

FORM 68A

Courts of Justice Act

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

BETWEEN:

**ELISE MICHALSKI, PETER MICHALSKI, ANA STANCIU
AND SEAN GLYNN**

Applicants

-and-

MCMASTER UNIVERSITY

Respondent

FRESH AS AMENDED

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar by the method of hearing requested by the applicant, unless the court orders otherwise. The applicant requests that this application be heard (*choose one of the following*)

- In person
- By telephone conference
- By video conference

at the following location: John Sopinka Courthouse, 45 Main St. E., Hamilton, ON L8N 2B7 on _____, at 10 a.m. or as soon after that time as the motion can be heard.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the

applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date

Issued by

Registrar

Address of court office

TO **McMaster University,**
1280 Main St. W.,
Hamilton, ON L8S 4L8

AND TO **Attorney General of Ontario**
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, Ontario M7A 2S9

FRESH AS AMENDED APPLICATION

1. The applicant makes application for:

- a. An interim and interlocutory injunction:
 - i. restraining McMaster University (“**McMaster**”) from preventing the Applicants from taking courses in the programs in which they were previously accepted and enrolled;
 - ii. restraining McMaster from preventing the Applicants from taking their courses and program requirements remotely, or, alternatively, from failing to accommodate their requests to continue their courses and programs in which they were previously accepted and enrolled without proof of Covid-19 vaccination; and
 - iii. restraining McMaster from deregistering, disenrolling or withdrawing the Applicants from their courses, by reason only of failing to show proof of Covid-19 vaccination, until the final determination of this Application.
- b. A Declaration that McMaster’s decisions to deny the Applicants’ requests for accommodation with respect to the McMaster Vaccination Policy (the “**Vaccine Policy**”), to remove them from their courses and programs and to disallow them to continue in their courses and programs (the “**Decisions**”):
 - i. breached the duty of fairness due to the Applicants and violated the principles of natural justice; and
 - ii. violated the Applicants’ rights to be free from discrimination based on creed under Section 1 of the *Human Rights Code*, RSO 1990, c H.9.;
- c. A Declaration that the Vaccine Policy:
 - i. is *ultra vires* McMaster’s authority;
 - ii. violates or conflicts with section 38(1) of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31; and
 - iii. violates or conflicts with sections 10 and 11 of the *Health Care Consent Act*, 1996 SO 1996, c. 2.
- d. An order under section 5(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1, extending the time permitted for the making of an application of judicial review in this case;
- e. An order quashing McMaster’s Decisions;

- f. An Order quashing McMaster's Vaccine Policy; and
- g. Such further and other relief as counsel may advise and this Honourable Court may permit.

2. The grounds for the application are:

- a. The Applicant, Elise Desjardins, is a Catholic McMaster PhD candidate in the School of Earth, Environment and Society in the Faculty of Science. Ms. Desjardins has been granted a Vanier Canada Graduate Scholarship (the "Vanier Scholarship") by the Social Sciences and Humanities Research Council;
- b. The Applicant, Peter Michalski, is a Catholic McMaster PhD student in the Department of Computing and Software in the Faculty of Engineering;
- c. The Applicant, Ana Stanciu, is an Orthodox Christian McMaster co-op student majoring in Biochemistry with a Biomedical Research Specialization;
- d. The Applicant, Sean Glynn, is a Catholic McMaster MBA student in the Accelerated MBA program at the DeGroot School of Business. Mr. Glynn has previously contracted Covid-19 and has antibodies to the Covid-19 virus;
- e. The Respondent, McMaster, is a public university in the City of Hamilton, in the Province of Ontario, governed under the *McMaster University Act, 1976* and its by-laws;
- f. McMaster announced the Vaccine Policy on or about August 16, 2021, requiring all McMaster students to show proof of having taken a Covid-19 vaccine by October 17th, 2021, with extremely limited exceptions;
- g. Prior to the Vaccine Policy, McMaster announced it would not impose a mandatory vaccine requirement unless legally required, which the Applicants relied upon to their detriment;
- h. The Vaccine Policy was passed in a purported exercise of statutory power;
- i. Students were ostensibly permitted to request exemptions from the Vaccine Policy on *Human Rights Code* grounds by providing a written request for exemption before September 19th, 2021;
- j. Each Applicant submitted a request for exemption from the Policy prior to the deadline based on the ground of religion and/or creed;
- k. Each Applicant holds a sincere religious belief that taking the Covid-19 vaccine is contrary to their religion, faith and deeply held moral and spiritual beliefs;
- l. McMaster denied each Applicant's request for exemption and has denied them access to campus, their courses and programs and to their ability to register for courses in their programs.

- m. Specifically, McMaster denied Ms. Stanciu's accommodation request on October 8th, 2021; Mr. Glynn's and Ms. Michalski's requests were denied on October 13th, 2021; and Mr. Michalski's request was denied October 16th, 2021;
- n. The Applicants were not provided with a right to be heard, were denied the right to appeal the Decisions and to have their requests be given any further consideration;
- o. Due to McMaster's decision not to accommodate Ms. Michalski, her Vanier Scholarship has been put on hold, and will be cancelled due to McMaster's decision;
- p. All Applicants will suffer significant harm due to McMaster's failure to accommodate them including being removed from their courses and programs;
- q. In making the Decisions, McMaster improperly fettered its discretion to grant accommodation to the Applicants
- r. McMaster's Decisions to reject the Applicants' requests for accommodation on the grounds of religion and/or creed:
 - i. were unreasonable;
 - ii. were contrary to the prohibition against discrimination based on under the *Human Rights Code* by failing to accommodate the Applicants and failing to engage in any attempt at accommodation;
 - iii. failed to give due consideration to the students' requests and issued denials in bad faith including by mischaracterizing the Applicants' accommodation requests and objections to taking the Covid-19 vaccine;
 - iv. were made for an ulterior or improper purpose;
 - v. took into account irrelevant considerations, including by considering the theological opinions of the decision maker as more determinative than the religious beliefs of the Applicants and the stated opinions of religious figures;
 - vi. failed to take into account relevant considerations, including the sincerely held religious beliefs of the Applicants;
 - vii. was based, in part, on evidence and information not put before the Applicants, relating to the alleged positions of religious leaders and organizations;
 - viii. were influenced by the decision makers' bias relating to the importance of religious beliefs, and what the Applicants' beliefs ought to be;
 - ix. mischaracterized the Applicants' religious objections as a "singular belief"; and
 - x. were contrary to McMaster's policies.
- s. Further, the Vaccine Policy is arbitrarily and inappropriately inflexible and improperly fetters the discretion of McMaster by not providing reasonable alternatives to vaccinations.

- t. Further, the *McMaster University Act* does not authorize the creation of the Vaccine Policy;
- u. s. 2(1), 4, 5(2) and 6(2), *Judicial Review Procedure Act*, RSO 1990, c J.1;
- v. s. 1, *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19;
- w. s. 101, *Courts of Justice Act*, RSO 1990;
- x. rules 14.05 and 68.01 *Rules of Civil Procedure*; and
- y. such further and other grounds as this Honourable Court may permit.

3. The following documentary evidence will be used at the hearing of the application:

- a. The affidavit of Elise Michalski, to be sworn or affirmed;
- b. The affidavit of Peter Michalski, to be sworn or affirmed;
- c. The affidavit of Ana Stanciu, to be sworn or affirmed;
- d. The affidavit of Sean Glynn, to be sworn or affirmed;
- e. The expert report of Dr. Richard Schabas, to be sworn or affirmed; and
- f. Such further and other documentary evidence as counsel may advise and the Honourable Court may permit.

December 23, 2021

Jorge Pineda
LSO# 65305B

Rob Kittredge
LSO# 54027Q

Justice Centre for Constitutional Freedoms
7620 Elbow Dr SW, Suite 253
Calgary, Alberta T2V 1K2
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ELISE MICHALSKI, et al.

APPLICANTS

and

MCMASTER UNIVERSITY

RESPONDENT

COURT File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at Hamilton

**FRESH AS AMANDED
NOTICE OF APPLICATION
(JUDICIAL REVIEW)**

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