File Number: 33390

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

DAVID T. LITTLE

Applicant
(Appellant)

AND:

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
HER MAJESTY THE QUEEN, RESPONDENT
(Rule 27)

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Memorandum of Argument

OVERVIEW

1. The Applicant was convicted at trial of failure to file income tax returns for the years 2000, 2001, and 2002 notwithstanding his counsel's argument that, amongst other things, his client's right to freedom of religion as well as his equality rights under sections 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms*[1] had been violated. The failure to file was actually a refusal to file based on the Applicant's belief that there was a risk that a portion of his taxes could trickle down to hospitals that provide therapeutic abortions. He was of the sincere view that filing a return made him complicit in those abortions.

2. The Defence evidence at trial, the Crown's cross-examination of the Applicant, and the Applicant's own submissions at both the summary conviction appeal and his appeal to the New Brunswick Court of Appeal (as well as those of the Respondent), were all based on the defence theory that freedom of religion was the central issue. All court decisions were premised on that being the Applicant's position and there was no suggestion that the terms "conscience" and "religion" were not interchangeable in the context of an alleged violation of his freedom of religion. His summary conviction appeal was dismissed and the Court of Appeal declined to give him leave to appeal.

3. While the Supreme Court of Canada has jurisdiction to hear an appeal from the refusal of a provincial court of appeal to grant leave to appeal, this Court has cautioned that it is a jurisdiction that should be exercised most sparingly, and only in those very rare cases where there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court. Leave ought not to be granted in this case because this Application neither meets this high threshold nor the "public importance" criterion that governs ordinary leave applications to this Court.

4. The Application for Leave to Appeal to this Court raises issues that were not before the

[1] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (hereinafter "the *Charter*").

courts below. In particular, the Applicant now abandons any claim based on freedom of religion and argues that it is his freedom of conscience that has been infringed. New counsel for the Applicant attempts to justify this change in strategy on the basis of an allegation of incompetent representation of the Applicant by former counsel at trial and the fact that the Applicant so far had represented himself on appeal. He advances a number of entirely new issues, but the exact argument in their support is not set out so that the Crown can respond in any meaningful sense. The new argument suffers the same flaw as the original one, the question being: what nexus, if any, would have to exist before it could be said that filing a tax return would make the author of that return complicit in an abortion? There is no such nexus. The "belief or practice" that has a nexus with his conscience is "abortion is wrong" -- not "filing tax returns is wrong".

5. Having refused to file a tax return, it is not known whether the Applicant had taxable income in the years in question, and thus the issue of what taxes he might be obliged to pay, and where the monies would end up were he to pay those taxes, is premature. The issues raised by the Applicant amount to an academic exercise based on hypotheticals surrounding the question: "What if he were to pay his taxes?" Finally, the Court of Appeal did not err in having failed to order, of its own motion, legal representation for the Applicant as there is no *Charter* right to such an order and in any event, the discretion to make an order of this kind would be unlikely to be exercised in a case that the Court regarded as "doomed to failure".

PART I: STATEMENT OF FACTS

6. The Applicant, an anti-abortion activist and practicing Roman Catholic, has refused to file personal income tax returns since 1999.[2] He believes that the moral consequences of his filing a tax return would make him indirectly complicit in murder and genocide, because he feels that some of the money which might be paid by him to the government could end up going to hospitals which perform therapeutic abortions.[3]

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[2] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 27. [Note: The Applicant appears to have consecutively numbered the pages in the book of Transcripts at the bottom instead of the top of the page (as per Rule 21(1)(c)). In citing a page number from this book, the Respondent has referred to the number at the top of the page.]

[3] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 26-27, 95-106.

7. On August 19th, 2003 the Applicant was served with three notices under the *Income Tax Act*[4] requiring him, by the 28th of November 2003, to provide to the Minister of National Revenue a completed and signed Income Tax Return on Form T1 including a Statement of Assets and Liabilities and a Statement of Income and Expenses, for each of the taxation years 2000, 2001, and 2002.[5] By way of response, the Applicant mailed a registered letter dated November 26th, 2003 to the Minister of National Revenue conveying his refusal to comply with the notices and giving his reasons.[6] He has stated that he will not file a tax return until a law is enacted and in force that prevents a single cent of his taxes from being used to fund therapeutic abortions in the nation's public hospitals.[7] To date he has continued to refuse to file.

8. On January 19th, 2005, the Applicant was charged with three offences under section 238(1) of the *ITA* for failure to file. At his trial, which commenced on November 24th, 2006, he was represented by Douglas H. Christie of Victoria, B.C. and on that date, the Crown presented its evidence (by way of affidavits) and closed its case. The Defence presented its case on March 8th, 2007. Mr. Little testified as the only witness called by the Defence. Mr. Christie disavowed any intention of challenging the constitutionality of section 238(1) of the *ITA* and indicated that he intended to rely on the "supremacy of God" provision in the Preamble to, as well as sections 2(a), 15(1), and 24(1) of, the *Charter*, and the common law defence of "due diligence."[8] The evidence offered by the Defence was largely, if not entirely, based on the theology and morality of Roman Catholicism. The section 2(a) *Charter* argument was characterized by the Applicant's counsel as "the religious freedom argument" and the section 15(1) argument as involving "discrimination based on religion."[9]

9. Although both the section 2(a) and the section 15(1) *Charter* claims were put forward at trial, the section 15 argument was only nominally pursued while the section 2(a) claim figured prominently. Throughout these proceedings, section 15 has been raised by the Applicant but the arguments in support of the claim have never been fully developed.

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[4] S.C. 1985, c. 1 (5th Supp.) (hereinafter "the *ITA*").
[5] Applicant's Transcript, Trial Transcript, Provincial Court, November 24, 2006, Tab 1, at 15.
[6] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 76-77.
[7] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 76-77, 143.
[8] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 1-2.
[9] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 186-87.

10. The Trial Judge ruled that the Applicant had failed to establish any connection between filing tax returns and his Roman Catholic faith, and accordingly held that section 2(a) of the *Charter* had not been triggered. He continued on in the analysis, ruling that even if there had been an interference with the Applicant's right, it was not more than trivial or insubstantial.[10] He declined to interpret the reference to God in the Preamble as preventing the government from imposing a legal obligation which takes priority over a citizen's religious beliefs.[11] Finally, the Trial Judge held that a requirement under the *ITA* objectively does not differentiate between the Applicant and anyone else; however, since the Applicant felt that subjectively it did, the Trial Judge went on to hold that even if there were a distinction, it did not make the Applicant out to be a person less capable or worthy of recognition or value. He concluded that a violation of section 15(1) of the *Charter* had not been established.[12] The Applicant was found guilty and sentenced to the minimum fine of $1,000 on each count.

11. The Applicant filed a summary conviction appeal in the New Brunswick Court of Queen's Bench and argued the matter himself in October of 2008. The defence of "due diligence" which had been raised in his written submissions to the Summary Conviction Appeal Court was formally abandoned at the outset of his oral submissions.[13] However, it resurfaced in a new form as part of a *Charter* section 7 argument predicated on the assertion that the factual unavailability of the defence in this case transformed the offences under section 238(1) of the *ITA* into absolute liability offences for which he faced the possibility of jail.[14] This was the first time that section 7 had been raised. The other *Charter* arguments under sections 2(a) and 15(1) were repeated but there was no reference to section 24(1). In an oral judgment, the Queen's Bench Justice dismissed the appeal on the grounds that the Applicant had made a religious and a political argument before him but not a legal one, and had cited no legal authority supporting the principle that individuals

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[10] Application for Leave to Appeal, Decision of Jackson CJ PC, dated November 9, 2007, at 8-9, paras. 12-16.
[11] Application for Leave to Appeal, Decision of Jackson CJ PC, dated November 9, 2007, at 9, paras. 17-18.
[12] Application for Leave to Appeal, Decision of Jackson CJ PC, dated November 9, 2007, at 9, paras. 20-24.
[13] Respondent's Record, Tab 2, Transcript, Court of Queen's Bench, October 24, 2008, Submissions of the Appellant, at 29-30.
[14] Respondent's Record, Tab 2, Transcript, Court of Queen's Bench, October 24, 2008, Appellant's Submissions, at 30-34; and Respondent's Record, Tab 2, Appellant's [Written] Submissions to the New Brunswick Court of Appeal at 41, 58-59, paras. 4, 40-41.

could withhold their taxes when they disagreed with government policy. The Court ruled that it could find no legal error in the Trial Judge's decision.[15]

12. The Applicant then sought leave to appeal from the New Brunswick Court of Appeal on the ground that the Court of Queen's Bench failed to address the issue of whether the Trial Judge had erred in ruling that the Applicant's right to freedom of religion had not been triggered. It was also alleged that the summary conviction appeal court's reasons were inadequate. In accordance with the practice of the New Brunswick Court of Appeal, the Application for Leave to Appeal and the appeal were heard simultaneously. The Applicant argued the matter himself in April of 2009.

13. The main argument advanced by the Applicant before the Court of Appeal was based on freedom of religion. The Applicant by this time however had made a significant shift in his approach to the freedom of religion claim. It first emerged in his oral submissions to the Court of Queen's Bench and was more fully developed in his submissions to the Court of Appeal. The shift centered on the application of the first part of the test in *Syndicat Northcrest v. Amselem*[16] which requires that a claimant demonstrate that he has a practice or belief, having a nexus with religion, which calls for a particular line of conduct that is objectively or subjectively obligatory or customary, and that the belief is sincere. At the second stage of the test, the claimant must demonstrate that there has been more than a trivial or insubstantial interference with the right. At the trial level, the Court found that the belief in question was that abortion was wrong and that that belief was rooted in his Roman Catholic faith. Where the Applicant failed at the trial level was in demonstrating that there was any nexus between the filing of an income tax return and his Roman Catholic faith.[17]

14. In his submissions to the Court of Appeal, the Applicant characterized a refusal to file an income tax return as itself a religious practice. By this recasting, the nexus between the filing of a tax return and the Applicant's religion was cleverly built into how the belief or practice was defined. The Court of Appeal rejected the argument and held that the "non-filing of income tax

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[15] Application for Leave to Appeal, Decision of McLellan J. dated October 24, 2008 at 11, paras. 5-6.
[16] [2004] 2 S.C.R. 551 at 583, para. 56 (hereinafter "*Amselem*").
[17] Application for Leave to Appeal, Decision of Jackson CJ PC, dated November 9, 2007, at 8, para. 13.

returns does not qualify as a religious practice because there is no 'nexus' between the so-called practice and religion."[18]

15. The Court of Appeal dismissed his Application for Leave in August of 2009 concluding that the Applicant's refusal to file tax returns was simply civil disobedience.[19] The *Charter* section 7 and 15(1) arguments were dismissed as lacking merit.[20] These are not the same section 2(a), 7 and 15(1) *Charter* arguments that are presently advanced by the Applicant before this Court.

PART II: QUESTIONS IN ISSUE

16. The basic question to be addressed is whether the decision of the Court of Appeal for New Brunswick raises any matters of major constitutional importance. Given that the Applicant seeks leave to appeal from that Court's refusal of leave to appeal, the Respondent says that this higher test applies to the present Application and that this test has not been met. Even on the lower threshold of public importance, the Applicant has not satisfied the test.

17. In formulating an answer to the above question, this Court must address whether leave to appeal ought to be granted to argue issues not put to the courts below because of a particular defence strategy that has now been changed. The asserted belief or practice in question, whether it arises from the exercise of freedom of conscience or religion, is the same in either case, namely that "abortion is wrong" – and not that "filing a tax return is wrong." The Respondent says that the proposed appeal is based on a logical misapprehension of a strategy of civil disobedience as and for a belief or practice rooted in the conscience. The new defence theory suffers from the same flaw as the old one, and this does not equate to denial of the assistance of effective counsel at trial.

[18] Application for Leave to Appeal, Reasons of Court of Appeal for New Brunswick dated August 20, 2009, at 20, para. 10.
[19] Application for Leave to Appeal, Reasons of Court of Appeal for New Brunswick dated August 20, 2009, at 21, para. 10.
[20] Application for Leave to Appeal, Reasons of Court of Appeal for New Brunswick dated August 20, 2009, at 17, para. 4.

18. A further consideration should be whether factually the issues raised by the Applicant are speculative and premature, notwithstanding the learned Trial Judge's inference from the Applicant's prior dealings with the Canada Revenue Agency that he would have owed taxes for the years in question. The Court of Appeal found these issues, or what it called the Applicant's "coercion argument," to be "problematic" in the sense that the argument was predicated on several steps that had not yet occurred.

PART III: ARGUMENT

This is not an exceptional case of major constitutional importance, nor does it meet the threshold of public importance

19. Technically, the New Brunswick Court of Appeal did not dismiss the Applicant's appeal -- the Court unanimously dismissed his Application for Leave to Appeal. The jurisdiction to entertain an appeal when the provincial court of appeal has denied leave is reserved for exceptional cases of major constitutional importance. In *MacDonald v. Montreal (City),* Justice Beetz, speaking for the majority stated:

> But I wish to stress that 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.[21]
>
> [emphasis added]

Justice Wilson (dissenting in the result but with the concurrence of the majority on this issue), stated:

> The broad terms in which the Court's role is expressed in s. 41(1) [the predecessor to the current section 40(1) of the *Supreme Court Act*], however, serve to indicate that the principle of deference underlying *Ernewein* should not be seen as requiring the Court to abdicate its supervisory role by denying itself jurisdiction in a case of major constitutional importance such as the one before us. The national significance of the issue must surely displace the deferential posture which would otherwise be appropriate. I would conclude that the tremendous importance of the

[21] [1986] 1 S.C.R. 460 at 503-504.

> constitutional issue raised in this case makes the restraint with which such a decision of an intermediate appellate court would normally be approached inappropriate and that the Court is therefore free to consider whether on its merits the Superior Court decision of Meyer J. requires further scrutiny at the appellate level.[22]
>
> [emphasis added]

20. In *MacDonald v. Montreal (City),* an English speaking person had been served with a summons from a Quebec Court entirely in the French language. The charge was for speeding contrary to a municipal by-law and it too was exclusively in French. The accused argued that the issuance of a unilingual summons was contrary to section 133 of the *Constitution Act, 1867*[23] and accordingly the trial court was without jurisdiction over him. The accused was convicted at trial by the Municipal Court, and then convicted at his trial *de novo* in the Superior Court. The Quebec Court of Appeal denied his application for leave to appeal. This Court allowed the application for leave to appeal and ultimately dismissed the appeal. The decision was released concurrently with a factually similar case involving an English summons being served on a French speaking person. In that case, the Manitoba Court of Appeal had unanimously overturned the trial decision.[24] These two cases were under appeal to the Supreme Court of Canada when *Re Manitoba Language Rights*[25] was decided and the three cases together represented a unique opportunity to provide some guidance on the meaning of section 133 of the *Constitution Act, 1867.*

21. Justice Wilson described the importance of the issues at stake in *MacDonald v. Montreal (City)* as follows:

> Section 133 of the *Constitution Act, 1867* is a provision of the utmost significance to members of the minority language group in Quebec and elsewhere in Canada. It has an impact not only on the rights of individuals when they confront the judicial branch of the state but also on the status generally of Canada's two official languages. The national importance of such an issue would be hard to gainsay as would also the appropriateness of this issue being considered in the nation's highest court. Indeed, given the recently expanded role of the Court in

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[22] *Ibid,* at 512.
[23] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (hereinafter "the *Constitution Act, 1867*").
[24] *Bilodeau v. A.G. (Man.),* [1986] 1 S.C.R. 449.
[25] [1985] 1 S.C.R. 721.

> constitutional review under the *Constitution Act, 1982*, a broad view of the Court's jurisdiction would seem to be essential.[26]

22. Unlike in *MacDonald v. Montreal (City),* this Court is not being asked to provide guidance on how a constitutional provision is to be interpreted. It is being asked to shield an individual from having to report to the state what his income is. This is not a case of "major constitutional importance."

23. Generally, in order for an Applicant to obtain leave to appeal under section 40 of the *Supreme Court Act,*[27] he must satisfy the Court that the case raises issues of public importance. The test allows this Court to reserve its docket for cases of general application and broader significance. The case advanced on behalf of the Applicant has failed to meet even this lower threshold.

24. The attractiveness to the Applicant of shifting from freedom of religion to conscience is heightened by the fact that the central question is designed to present as what appears to be a novel constitutional issue since the Supreme Court of Canada has never decided a case on this limited basis. In deciding whether this is the appropriate case to address the issue, this Court ought to consider firstly, whether there is truly a need for guidance on this point from the Supreme Court of Canada; secondly, whether factually this is the most appropriate case on which to make new law; and thirdly, whether the issues are ripe for determination.

25. The test developed in the context of freedom of religion in *Amselem* may be adapted for use in the context of freedom of conscience. The two concepts are related and the approach to them should be internally consistent while accommodating any distinction between them. The "novel" analytical approach proposed by the Applicant bears no relationship to the existing framework developed for freedom of religion; instead it draws on concepts of natural law, the rule of law and the Supremacy of God. The Applicant advances no explanation as to why the existing framework cannot be adapted or why such a radical departure from the existing framework is necessary or appropriate. This approach is not in keeping with this Court's view of interpreting related *Charter* rights. The test for freedom of religion can be adapted to address

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[26] *MacDonald v. Montreal (City), supra* note 21, at 510.
[27] R.S.C., 1985, c. S-26.

freedom of conscience and it should be. Even though the Supreme Court of Canada has never decided a case based on freedom of conscience alone, there is no pressing need for guidance from this Court given that there is an existing framework that may be developed by the lower courts in an incremental fashion.

26. There are meaningful distinctions between religion and conscience that should be closely examined and understood before the approach to freedom of conscience is particularized. In the case at bar, those distinctions are limited if not lost. There is no question that the Applicant's conscience is informed by his religion. This is not always the case, though it may often be. A case involving a truly secular set of beliefs, like (non-religious) vegetarianism, would provide a clearer factual context in which to frame the appropriate analysis thereby allowing the Court to provide meaningful guidance on how the approach to each freedom should differ.

27. The freedom of conscience jurisprudence is very limited. Often the practical difficulties with a proposed analytical framework are revealed in their application to diverse cases. The disadvantage of crafting an approach to freedom of conscience at this early stage in its legal development is that the issues likely to emerge are not yet apparent.

28. For the foregoing reasons, this is not the appropriate case to develop the freedom of conscience analytical framework.

29. A total of five judges and justices have presided over this case and they are unanimous in their reasoning and result. Often a plea is made to the Supreme Court of Canada to rule upon an issue when a unified approach is needed because the highest provincial appellate courts have conflicting decisions, or the Court is being asked to rule upon the constitutionality of a federal statute. That is not the issue here: this case fails to meet any of the criteria of a case of public importance under section 40 of the *Supreme Court Act*, let alone the higher threshold of "major constitutional importance."

30. The Applicant has not put forward a single case – from any level of Canadian court – that is similar in its facts and supports the position being advanced by him. Quite the contrary, on at least two other occasions, this Court has declined leave to consider arguments of a similar

nature.[28] Although those cases were decided on the basis of freedom of religion, the proposed shift in this case from freedom of religion to conscience is a distinction without a difference.

This Court should decline to hear the new issues raised by the Applicant

31. The Applicant seeks to raise four new issues that were not before the Court of Appeal or any of the Courts that preceded it. The Supreme Court of Canada should not be transformed into what in effect would be a first instance court for litigants who have abandoned their original arguments in favour of yet untried ones.

32. The Applicant raises four main questions:

a. Whether the obligation to file income tax returns violates his freedom of conscience under section 2(a) of the *Charter* because he believes that abortion is wrong and abortions are publicly funded.

b. Whether the obligation to file income tax returns, being contrary to his conscience, interferes with his "personhood" contrary to the principles of fundamental justice, and therefore infringes section 7 of the *Charter*.

c. Whether the obligation to file income tax returns affects him in a discriminatory way on the basis of a proposed analogous ground – conscientious objector – contrary to section 15(1) of the *Charter.*

d. Whether the remedy sought by the Applicant falls within section 24(1) of the *Charter* or section 52 of the *Constitution Act, 1982.*[29]

33. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*,[30] a civil case,[31] the Appellants sought to raise various issues pertaining to rectification of a contract that had not

[28] *Prior v. The Queen* (1989), 43 D.T.C. 5503 (F.C.A.) leave to appeal refused, [1990] 1 S.C.R. x; and *Petrini v. Canada*, [1994] F.C.J. No. 1451 (C.A.) leave to appeal refused, [1995] S.C.R. ix.
[29] Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
[30] *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678 at 693-94, para. 33.
[31] In the criminal context, see *R. v. Brown* (1992), 73 C.C.C. (3d) 481 (Alta. C.A.) per Harradence, J.A. and *R. v. Brown,* [1993] 2 S.C.R. 918.

been argued at trial. This Court noted that generally, an appellant is foreclosed from raising new issues at the appeal stage unless the Court is satisfied that it may decide the matter on the basis of the evidentiary record as is, there are important issues of law at stake, it is able to do so without procedural prejudice to the opposing party, and a refusal to do so would risk an injustice.

34. In that case, the Court was satisfied that the issues could be determined on the basis of the existing record. The Respondent had obtained an equitable remedy and the Court expressed the view that in the circumstances, as equitable principles were in play, it would be incongruous to take an overly technical approach to the development of issues. In addition, the case was factually complex and the new issues were not the only issues before the Court.

35. In the case at bar, the Crown's case consisted of affidavit evidence tendered to prove that the Applicant had been personally served with Requirements to file his 2000, 2001 and 2002 tax returns within a specified time and he failed to comply with those demands. The Applicant testified as the only defence witness. The Crown did not call any evidence in response to the defence advanced. Given the extent to which the concepts of religion and conscience overlap, especially in this particular case where it is apparent that the Applicant's conscience is informed by his religion, it is unlikely that a cross-examination specific to the issue of conscience would have produced much additional useful evidence. Accordingly, the factual record before the Court is likely sufficient to proceed on the basis of freedom of conscience.

36. Having said that, in the circumstances, this is not an appropriate case to permit the introduction of new issues. The "appeal" that the Applicant seeks to advance is overborne by new issues. The Applicant is not asking for one issue to be added to the list of other pre-existing issues, he is seeking to advance a new case altogether (see para. 44 below). The issues raised are not of such importance that, despite any procedural irregularity, they warrant consideration by this Court (see paras. 22-30 above). Finally, the Applicant has not demonstrated that a refusal to hear the new issues would result in an injustice (see paras. 47-60 below). Based on all of these factors, this Court ought not to exercise its discretion to hear the matter.

37. In by-passing the usual procedure developed in the common law courts of advancing the same argument at trial as before the highest court of appeal, the Applicant deprives this Court of the benefit of the wisdom and experience of the lower courts having weighed in on the issue. The

three new *Charter* claims advanced all raise complex legal issues that should not be decided without full consideration in the lower courts.[32]

The Applicant's Charter claim is premature

38. The Crown raised as a preliminary matter at trial an argument that the Applicant had failed to lay a proper evidentiary foundation for his claim. In collapsing the filing of an income tax return into the funding of any particular governmental service one has to assume three necessary further conditions after filing:

i) that the filer has sufficient taxable income to owe taxes;
ii) that he actually pays those taxes; and
iii) that it is possible to trace those tax dollars individually, from source to use.

39. At trial, the Crown argued that Applicant had failed to draw the necessary causal link between the filing of tax returns and the funding of abortions.

40. In his testimony before the Trial Judge, the Applicant spoke generally of how he dealt with his filing obligations. In the early 70s, he filled out the forms, paid his taxes and sent a letter of objection.[33] From 1987 to 1992, he filed tax returns but didn't pay any taxes. In some cases this led to his wages being garnished.[34] The Applicant did not lead any evidence as to whether or not he was in a taxable position after 1992. The Crown examined the Applicant in respect of the 2000, 2001 and 2002 taxation years and the Applicant declined to either confirm or deny that he would owe taxes for those years.[35]

41. The Trial Judge inferred that the Applicant would owe taxes in respect of the years in issue based on the fact that in previous years [1987-1992] he had paid taxes and in some years his pay had been garnished to recover the taxes owed.[36]

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[32] *R. v. Mann,* [2004] 3 S.C.R. 59 at 72, para. 22.
[33] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 23.
[34] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 24-25.
[35] Applicant's Transcript, Trial Transcript, Provincial Court, March 8, 2007, Tab 2, at 126-27.
[36] Application for Leave to Appeal, Decision of Jackson CJ PC, dated November 9, 2007, at 8, para. 8.

42. The Court of Appeal revisited the issue *in obiter* and noted that it was questionable whether the Applicant's freedom of religion claim (or "coercion argument" as it was referred to by that Court) called for consideration in the circumstances:

> Mr. Little's second Charter argument is that the provisions of the Income Tax Act require him to participate in a federal scheme which funds public abortions contrary to his sincerely held religious belief that abortion is wrong. At the outset, let me say that the argument is problematic for the following reason. Mr. Little was charged with and convicted of failing to file annual income tax returns, not for failing to pay taxes properly assessed by the Canada Revenue Agency. Until such time as Mr. Little files these returns, the Agency is simply not in a position to assess whether Mr. Little is obligated to pay taxes. In truth, Mr. Little's true objection lies in the prospect of being required to pay taxes which in turn will trickle down and be used to defray the costs of funding abortions. But until such time as he files his annual tax returns, and until such time as it is determined that taxes are owing and there is a demand for payment and a refusal to pay, it is questionable whether Mr. Little's Charter "coercion argument" warrants consideration. This reality did not escape the Crown. On a preliminary motion, the Crown argued before the trial judge that the Charter claim was premature given the fact that Mr. Little was only required to file an income tax return and there had been no determination with respect to tax liability. However, the trial judge held there was sufficient evidence to allow the Charter defence to proceed. In the circumstances, I shall deal with Mr. Little's coercion argument.[37]

43. In explaining the necessary factual preconditions to the existence of coercion, the Court of Appeal identifies at least four necessary steps: 1) the taxpayer must file a tax return; 2) the Canada Revenue Agency must assess the return and determine that taxes are owing; 3) the Canada Revenue Agency must demand payment of the taxes owing from the taxpayer; and 4) the taxpayer must refuse to pay the taxes owing as an exercise of his freedom of conscience. If the taxpayer challenges the assessment or if the assessment goes to collection, then his recourse is to the civil courts (although the claim may still be doomed to failure on the basis of the reasoning in *Prior v. The Queen* and *Petrini v. Canada*[38]). At this stage, however, the Applicant's claim that his *Charter* rights have been infringed is premature.

The Applicant's only arguably legitimate issue for appeal is unsupported

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[37] Application for Leave to Appeal, Reasons of Court of Appeal for New Brunswick dated August 20, 2009, at 21 para. 11.

[38] *Supra* note 28.

44. Put simply, an appeal is a request that a supervising court reverse in some material respect the judgment of the highest and latest court to consider a set of legal issues in a case on the basis that the previous court made one or more errors. In this case, the latest Court to preside over this matter was the New Brunswick Court of Appeal. However, the Applicant only alleges one error by that Court -- it failed to raise the issue of the Applicant's absence of legal representation on its own motion.[39] The remainder of the issues identified by the Applicant assert that the Court of Appeal erred: a) in not deciding issues that were not pleaded before it;[40] b) in failing to address the issue of accommodation despite having found no infringement of a right;[41] or c) in its treatment of issues that have now been abandoned by the Applicant.[42]

45. The Applicant's criticism that the appeal courts failed to appoint counsel is premised on the existence of a *Charter* right to legal representation on appeal in these circumstances. The Applicant sets out no legal analysis to support his contention that the failure to appoint counsel is contrary to some unspecified section of the *Charter.* He simply accuses the Court of "mocking the rule of law" by failing to appoint counsel of its own motion.[43] Both the Alberta and Nova Scotia Courts of Appeal have held that there is no constitutional right to have counsel appointed to argue an appeal.[44] However, there is authority to appoint counsel when the interests of justice require it.[45] That discretion should not be exercised unless the appeal could have a reasonable chance of success.[46] The New Brunswick Court of Appeal made its assessment of the merits of this case clear when it described the appeal as "doomed to failure."[47]

46. Despite the fact that this is an Application for Leave, the Applicant advances no argument whatsoever in support of the view that this issue is a matter of major constitutional importance[48] such that it warrants consideration by this Court. With respect, this issue is not seriously argued

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[39] Application for Leave to Appeal, Applicant's Memorandum of Argument, Part II -- Points in Issue, at 31, para. 29.
[40] Application for Leave to Appeal, Applicant's Memorandum of Argument, Part II -- Points in Issue, at 30-31, paras. 25-26, 28.
[41] Application for Leave to Appeal, Applicant's Memorandum of Argument, Part II -- Points in Issue, at 31, para. 27.
[42] Application for Leave to Appeal, Applicant's Memorandum of Argument, Part II -- Points in Issue, at 31, para. 30.
[43] Application for Leave to Appeal, Applicant's Memorandum of Argument, at 43-44, paras. 65-66.
[44] *R. v. Robinson; R. v. Dolejs* (1989), 51 C.C.C. (3d) 452 (Alta. C.A.) and *R. v. Grenkow*, [1994] N.S.J. No. 26 (C.A.).
[45] *Criminal Code*, R.S.C., 1985, c. C-46, s. 684.
[46] *R. v. Grenkow, supra* note 44, at paras. 27-31.
[47] Application for Leave to Appeal, Reasons of Court of Appeal for New Brunswick dated August 20, 2009, at 15, para. 1.
[48] As to the application of this test see para. 19 above.

by the Applicant – the real issue that the Applicant seeks to have determined is that of whether the requirement to file an income tax return infringes the Applicant's freedom of conscience contrary to section 2(a) of the *Charter.* As a new issue, it is not properly before this Court.

The Applicant has failed to demonstrate that he was denied the effective assistance of counsel at trial

47. The Applicant urges this Court to entertain the appeal on the basis that the late development of the issues he now raises is really the fault of trial counsel who provided what he calls "ineffective assistance." Specifically, he is alleged to have made "the wrong Charter argument at trial" (freedom of religion instead of freedom of conscience), erred in failing to attack the constitutional validity of section 238 of the *ITA*[49] and erred in failing to raise a section 7 argument.[50] In addition, the Applicant accuses trial counsel of declining to follow his instructions in at least two respects -- by making a motion for directed verdict and declining to challenge the constitutionality of section 238 of the *ITA*[51] -- but he does so in the absence of any support for that allegation on the record before this Court. According to the Applicant, trial counsel's errors were compounded by a lack of legal representation at the appeal levels.

48. In order to establish that counsel has provided ineffective assistance, the Applicant must displace the strong presumption that counsel's conduct fell within the wide range of reasonable professional judgment and he must demonstrate that a reasonable probability exists that a miscarriage of justice resulted as shown by procedural unfairness or a compromise in the reliability of the trial's result.[52] The law that governs claims of ineffective assistance of counsel is settled and the Applicant makes no request that this Court revisit it. Again, this is not a matter of public importance let alone major constitutional importance.

49. The Applicant has failed to demonstrate that trial counsel made any error, only that new counsel would have approached the matter differently. Finally, the Applicant has failed to demonstrate that, but for trial counsel's "errors", a reasonable probability exists that the result of

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[49] Application for Leave, Notice, at 3, para. 14.
[50] Application for leave, Applicant's Memorandum of Argument, at 43, para. 64.
[51] Application for leave, Applicant's Memorandum of Argument, at 43, para. 64.
[52] *R. v. G.D.B.,* [2000] 1 S.C.R. 520 at 531-32, paras. 26-29.

the trial would have been different. The Applicant has not demonstrated that the arguments that trial counsel failed to advance have merit.

50. From the moment that he first appeared in Court, the Applicant has consistently and vigorously asserted that the obligation to file an income tax return infringes his freedom of religion because public funds are used to pay for abortion, and abortion is contrary to his Roman Catholic beliefs. Indeed, it is almost impossible for him to express his beliefs without resort to Catholic teaching and Christian principles. To re-cast this as a matter of freedom of conscience, rather than freedom of religion, at this stage in the proceedings, is nothing more than a retreat from a losing battle into the refuge of a yet undefined, and therefore amorphous freedom ripe for moulding on a final appeal.

51. The Applicant alleges that trial counsel fell below the standard of reasonable professional judgment by failing to advance what now must be seen to be a novel and unprecedented argument based on freedom of conscience -- and this is not the standard to which counsel is held.

52. In framing the claim as a matter of freedom of conscience, the Applicant appears to take the view that the belief that warrants constitutional protection is that the Applicant must not file a tax return. In defining the belief in that way, the whole analysis is subsumed in the first element of the first part of the *Amselem* test. This same strategy -- conflating the elements of the test -- was attempted by the Applicant in framing his case based on freedom of religion before the Court of Appeal. It was rejected by that Court. Viewing the case in context, the belief, fairly and objectively defined, remains that abortion is wrong and the line of conduct that it calls for is still that the Applicant must not participate in it. Again, there is no nexus between participation in abortion and the filing of tax returns. Although it was expressed slightly differently by each of the courts, it is this breakdown in the Applicant’s reasoning that has ultimately led every court below to find that there has been no breach of section 2(a) of the *Charter*. In the context of a claim that the payment of union dues infringed the freedom of expression of a claimant, Justice Wilson (in a concurring judgment) said as follows:

> To my mind, compelled financial support does not necessarily violate freedom of expression. For example, all members of the community are compelled to pay taxes on pain of legal penalty. It seems axiomatic that the payment of taxes does not signify in the eyes of others support for the uses to which tax money is put or

> support for the political party in power or, indeed, support for the idea of government at all.[53]

53. Even if a Court were to find an infringement of the right -- perhaps out of a reluctance to scrutinize a declared belief beyond a finding of sincerity -- any such interference, objectively evaluated, cannot be characterized as more than trivial or insubstantial. The relationship between the two is too tenuous to support any other conclusion. The new section 2(a) argument suffers from the same defect that plagued the previous argument notwithstanding the change in counsel.

54. The Applicant also argues that trial counsel should have made a section 7 argument since in his view, section 7 and 2(a) are closely related. The decision to proceed with the *Charter* claim most closely tailored to the issues at stake (section 2(a)) rather than a general *Charter* claim (section 7) is reasonable and appropriate. The section 7 claim adds nothing to what is really a section 2(a) matter. Although it may have been open to trial counsel to advance the argument, the decision not to do so is consistent with the leading jurisprudence.[54] A difference in preferred strategy, by itself, is not a proper basis upon which to claim ineffective assistance of counsel.

55. The Applicant dangles a hint of an argument that the obligation to file tax returns, when that conduct is contrary to one's conscience, is a violation of his "personhood" contrary to section 7 of the *Charter*. This argument has the same frailties as the freedom of conscience claim -- filing a tax return is not contrary to the Applicant's conscience, participation in abortion is. By the phrase "personhood", the Respondent infers that the Applicant invokes the liberty to make decisions of personal autonomy without interference by the state. While that liberty interest may comprise a freedom from an abuse of state power, it does not protect against routine and legitimate exercises of it.[55] The Applicant advances no argument that leads to the conclusion that his liberty has been infringed, nor does he identify which principle of fundamental justice is offended by the routine obligation to file a tax return. While in the context of an application for leave to appeal it may be unnecessary to argue the merits of the appeal in a comprehensive manner, surely the essential elements of the argument should be disclosed.

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[53] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 280. See also *Prior v. The Queen*, *supra* note 28, at 5505 (F.C.A.); and *Petrini v. Canada*, *supra* note 28, at para. 3 (F.C.A.).

[54] *Philippines (Republic) v. Pacificador,* [1993] O.J. No. 1753 (Ont. C.A.) at para. 60.

[55] *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 at 345, para. 59.

56. In advancing the section 15 argument, the Applicant claims the protection of a novel analogous ground – "conscientious objector." [56] In *Govt. PEI v. Condon et al.*,[57] the Prince Edward Island Court of Appeal, in *obiter dicta*, expressed some doubt as to whether "political belief" is an analogous ground under section 15(1) of the *Charter*. In proposing this new analogous ground, the Applicant has failed to demonstrate its relationship to the contextual factors identified by this Court in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*[58] for the development of new analogous grounds. Furthermore, as this argument hinges on the premise that the Applicant has a conscientious belief that filing taxes is wrong, it too suffers from the same fundamental flaw as the freedom of conscience argument. The objective of section 15(1) is to prevent "governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping."[59] The Applicant claims that because of his beliefs, he is affected differently by the obligation to file tax returns but his analysis stops there. He makes no attempt to craft an argument consistent with the analytical framework developed for the determination of section 15(1) claims. The Respondent and this Court are left to guess at what disadvantage has been imposed on the basis of stereotyping. The argument, such as it is, does not warrant consideration by this Court.

57. In keeping with the casual treatment of section 15 of the *Charter* throughout these proceedings, at the conclusion of his submissions, the Applicant makes a throw-away section 15 argument. He states that the "government" has violated his section 15 rights by "failing to acknowledge" the infringement of his freedom of conscience. No attempt is made to identify the source of this ambiguous obligation to "acknowledge" such a claim or what such an acknowledgement should look like. With respect, the argument is entirely without merit.

58. Finally, the Applicant does not articulate the basis upon which he concludes that it was an error, and not merely a strategic decision, not to attack the constitutionality of section 238 of the *ITA*. It was open to the Applicant to allege at trial that the statutory scheme passes constitutional muster while the decision of a government official to serve the Applicant with Requirements to

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[56] Application for Leave to Appeal, Notice, at 3, para. 10.
[57] 2006 PESCAD 1 at para. 43, leave to appeal refused, [2006] 2 S.C.R. viii.
[58] [1999] 2 S.C.R. 203 at 252, para. 60.
[59] *R. v. Kapp,* [2008] 2 S.C.R. 483 at 506, para. 25.

file his 2000, 2001 and 2002 income tax returns was a breach of the Applicant's *Charter* rights (and seek a section 24(1) remedy). The Applicant has not identified the error in this approach. All he does is point out that there was another way to approach the issue.

59. The mere allegation of ineffective assistance of counsel is serious and may adversely affect the professional reputation of the impugned counsel as well as the administration of justice as a whole. If such a claim is made, with the assistance of new counsel, any arguments in support of it should be well supported and clearly articulated. It must not be used a strategic means of freeing oneself of the consequences of decisions that ultimately did not find favour with the courts below.

60. The issues raised by the Applicant are poorly developed and unsupported by case law. In the circumstances, it is impossible to conclude that the failure to raise them at trial or on any subsequent appeals resulted in any miscarriage of justice.

PART IV: SUBMISSIONS CONCERNING COSTS

61. The Respondent makes no submission as to costs.

PART V: NATURE OF ORDER SOUGHT

62. That the application for leave to appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Keith Ward

Suhanya Edwards

Counsel for the Respondent

12 November 2009
Halifax, Nova Scotia

PART VI: AUTHORITIES

Case	*Paragraph(s)*
Bilodeau v. A.G. (Man.), [1986] 1 S.C.R. 449.	20
Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307.	55
Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203.	56
Govt. PEI v. Condon et al., 2006 PESCAD 1, leave to appeal refused, [2006] 2 S.C.R. viii.	56
Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211.	52
MacDonald v. Montreal (City), [1986] 1 S.C.R. 460.	19 - 22
Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., [2002] 1 S.C.R. 678.	33 – 34
Petrini v. Canada, [1994] F.C.J. No. 1451 (C.A.) leave to appeal refused, [1995] S.C.R. ix.	30, 43, 52
Philippines (Republic) v. Pacificador, [1993] O.J. No. 1753 (Ont. C.A.).	54
Prior v. The Queen (1989), 43 D.T.C. 5503 (F.C.A.) leave to appeal refused, [1990] 1 S.C.R. x.	30, 43, 52
R. v. Brown (1992), 73 C.C.C. (3d) 481 (Alta. C.A.).	33
R. v. Brown, [1993] 2 S.C.R. 918.	33
R. v. G.D.B., [2000] 1 S.C.R. 520.	48

R. v. Grenkow, [1994] N.S.J. No. 26 (C.A.).	45
R. v. Kapp, [2008] 2 S.C.R. 483.	56
R. v. Mann, [2004] 3 S.C.R. 59.	37
R. v. Robinson; R. v. Dolejs (1989), 51 C.C.C. (3d) 452 (Alta. C.A.).	45
Re Manitoba Language Rights, [1985] 1 S.C.R. 721.	20
Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551.	13, 25, 52

PART VII: STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 2, 7, 15.

English	Français
Fundamental freedoms	Libertés fondamentales
2. Everyone has the following fundamental freedoms:	2. Chacun a les libertés fondamentales suivantes :
(a) freedom of conscience and religion;	a) liberté de conscience et de religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;	b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
(c) freedom of peaceful assembly; and	c) liberté de réunion pacifique;
(d) freedom of association.	d) liberté d'association.

. . .

English	Français
Life, liberty and security of person	Vie, liberté et sécurité
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

. . .

English	Français
Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques

Constitution Act, 1982, s. 52, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the Canada Act 1982, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la Loi de 1982 sur le Canada, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas a) ou b).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Income Tax Act, S.C. 1985, c. 1 (5th Supp.), as amended, s. 238.

Offences and punishment

238. (1) Every person who has failed to file or make a return as and when required by or under this Act or a regulation or who has failed to comply with subsection 116(3), 127(3.1) or 127(3.2), 147.1(7) or 153(1), any of sections 230 to 232 or a regulation made under subsection 147.1(18) or with an order made under subsection 238(2) is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(a) a fine of not less than $1,000 and not more than $25,000; or

(b) both the fine described in paragraph 238(1)(a) and imprisonment for a term not exceeding 12 months.

Compliance orders

(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.

Saving

(3) Where a person has been convicted under this section of failing to comply with a provision of this Act or a regulation, the person is not liable to pay a penalty imposed under section 162 or 227 for the same failure unless the person was assessed for that penalty or that penalty was demanded from the person before the information or complaint giving rise to the conviction was laid or made.

Infractions et peines

238. (1) La personne qui ne produit ou ne présente pas ou ne remplit pas une déclaration de la manière et dans le délai prévus à la présente loi ou à son règlement ou qui contrevient au paragraphe 116(3), 127(3.1) ou (3.2), 147.1(7) ou 153(1) ou à l’un des articles 230 à 232 ou à une disposition réglementaire prise en vertu du paragraphe 147.1(18) ou encore qui contrevient à une ordonnance rendue en application du paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire et outre toute pénalité prévue par ailleurs :

a) soit une amende de 1 000 $ à 25 000 $;

b) soit une telle amende et un emprisonnement maximal de 12 mois.

Ordonnance d’exécution

(2) Le tribunal qui déclare une personne coupable d’une infraction prévue au paragraphe (1) peut rendre toute ordonnance qu’il estime indiquée pour qu’il soit remédié au défaut visé par l’infraction.

Réserve

(3) La personne déclarée coupable, par application du présent article, d’avoir contrevenu à une disposition de la présente loi ou de son règlement n’est passible d’une pénalité prévue à l’article 162 ou 227 pour la même contravention que si une cotisation pour cette pénalité a été établie à son égard ou que si le paiement en a été exigé d’elle avant que la dénonciation ou la plainte qui a donné lieu à la déclaration de culpabilité ait été déposée ou faite.

Criminal Code, R.S.C., 1985, c. C-46, s. 684.

Legal assistance for appellant

684. (1) A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

Counsel fees and disbursements

(2) Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

Taxation of fees and disbursements

(3) Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements.

Assistance d'un avocat

684. (1) Une cour d'appel, ou l'un de ses juges, peut à tout moment désigner un avocat pour agir au nom d'un accusé qui est partie à un appel ou à des procédures préliminaires ou accessoires à un appel, lorsque, à son avis, il paraît désirable dans l'intérêt de la justice que l'accusé soit pourvu d'un avocat et lorsqu'il appert que l'accusé n'a pas les moyens requis pour obtenir l'assistance d'un avocat.

Honoraires et dépenses

(2) Dans le cas où l'accusé ne bénéficie pas de l'aide juridique prévue par un régime provincial, le procureur général en cause paie les honoraires et les dépenses de l'avocat désigné au titre du paragraphe (1).

Taxation des honoraires et des dépenses

(3) Dans le cas de l'application du paragraphe (2), le registraire peut, sur demande du procureur général ou de l'avocat, taxer les honoraires et les dépenses de l'avocat si le procureur général et ce dernier ne s'entendent pas sur leur montant.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 40.

Appeals with leave of Supreme Court

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other

Appel avec l'autorisation de la Cour

40. (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout

judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, 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 that 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, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

Appeals in respect of offences

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

(4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

jugement, définitif ou autre, rendu par la Cour d’appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l’affaire en question, ou par l’un des juges de ces juridictions inférieures, que l’autorisation d’en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l’importance de l’affaire pour le public, ou de l’importance des questions de droit ou des questions mixtes de droit et de fait qu’elle comporte, ou de sa nature ou importance à tout égard, qu’elle devrait en être saisie et lorsqu’elle accorde en conséquence l’autorisation d’en appeler.

Demandes d’autorisation d’appel

(2) Les demandes d’autorisation d’appel présentées au titre du présent article sont régies par l’alinéa 58(1)a).

Appels à l’égard d’infractions

(3) Le présent article ne permet pas d’en appeler devant la Cour d’un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l’une ou l’autre de ces décisions dans le cas d’un acte criminel ou, sauf s’il s’agit d’une question de droit ou de compétence, d’une infraction autre qu’un acte criminel.

Prorogation du délai d’appel

(4) Dans tous les cas où elle accorde une autorisation d’appel, la Cour ou l’un de ses juges peut, malgré les autres dispositions de la présente loi, proroger le délai d’appel.