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INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

COMMUNICATION TO

THE HUMAN RIGHTS COMMITTEE

c/o Division of Human Rights
United Nations Office
Geneva, Switzerland

Submitted for consideration under the
Optional Protocol to the International Covenant
on Civil and Political Rights

AUTHOR OF THE COMMUNICATION: JERILYNN PRIOR

STATE PARTY CONCERNED: CANADA

February 2l, 1991

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INTRODUCTION

1. This is an application by Jerilynn Prior, a physician and member of the Quaker faith, of 806 W. 18th Avenue, Vancouver, British Columbia, Canada, to the Human Rights Committee to consider her complaint against Canada. She says that Canada has violated her freedom of conscience and religion under Article 18 of the International Covenant on Civil and Political Rights.

2. Dr. Prior asserts that her refusal to see her taxes used for military purposes is a matter of freedom of conscience and religion. The <u>Income Tax Act</u>, S.C. 1970-71-72, C.63 and amendments thereto have the effect of violating her rights under Article 18.

3. Dr. Prior says that under the Optional Protocol to the International Covenant on Civil and Political Rights, the complaint is one which ought to be considered by the Committee.

4. Canada acceded to the International Covenant and the Optional Protocol on May 19th, 1976; they became binding on Canada on August 19th, 1976.

EXHAUSTION Of REMEDIES

5. Dr. Prior has taken her cause to the Federal Court, Trial Division, to the Federal Court of Appeal and to the Supreme Court of Canada, which has refused to grant leave to appeal in her case and has refused a request by Dr. Prior for reconsideration. She has therefore exhausted her domestic remedies. Dr. Prior's Application for Reconsideration in the Supreme Court of Canada accompanies this communication and may be considered as Appendix "A" hereto.

6. The Committee should appreciate that there is an anomaly here. The Supreme Court of Canada has adopted in the past the view that freedom of conscience and religion under Canada's <u>Charter of Human Rights and Fundamental Freedoms</u>, adopted in 1982, should be given a broad meaning. Some of their decisions are referred to in this Communication and in Appendix "A". Nevertheless, the Supreme Court refused to grant leave to appeal from the decision of the Federal Court of Appeal and refused an application for reconsideration. In Canada an application for leave to appeal and an application for reconsideration of refusal to grant leave are dealt with by a panel of three judges only (a quorum for an appeal, if leave is

granted, is 5 judges; normally 7 or 9 judges will sit). Furthermore, the practice of the court is not to give reasons on refusal of a motion for leave. So no reasons were given in this case for refusing leave and for refusing reconsideration. The point is that where leave is refused, that is not be taken as indicating that the Supreme Court has spoken on the matter. The Court has been known to overrule decisions of lower courts even though in another case involving the same question it may have on another occasion refused leave. So the argument in Appendix "A" is necessarily addressed to the Reasons of the Federal Court of Appeal.

7. Dr. Prior has therefore exhausted her domestic remedies, even though the Supreme Court of Canada has not spoken. It may be that the panel of the Court that considered the matter thought the time was not ripe. However that may be, she has no recourse now except to the U. N. Human Rights Committee.

DR. PRIOR'S BELIEFS

8. Dr. Prior, and 532 other Canadians who share her beliefs, are paying that portion of their taxes that goes to pay for national defence (approximately 10%) into the Peace Tax Fund Trust Account.

9. Dr. Prior claims that Canada's Income Tax Act, S.C 1970-71-72, c.63, to the extent that it requires her to contribute her tax money to military expenditures, violates her freedom of conscience and religion under Article 18 of the International Covenant.

10. Dr. Prior is a member of the Society of Friends or Quakers. It is a matter of Dr. Prior's conscience and a living expression of her religion and faith that she refuse to participate in any expenditures for military or war purposes, including the payment of tax which will be used for military or war purposes whether for defence or otherwise, providing such defence involves the intent to use or actual use of violence.

11. A Quaker paying taxes to government regards himself or herself as morally responsible for the expenditures of that government.

12. Dr. Prior, and 532 other Canadians who, like her, are paying a portion of their taxes into the Peace Trust, rely on the tradition of Quaker and Christian pacifism. For Quakers, it goes back to 1661.

> "We utterly deny all I outward wars and strife and fightings with outward weapons, for any end or under any pretence whatsoever. And this is our testimony to the whole world. The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil, and again to move unto it; and we do certainly know, and so testify to the world, that the spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with

> outward weapons, neither for the kingdom of Christ, nor for the kingdoms of this world."

A Declaration from the Harmless and innocent People of God, called Quakers presented to Charles II, 1661

13. The tradition of Christian pacifism, central to Quaker belief, is not unknown in Canada. J. S. Woodsworth's famous speech to the House of Commons on the declaration of war against Germany in 1939, reproduced in McNaught, A Prophet in Politics, U. of T. Press, 1959; includes these words, at p. 311:

> "I left the ministry of the church during the last war because of my ideas on war. Today I do not belong to any church organization. I am afraid that my creed is pretty vague. But even in this assembly I venture to say that I still believe in some of the principles underlying the teachings of Jesus, and the other great world teachers throughout the centuries… War is an absolute negation of anything Christian." [Emphasis added]

14. Dr. Prior wishes to apply the idea of conscientious objection to her taxes. This also is intrinsic to Quaker faith: John Woolman, one of the founders of the Society of Friends in North America (1720-72), admitted that he had longstanding scruples against paying taxes "for carrying on wars." He could see no effective difference between actually fighting a war and supporting it with taxes. In his Journal, he wrote:

> "To refuse the active payment of a tax which our society generally paid was exceeding disagreeable, but to do a thing contrary to my conscience appeared yet more dreadful. Thus, by small degrees, we might approach so near to fighting that a distinction would be little else but the name of a peaceable people."

Janet Whitney (ed.), The Journal of John Woolman (Chicago, Ill.; Henry Regnery Company, 1950), pp. 66, 68.

15. In Canada the conscription of ordinary citizens has become irrelevant to the maintenance of the armies of modern technological societies. It is the citizen's resources that the government now conscripts.

16. The issue is one of world-wide importance: resolutions and bills to uphold conscientious objection to taxation on grounds of freedom of conscience and religion have been introduced in Canada from time to time since 1984. In the U.S. Congress similar bills have been introduced every second year since 1972. Britain, West Germany, Italy, the Netherlands and Australia have also seen bills introduced, or will see them introduced soon.

17. Its importance is also apparent owing to the U.N. authorization of the use of force to expel Iraq from Kuwait and the controversy among the people of the U.N. member countries about the U.N.'s abandonment of sanctions and disproportionate use of force against Iraq.

18. As William Stringfellow has written:

> "This extraordinary change in warfare places military professionals and citizens back home in more nearly the same practical relationship to those who are being killed. And if it is tempting to suppose that remote proximity abolishes responsibility for the killing, it must be remembered that the use of apparently anonymous automated weapons exposes the common and equal culpability for slaughter of those who pull the trigger and those who press the button with those who manufacture the means and those who pay the taxes. ..."
>
> William Stringfellow, An Ethic for Christians and Other Aliens in a Strange Land, 1973, pp. 72-73.

19. This case presents an important test of freedom of conscience and religion under Article 18 of the International Covenant. The judgments in the Canadian courts (the Federal Court, Trial Division and the Federal Court of Appeal) take a narrow view of the corresponding provision of Canada's Charter of Rights, s.2(a), which guarantees freedom of conscience and religion. If allowed to stand, these judgments will stunt the development of emerging notions of freedom of conscience and religion.

20. Canada has always acknowledged the principle of conscientious objection to military service; it is acknowledged to be a human right in free and democratic countries. Conscientious objectors are allowed to do alternative service. Canadian statutes and orders-in-council going back to 1793 have acknowledged the rights of conscientious objectors and provided for alternative service. Dr. Prior seeks to establish conscientious objection to payment of taxes for military purposes. Dr. Prior wishes to have her tax money do alternative service.

21. The idea of freedom of conscience and religion is not undeveloped in Canada. In the Queen v. Big M Drug Mart, [1985] 1 S.C.R. 295, Mr. Justice Brian Dickson (as he then was), writing for the Supreme Court, at p. 336, offered a broad definition of freedom of religion under Canada's Charter of Human Rights and Fundamental Freedoms:

> "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. ... The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of

hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. ...”

22. Dr. Prior's case truly engages freedom of conscience and religion; it requires a consideration of the tenets of the Quaker faith and the violation of her conscience and religion that is entailed by coercing her to contribute to military expenditures.

23. Dr. Prior asserts that the law in Canada, as applied by the Canadian courts, is in contravention of the rights and freedoms set forth in the International Covenant.

VIOLATION OF ARTICLE 18

Is there a violation hereof the International Covenant on Civil and Political Rights?

24. Article 18 of the International Covenant reads as follows:

> “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

25. The issue of whether coercion of money from citizens for purposes of war is a violation of Article 18 has not yet come before the Committee, let alone been determined.

26. In Communication No. 89/1981 (Muhonen v. Finland), the Military Service Examining Board at first held against Mr. Muhonen and then, on February 2nd, 1981, reversed itself and found that he was entitled to be exempted from bearing arms. It is true that the Committee found no violation of Article 18. But the Committee said at p. 166, that “the decisions of the Military Service Examining Board and of the Ministry of Justice in 1977 and 1978) refusing Mr. Muhonen’s application to be exempted from service in the armed forces on ethical grounds,

raised a question of compliance with Article 18, paragraph 1 of the Covenant, [but] the subsequent decision of the Examining Board of 2 February 1981 had already provided an answer in that respect and that consequently no further question of violation of that article arose".

27. The most recent decision of the Committee bearing on the issue is Communication No. 295/1988 (Jarvinen v. Finland). The Committee's decision is dated 25 July 1990. In this case a Finnish citizen complained about Finland's requirement that conscientious objectors should put in 11 or 12 months civilian service in municipalities or in hospitals, in substitution for 8 months' service in the army.

28. It was held by the Committee that this was not discrimination under Article 26 of the Covenant since it was not unreasonable or punitive, though two members of the Committee found the requirement to be a violation of Article 26. Of most importance is the opinion of Mr. Bertil Wennergren, dealing with Article 18, to which we shall return.

29. It is true, as the Committee held, in Communication No. 185/1984 (L.T.K. v. Finland) that the Covenant "does not provide for the right to conscientious objection." It is equally apparent, on reading the Covenant, that it does not expressly provide for taxpayers to require that their tax money be diverted to civilian uses. But, just as the Committee has made it plain in Jarvinen v. Finland that the absence of an express right to conscientious objection does not give a state carte blanche to discriminate, so also the absence of a right to require peaceful uses of one's taxes does not mean that coercing the citizen to pay taxes for war is not a violation of Article 18.

Here Dr. Prior calls in aid the opinion of Mr. Bertil Wennergren in Jarvinen v. Finland, who said:

> "The ratio legis of [the Finnish statute] that by choosing to prolong service time by as much as 240 days, the effect would be to discourage applicants without sincere and truly genuine convictions. Looked upon exclusively from the point of view of deterrence of objectors without genuine convictions, this method may seem both objective and reasonable. However, from the point of view of those for whom national service had been established in place of military service, the method is inadequate and runs counter to its purpose. As the Committee observes in paragraph 6.5, the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service, no matter how long it is in comparison to military service. From this finding I draw the conclusion, contrary to the Committee, that the method not only is inadequate in relation to its very purpose to provide a possibility to those who, for reasons of conscience, are unable to perform military service, to instead perform civilian service. The effect of this practice is that they

will be compelled to sacrifice twice as much of their liberty in comparison to those who are able to perform military service on the basis of their belief.

In my view, this is unjust and runs counter to the requirement of equality before the law laid down in article 26 of the Covenant. The differentiation in question is, in my view, based on grounds that are neither objective nor reasonable. <u>Nor does it in my opinion comply with the provisions of article 18, paragraph 2, which state that no one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice</u>. Obliging conscientious objectors to perform 240 extra days of national service on account of their beliefs is to impair their freedom of religion or to hold beliefs of their choice.

I am therefore of the view that the terms for performance of national service, in place of military service, imposed on Mr. Jarvinen by Act No. 647/85 disclose violations of articles 18 and 26 in conjunction with article 8 of the Covenant." [Emphasis added]

The Eide/Mubanga-Chipoya report, published in 1985, was prepared pursuant to resolutions 14 (XXXIV) and 1982/30 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It is an excellent report, reviewing the provisions that states have made for alternative service for conscientious objectors, and urging the adoption by the Sub-Commission of certain recommendations to the Commission.

"1. Right to conscientious objection

"(a) States should recognize by law the right of persons who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian or similar motives, refuse to perform armed service, to be released from the obligation to perform military service.

"(b) States should, as a minimum, extend the right of objection to persons whose conscience forbids them to take part in armed service under any circumstances (the pacifist position).

"(c) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used to enforce apartheid.

"(d) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used in action amounting to or approaching genocide.

"(e) States should recognize by law the right to be released from service in armed forces which the objector considers likely to be used for illegal occupation of foreign territory.

“(f) States should recognize the right of persons to be released from service in armed forces which the objector holds to be engaged in, or likely to be engaged in, gross violations of human rights.

“(g) States should recognize the right of persons to be released from the obligation to perform service in armed forces which the objector considers likely to resort to the use of weapons of mass destruction or weapons which have been specifically outlawed by international law or to use means and methods which cause unnecessary suffering.

“2. Procedural aspects

“(a) States should maintain or establish independent decision-making bodies to determine whether a conscientious objection is valid under national law in any specific case. There should always be a right of appeal to an independent, civilian judicial body.

“(b) Applicants should be granted a hearing and be entitled to be represented by legal counsel and to call witnesses.

“(c) States should disseminate information about the right of objection, and allow non-governmental organizations to do likewise.

“3. Alternative service

“States should provide alternative service for the objector, which should be at least as long as the military service, but not excessively long, so that it becomes in effect a punishment. States should, to the extent possible, seek to give the alternative service a meaningful content, including social work or work for peace, development and international understanding.

30. The tendency of the Committee’s decisions and of the Sub-Commission’s and Commission’s deliberations is plainly moving towards a recognition that refusal by a state to recognize the right of conscientious objection to military service and to provide for alternative service is a violation of Article 18.

31. The United Nations Commission on Human Rights, on March 8th, 1989, adopted unanimously a resolution on conscientious objection to military service. It cited the report prepared by Mr. Eide and Mr. Mubanga-Chipoya for the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN4/Sub.2/1983/30), and decided “to consider this matter further at its forty-seventh session under the agenda item ‘the role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service’.” The issue has emerged in conjunction with the role of youth. But it has broader implications.

32. Dr. Prior has the right under Article 18, to freedom of conscience and religion. She has the right to manifest her religion or belief in worship, observance, practice and teaching. Freedom of conscience and religion is therefore expressed in the most liberal terms. Furthermore, she is to be spared "coercion which would impair [her] freedom to have... a religion or belief of [her] choice."

33. Dr. Prior submits that, by requiring her to pay taxes for military purposes, Canada is violating Article 18 as surely as if, in the case of a young person, it did not make suitable arrangements for alternative service.

34. The government collects taxes from Dr. Prior and devotes them, in part to military purposes. It is clear from the wording of the Financial Administration Act R.S.C. 1970, Chap. F-10, that Canada's Consolidated Revenue Fund is an aggregate of all public monies, including the taxes paid by Dr. Prior. It merely requires a calculation to determine what portion of Dr. Prior's taxes go to each of the various expenditures, including military expenditures, made by the federal government. Dr. Prior has made the calculation, and sent to the Peace Trust that portion of her federal taxes that would otherwise go to military expenditures. Ordinary taxpayers have no doubt about it; they know that their money in some small proportion goes to pay the salaries of Members of Parliament or the salaries of federal judges, or for national defence and so on. If you told them there was no connection, they would think you an idiot.

35. To the Quaker, conscience is the essential link between faith and practice. Quakers seek to live a sacramental life, according to an internal yard stick, that Inner Light to which individual choices are subjected. To quote William Penn:

> "In that day we judged not after the sight of the eye, or after the hearing of the ear, but according to the light and sense this blessed principle gave us, we judged and acted in reference to things and persons, ourselves and others, yea, towards God our Maker. For being quickened by it in our inward man, we could easily discern the difference of things; and feel what was right and what was wrong, what was fit and what not, both in reference to religious and civil concerns."

Preface to the Journal of George Fox, 8th edition, 1891. For Quakers, the Inner Light represents conscience i.e., the link between faith and practice.

36. The paramountcy of the individual's conception of the dictates of his or her own conscience is illustrated by R. v. Videoflicks Ltd. (1985), 14 D.L.R. (4th) 10. Mr. Justice Tarnopolsky, writing for a five-member bench of the Ontario Court of Appeal in that case, said at pp. 35-37:

"Freedom of religion goes beyond the ability to hold certain beliefs without coercion and restraint and entails more than the ability to profess those beliefs openly. In my view, freedom of religion also includes the right to observe the essential practices demanded by the tenets of

one's religion and, in determining what those essential practices are in any given case, the analysis must proceed not from the majority's perspective of the concept of religion but in terms of the role that the practices and beliefs assume in the religion of the individual or group concerned." [Emphasis added]

The case went to the Supreme Court of Canada, and is reported as Edwards Books v. The Queen, [1986] 2 S.C.R. 713. In the Supreme Court, no difference of opinion was expressed regarding the analysis of s.2(a) by Mr. Justice Tarnopolsky. Indeed, it was affirmed by Chief Justice Brian Dickson at p. 735.

37. Dr. Prior also relies on R. v. Morgentaler (1988), 1 S.C.R. 130. In that case Madam Justice Wilson said:

> "In my view, the deprivation of the s.7 right with which we are concerned in this case offends s.2(a) of the Charter. I say this because 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. Indeed, s.2(a) makes it clear that this freedom belongs to "everyone", *i.e.*, to each of us individually." [Emphasis added]

38. Dr. Prior says that, in fact, a proportion of her taxes is used for military purposes. That is what the ordinary man or woman on the street believes. That is what she believes. And she believes she is morally responsible for what the government does with the money. Sophistical distinctions do not alter the fact. And to coerce her into payment of taxes contrary to her beliefs is a violation of Article 18.

THE CANADIAN COURTS

39. The Canadian courts treated Dr. Prior's case as a challenge to the Parliament of Canada's power to impose taxes under S.91(3) of the Constitution Act, 1867. This is patently unsound.

40. It is true that Canada's power to tax for military or other purposes is ultimately authorized under the heads of federal legislative power, in this case found in the Constitution Act, 1867, s.91(3). In most other countries the power to tax is similarly derived from the country's basic law or constitution. Indeed, in every country with a written constitution, all legislative authority depends on the grant of legislative power by a country's basic law. It does not mean, however, that a challenge to the basic law itself is implicated in every case where the constitutionality of statutes enacted pursuant to the basic law is challenged.

41. Dr. Prior is not challenging the power of governments to tax (or to spend) for military purposes; rather what is claimed here is her right to be protected in her freedom of conscience and religion.

DR. PRIOR'S REMEDY

42. The Canadian courts held that since the courts are without the power to fashion a legislative remedy no declaration could be made under s.52 of the Constitution Act, 1982. The Federal Court of Appeal rejected the constitutional exemption doctrine, indeed they refused to consider it at all.

43. Dr. Prior seeks the type of relief granted by the Ontario Court of Appeal to Nortown Foods Ltd. in R. v. Videoflicks Ltd. (1985), 14 D.L.R. (4th) 10, per Mr. Justice Tarnopolsky, at p. 35. There the Retain Business and Holidays Act was "read down" so as not to apply to Nortown Foods Ltd., a Jewish firm operating on Sunday, that is, the legislation, though otherwise valid, was held not to apply to Nortown. When the case went to the Supreme Court of Canada (R. v. Edwards Books [1986] 2 S.C.R. 713) the Court reversed the Ontario Court of Appeal on the question whether Nortown's freedom of religion had been violated, but did not rule on the propriety of the order made by Mr. Justice Tarnopolsky. See Chief Justice Brian Dickson at pp. 784-785. Chief Justice Dickson said at p. 784 that the question whether the Charter could render legislation "ineffective or inapplicable with respect to a limited class of persons" should be left for another day.

44. To grant the declaration sought regarding the violation of Dr. Prior's conscience would not mean that the Income Tax Act would be rendered a dead letter.

45. No one suggests that the Income Tax Act and other statutes implicated here are legislation in relation to freedom of conscience and religion; nevertheless, if the effect of legislation is to violate Dr. Prior's freedom of conscience and religion, there has been a violation of Article 18. Dr. Prior need only show the special impact of the legislation on her own situation, she need not show that infringement of her freedom of conscience and religion was the purpose of the legislation.

46. Dr. Prior does not say she and others should not have to pay their taxes. Parliament would fashion a legislative remedy, and any order by this Committee regarding the constitutional exemption would be suspended for a period of time to enable Parliament to do so. The Supreme Court of Canada did this in RE Manitoba Language Rights, [1985] 1 S.C.R. 721.

47. All that is required by way of remedy, should it come to that, is a means to enable Dr. Prior's tax money to do alternative service. As early as 1841 this was done for Quaker and Mennonite conscientious objectors in Upper Canada by the old Province of Canada: 4 and 5 Victoria, cap. 2, 1841. It was provided that the money that Quakers and Mennonites had to pay

in lieu of military training would be kept on a separate tax roll and paid into a fund for building roads and bridges: The relevant sections of 4 and 5 Victoria, cap. 2, 1841 provided:

"III. And be it enacted, that it shall be the duty of the Assessor or Assessors in each Township within the said portion of this Province, and they are hereby required to annex a column to each and every Assessment roll of each and every Town, Township or Place in his or their respective District, and therein to insert the names of every such Quaker, Mennonist or Tunker, and also affix the sum of money so to be paid opposite thereunto….

IV. And be it enacted, that it shall be lawful to and for the said Town Clerk for such Town), Township or Place, and he is hereby required to pay out the said monies from time to time to the order of the Road or Path Master of the division wherein such fine shall have been levied and to be expended on the public Roads Highways and Bridges within such division."
[Emphasis added]

48. In the age of computers it should be possible to ensure that the portion of Dr. Prior's tax money that would otherwise go to military expenditure be accounted for separately, and that it then be assigned to the support of, for instance, the Canadian institute for International Peace and Security or some other peaceful purpose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"THOMAS R. BERGER"
Thomas R. Berger,
Counsel for Dr. Jerilynn Prior

APPENDIX 'A'

PROCEEDINGS IN THE DOMESTIC COURTS CONTAINED IN DR. PRIOR'S APPLICATION FOR RECONSIDERATION — TAB

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