The ARPA Canada FIPPA challenge - FAQs

Background:
In January, 2012, the Ontario government quietly slipped in an amendment to the provincial *Freedom of Information and Protection of Privacy Act* (FIPPA) whereby all information related to abortion is no longer accessible via an Access To Information and Privacy (ATIP) request. Section 65(5.7) reads: "This Act does not apply to records relating to the provision of abortion services." Note that one of the FIPPA's purposes is to guarantee access to government information to maintain transparency and accountability. Yet this addition undermines this purpose and was never debated in the Legislature.

Patricia Maloney, a pro-life blogger who we have regular contact with and who has done excellent work using ATIPs, ran up against this roadblock in January 2014. When her request for statistical information was denied (under the new provision) she appealed the decision on her own, but lost. She then retained a lawyer on a pro bono basis and appealed again. After a third appeal, she finally received the information late last year. The government released this information to her "outside of the FIPPA process" mere days before her hearing in court. But the bad law remains on the books.

ARPA Canada and Patricia Maloney are now challenging the law itself as unconstitutional. We have filed a notice of application asking the Ontario Superior Court to strike down section 65(5.7) of Ontario's FIPPA. Freedom of Information is guaranteed under the *Charter of Rights and Freedoms*, falling under the freedom of expression protection. A successful *Charter* challenge would produce the information we are looking for, would require the Ontario legislature to amend the legislation, and would expose the extremism of the Ontario government in banning all information, including basic statistical information, from the citizens of Ontario in order to hide the injustice of abortion.

1) **What is this case really about? Why is ARPA going to such lengths to do this?**
    - This case is about justice. Justice requires accountability. Each victim of abortion is a human being. The death of each one requires documentation, recognition, and hopefully one day, public acknowledgement of the crimes against humanity perpetrated by our society and State government. By making these statistics public, the injustice of abortion would no longer be kept invisible. The government probably passed this portion of FIPPA because they don't want people to be exposed to the magnitude of the injustice of abortion.
    - This case is about the rule of law. Should we win, the message would be that the government cannot simply use the law to hide things they don't want the residents of Ontario to know about. The duplicitous way in which the Ontario legislature passed the exception to the FIPPA demonstrates their attempt to put themselves above the law. This is fundamentally unfair and violates Biblical principles (see, for example, the prohibitions in Samuel of the king being above the law).
    - This case is about transparency and democracy. Not only does every victim need to be accounted for, but every action of democratic government, should

be open to scrutiny by the taxpayer and voter. If the Ontario government is to be held accountable for allowing and paying for the killing of pre-born children, there needs to be facts that back up our claim that they are actually allowing and paying for this.

- Finally, this case is about our *raison d'être* – it is about protecting the efficacy of grassroots political engagement. It is very difficult indeed to do political action without access to the information about political decisions and policies. A win would encourage this type of work and would send a strong message that an individual like Pat or a small organization like ARPA Canada who cares about justice, can really, truly expose the wrong done by a massive government bureaucracy.

2) **How, specifically, would ARPA's mission be advanced by devoting a substantial amount of time and finances towards fighting Ontario censorship of abortion statistics?**
    - ARPA's first mission is to educate, equip and encourage reformed Christians to political action. By gaining access to abortion statistics, we will be equipping and educating our base about important abortion-related information necessary for effective grass-roots activism (action!) on this file.
    - ARPA's second mission is to bring a biblical perspective to our civil governments. We will have limited opportunity to bring an explicitly biblical perspective in a court case like this. However, the implicit arguments for accountability and justice are Biblical.
    - ARPA operates the WeNeedaLAW.ca campaign, which has a mission of building a groundswell of support for legislation that limits abortion to the greatest extent possible. In order to do this most effectively, we need to expose the magnitude of the injustice. We need to have the basic facts required to make sound public policy. Ignorance is bliss. Knowledge is power. Our action through this court case helps remove the blissful ignorance of the mushy middle.

3) **Doesn't Court action against the government show disrespect for those in authority over us?**
    - Court action, in a constitutional democracy, is a legitimate form of government interaction. In our constitution, there are three branches to the government: the legislature (makers of the law), the executive (those who carry out the law) and the judiciary (those who review the application of the law). All three are necessary in a democracy to balance each other out. Our tendency as Christians is to be suspicious of using the judicial branch due to the misapplication of 1 Corinthians 6. However, that passage applies to two private individuals, particularly, two members of the Church, and the passage urges settling the matter before going to an "ungodly court". In the case we are considering here, the "ungodly court" and the other entity in the legal dispute are of the same nature – both government bodies. What we are doing is much more akin to Paul's appeal to Caesar (Acts 25) than to Paul's urging to avoid court.
    - Further, 1 Corinthians 6 must be seen in the context of internal church strife: in the church the wisdom of fellow-members or church leaders should prevail over the need to go to court, assuming that these "wise men" dealing with the

matter will deal with it in a just, calm, and wise manner. The brothers challenging each other on a judicial matter should be humble and spiritual enough to accept their wise counsel rather than sue each other. A court challenge of the government's unjust handling of the FIPPA issue does not enter the picture of 1 Corinthians 6 at all.

- In Calvin's Institutes, in the chapter on the Civil Government, Calvin outlines several factors in favour of pursuing a court application: He writes, "Judicial proceedings are lawful to him who makes right use of them; and the right use… is… without bitterness, urge what he can in his defence, but only with the desire of justly maintaining his right; and…demand what is just and good." Later, in the same subsection, Calvin writes, "When we hear that the assistance of the magistrate is a sacred gift from God, we ought the more carefully to beware of polluting it by our fault." This then, speaks of a specifically Christian approach to litigation: that we "feel as kindly towards [our] opponent… as if the matter in dispute were amicably transacted and arranged." Later, Calvin also rejects the idea that Paul absolutely or universally prohibits litigation in 1 Cor. 6; rather, an interpretation of that text is to apply to brothers inside the church.
- Finally, Calvin speaks very, very highly of the Christian duty, as private individuals, to respect the civil government. Nevertheless, he does discuss briefly the role of other parts of government, which is very applicable to the case at hand. He writes (quoting from a modern translation): "there may be magistrates appointed as protectors of the people in order to curb the excessive greed and licentiousness of kings… I would not forbid those who occupy such an office to oppose and withstand, as is their duty, the intemperance and cruelty of kings. Indeed, if they pretended not to see when kings lawlessly torment their wretched people, such pretence in my view should be condemned as perjury, since by it they wickedly betray the people's liberty of which, as they ought to know, God has made them defenders."
- In Canada then, a judge is allowed (in fact, is duty bound) to curb the injustice of another civil power for the protection of the people under his oversight. In our current context, the Canadian civil government is split into three arms (called, in our constitution, the "separation of powers"). What we are doing should not be seen as a lawsuit in the sense that we are most familiar with – a vengeful opportunity to get rich over against an equal opponent – but rather, we are simply approaching one of the three branches of the government and asking the magistrate to do its God-given duty to call the other branch to account, and to remind it of what exactly its obligations are under the Constitution and what its obligations are with regards to justice and righteousness.

4) What are our legal arguments?

- The law is on our side when it comes to access to information. Since we would only be requesting access to statistics (costs, complications, age of gestation, etc.) no personal or private information is accessed.
- We are challenging the provision in the law itself as unconstitutional. Freedom of Information is guaranteed (within reasonable limits) under the Charter of Rights and Freedoms, falling under the freedom of expression protection

(section 2(b)). A Charter challenge would expose the extremism of the Ontario government in banning all information, including basic statistical information, from the citizens of Ontario in order to protect the abortion procedure.

- Two cases from the Supreme Court speak favourably to our case:
    a) *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 61
    b) *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 at para. 33, 34, 36, 37.
- This case is about Justice. This case is about the Rule of Law. This case is about Transparency and Democracy.

5) What exactly are we asking from the Court?

- There are two different orders that we could ask for from the Court. The first is an order of mandamus, that is, an order from the court that forces the government to disclose the information we are looking for. This is a more difficult legal argument to make, because our challenge is separate from any ATIP request. The second thing we can ask for (and will ask for) is a constitutional ruling that finds the law, as written, unconstitutional and strikes it down. You will recall that the FIPPA was amended to exclude all abortion statistics. The judge has the power under the Constitution to strike down any law that is in violation of the Constitution. We hope the judge will be persuaded by our arguments that this particular section of the FIPPA is too broad, and should be amended appropriately to ban only access to private abortion information, not generic information. To be clear, we are not suing for money, though we will ask for costs (which is standard practice).

6) **Why not just lobby? Can we not approach individual MPPs to get them to change the law?**

- MPPs have been approached on this issue. The Liberal Party is not at all interested in changing the law back to what it was before. After all, it was this party that changed it to the way it was. And since they have a relatively new majority government, we have no hope of getting them to change their mind before an election either.
- From a strategy perspective, beginning in court now, with the hopes of a win at the first instance, gives us something with which we can hopefully go to our MPPs and demand change, urging them to accept the decision and not appeal. However, (since it's not their money anyway), they will probably appeal.

7) Are there no other alternative means to get the information that we are after?

- There is no reliable way through which to obtain the same information since hospitals are independent from each other, and only report to the government. To gather the information would be a Herculean task, virtually impossible to do accurately. Each hospital, private abortion clinic, and independent family doctor would have to voluntarily provide to us their numbers of abortions performed. The cost in undertaking such a process would be more expensive than a court action, and even then, the likelihood of an accurate and complete record are virtually zero.