APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

There is Only One Test for Leave

1. The Crown alleges there are two tests for the granting of leave. The first test for ordinary cases, set out in s. 40 (1) of the *Supreme Court Act*, reserved for cases where the highest court of final resort in a province has granted leave, but dismissed the appeal. Then the Crown alleges there is a higher more burdensome test, based upon comments made in *Macdonald v. Montreal (City),* [1986] 1 S.C.R. 460 by Beetz, J. which is reserved for cases where the highest court in a province refused to grant leave, and did not dismiss the case on its merits. In this Reply, the first scenario is referred to as the Statutory Test, and the second, as the Circumvent Test. It is the position of the Applicant that there is only one test, the Statutory Test, which applies equally to all cases originating from all provincial court of appeal, whether or not the final disposition of the case was a dismissal on the merits or a refusal to grant leave. The Circumvent Test, assuming it does exist, does not apply in every case where a court of appeal has refused leave to appeal, but only in those rare situations where Case A sets a binding precedent on the merits, and Case B is refused leave on the identical issue, and Applicant B tries to circumvent the effect of Case A by applying for leave to appeal to the Supreme Court of Canada. To suggest that the higher burden imposed by the Circumvent test applies even to cases of first impression arises from a misreading of *Macdonald,*

2. The confusion befuddling the Crown comes from taking the *obiter* remarks of Beetz J. out of context. At para. 128, Beetz J. agrees with Wilson J., that this Court has jurisdiction to grant leave in a case where leave has been refused by a provincial court of appeal. At para. 139, Wilson J. revisited the case of *Ernewein v. Minister of Employment and Immigration*, [1980] 1 S.C.R. 639, which appeared to limit the jurisdiction of the Supreme Court to grant leave. Wilson J. in para. 140 suggested that deference and judicial comity, must not lead the Supreme Court to abrogate its supervisory power over the courts below.

3. At para. 141, Wilson J. found that the Supreme Court's jurisdiction to exercise its discretion was not confined by statute and permitted the Court to intervene in cases where leave was denied where there is "an issue of national importance." The statutory test is to be given a large and liberal interpretation, for it is broadly phrased "… the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it …"

4. Wilson J. concluded at para. 142 that "the Court's jurisdiction is confined only by its own exercise of discretion in determining which decisions of an intermediate appellate court are of sufficient national importance to warrant a grant of leave." This is plainly an unfettered discretion that applies equally to all cases, whether or not leave was granted below.

5. In conclusion, Wilson J. observed in para. 143 that where the issue at stake was one of constitutional law, her line of reasoning becomes all the more pertinent, for the Court must not shirk from its duty and responsibility to settle questions of national importance.

6. Not only did the majority through Beetz J. agree with Wilson J. on the issue of jurisdiction, there was no disagreement over the fact there was only one test – the Statutory Test.

7. The later comments made by Beetz J. at para. 129, 130, and 131 addressed a very rare situation. Beetz J. worried about a unique procedural problem created by the Quebec Court of Appeal, when it refused leave in *Macdonald* because it had earlier decided on its merits the identical issue a companion case called *Walsh v. Ville de Montreal*, (Nov. 10, 1980)(unreported). What the Court of Appeal ought to have done was to grant leave, to appeal and then dismiss the appeal of Macdonald, for the same reasons issued in *Walsh*.

8. At para. 131 Beetz J. expressed his concern that had the Supreme Court ruled in Macdonald's favor on the merits, "it would have been improper directly or indirectly to ask the Court of Appeal to reconsider its decision in *Walsh*, whatever view one might take of this decision." Fortunately, this was unnecessary, because Macdonald lost. It was then Beetz J. remarked, "this is a jurisdiction which, for obvious reasons of policy and comity, we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court."

9. It is plain from this context, that "very rare cases" refers to a situation where two cases are heard by a provincial court of appeal on the same issue, the first case is dismissed on the merits, the second case is refused leave to appeal, and only the defendant in the second case seeks leave to appeal to the Supreme Court. It is only in this rare situation, the Supreme Court may grant leave, only if it decides the case has major constitutional importance, notwithstanding the delicate matters of policy and comity.

10. It is simply wrong to conclude, as the Crown argues in this case, that "very rare cases" means every case where leave is denied by a provincial court of appeal. Since this case is one of first impression, the very rare situation envisioned by the Supreme Court does not arise, and the "most sparingly" exercise of discretion is not applicable. The rare situation encountered by Supreme Court in *Macdonald*, simply does not exist in this case.

11. Thus to suggest that the Applicant must satisfy two tests for leave to appeal is wrong. There is only the Statutory Test, the standard of national importance.

No New Issues: Just a Correct Re-Statement of the Actual Issues

12. The Applicant has always maintained that his constitutional rights under s. 2 (a) of the *Charter* were infringed or denied. Counsel in this Court has not raised new issues, but merely restated the correct framing of the freedom of conscience issue so it is not blurred and subsumed within a freedom of religion issue that distracts from the

fundamental position of the Applicant: that publicly tax funded abortion is morally wrong and he will not be a party to an action that violates his conscience as a human being, as a person, and as a Christian. Thus there is a nexus between the Applicant's refusal to file income tax returns which in turn is linked to the paying of taxes, which in turn, publicly finances abortion. This is not a change in strategy, but the correct application of the law to the facts. The Applicant should not now be punished for having the assistance of competent counsel who can level the playing field by articulating complex constitutional arguments that were either ignored by or failed to be advanced on his behalf by either the Crown, his trial counsel, or the judges below, who left the Applicant to navigate treacherous legal waters, founder and shipwreck. He needed a pilot to guide him and put him on the right course. Having now the assistance of counsel is not a tactical change in strategy, but the long overdue help he needed throughout this case that is loaded with issues of national importance.

Crown Resurrects An Old Issue It Chose Not to Appeal

13. The trial judge found as a fact that the Applicant's *Charter* arguments were not premature, by taking judicial notice that a portion of income tax dollars end up paying for abortion. The Crown chose not to cross appeal on this finding, and cannot now complain that the arguments in this case amount to an academic exercise based on a hypothetical assumption that the Applicant owed taxes.

The Need for Appointed Counsel

14. The Crown concedes the *Charter* claims herein "all raise complex legal issues," and admitted at trial that the court would benefit from counsel acting on behalf of the Applicant. The appellate courts below were deprived of the benefit of the wisdom and experience of learned counsel that could have effectively advocated the Applicant's position. It is unfair to now deprive the Applicant of a fair process, for without the benefit of counsel, the adage becomes true, that he who represents himself has a fool for a lawyer. To suggest that the Applicant's arguments were "doomed to failure" making it

unnecessary for the appointment of counsel, overlooks the fundamental principles of justice and the constitutional right to counsel. Gracious accommodation of an unrepresented defendant can never be a substitute for skilled experienced counsel that can effectively make all the difference in turning a "doomed" position into a "winning" one.

National Importance

15. There is a pressing need for this Court to develop and articulate a free-standing test for the infringement or denial of freedom of conscience under s. 2 (a) of the *Charter*. This Court is entitled to consider and draw upon history, concepts of natural law, the rule of law, the supremacy of God, and the unwritten constitution to formulate a test that will be applicable in all circumstances and meet the test of time. Concurrent with this responsibility, this Court needs to pronounce upon the appropriate avenue for a remedy where there has been a violation of s. 2 (a) of the *Charter*. Ought there to be an individually tailored remedy under s. 24 (1) of the *Charter*, or a general societal remedy under s. 52 of the *Charter*, that requires the striking down of legislation? These are weighty issues of national importance. For the Crown to boil this case down to a selfish request "to shield an individual from having to report to the state what his income is," trivializes this case, is offensive, and demonstrates insensitivity to all individuals who struggle in their conscience to choose what is morally right over the coercive might of the State to enforce its positive laws. Nothing can be of greater national importance as to how this Court is able to accommodate sincere conscientious objectors in a democracy governed by the rule of law, and by granting leave, this Court will send a strong signal that freedom of conscience is taken seriously as an issue of national importance.

Relief Requested

16. The Applicant requests that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2009

LUGOSI LAW FIRM PLC

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