefs constitute a creed must be consistent with the jurisprudence under the *Code*. The Validation Team adopted an interpretation of "creed" that is contrary to the *Code* and that therefore undermines the very foundational purpose of the exemption decision-making process. The Applicants submit that a "decision that undermines its own purpose is unreasonable."

[69] More specifically, the Applicants submit that, in deciding whether their objections to COVID-19 vaccination have a nexus to their religion, the decision-makers incorrectly conflated "creed" with obligatory religious doctrine and failed to give proper consideration to their subjectively held individual religious beliefs. They rely on the following passages from the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551 (emphasis added):

[46] [F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes, ... *irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.*

...

[54] A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. *Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief.*

[70] The Applicants further argue that the Validation Team erred by considering that they did not submit evidence of a personal history of refusing to accept other vaccines or of avoiding the use of pharmaceutical products that have been tested on HEK-293 cell lines. The Applicants again cite *Amselem*, where the Supreme Court stated that it is not appropriate for a decision-maker to focus on the past practice of claimants because people's perceptions of their religious obligations may change over time. The Supreme Court held, at para. 53, "[b]ecause of the vacillating nature of religious belief, a court's inquiry into sincerity... should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."

[71] Framing the above arguments as "unreasonable" decision making by the Validation Team does not change the true nature of the Applicant's submissions, which is fundamentally that the university violated their right to equal treatment with respect to education services without discrimination based on creed, contrary to s. 1 of the *Human Rights Code*. Similarly, the fact that the Applicants are no longer seeking declaratory relief with respect to a breach of the *Code* does not alter the essence of their claims, which is that the university discriminated against them because of their religion and failed to comply with its accommodation obligations under the *Code*.

[72] The Applicants' counsel have strategically framed their argument as one of unreasonableness for the purpose of judicial review, but they are effectively asking this Court to rule on whether the Validation Team correctly interpreted the meaning of "creed" under the *Human Rights Code*. McMaster defends the reasonableness of the impugned decisions. It advances arguments in response to the Applicants' submissions on the *Code*, citing different passages from the *Amselem* case. It is unnecessary to review those responses because we have decided that it would be inappropriate for this Court to make pronouncements on this issue without the benefit of a full evidentiary record.

[73] Although this Court has jurisdiction to review the impugned decisions, this is not the appropriate forum to rule on the Applicants' concerns. One of the discretionary grounds for refusing to undertake judicial view is that there is an adequate alternative forum: *Strickland*, at para. 40. In this case, the alternative is the Human Rights Tribunal of Ontario (HRTO). Several factors support the conclusion that the HRTO is a more appropriate forum for the Applicants' claims to be adjudicated. These factors include: the nature of the errors alleged by the Applicants (i.e., a misinterpretation of the meaning of "creed" in the *Code*); the relative expertise of the HRTO in matters of religious freedom and discrimination based on creed; the capacity of the HRTO to render a remedy comparable to that which the Applicants are seeking (having abandoned their requests for declaratory relief); and the economical use of judicial resources. Perhaps the most significant factor is that the HRTO would be able to receive and consider the

voluminous expert evidence that had to be excised from the Application Record. The suitability and appropriateness of judicial review in this forum is undermined by the comparatively limited evidentiary record before this Court.

[74] The Applicants raise the issue of expeditiousness to support their submission that this Court should conduct a judicial review of the reasonableness of McMaster's decisions. They argue that the Divisional Court was able to accommodate a hearing on an expedited basis, whereas the HRTO process would have been much slower. The Applicants are understandably eager to have their claims decided prior to the commencement of the next academic year in September 2022.

[75] Delay is a relevant factor for consideration, but it does not offset the other factors that weigh in the balance in determining whether to exercise discretionary jurisdiction in this case. There is an avenue for obtaining an expedited hearing before the HRTO: *JL v. Empower Simcoe*, 2020 HRTO 641. Furthermore, Rule 23.2 of the HRTO's *Rules of Procedure* permits a request for an interim remedy: *RB v. Keewatin-Patricia District School Board*, 2013 HRTO 130.

[76] The only other reason advanced by the Applicants to support this Court's exercise of its jurisdiction is the fact that they started their Application as a *Charter* challenge to the university's vaccination policy, which could not have been heard by the HRTO. We do not view this as a compelling reason to exercise the Court's powers of judicial review in a case that is fundamentally, at its core, a claim of discrimination based on creed under the *Code*.

[77] One final consideration, not raised by the parties, is the fact that the Applicants are also seeking an order of *certiorari* based on alleged procedural unfairness, which raises issues that fall squarely within this Court's exclusive jurisdiction of judicial review. In the circumstances of this case, we do not view that as sufficient reason to engage in a judicial review of the merits of the Validation Team's decisions. As set out below, the Applicants' procedural fairness arguments lack merit and are not a basis for this court to adjudicate a claim that should be made before the HRTO.

### **PROCEDURAL FAIRNESS**

[78] The Applicants submit that a high standard of procedural fairness was owed to them. They argue that the university denied them procedural fairness because: (i) they were not given notice of the potential consequence of being unenrolled if their exemption requests were denied; (ii) they were not given an opportunity to be heard on specific criteria that influenced the Validation Team's decision; (iii) they were not afforded an internal right of appeal; (iv) the university provided them with insufficient reasons for the rejection of their exemption requests;

and (v) there is a reasonable basis to apprehend that the decision-makers were biased against them.

***Principles for Determining the Content of the Duty of Procedural Fairness***

[79] The duty of procedural fairness in administrative law is variable and context specific. “Where a particular decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all the circumstances”: *Vavilov*, at para. 77. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23, the Supreme Court of Canada set out a non-exhaustive list of factors that inform the content of the duty of fairness in any given case. When considered together, the *Baker* factors militate in favour of relaxed and rudimentary procedural requirements for the decisions at issue in this case.

[80] First, the process followed by the Validation Teams did not resemble judicial or quasi-judicial decision-making, so McMaster’s duty of fairness is not likely to encompass the protections typically afforded to litigants who appear before an adjudicative tribunal (e.g., notice and disclosure requirements, right to counsel, right to cross-examine witnesses, right to make oral submissions, etc.).

[81] Second, as the Intervener Council submitted in its factum, the governing statute under which McMaster operates gives the university significant autonomy and independence in the governance of its affairs. An adjudicative process to decide student requests for *Code*-based exemptions from a university policy is neither required, nor even contemplated, by the *McMaster University Act, 1976*.

[82] Third, the university’s institutional constraints are an important consideration: *Baker*, at paras. 27 and 90. McMaster’s procedural choices must be examined in the broader factual and social context in which they were made. The university was planning an imminent return to in-person learning in the midst of a global pandemic, with emerging new coronavirus variants of concern and shifting public health guidelines. It was obligated to adopt a vaccination policy pursuant to instructions given by the Office of the Chief Medical Officer of Health. It was operating under strict time constraints. Due to the controversial and divisive nature of COVID-19 vaccine mandates, it correctly anticipated that it would likely receive a flood of exemption requests from both employees and students based on a variety of grounds. In fact, it received 117 medical exemption requests (88 from students) and 470 non-medical requests (362 from students). These voluminous requests needed to be individually assessed under compressed timelines, so the university developed a streamlined process of written submissions.

[83] The only relevant *Baker* factor that militates in favour of imposing a duty of procedural fairness is the importance of the impugned decisions to the Applicants, who are directly affected. The Validation Team's decisions and the Applicants' resulting unenrollment from their programs caused a significant interruption in the Applicants' education. Two Applicants are Ph.D. students who fear the potential loss of their academic supervisor because of the delay in completing their studies. Mr. Glynn was enrolled in an "accelerated" MBA program that would see him return to the workforce after only 8 months of study. The value of that accelerated program has been lost to him.

[84] There is no question that the Applicants have been significantly affected by the university's decisions. However, the negative impact of unenrollment from their Winter 2022 courses must not be overstated. It will not have the type of severe effect that an expulsion, for example, would entail. There will be no record of misconduct or discipline on any of their transcripts. They are currently withdrawn from their programs "in good standing." Moreover, their unenrollment is likely only temporary, albeit of uncertain duration. They are permitted to resume their university studies at McMaster when the vaccination policy is lifted. Their relationship with McMaster has not been permanently severed.

[85] Taking all the relevant factors into account, we conclude that the university owed a duty of fairness to the Applicants, but one with only rudimentary procedural requirements. Specifically, the Applicants were entitled to be afforded the opportunity to make representations, to submit supporting documentation with respect to their exemption requests, and to have their requests considered fairly by an impartial decision-maker, who provided them with adequate reasons for the decision that was ultimately reached. As explained below, we are of the view that these procedural safeguards were met. The absence of an internal right of appeal does not constitute a denial of procedural fairness in the circumstances of this case.

### ***Procedural Fairness was Afforded to the Applicants***

#### **Notice Requirement**

[86] The Applicants argue that McMaster breached its duty of procedural fairness because the university's vaccination policy is not explicit about the seriousness of consequences in the event an exemption request is denied. They claim that they were not aware that they could be unenrolled. There is, however, no evidence as to what they might have done differently had they known.

[87] Assuming (without deciding) that notice of the severity of consequences is a requirement of McMaster's duty of procedural fairness, the evidentiary record does not support the Applicants' submissions on this point:

- a) The vaccination policy specifies sanctions for Community Members who refuse to disclose their vaccination status or who fail to provide proof that they are Fully Vaccinated, and who do not obtain an exemption by October 17, 2021. With respect to students, it states, “such individuals may be required to un-enroll.”
- b) McMaster posted additional information on its website, advising students that, if they did not submit proof of full vaccination by 11:59 PM on October 17, 2021, they would be permitted to complete remote Fall 2021 courses but would be unenrolled from both remote and in-person Winter 2022 courses, unless they obtained an exemption from the vaccine mandate on a substantiated human rights ground.
- c) Two of the Applicants, Elise and Peter Michalski explicitly acknowledged the risk of unenrollment in their exemption request letters. Similarly, the National Catholic Bioethics Centre’s Statement on COVID-19 Vaccine Mandates, appended to Mr. Glynn’s exemption request form, references a threat to students’ ability to continue their education.

[88] The Applicants were therefore given notice of the potential consequences if their exemption requests were denied. They either knew or ought to have known that they might be unenrolled from their courses.

Disclosure Requirement

[89] The Applicants argue that the process adopted by the university was unfair because they were not given the internal documents used by the Validation Team or the information contained in those documents. They submit that the university should have advised them to identify their prior practice with other vaccines and with common medications that are tested on HEK-293 cell lines, so that they would have included that information in their exemption requests and could have provided an explanation if they did not have a consistent practice of avoiding vaccines or health products tested on fetal cell lines. Alternatively, the Applicants submit that the Validation Team ought to have asked them to submit additional information relating to these topics because their exemption requests did not address these factors that were under consideration.

[90] We agree with the university’s submission that the duty of procedural fairness, in the circumstances of this case, did not require McMaster to instruct students on how to support their creed-based exemption requests. The process created by the university was fair; the students had an obligation to put their best foot forward. The Exemption Request Form explicitly instructed



students to attach supporting documentation to substantiate their claim that they are unable to be vaccinated due to a human rights ground. It was incumbent upon the Applicants to include all relevant information and documentation.

[91] Moreover, even if the university had a duty to disclose the relevance of these factors to the Validation Team's assessment process, there is no evidence that the lack of disclosure resulted in any procedural unfairness in this case. Although evidence on an Application for judicial review is generally restricted to that which was before the original decision-maker, there are recognized exceptions to the general rule, including the admissibility of materials "to show procedural defects that are not apparent from the record or the reasons – for example, a reasonable apprehension of bias or a denial of procedural fairness": *30 Bay ORC Holdings v. Toronto*, 2021 ONSC 251, 13 M.P.L.R. (6<sup>th</sup>) 52 (Div. Ct.) at para. 114; *Murray*, at para.18. The Applicants could have submitted affidavit evidence in this proceeding to show the prejudicial impact of McMaster's failure to disclose all relevant factors being considered by the Validation Team. For example, they could have attested to the fact that, had they known it was a relevant consideration, they would have outlined their personal history of rejecting other vaccines and/or avoiding the use of medications tested on HEK-293 cell lines, or would have provided an explanation for why they did not have that prior practice when they submitted their exemption requests. No attempt was made to adduce any such evidence to show a denial of procedural fairness. Once again, it was incumbent upon the Applicants to put their best foot forward.

[92] Notably, as set out earlier in these Reasons, the supporting letter appended to Ms. Stanciu's exemption request specifically addresses the fact that persons who refuse COVID-19 vaccines because of an objection to testing on HEK-293 cell lines may not have a history of declining other vaccines because they may not have been aware that the other vaccines were similarly tested on fetal cell lines. Ms. Stanciu can therefore be presumed to have known that this was a relevant consideration at the time of her request, yet she did not provide the Validation Team with information about her own vaccine history or prior knowledge of vaccine testing on fetal cell lines.

[93] Finally, it is also important to note that prior history of declining other vaccines and prior history of avoiding common medications tested on HEK-293 cell lines were just two among many factors considered by the Validation Team. The denial letters provided to the Applicants clearly show that these were not, in and of themselves, determinative of the outcomes of their exemption requests.

Reasonable Apprehension of Bias

[94] The Applicants submit that the decision-makers on the Validation Team took a perfunctory approach to their task and pre-determined the rejection of the Applicants' requests without conducting an individualized assessment of the *bona fides* of the Applicants' professed religious beliefs. In support of this position, the Applicants point to the internal *Guideline* and other documents prepared for and used by the Validation Team. They argue that McMaster's decision-makers were not provided with guidance on how to assess creed-based exemption requests, but rather were given guidance on how to deny such requests.

[95] The Applicants note that the Validation Team was given the *Denial Rationale* document, but no comparable *Approval Rationale* document. The team was also given a decision template letter for denials. The reasons inserted into the template for each Applicant were mostly cut and pasted from the *Denial Rationale* document. The Applicants assert that the reasons they were given are formulaic and non-responsive to the substance of their individual requests. They argue that this is evidence of "rubber stamping" of rejections without appropriate consideration of the merits of each of their creed-based exemption requests.

[96] I am not persuaded by these arguments. The internal *Guideline* and other documents prepared for the Validation Team did not fetter the decision-makers' discretion or lead them to rubber stamp rejections of creed-based requests. The decision-makers were provided with appropriate tools to complete their task, including external OHRC documents and internal documents developed in consultation with subject-matter experts. The documents set out the relevant criteria for what constitutes a "creed" within the meaning of the *Human Rights Code* and instructed the Validation Team to apply those criteria.

[97] Given the anticipated high volume of exemption requests, the time constraints within which they had to be processed, and the need to provide written reasons for any denials, it was appropriate for the university to prepare tools for the Validation Team, including a template decision letter for denials, and the *Denial Rationale* document. These tools not only fostered expediency, but they also strengthened institutional decision-making by encouraging consistency in the Validation Team's approach to creed-based requests. An *Approval Rationale* document was not necessary because detailed reasons for approving requests were not required.

[98] In our view, there is no evidence that the Validation Team treated all creed-based exemption requests as spurious or failed to give the Applicants' requests proper consideration. We do not agree that the reasons inserted into the Applicants' denial letters were non-responsive to their individual requests. The summaries set out earlier in these Reasons show the correlation of the reasons for denial to the arguments set out in each Applicant's request form. The extent of

identical or similar reasons contained in the different decision letters simply reflects the similarity and overlap in the Applicants' grounds for their exemption requests.

Adequacy of Written Reasons

[99] We have already rejected the Applicants' argument that the written reasons provided in their decision letters were unresponsive to their requests. On the issue of the adequacy of the reasons provided, we would simply add that the decision-makers on the Validation Team were not required to respond to every extraneous point raised by the Applicants in their requests. The Applicants made numerous assertions about the severity of the COVID-19 pandemic, the efficacy of vaccines, the risks associated with vaccines, and the extent of public disinformation about COVID-19 and about the vaccines. These assertions were extraneous to the task of assessing the *bona fides* of the Applicants' creed-based exemption requests and therefore did not need to be addressed in the written reasons provided by the university.

CONCLUSION AND COSTS

[100] For the above reasons, the Application is dismissed.

[101] Given the public interest nature of the issues in dispute, McMaster is not seeking its costs, so no costs will be awarded.



**Petersen, J.**

I concur.



**Corbett, J.**

I concur.



**Broad, J.**

**CITATION:** Desjardins v McMaster University, 2022 ONSC 2625  
**COURT FILE NO.:** 970/21  
**DATE:** 20220429

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**D.L. Corbett, Broad and Petersen JJ.**

**BETWEEN:**

Elise Desjardins, Peter Michalski, Ana  
Stanciu and Sean Glynn

Applicants

– and –

McMaster University

Respondent

-and-

Council of Ontario Universities

Intervenor

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**REASONS FOR DECISION**

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**Petersen J.**

**Date of Release:** April 29, 2022