PART I – STATEMENT OF FACTS

A. Overview

1. David T. Little, the Applicant and devout Roman Catholic, was convicted of failing to file an individual income tax return for each of the years 2000, 2002, and 2002, contrary to s. 238(1) of the *Income Tax Act*. Mr. Little testified at trial that his "conscience would be corrupted" if he filed his income tax return, believing that a portion of any tax he ultimately paid would be used to pay for abortions, which he believes is murder and contrary to the law of the Gospel. In his mind, abortion constitutes an unjust war against innocent unborn children, and he relies upon his constitutional rights as a conscientious objector to take no part, direct or indirect, in the financing of abortions by his tax dollars.

2. Mr. Little's conscience is guided by s. 24 of the *Encyclopedia of Catholic Doctrine*, and s. 16[1] and s. 74 of the *Pastoral Constitution on the Church in the Modern World,* which instruct him to obey civil authorities, except when his conscience is coerced, oppressed or violated by any State law that requires him to disobey the Gospel and the natural law, which in this case is to co-operate with the evil of killing innocent unborn children.

3. Mr. Little's refusal to file income tax returns is justified in his conscience, for he will no longer co-operate either directly or indirectly in the tax funded abortions, for the "law of God supercedes, in the case of murder, any law of man." "Direct induced abortion is the murder of a little child," and thus contrary to the natural law. Mr. Little chooses to obey natural law rather than positive law, in the same way, natural law trumped positive law at the Nuremberg War Crimes Tribunals.

4. The primary issue is whether there is a constitutional violation of Mr. Little's conscience, and if so, what individual remedy may be fashioned for him under s. 24(1) of the *Charter* that accommodates his sincere beliefs and preserves the dignity of his conscience.

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[1] "*For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of a man." S. 16, Pastoral Constitution.*

5. In resolving this question, it will be necessary to consider the Preamble to the *Constitution Act, 1982*, and consider the meaning of the rule of law, and the extent to which the term, the "supremacy of God" defines the "rule of law" to mean conformity to natural law.

6. This Court has an opportunity to craft its own definition of a true democracy to accommodate the conscientious views of discrete and insular minorities and individuals like the Applicant, who would otherwise be discriminated against and coerced to act contrary to his conscience.[2]

7. Finally, a new trial may be mandated in any event, for this Court may find that a miscarriage of justice resulted from the ineffective assistance of counsel.

B. **Facts**

8. The Applicant was born in 1944 in St. John New Brunswick, where he was raised in the Roman Catholic faith. He has a grade 10 education. At 16 he earned his pilots licence and joined the Air Force, which honorably discharged him within three months, in response to his conscientious objection to being subject to the profanity and vulgar language utilized by his drill instructor. In 1968 the Applicant graduated with a teacher's diploma in the Catholic faith, after completing 160 hours of instruction.

9. Throughout his life, Mr. Little filled out and filed income tax returns. In the early 1970's, Mr. Little began attaching to his tax returns a protest letter objecting to the use of his tax dollars for abortions. His letters had no effect. In the late 1980's, he stopped paying income tax. In 1999, he stopped filing his income tax returns.

10. In 1971 the Applicant began pro-life activities. In 1978, he organized a pro-life action committee, became a fundraiser and organized a petition that collected more than 60,000

[2] Should individual dissent be subordinated to majority rule, or the view expressed by the US. Supreme Court in footnote 4 of *U.S. v. Caroline Products Company* 304 U.S. 144 (1938) or the view of the European Court of Human Rights, in *Sahin v. Turkey* [GC], No. 44774/98, ECHR 2005-XI, p.108?

signatures. He became the Assistant Executive Director of New Brunswick Right to Life and founded the Catholic Foundation for Human Life, edited a book titled *How to Open and Operate Pregnancy Outreach Crisis Centers*, and started such a center in Moncton, New Brunswick. Later he founded the St. Thomas More Society of Canada.

11. The Applicant became friends with famous leaders who encouraged him, supported him and approved of his pro-life activities. These individuals included Mother Teresa, Pope John Paul II, Bishop Fulton Sheen, Cardinal O'Connor, and Malcolm Muggeridge. His mentor, Father Bernard McDonald, professor of moral theology at St. Francis Xavier University, refused a salary to avoid paying income taxes that might fund abortions.

12. The Applicant testified that if compelled to file a tax return that funds abortions his soul is in jeopardy of everlasting death in hell. At the very least, his soul would need to undergo purgation. Even coerced funding of abortion rises to the level of mortal sin over the attrition of time, for what was once indirect material co-operation evolves over time to direct formal co-operation, elevating Mr. Little's culpability. Mr. Little's conscience faced a crisis. For Mr. Little, his spiritual condition and undefiled conscience is paramount to any temporal consequences, and for that reason, permanently ceased filing his tax returns.

13. The trial judge found that the Applicant deliberately refused to file the T1 Income Tax Returns and a Statement of Income and Expenses for each of the years 200, 2001, and 2002 as required by law. He also found that the Applicant would owe taxes if he filed as requested, and after taking judicial notice that health services, including abortions, are funded by the state under the *Canada Health Act*, found that the Applicant had established a sufficient basis to assert a *Charter* claim.

14. The trial judge found that the Applicant "clearly holds a sincere belief that abortion is wrong, which view is rooted in his Roman Catholic faith." The trial judge failed to make a finding as to whether filing an income tax return violated Mr. Little's conscience, under s. 2(a) of the *Charter*. Instead, the trial judge found that Mr. Little's freedom of religion was not impaired by the legal requirement to file his tax returns.

15. In his Submission in Reply, Mr. Little's trial counsel abandoned any attack on the constitutional validity of s. 238 of the *Income Tax Act*,[3] but did argue, relying upon Wilson J. in *R. v. Morgentaler,* [1988] 1 S.C.R. 30 at 37, in moral matters an individual's conscience is supreme over the State.

16. This freedom of conscience argument was not addressed by the trial judge: "Consequently I find that the Defendant has not demonstrated that s. 231.2 (1)(a) and 238 (1) of the *Income Tax Act* actually interfere with his religious beliefs and that there has been no violation of his s. 2 (a) *Charter* rights."

17. The trial judge followed the dicta of Southen, J. in *R. v. Sharpe* (1989), 175 D.L.R. (4th) 1 (B.C.C.A.) in finding that the phrase, "the supremacy of God," which is part of the Preamble to the *Constitution Act, 1982*, is "dead letter" and thereby had no force or effect for the purpose of interpreting various provisions of the *Charter*, including s. 2 (a).

18. The trial judge then dismissed the Applicant's claim under s. 15 of the *Charter*, finding that there was no objective differentiation between Mr. Little and anyone else, and even if the filing of a tax return did affect Mr. Little differently from everyone else, his dignity was not impaired, in that he is not made out to be a person less capable or worthy of recognition or value as a human being or as a member of Canadian society.

19. The Applicant represented himself on appeal. McLellan J. summarily dismissed the appeal on October 24, 2008 saying Mr. Little did not make a valid legal argument, nor did he cite to any legal authority where people were allowed not to pay taxes because they "disagreed with government policy."

20. McLellan J. did not appoint counsel to represent Mr. Little. McLellan J. made no reference to the opening statement made in this case on November 24, 2006 by Mr. [redacted] at

[3] Mr. Christie wrote: "This is not a case of general application attacking the constitutional validity of s. 238 of the Income Tax Act, it is a case where a remedy under s. 24(1) of the Charter is appropriate to the accused in the unique circumstances of this case."

the time of his first appearance before the trial judge as to Mr. Little's inability to represent himself in this complex constitutional case.[4]

21. Without the assistance of counsel, the Applicant raised before McLellan J. legal, religious and political arguments that were summarily dismissed without being addressed.

22. The opinion by McLellan J. did not address the key freedom of conscience issue. Rather, the court attributed Mr. Little's motivation for refusing to file his tax returns as "religious reasons."

23. In the N.B.C.A., the Applicant again was unrepresented. In dismissing Mr. Little's arguments based on s. 7 of the *Charter*, Robertson J.A. stated: "Self-represented litigants must understand that courts are not obliged to address arguments that are premised on misunderstandings of the law." Again, no counsel was appointed to act on behalf of Mr. Little, despite what was said by the trial judge and counsel on the first day of trial about Mr. Little's inability to represent himself, and despite the fact that complex issues of constitutional law were at the heart of the appeal.

24. The Applicant's objections were dismissed, and he was convicted at trial and the Court of Appeal refused his application for Leave to Appeal.

PART II – POINTS IN ISSUE

25. Did the N.B.C.A. err in law by failing to find that the Applicant's fundamental freedom of conscience under s. 2(a) of the *Charter* was infringed or denied under s. 24(1) of the *Charter*?

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[4] Mr. Christie: " …it [the case] involves *a legal issue of some complexity* respecting the constitutional validity of the affect [sic] of s. 238 of the *Income tax Act*, vis-à-vis, aspects of the charter [sic] pertaining to freedom of religion…. *It's not something he feels competent to deal with* and I think I agree with him on that. … *because of the complexity* of some of these questions – … the Court Challenges Program … is no longer available …
The Court: … *a charter [sic] challenge without legal representation is very difficult."* [my emphasis]

26. Did the N.B.C.A. err in law by applying the legal test formulated in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 designed for cases rooted in freedom of religion, when this case is not about freedom to practice religion, worship God, or engage in a particular religious practice, but rather is all about a conscientious objector who refuses to participate in a violation of natural law, even though sanctioned by positive law? The Supreme Court has never directly answered this question.

27. Did the N.B.C.A. err in law by not proceeding to a reasonable accommodation analysis as required by *Hutterian Brethren*, 2009 SCC 37, when there is in this case no constitutional attack on the validity of a law of general application, but instead an application under s. 24(1) of the *Charter* for a uniquely tailored remedy that takes into account the conscience of the Applicant and allows for dialogue to reach a consensus or an appropriate and just remedy? The Supreme Court has never directly answered this question.

28. Did the N.B.C.A. err in law by misdirecting itself as to what constitutes "the rule of law," and the extent to which the entire Preamble to the *Constitution Act, 1982*, including the "supremacy of God" clause, affects the interpretation of fundamental *Charter* rights, and in particular the freedom of conscientious objectors to seek an individual remedy under s. 24(1) of the *Charter*? The Supreme Court has never directly answered this question.

29. Did the N.B.C.A. in law by failing to raise on its own motion the question of ineffective representation, when it knew or ought to have known that the Applicant had limited formal and no legal education, and by all accounts, was incapable of self-representation in this complex constitutional case, and that his trial counsel, erred by abandoning a constitutional attack on the general validity of the law requiring the universal filing of income tax returns, and further erred by misdirecting the trial court by characterizing this case as one of religious freedom, when plainly it was not, and filed to raise a s. 7 argument?

30. Did the N.B.C.A. err in law by not addressing the s. 7 and 15(1) *Charter* argument at all, let alone on its merits?

PART III – ARGUMENT

A. Overview

31. Unlike the U.S. Constitution, which has no text guaranteeing freedom of conscience, but has a clause pertaining to the free exercise of religion, the *Charter of Rights* guarantees both freedom of conscience and freedom of religion, consistent with Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR), which states that everyone shall have the right to freedom of thought, conscience and religion. In practical terms, this means that in Canada, there is no need to establish a violation of the free exercise of religion in order to succeed under a s. 2(a) conscience claim. Freedom of conscience and freedom of religion are separate spheres that are not interdependent or interchangeable, although in some cases may be indivisible when inextricably linked in substance and form.

32. The *Charter* also has another advantage over the *First Amendment*, for international legal principles founded upon natural law have a gateway into *Charter* interpretation through the Preamble to the *Charter*, which declares that Canada is founded upon principles that recognize the supremacy of God and the rule of law (founding principles). In practice, this means that these founding principles are indivisible, have equal force, and are integral to the principles of fundamental justice anchored in s. 7 of the *Charter*, and inform the Court in interpreting "freedom of conscience" in s. 2 (a) of the *Charter*. As a matter of academic jurisprudence, the practical application of the founding principles means that positive law (such as legislation permitting the killing of innocent human beings) must yield to natural law (which stands on a higher law that forbids the legal killing of innocent human beings) in circumstances where there is a conflict.

33. Lamer C.J. in *Reference Re Remuneration of Judges*, [1997] 3 S.C.R. 3 held that there is an unwritten part of Canada's constitution imported in the Preamble to the *Constitution Act, 1867*. A preamble is "clearly part of the constitution" and has no enacting force, for it is not positive law. While in the course of statutory interpretation a preamble is useful to identify the purpose of a statute and to aid in the construction of ambiguous language, in constitutional law

the preamble articulates the political theory of the organizing principles to not just aid construing the express provisions of the written constitution, but fill the gaps in the constitutional scheme. (paragraphs 94-95)

34. Just as judicial independence is not found in the text of the *Constitution Act, 1982*, neither is there a textual reference to "natural law." The Applicant says the phrase, "the supremacy of God and the rule of law," means that natural law is part of Canada's unwritten constitution. Rule of law, when consistent with and rooted in natural law, means that justice is the defining characteristic of society and not coercion, and even though positive law may legalize the killing of innocent human beings, natural law never will. Thus the Preamble is far from being a "dead letter," but the roots of the "living tree" described by Viscount Sankey in *Edwards v. Canada (Attorney General*) [1930] A.C. 124. In *Edwards,* the House of Lords overruled the Supreme Court of Canada that decided women could not be "qualified persons." Today the Court says unborn human beings are not persons and the government may fund their killing. Thus the Applicant relies on the Preamble, not only to show that his conscience is in line with natural law and must be honored, but also says that the Preamble informs this Court as to the correct interpretation of the meaning of "freedom of conscience."

35. While the ICCPR has no enforcement mechanism to remedy a violation of conscience, the *Charter* does, and offers two methods. Under s. 24 (1), a tax law that is neutral in its general application may remain intact, even though a court of competent jurisdiction may fashion a unique accommodation remedy for a conscientious objector. Under s. 52 of the *Charter*, the validity of a law of general application may be challenged, and if successful, require amendment to conform to constitutional requirements. American jurisprudence has no equivalent to s. 24 (1) of the *Charter*, and consequently conscientious objectors are not accommodated by the judicial system.

36. In this case, the Applicant does not deny his tax liability and for many years filed an income tax return with a letter explaining why he could not in good conscience finance the killing of innocent unborn children. When his letters were ignored and when it became apparent to the Applicant that abortion was here to stay and funded by taxpayer dollars, the Applicant was

forced to choose between his conscience and state coercion. As a conscientious objector, the Applicant is in principle no different from an individual who refuses to pay a portion of his or her taxes to finance an unjust military war against defenceless unarmed innocent children who belong to another sovereign state, and refuses to pull the trigger or to pay for the guns and bullets that would render him complicit to a genocidal act that by his conscience is contrary to natural law, the rule of law, and the supremacy of God. Since the *Charter* allows for the accommodation of conscientious objectors, the Applicant seeks an appropriate and just remedy.

37. Accommodating the Applicant and potentially other similarly situated conscientious objectors does not pose a threat to the integrity or viability of the Canadian income tax regime. Not to accommodate the Applicant undermines the cherished values in our free and democratic society by manifesting an intolerance of peaceful dissenters whose consciences enrich Canadian society. No floodgates would be opened because conscientious objectors to the killing of innocent human beings fall into a special category, distinguishable from taxpayers at large who want to pick and choose the use the government can apply their money to, and thus disrupt the business of a democratically elected government.[5] The connection between the payment of income tax and the immoral taking of human life is normally not present in objections voiced to the use of taxpayer dollars.

38. A true democracy does not suppress the conscience of people who choose to think for themselves, for today's minority view may become tomorrow's dominant view. The health of a democracy may be assessed by its treatment of conscientious objectors, who risk their future by choosing the sanctity of their conscience in the face of coercion from the state. Presumably a key purpose of s. 2(a) and s. 7 is to assign a paramount position to conscience and personhood over a positive law such as s. 238 of the *Income Tax Act*, which in this case creates a dilemma for the Applicant.

39. The issue to be resolved here is that under current law, the Applicant cannot simultaneously honor his conscience and the tax laws. The challenge is to find an appropriate and just remedy to enable this conscientious objector to preserve the integrity of his conscience

[5] See Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, (1999) Wis. L. Rev. 939 at 993.

without impacting on the government's need to generate revenue to fulfill its mandate. This is achievable under s. 24(1) of the *Charter* without any undue burden placed upon the government. The ultimate winner of this accommodation is Canadian society and the *Charter*, when freedom of conscience is honored. The alternative is to pay mere lip service to the fundamental right of conscience and to make a martyr out of the Applicant.

B. Was the Applicant's Freedom of Conscience Infringed or Denied?

40. The Applicant's freedom of conscience was infringed and denied. The Applicant's free exercise of religion was not. The courts below erred by applying the wrong test – the one designed for freedom of religion. Compulsion to file an income tax return which in turn triggers the payment of money which in part funds abortion forces the Applicant to be a participant in what he considers to be murder.

41. The current test in Canada to determine an infringement of s. 2(a) of the *Charter* originated in *Amselem*, *supra*, in the context of a condominium bylaw preventing Orthodox Jews from engaging in a religious practice (building a Succah). In finding a violation of the *Quebec Charter of Human Rights and Freedoms* (and by implication the Canadian *Charter*), Iacobucci J. criticized the Quebec Court of Appeal for adopting an unduly restrictive interpretation of freedom of religion and in formulating the proper test, considered *First Amendment* jurisprudence. Iacobucci J. observed that freedom of religion is not absolute, that subjective belief matters, and that inconsistent prior practices or beliefs do not. There are two components to the *Amselem* test, the subjective "nexus" test and the objective "non-trivial" test:

"... the first step in successfully advancing a claim that an individual's freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion. The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual's ability to act in accordance with that practice or belief in a manner that is non-trivial." (paragraph 65)

42. In *Hutterian Brethren*, *supra*, McLachlin C.J. modified the *Amselem* test by incorporating dicta from Dickson C.J. in *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713, at 759 (paragraph 97): "The Constitution shelters individuals and groups only to the extent that

religious beliefs or conduct might reasonably or actually be threatened. For a state imposed cost or burden to be proscribed by s. 2 (a) it must be capable with interfering with religious belief or practice."

43. *Hutterian Brethren* was about a challenge to the constitutional validity of a law of general application, necessitating an *Oakes* analysis. Since in this case there is no issue pertaining to a religious practice, this aspect of the freedom of religion test is not relevant to this s. 2(a) freedom of conscience case, let alone in the context of a remedy sought under s. 24 (1) of the *Charter*.

44. The definition of freedom of religion adopted by this Court in *R. v. Big M Drug Mart Ltd,* [1985] 1 S.C.R. 295, 336-337, (per Dickson C.J.) while useful in religious practices cases, does not address the core meaning of freedom of conscience, but does discuss coercion:

"Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. *Freedom means that*, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, *no one is to be forced to act in any way contrary to his beliefs or his conscience.*" [my emphasis]

45. An application of freedom from coercion and freedom of religion is found in *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, where the Court declared:

"It therefore seems clear the state compulsion on religious officials to perform same sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, … such a violation could not be justified under s. 1 of the *Charter*" (paragraph 58).

46. The Court in *Edwards Books, supra*, severed freedom of conscience from freedom of religion: " … freedom of conscience necessarily includes the right not to have a religious basis for one's conduct." (paragraph 100) The Court also observed freedom of conscience may be solely

individual: " … I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects." (paragraph 145)

47. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted: freedom of conscience in s. 2 (a) of the *Charter* is linked to liberty and security of the person in s. 7 of the *Charter*; freedom of conscience is to be given a generous rather than legalistic interpretation; there is an invisible fence protecting an individual from trespass by the State; *Charter* rights are inextricably tied to human dignity, self-respect, contentment, and essential humanity; an emphasis on individual conscience and individual judgment lies at the heart of the democratic political process; freedom of conscience may have an independent meaning from freedom of religion; and that the conscience of the individual is paramount to the interest of the State. Wilson, J. wrote:

"… I believe that the decision whether or not to terminate a pregnancy is essentially *a moral decision, a matter of conscience*. I do not think there is or can be any dispute about that. The question is: whose conscience? *Is the conscience of the woman to be paramount or the conscience of the state?* I believe, for the reasons I gave in discussing the right to liberty, that *in a free and democratic society it must be the conscience of the individual.* "(pp. 175-176)[my emphasis]

48. Freedom of conscience lies at the heart of the *Charter*:

"What unites enunciated freedoms in the American First Amendment, s. 2(*a*) of the *Charter* and in the provisions of other human rights documents in which they are associated is the *notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation*. … It is easy to see the *relationship between respect for individual conscience and the valuation of human dignity* that motivates such unremitting protection. … *an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition.* The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self‑government. It is because of the *centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democractic political system* that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*. Viewed in this context, the purpose of freedom of conscience and religion becomes clear. *The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.* (*Big M Drug Mart, supra*, paragraphs 121-123)[my emphasis]

49. The following conclusions may be drawn from the above passage: protection of an individual's conscience lies at the heart of a true democracy and is the measure of a free and democratic society; freedom of conscience stops when injury to neighbor begins; freedom of conscience need not be based on religious belief; freedom of conscience extends beyond religious practice; the question of the coercive power of the state and its power to intrude upon freedom of conscience is yet undecided.

50. A two-part test for freedom of conscience emerges, that could have been articulated and applied in the Applicant's case:

(i) **Does the proposed governmental action offend against an individual's freedom to hold to sincerely held beliefs or opinions his or her free conscience dictates, that is consistent with the supremacy of God and the rule of law?**

(ii) **Can the government overcome its burden to displace the paramount right of an individual's freedom of conscience by clear and convincing evidence that coercion upon freedom of conscience is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, having deference to the supremacy of God and the rule of law, and whether the individual is seeking an individual remedy under s. 24 (1) of the *Charter*, or a general remedy under s. 52 of the *Charter*?**

51. Applying this freedom of conscience test results in a finding that the Applicant is a conscientious objector who has sincerely held beliefs that merit protection from state coercion. The Applicant also passes the second prong of this test, for the accommodation he seeks under s. 24 (1) of the *Charter* does not threaten public safety, order, health or morals, or offends against the fundamental rights and freedoms of others and in fact honors the supremacy of God and the rule of law.

C. Application of American Jurisprudence

52. It is wrong to assume that accommodating the Applicant would trigger a domino effect that would result in the ultimate financial collapse of the Canadian government, as such thinking misconceives the nature of our free and democratic society, which promotes and defends freedom of thought and pluralistic diversity. It is harmless to tolerate and accommodate the

Applicant's conscientious objection, even though some may consider his beliefs to be what to be eccentric or abnormal. Compelling the Applicant to finance abortion invades the sphere of conscience that is the purpose of s. 2(a) of the *Charter* to preserve from government intrusion. The challenge identified by Justice Jackson in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943) is the same before this Court today: "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order*." [my emphasis]

53. Canada's financial health does not depend on compelling the Applicant to participate in a process that creates a fear of spiritual condemnation. Enforcing temporal punishment against a conscientious objector whose thoughts are informed by religious belief amounts to disguised persecution and is inconsistent with the purposes of the *Charter* to promote freedom of conscience and security of the person. As noted by Chief Justice Hughes in *U.S. v. Macintosh* 283 U.S. 605, 634 (1931)(dissenting): "When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, *in the forum of conscience, duty to a moral power higher than the State has always been maintained*." [my emphasis]

54. Prior to becoming Chief Justice of the United States Supreme Court, Harlan Fiske Stone advanced the reasons why conscientious objectors must be accommodated by the State:

"… both morals and sound public policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that *nothing short of the self-preservation of the state should warrant its violation*; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose by the process." (Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919)[my emphasis]

55. Over 200 years ago, Thomas Jefferson, articulated the principle that it is wrong to coerce an individual, in violation of his or her conscience, to pay money to support an idea considered

sinful and tyrannical: "… to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical… " [6]

56. Unlike the *Charter of Rights and Freedoms*, which guarantees both freedom of conscience and religion, the *First Amendment* dropped in its final draft earlier references to conscience, in favor of a clause protecting the free exercise of religion. Historical records suggest "the framers viewed "free exercise of religion" and freedom of conscience" as virtually interchangeable concepts. "[7] That view is now obsolete, for today "… current constitutional doctrine … if anything gives secular conscience more respect than it affords religious conscience." [8] Professor Smith explains:

"indeed, the constitutional pendulum may have swung to the other extreme … the Supreme Court has ceased to treat the Free Exercise Clause as a provision for protecting conscience in any direct way; instead, the focus in modern free exercise doctrine is on the form of the laws that burden conscience. … so long as such laws are viewed by the courts as being "generally applicable' and "religiously neutral," *no accommodation of religious exercise – and hence of conscience – is required*. But judicial concern for conscience … has not disappeared altogether. Rather, it has migrated to textual locations like the Establishment Clause and the Due Process Clause, where freedom of conscience can appear in peculiar and secularized forms.

… under the heading of the Establishment Clause, advocates like Justice Souter *invoke freedom of conscience in school aid cases to argue that it is unconstitutional to burden the consciences of taxpayers* who object to spending public money in ways that have a legitimate secular function but may also have the effect of subsidizing religious instruction. And while the Court as a whole has not fully embraced this position, the Court has indicated that *protecting the consciences of such taxpayers is at least a legitimate and important state interest* – one that can serve to justify what might otherwise be anti-religious discrimination. [*Locke v. Davey*, 540 U.S. 712, 722 (2004)[holding that the state interest in protecting the conscience of taxpayers could justify exclusion of theology students from eligibility for a state-sponsored scholarship.]
…
In the realm of "substantive due process," … *Planned Parenthood v. Casey* centrally featured an appeal to freedom of conscience in its defense of a right to an abortion."[9]

[6] I. Brant, *James Madison: The Nationalist* 354 (1948); Thomas Jefferson, *Bill for establishing Religious Freedom, reprinted in The Supreme Court on Church and State*, 25 (Robert S. Alley ed. 1988).
[7] Steven D. Smith, *What Does Religion Have to Do With Freedom of Conscience*? 76 U. Col. L. Rev. 911 (2005)
[8] Smith, *supra*, 3.
[9] Smith, *supra*, 2-3. [my emphasis]

57. In Canada, there is no need to use "freedom of religion" as the gateway to protect "freedom of conscience" as each right is supreme in its respective sphere. Furthermore, in *Multani v. Commission Scholaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 there is a requirement to accommodate individual conscience when the appropriate remedy is under s. 24 (1) of the *Charter*. In *Hutterian Brethren*, *supra,* McLachlin C.J. set out a general test for accommodation under s. 24 (1):

"A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual complainant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, and not whether a more advantageous arrangement for a particular claimant could be envisioned."

D. Income Tax and Conscientious Objections

58. The U.S. Supreme Court has refused to permit conscientious objectors an accommodation from the general legal obligation to pay tax. *United States v. Lee*, 455 U.S. 252 (1982)(holding that all conscientious objectors are to be treated on the same footing, and dismissed the free exercise of religion arguments raised by an Old Amish farmer whose conscience did not permit him to pay social security taxes on behalf of his employees.) Yet years earlier in *Murdoch v. Pennsylvania (City of Jeannette)* 319 U.S. 105 (1943) the Supreme Court struck down an ordinance that imposed a flat license tax on Jehovah Witnesses for disseminating their faith in the community, declaring: "A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution." (Douglas, J. at 113)

59. The leading American cases focus on the free exercise clause and find against conscientious objectors who refuse to pay taxes in support of immoral wars.[10]

[10] *A.J. Muste v. Commissioner of Internal Revenue*, 35 T.C. 913 (1961); *U.S. v. American Friends Service Committee*, 419 U.S. 7 (1974)(dismissed on procedural grounds without reaching the merits); *Waitzkin and Waterman v. Commissioner of Internal Revenue*, T.C. Memo 1981-281 (1981); and *U.S. v. Philadelphia Yearly Meeting of Friends*, 753 F. Supp. 1300 (E.D. Pa)(1990).

60. However, when the collection of money is not an issue, but a moral and religious objection to a state slogan on a motor vehicle license plate is, ("Live Free or Die"), freedom of conscience prevails. In *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), Burger, C.J. found that the purpose of the *First Amendment* was to protect the right of dissenters. The will of the majority to disseminate an ideology may not override the view of a conscientious objector.[11]

E. Canadian Tax Disputes

61. The courts below all relied upon case law that was outside the context of an income tax prosecution where a s. 24 (1) *Charter* application is made: *Prior v. Canada*, [1988] 2 F.C. 371 (Trial Div.); [1989] 101 N.R. 401 (F.C.A.)(holding declaration sought was outside the jurisdiction of the court)(leave to S.C.C denied February 22, 1990; reconsideration denied September 20, 1990); *Petrini v. Canada*, [1995] 1 C.T.C. 200 (F.C.A.)(dismissing s. 52 Charter challenge that use of taxpayer's dollars infringed freedom of religion); and *Lavingne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (holding no infringement of freedom of expression of union member who objected to his union's use of dues for political purposes unrelated to collective bargaining activities).

62. The trial judge made reference to *O'Sullivan v. Minister of National Revenue*, [1991] 45 F.T.R. 284 (Trial Div.) wherein Muldoon J. was faced with a s. 52 *Charter* application by a devout Roman Catholic who objected on religious belief grounds to the use of his tax dollars or any portion thereof to finance abortion. Muldoon J. took an unduly restrictive view of freedom of conscience:

"Mr. Sullivan is utterly free to adhere to … his beliefs about the moral depravity of abortion. The State cannot compel him to witness or to participate personally in any such deeds. … That, however, is as far as his freedom of conscience and religion goes." (paragraph 36)

[11] "The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The *First Amendment* protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."

63. The argument of freedom of religion failed, as Muldoon J. adopted American "free exercise" reasoning and held that there was no s. 2(a) *Charter* violation of "freedom of religion and the manifestation of his religion by worship and practice." (paragraphs 41, 44) The constitutional accommodation of minority dissenters is up to Parliament, and not under the *Charter*, concluded Muldoon J.

F. Ineffective Representation

64. The Applicant's immediate objective is to end compelled tax funded abortion, and his ultimate goal is the end of abortion. To accomplish his goal, the Applicant had two constitutional avenues to pursue, the first a societal remedy under s. 52 of the *Charter* and the second, an individual remedy under s. 24(1) of the *Charter*. Unfortunately the Applicant and his counsel Mr. [redacted] were at cross-purposes, for the constitutional validity of s. 238 of the *Income Tax Act* was not challenged, and the s. 52 and s. 1 *Charter* arguments were abandoned. On his own, Mr. [redacted] attempted to establish a defence of due diligence and made an unsuccessful motion for a directed verdict based on failure to prove identity with a social security number. When Mr. [redacted] did make a *Charter* argument, he failed to rest his case upon freedom of conscience, and instead built an argument on freedom of religion, when he knew or should have known that this argument was doomed to failure. Then Mr. [redacted] failed to raise a s. 7 *Charter* argument, when he knew or should have known that freedom of conscience is inextricably linked to security of the person. This last failure in particular thwarted the Applicant from advancing his complete position in his submissions to the Court of Appeal. The Applicant's case was thus torpedoed by his own counsel's failure to craft the correct constitutional arguments.

65. Given the national importance of the issues raised in this Application for Leave, and the complexities of the constitutional arguments, it is self-evident that the Applicant was clearly incapable of effective self-representation, and his *Charter* right to have a meaningful, fair, and competent hearing of his arguments were denied in his appeals. Not to appoint counsel in these circumstances is tantamount to trivializing the deep and serious nature of this case and mocking the rule of law, for it is also substance, not just form, that the *Charter* demands to ensure due

process. *R. v. G.B.D.,* [2000] 1 S.C.R. 520 requires this Court to look behind the decisions made both by trial counsel and by the decision of the appeal courts not to appoint competent counsel, to reverse a miscarriage of justice resulting from procedural and substantive unfairness, improperly pleaded and argued issues, and decisions made that were not in the best interests of the Applicant.

66. The judgments below would have been different had the Applicant framed his case as a conscientious objection based on conscience and security of the person, and also pursued an alternative remedy under s. 52 of the *Charter*. As a result, the verdict is unreliable, since the combination of a lack of counsel and the ineffectiveness of trial counsel, suggest a reasonable possibility of a different outcome.

G. Discrimination

67. Finally, the Applicant relies upon s. 15(1) of the *Charter*. Since the government of Canada has not recognized that his conscience has been violated in s. 2(a) of the *Charter*, the Applicant says that this failure to acknowledge the genuine infringement of his conscience by the government is an affront to his human dignity and personhood, discriminates against him, and makes him the target of ridicule.

PART IV – SUBMISSION RE COSTS

68. The Applicant is not seeking any order for costs.

PART V – ORDER SOUGHT

69. That the Application for Leave to Appeal be granted from the judgment of the New Brunswick Court of Appeal dated August 20, 2009.

Respectfully submitted this 15th day of October 2009.

Charles I. Lugosi
Solicitor for the Applicant

PART VI – TABLE OF AUTHORITIES

Law Review Articles and Books

Catholic Authority

PART VII – TREATIES, ACTS & REGULATIONS

Paragraphs