

DIVISIONAL COURT DISMISSES STUDENTS' APPEAL FOR COVID-19 VACCINE RELIGIOUS EXEMPTIONS

*By Barry W. Kwasniewski and Martin U. Wissmath**

A. INTRODUCTION

FOUR STUDENTS of McMaster University did not succeed in appealing the rejection of their claims for COVID-19 vaccine exemptions on religious grounds in the Ontario Divisional Court. Rather, the proper forum for their appeal is the Human Rights Tribunal of Ontario (HRTO), as decided by the Divisional Court in *Michalski v McMaster University*,¹ a unanimous judgment published on April 29, 2022. Although the students initially sought declarations that McMaster University's ("McMaster") vaccination policy violated the *Canadian Charter of Rights and Freedoms*² (the "Charter") as well as the Ontario *Human Rights Code* ("OHRC"),³ they later amended their application and narrowed it down to an appeal for judicial review of McMaster's decisions not to grant exemption requests, claiming that McMaster breached a duty of fairness owed to the students, and that McMaster's decisions were unreasonable.⁴ Charities and not-for-profits will find this case of interest, particularly in the area of employment law, because of the issues surrounding COVID-19 mandatory vaccination policies and the procedure for claiming religious exemptions. This *Charity & NFP Law Bulletin* summarizes the background and provides commentary on the Divisional Court judgment.

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¹ 2022 ONSC 2625 [*Michalski*], online: CanLII <<https://www.canlii.org/en/on/onsc/doc/2022/2022onsc2625/2022onsc2625.html>>.

² Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³ RSO 1990, c H.19, online: <https://www.ontario.ca/laws/statute/90h19>

⁴ *Michalski*, *supra* note 1 at paras 4–5.

B. BACKGROUND

MCMMASTER ANNOUNCED in the late summer of 2021 that it would require all employees and students to be vaccinated against COVID-19, and developed its policy (the “Vaccine Policy”) in accordance with instructions issued by the Chief Medical Officer of Health for Ontario, enforced in Ontario Regulation 364/20 under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*.⁵ The Vaccine Policy applied to students and employees, and, effective October 18, 2021, required proof that students and employees — both “on-site” and “off-site” — were “Fully Vaccinated”, having received two COVID-19 vaccines approved by the World Health Organization. The Vaccine Policy also stated, “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.”⁶

1. Vaccine FAQ and Guideline

McMaster posted a “Vaccine FAQ” on-line for students, with the following answer to the question, “Do the COVID-19 vaccines contain fetal material?”:

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 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. These cell lines were chosen because they are safe and reliable for vaccine development.

With the following italicized note:

⁵ *Ibid* at para 15; SO 2020, c 17, online: <https://www.ontario.ca/laws/statute/20r17>.

⁶ *Ibid* at paras 16–18.

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.⁷

A Validation Team was established to evaluate exemption requests, with instructions from an internal document entitled *Guideline for assessing Covid-19 vaccination exemption requests based on the human rights ground of creed* (the “Guideline”). The Guideline included instructions to use the Ontario Human Rights’ Commission’s criteria for “creed” as the basis of a human rights exemption, being a professed belief that is:

- sincerely, freely and deeply held
- integrally linked to a person’s identify, self-definition and fulfilment
- 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.

The Guideline stated, “Personal beliefs and convictions, political positions, concerns about medical science, etc. are not creed and the exemption request should not be approved.” If it is not clear whether a belief is personal or connected to a creed, the Guideline instructed the Validation Team to ask for more details.⁸ McMaster provided the Validation Team with a template decision letter to use for denying exemption requests, which referenced the OHRC’s⁹ legal standard for accommodation, the obligation for

⁷ *Ibid* at paras 19–20.

⁸ *Ibid* at paras 22–24.

⁹ *Supra* note 3.

McMaster to protect health and safety, and the OHRC criteria for “creed.” This template letter was used to deny the Applicants’ requests for exemption on the basis of creed.¹⁰

2. Exemption Requests

Three of the Applicants, Elise and Peter Michalski, and Sean Glynn, are Roman Catholics; the fourth Applicant, Ana Stanciu, is Romanian Orthodox. Each completed an exemption request form detailing the reasons why they did not receive COVID-19 vaccines, with supporting material attached, and submitted to McMaster.

a) Elise and Peter Michalski

Both Elise Michalski (“Elise”) and Peter Michalski (“Peter”) submitted letters from their pastor, confirming that they are parishioners who regularly attend St. Augustine’s church in the Diocese of Hamilton. Elise stated that she refuses to receive a COVID-19 vaccine “that used aborted human fetal cell lines in its production and/or confirmation.” She disagreed with the Canadian Conference of Catholic Bishops’ statement that receiving a COVID-19 vaccine “does not constitute formal cooperation with abortion” and believed that the statement “contradicts the Catechism of the Catholic Church.” Elise also stated that full vaccination is ineffective in preventing infection from the SARS-CoV-2 virus that causes COVID-19, and that “it 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.”¹¹

Peter stated that “COVID-19 is not an extremely severe or deadly virus for people under the age of 40” and that those who are fully vaccinated can still be infected and spread the virus. Therefore, Peter stated, the Vaccine Policy is unjustified and he “cannot participate in or comply with falsehoods.” He also objected to receiving “any vaccine that was derived directly or indirectly from aborted human fetal cell lines.” Despite a Vatican statement that the moral duty to avoid passive cooperation with abortion is not obligatory “if there is a grave danger”, Peter stated his belief that there is “insufficient evidence that COVID-19 is a grave danger to me or to the vast majority of the student population.” His final objection concerned a medical condition that would place him at risk of adverse events related to COVID-19

¹⁰ *Ibid* at paras 29–30.

¹¹ *Ibid* at paras 32–34.

vaccines; however, he did not disclose his medical condition because “students should not have to disclose this information in order to be free from coercion.”¹²

McMaster responded to Elise and Peter, denying each of their requests for religious exemptions, using the same template letter, with the following reasons:

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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).
- v. The exemption request makes extraneous arguments concerning the health risks of COVID-19 and the evidence in support of vaccination.

An additional reason in the response to Peter addressed his final objection, noting that “belief concerning personal choice in medicine is also not a valid basis for a religious accommodation.”¹³

¹² *Ibid* at paras 36–39.

¹³ *Ibid* at para 40.

b) Sean Glynn

Sean Glynn also objected to receiving the COVID-19 vaccines for “having used cell lines originating from aborted fetuses.” Glynn objected to “vaccine passports” as a “mark of the beast”, which Catholics must reject. He also disclosed that he recovered from a previous infection and there is “increasing scientific evidence that natural immunity is much more protective against re-infection (including variants of concern) than vaccination alone.” McMaster’s response to Glynn provided the first three reasons in the responses to Elise and Peter.¹⁴

c) Ana Stanciu

Ana Stanciu asserted her “sincerely, freely and deeply held belief as an Orthodox Christian” that she has “the right to bodily autonomy” and a religious obligation not to defile her body with “human cells and debris in vaccines.” Stanciu submitted a supporting letter from a Romanian Orthodox priest, who wrote that the “body is the temple of the Holy Spirit and as such, should not be used for medical experimentation.” The priest’s letter cited the Social Life document of the Russian Orthodox Church, which condemns the medical use of fetal tissue to treat disease and the harvesting of biological material from an embryo, which cannot give informed consent. Stanciu also stated that she is not a threat to others due to the low mortality rate of COVID-19, that the vaccine could cause health problems for the 12–29 age group, and that it would not be effective against future variants. The reasons in McMaster’s response were as follows:

- i. 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.
- ii. We do note that the Russian Orthodox Church has encouraged members to be vaccinated against COVID-19.

C. COMMENTARY

THE DIVISIONAL COURT found that although it has jurisdiction to review McMaster’s decisions to reject the Applicants’ religious exemption requests, the exercise of that jurisdiction is “within the discretion of the Court”. It further found that, because the “reasonableness dispute” is essentially a discrimination claim,

¹⁴ *Ibid* at paras 48–52; see B.2. a) i.–iii., *above*.

it would be inappropriate for the Divisional Court to exercise its jurisdiction in this circumstance, given the existence of an adequate alternative forum: the HRTO.¹⁵ The Divisional Court further found that 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."

The *McMaster University Act, 1976*,¹⁶ as McMaster's governing statute, "gives the university significant autonomy and independence in the governance of its affairs," according to the Divisional Court. "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."¹⁷ Therefore, while McMaster owed the Applicants a duty of fairness, it was a duty "with only rudimentary procedural requirements." As the Applicants were afforded the opportunity to make representations, submit supporting documentation with respect to their exemption requests, to have those requests considered "fairly by an impartial decision-maker, who provided them with adequate reasons for the decision that was ultimately reached", the Divisional Court found that the "procedural safeguards" for the duty of fairness were met. "The absence of an internal right of appeal does not constitute a denial of procedural fairness in the circumstances of this case."¹⁸

D. CONCLUSION

WHAT REMAINED of the Applicants' case, narrowed down from the initial application seeking broad declaratory relief, including a declaration that their rights were violated under the *Charter*, was essentially a discrimination claim on the ground of "creed" under the OHRC, according to the Divisional Court. As such, while acknowledging that the Divisional Court has jurisdiction to review McMaster's decisions to deny the Applicants exemptions to its Vaccine Policy, the Divisional Court declined to rule on the reasonableness of those decisions because it held the HRTO to be a more appropriate forum. As for the procedural fairness arguments, this case demonstrates the deference that Ontario courts are willing to give a university with its own governing statute, allowing for greater autonomy. While a "rudimentary" duty of fairness existed, the Divisional Court found that McMaster satisfied the requirements for procedural

¹⁵ *Ibid* at paras 65–77.

¹⁶ As amended by Bill 173, Chapter 5, SO, 2016.

¹⁷ *Michalski*, *supra* note 1 at para 81.

¹⁸ *Ibid* at para 85.

fairness under the circumstances, being a global pandemic and public health crisis. Without overlooking or diminishing the sincerity of the Applicants' religious convictions and requests for exemption, this case also demonstrates the importance of choosing the right forum for challenging an organization's decision not to grant a religious exemption to a COVID-19 mandatory vaccine policy, such as, in the case of a discrimination claim, the HRTO. It remains to be seen if any future challenges of this type regarding the legality of vaccine policies will be brought before the HRTO.



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