

**SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

**SASKATCHEWAN HUMAN RIGHTS COMMISSION**

Appellant

- and -

**WILLIAM WHATCOTT**

Respondent

- and -

**THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA**

Proposed Intervener

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**MOTION RECORD OF THE PROPOSED INTERVENER,  
THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA**

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**VINCENT DAGENAIS GIBSON LLP**  
325 Dalhousie Street, Suite 600  
Ottawa, Ontario K1N 7G2

**Albertos Polizogopoulos**  
Tel: (613) 241-2701  
Fax: (613) 241-1599  
[albertos@vdg.ca](mailto:albertos@vdg.ca)  
Counsel for the Proposed Intervener,  
The Association for Reformed  
Political Action Canada

TO: **THE REGISTRAR OF THE  
SUPREME COURT OF CANADA**

COPIES TO:

**Grant J. Scharfstein, Q.C.**

Deidre L. Aldcorn

**SHARFSTEIN GIBBINGS WALEN  
& FISHER LLP**

500, 111 Second Avenue South  
Saskatoon, Saskatchewan  
S7K 1K6

Tel : (306) 653-2838

Fax: (306) 652-4747

[lawyers@scharfsteinlaw.com](mailto:lawyers@scharfsteinlaw.com)

**Counsel for the Appellant**

**The Saskatchewan Human Rights  
Commission**

**Janice E. Gingell**

**THE SASKATCHEWAN HUMAN RIGHTS  
COMMISSION**

816, 122 Third Avenue North  
Saskatoon, Saskatchewan  
S7K 2H6

Tel : (306) 933-5956

Fax : (306) 933-7863

[Janice.Gingell@gov.sk.ca](mailto:Janice.Gingell@gov.sk.ca)

**Co-Counsel for the Appellant,**

**The Saskatchewan Human Rights  
Commission**

**Thomas A. Schuck**

**NIMEGEERS, SCHUCK, WORMSBECKER  
& BOBBIT**

319 Souris Avenue NE Box 8  
Weyburn, Saskatchewan  
S4H 2J8

Tel: (306) 842-4654

Fax: (306) 842-0522

[tschuck@nswb.com](mailto:tschuck@nswb.com)

**Eugene Meehan, Q.C.**

Marie-France Major

**McMILLAN LLP**

Suite 300, 50 O'Connor Street

Ottawa, Ontario

K1P 6L2

Tel: (613) 232-7171 ext. 132

Fax: (613) 231-3191

[eugene.meehan@mcmillan.ca](mailto:eugene.meehan@mcmillan.ca)

**Agent for Counsel for the Appellant,  
The Saskatchewan Human Rights  
Commission**

**Jeremie Fournier**

**VINCENT DAGENAIS GIBSON LLP**

325 Dalhousie Street, Suite 600

Ottawa, Ontario

K1N 7G2

Tel: (613) 241-2701

Fax: (613) 241-1599

[jeremie.fournier@vdg.ca](mailto:jeremie.fournier@vdg.ca)

**Counsel for the Respondent,  
William Whatcott**

**J. Thomson Irvine**

**MINISTRY OF JUSTICE &**

**Agent for the Respondent,  
William Whatcott**

**Henry S. Brown, Q.C.**

**GOWLINGS LAFLEUR HENDERSON LLP**

**ATTORNEY GENERAL**  
Constitutional Law Branch  
800 – 1874 Scarth Street  
Regina, Saskatchewan  
S4P 4B3  
Tel: (306) 787-6307  
Fax: (306) 787-9111  
tom.irvine@justice.gc.ca

2600- 160 Elgin Street  
P.O. Box 466, Stn 'D'  
Ottawa, Ontario  
K1P 1C3  
Tel: (613) 233-1781  
Fax: (613) 788-3433  
henry.brown@gowlings.com

**Counsel for the Intervener,  
Attorney General of Saskatchewan**

**Agent for Counsel for the Intervener,  
Attorney General of Saskatchewan**

**Christopher M. Rupar**  
**ATTORNEY GENERAL OF CANADA**  
Bank of Canada Building – East Tower  
234 Wellington Street, Room 1212  
Ottawa, Ontario K1A 0H8  
Tel: (613) 941-2351  
Fax: (613) 954-1920  
Christopher.rupar@justice.gc.ca

**Counsel for the Intervener,  
Attorney General of Canada**

**Henry S. Brown, Q.C.**  
**GOWLINGS LAFLEUR HENDERSON LLP**

2600- 160 Elgin Street  
P.O. Box 466, Stn 'D'  
Ottawa, Ontario  
K1P 1C3  
Tel: (613) 233-1781  
Fax: (613) 788-3433  
henry.brown@gowlings.com

**Agent for Counsel for the Intervener,  
Attorney General of Alberta**

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**SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

**SASKATCHEWAN HUMAN RIGHTS COMMISSION**

Appellant

- and -

**WILLIAM WHATCOTT**

Respondent

- and -

**THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA**

Proposed Intervener

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**NOTICE OF MOTION FOR INTERVENTION**  
**by THE ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA**  
**Proposed Intervener**  
**Pursuant to Rules 18(1), 55 and 56(b) of the *Rules of the Supreme Court of Canada***

**TAKE NOTICE** that The Association for Reformed Political Action Canada (“ARPA Canada”) hereby applies to a Judge of this Court, at a date to be fixed by the Registrar, pursuant to subsections 18(1), 55 and 56(b) of the *Rules of the Supreme Court of Canada* for an Order granting it leave to intervene and present written and oral arguments in the present appeal or any further or other Order that the Judge may deem appropriate.

**AND FURTHER TAKE NOTICE** that the following documents will be referred to in support of such motion:

- a. the Affidavit of Mark H. Penninga;
- b. The Memorandum of Argument of ARPA Canada; and,
- c. such further or other material as counsel may advise and as this Honourable Court may permit.

**AND FURTHER TAKE NOTICE** that the said motion shall be made on the following grounds:

1. ARPA Canada is a national association whose mission is to educate, equip, and encourage Christians from Reformed churches to *political action* and to shine the light of God's Word to Canada's municipal, provincial, and federal governments. Believing Biblical principles about social and political issues must translate into living these principles out, even if they are regarded as unpopular.
2. ARPA Canada directs its mission towards Reformed Protestant Christians from seven different denominations. These denominations include approximately 140 individual congregations across Canada. There are also 18 local ARPA chapters across Canada.
3. Since its inception, ARPA Canada has grown to become one of the most active Christian political advocacy organizations in this country today.
4. ARPA Canada and its supporters have a very direct interest in the public policy and constitutional issues that have been raised in this appeal as those issues are integral to its mission and will impact its constituents.
5. There is a real and wide-spread concern among the Reformed church community that legal developments are making it difficult or even impossible to apply personal faith to public life.
6. The fundamental freedoms of the Reformed church community, the members of the local ARPA chapters, and ARPA Canada's constituents, board and employees may be adversely affected by the outcome of this appeal.
7. ARPA Canada and the thousands who make use of its resources engage in many different public policy issues including issues concerning the content of public

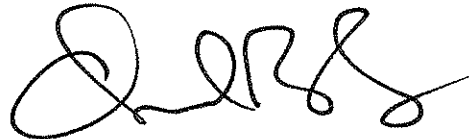
school curricula as well as advertising standards as the Respondent did. As one example, ARPA Canada is part of an initiative to give voice to parents in the public education system ([www.TakeBackOurSchools.org](http://www.TakeBackOurSchools.org)) in response to the British Columbia Corren Agreement that allowed a homosexual activist couple to promote alternative sexual lifestyles in the BC education curriculum. ARPA Canada constituents do, from time to time, make use of the media of pamphlets delivered in mailboxes, as the Respondent did. Although ARPA Canada does not condone the content of the Respondent's flyers, it recognizes that when the standard of what is acceptable discourse is vague and subjective, ARPA Canada's materials can also be deemed offensive and subject to fines and prosecution.

8. ARPA Canada has a unique perspective on behalf of a wide range of Reformed Protestant denominations and religious institutions across Canada with respect to the public policy and constitutional issues to be dealt with.
9. ARPA Canada can bring the Reformed Protestant community's perspective and concerns before the Court which it submits would be helpful to the Court in its deliberations concerning the extremely important and fundamental issues raised in this appeal.
10. ARPA Canada has intentionally chosen not to be a registered charity so it could be involved in political expression, which it believes is part of its biblical mandate.
11. To the best of its knowledge, ARPA Canada is the only politically active and non-charitable organization seeking leave to intervene in this appeal.
12. ARPA Canada will make a useful and valuable contribution to the resolution of the issues raised in this case. ARPA Canada's specialized knowledge and experience will assist the Court and enhance its ability to determine the issues involved in this matter. The perspective offered by ARPA Canada is unique and distinct from that of the other parties.
13. ARPA Canada's intervention will not prejudice the parties in any way and will not change the focus, scope or nature of the proceedings.
14. If intervener status is granted, ARPA Canada wishes to file a factum of no more than 20 pages and make an oral argument of 20 minutes at the hearing of this appeal.

15. Such further and other grounds as counsel may advise and as this Court may permit.

DATED at Ottawa, Ontario, this 29<sup>th</sup> day of April, 2011.

SIGNED BY:



**VINCENT DAGENAIS GIBSON LLP/s.r.l.**  
325 Dalhousie Street, Suite 600  
Ottawa, Ontario K1N 7G2

**ALBERTOS POLIZOGOPOULOS**

Tel : 613-241-2701

Fax : 613241-2599

Counsel for the Proposed Intervener, The  
Association for Reformed Political Action  
Canada

ORIGINAL TO: **THE REGISTRAR OF THE  
SUPREME COURT OF CANADA**  
301 Wellington Street  
Ottawa, Ontario K1A 0J1

COPIES TO:

**Grant J. Scharfstein, Q.C.**  
Deidre L. Aldcorn  
**SHARFSTEIN GIBBINGS WALEN  
& FISHER LLP**  
500, 111 Second Avenue South  
Saskatoon, Saskatchewan  
S7K 1K6  
Tel : (306) 653-2838  
Fax: (306) 652-4747  
[lawyers@scharfsteinlaw.com](mailto:lawyers@scharfsteinlaw.com)

**Counsel for the Appellant  
The Saskatchewan Human Rights  
Commission**

**Janice E. Gingell**  
**THE SASKATCHEWAN HUMAN RIGHTS  
COMMISSION**  
816, 122 Third Avenue North  
Saskatoon, Saskatchewan

**Eugene Meehan, Q.C.**

Marie-France Major

**McMILLAN LLP**

Suite 300, 50 O'Connor Street  
Ottawa, Ontario

K1P 6L2

Tel: (613) 232-7171 ext. 132

Fax: (613) 231-3191

[eugene.meehan@mcmillan.ca](mailto:eugene.meehan@mcmillan.ca)

**Agent for Counsel for the Appellant,  
The Saskatchewan Human Rights  
Commission**



S7K 2H6  
Tel : (306) 933-5956  
Fax : (306) 933-7863  
Janice.Gingell@gov.sk.ca

**Co-Counsel for the Appellant,  
The Saskatchewan Human Rights  
Commission**

**Thomas A. Schuck**  
**NIMEGEERS, SCHUCK, WORMSBECKER  
& BOBBIT**  
319 Souris Avenue NE Box 8  
Weyburn, Saskatchewan  
S4H 2J8  
Tel: (306) 842-4654  
Fax: (306) 842-0522  
[tschuck@nswb.com](mailto:tschuck@nswb.com)

**Jeremie Fournier**  
**VINCENT DAGENAIS GIBSON LLP**  
325 Dalhousie Street, Suite 600  
Ottawa, Ontario  
K1N 7G2  
Tel: (613) 241-2701  
Fax: (613) 241-1599  
[jeremie.fournier@vdg.ca](mailto:jeremie.fournier@vdg.ca)

**Counsel for the Respondent,  
William Whatcott**

**Agent for the Respondent,  
William Whatcott**

**J. Thomson Irvine**  
**MINISTRY OF JUSTICE &  
ATTORNEY GENERAL**  
Constitutional Law Branch  
800 – 1874 Scarth Street  
Regina, Saskatchewan  
S4P 4B3  
Tel: (306) 787-6307  
Fax: (306) 787-9111  
[tom.irvine@justice.gc.ca](mailto:tom.irvine@justice.gc.ca)

**Henry S. Brown, Q.C.**  
**GOWLINGS LAFLEUR HENDERSON LLP**  
2600- 160 Elgin Street  
P.O. Box 466, Stn 'D'  
Ottawa, Ontario  
K1P 1C3  
Tel: (613) 233-1781  
Fax: (613) 788-3433  
[henry.brown@gowlings.com](mailto:henry.brown@gowlings.com)

**Counsel for the Intervener,  
Attorney General of Saskatchewan**

**Agent for Counsel for the Intervener,  
Attorney General of Saskatchewan**

**Christopher M. Rupar**  
**ATTORNEY GENERAL OF CANADA**  
Bank of Canada Building – East Tower  
234 Wellington Street, Room 1212  
Ottawa, Ontario K1A 0H8

Tel: (613) 941-2351  
Fax: (613) 954-1920  
Christopher.rupar@justice.gc.ca

**Counsel for the Intervener,  
Attorney General of Canada**

**Henry S. Brown, Q.C.  
GOWLINGS LAFLEUR HENDERSON LLP**

2600- 160 Elgin Street  
P.O. Box 466, Stn 'D'  
Ottawa, Ontario  
K1P 1C3  
Tel: (613) 233-1781  
Fax: (613) 788-3433  
henry.brown@gowlings.com

**Agent for Counsel for the Intervener,  
Attorney General of Alberta**

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

*(In the case of an originating motion, include a copy of the judgment and reasons for judgment appealed from and a copy of the certificate in Form 25B and, if applicable, the certificate in Form 25C.)*

SOR/2006-203, s. 47, SOR/2011-74, s. 49.

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)**

BETWEEN:

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Appellants

- and -

**WILLIAM WHATCOTT**

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- and -

**ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA**

Proposed Intervener

**AFFIDAVIT OF MARK H. PENNINGA,  
ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA**

I, Mark H. Penninga, of the City of Langley, in the province of British Columbia, **MAKE OATH AND SAY:**

1. I am the Executive Director of the proposed intervener, the Association for Reformed Political Action (ARPA) Canada (hereinafter referred to as "ARPA Canada"). I have held this position since August, 2007, and as such have personal knowledge of the facts and matters herein set out, except where stated to be based on information and belief and where so stated I

believe them to be true. ARPA Canada has authorized me to make this Affidavit in support of a motion for intervener status in this appeal.

2. ARPA Canada seeks intervener status in this appeal in order to make submissions to the Court with respect to the impact of this decision on the exercise of freedom of speech and political activity in Canada.

**A. The Association for Reformed Political Action (ARPA) Canada**

3. As “faith without deeds is dead” (James 2:26) so ARPA Canada believes that the Christian faith must be applied to Canadian society in both word and deed. The mission of ARPA Canada is to educate, equip, and encourage Christians from Reformed churches to *political action* and to shine the light of God’s Word to Canada’s municipal, provincial, and federal governments. Believing Biblical principles about social and political issues must translate into living these principles out, even amidst a secular nation that may disagree with these principles.
4. ARPA Canada’s mission is rooted in the Reformed confessions of faith, which are distinct from the larger and more well-known branches of Christianity (Evangelical, Mainline, Roman Catholic and Orthodox). The Reformed Christian faith upholds the sovereignty of God and consequently the importance of applying His Word to all of life, including the social, moral and political spheres.
5. With a theological history rooted in John Calvin and the Protestant Reformation, Reformed churches have a long history of faith-based political action. The Belgic Confession [1561] (subscribed to by most Reformed denominations) states: “We believe that, because of the depravity of mankind, our gracious God has ordained kings, princes, and civil officers. He wants the world to be governed by laws and statutes, in order that the

lawlessness of men be restrained and that everything be conducted among them in good order.”

6. Consistent with their theological heritage in the Netherlands, local ARPA's first started in Canadian Reformed Churches in the late 1970's and operated independently and to varying degrees of activity until 2007, when ARPA Canada was registered as a national non-profit corporation.
7. ARPA Canada made the decision to not register as a charity in order to allow for full and frank political engagement without limitations from laws governing charitable organizations. To my knowledge, ARPA Canada is the only politically active and non-charitable intervener before this Court.
8. In the short amount of time since our incorporation, ARPA Canada has become the primary means through which many Reformed Christians engage in social and political action in their communities, provinces, and this nation. ARPA Canada currently directs its mission to the following church denominations, composed of approximately 140 churches:
  - Canadian Reformed Churches
  - United Reformed Churches
  - Free Reformed Churches
  - Heritage Reformed Churches
  - Netherlands Reformed Congregations
  - Reformed Presbyterian Churches
  - L'Église Réformée du Québec (The Reformed Church of Québec)

In addition, numerous Evangelical and Roman Catholic Christians make use of our resources, events, and activities.

9. ARPA Canada has quickly grown to become one of the most active Christian political advocacy organizations in the country.

10. ARPA Canada coordinates 18 local ARPA chapters, spread across British Columbia, Alberta, Manitoba, and Ontario. The size of the groups and total number of groups are increasing constantly. These local ARPA chapters retain independence from, but work closely with, ARPA Canada. They are made up of volunteers from a wide variety of age-groups, socio-economic, denominational and political backgrounds.
11. To the best of my knowledge, there is no other Canadian Christian political advocacy organization with active local chapters. This reflects ARPA Canada's grass-roots and action-oriented mission. In 2010 ARPA Canada set the goal of 2,010 action items (letters to the editor, meetings with MP's, pamphleting, etc.) to be completed by our readers. That goal was easily surpassed.
12. ARPA Canada relies primarily on electronic communication to reach Canadians and coordinate action. We operate a website that attracted 1.5 million page views in 2010. We also provide a flag-ship newsletter (E-Luminary) that reaches about 3,500 people every two weeks and 50 churches every four weeks, as well as a secondary newsletter (Frontlines) for the members of the local ARPA chapters. In the past few years alone we have organized over 75 events in towns and cities across Canada, not including the events organized by the local ARPA chapters.
13. In 2009 and 2010 ARPA Canada sponsored events in Canada's Parliament for Members of Parliament and Senators that focused on the place of religion in a secular nation. At the 2010 event, 25 ARPA representatives came from cities across Canada and met with approximately 40 MPs to share their faith-based concerns. Similar conferences have occurred and are being planned provincially.

14. Because these Reformed churches hold to the infallibility of Scripture and its relevance in our daily lives, we also uphold beliefs about parental responsibility, family life, sexuality, abortion, and economics, among others, that are distinctly opposed to secular humanist beliefs that dominate the public square today. As such, much of our faith-based political action is sometimes unwelcomed and deemed politically incorrect.
15. Members of these Reformed churches have been brought before human rights commissions because of their faith-based decisions. There is a real and wide-spread concern among the Reformed church community generally that legal developments are making it difficult or even impossible to apply our faith to our public life. This concern led us to create a legal guide that we distributed to approximately 130 Reformed congregations to help protect them from human rights complaints.
16. Our concern over freedom of expression, conscience and thought, as well as freedom of religion goes beyond self-interest. In 2010 ARPA Canada spear-headed a national campaign in response to the suppression of freedom by Canada's human rights commissions. *Stand Up for Freedom Canada!* ([www.HumanRightsCommissions.ca](http://www.HumanRightsCommissions.ca)) was launched in November and has been featured in full articles in major newspapers across Canada. The campaign is directed to all Canadians and continues to grow.
17. ARPA Canada has made submissions to provincial and federal governments in Canada on issues such as early childhood education, euthanasia, abortion, and budget recommendations.

**B. Proposed Arguments**

18. If leave to intervene is granted, ARPA Canada will make the following

arguments outlined and summarized as follows:

- a. Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees the right to freedom of expression for all Canadians;
- b. A free and democratic society in which all members can participate and make their views known requires a high tolerance for and robust protection of expression in general and political expression in particular;
- c. The purpose and object of human rights legislation in general and the Saskatchewan *Human Rights Code* in particular is to discourage discrimination;
- d. Engaging in public policy dialogue must be protected as political expression and cannot be considered an act of discrimination or the promotion of hate speech;
- e. The interpretation of s. 14 of the Saskatchewan *Human Rights Code* by the Tribunal and the Saskatchewan Court of Queen's Bench unnecessarily and severely limits and restricts the section 2(b) *Charter* rights of Canadians in general and members of ARPA Canada and its supporting communities in particular;
- f. Section 14(b) of the Saskatchewan *Human Rights Code* fails the first stage of the *Oakes* test because the justification given is *ultra vires* of the provincial legislature;
- g. If this Honourable Court finds that this limitation is reasonable and demonstrably justified, and that the justification is not *ultra vires* of the province, the limitation on free expression in s. 14 of the




Saskatchewan *Human Rights Code* is nevertheless unconstitutional as it fails the section 1 *Charter* analysis on the questions of rational connection, minimal impairment, and proportionality.

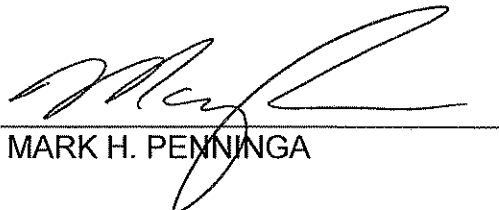
19. ARPA Canada understands the time constraints of such an appeal and undertakes, if leave to intervene is granted, to prepare, serve and file all documentation in a timely manner as directed by this Honourable Court.

20. If intervener status is granted, ARPA Canada wishes to file a factum of 20 pages and make oral argument of 20 minutes at the hearing of this appeal.

21. I make this affidavit in support of a motion to intervene in this appeal by ARPA Canada and for no other or improper purpose.

SWORN BEFORE ME at the City of Langley, in the Province of British Columbia, on the 25<sup>th</sup> day of April 2011.

  
A Commissioner for taking Affidavits  
within British Columbia  
IAN C. MOES  
Barrister and Solicitor  
300 - 31935 South Fraser Way  
Abbotsford, BC V2T 5N7

  
MARK H. PENNINGA

## PART I – OVERVIEW

1. The Moving Party, The Association for Reformed Political Action (ARPA) Canada's ("ARPA Canada"<sup>1</sup>) structure, objectives and activities are described in the Affidavit of its Executive Director, Mark H. Penninga, sworn April 25, 2011.
2. The issues of public importance before this Court regard the extent to which the State can censor public discourse. The Respondent distributed flyers throughout his neighbourhood regarding social, moral and political issues. ARPA Canada and its constituents also engage politically on similar issues and have a direct and substantial interest in this appeal as its outcome will significantly impact their freedom of expression.

## PART II – ISSUES

3. The sole issue in this motion is whether ARPA Canada should be granted leave to intervene in this appeal.
4. In making this determination, the Court must consider whether ARPA Canada has a substantial interest in the proceeding, whether its submissions to the Court will be relevant and useful to the Court and different from those of the other parties, and whether any prejudice would result from accepting or denying ARPA Canada's leave to intervene.
5. The public policy questions on this appeal are:
  - a. Whether or not it is the state's role to limit the peaceful expression of political, moral or social commentary and opinion of individuals when those commentaries or opinions may be deemed offensive by some;
  - b. Whether limiting political, moral or social commentary and opinion falls within the power and mandate of provincial human rights commissions; and,
  - c. Whether political, moral and social commentary or opinion can be censored as "hate speech".
6. The constitutional question on this appeal is whether section 14(1)(b) of the *Saskatchewan Human Rights Code*<sup>2</sup> (the "Code") violates the *Canadian Charter of*

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<sup>1</sup>ARPA Canada is an incorporated, not-for-profit organization whose mission is to educate, equip, and encourage Christians from Reformed churches to political action and to shine the light of God's Word to Canada's municipal, provincial, and federal governments. ARPA Canada has grown to become one of the most active Christian political advocacy organizations in Canada and has become the primary means through which thousands of Reformed Christians across Canada engage in social and political action in their communities, provinces, and this nation.

<sup>2</sup> *The Saskatchewan Human Rights Code* S.S. 1979, c. S-24.1 [Code], s. 14(1)(b) [Code].

*Rights and Freedoms*<sup>3</sup> (the “*Charter*”) and if so, if it is saved by section 1 of the *Charter*?

### PART III – STATEMENT OF ARGUMENT

7. If leave to intervene is granted, ARPA Canada will make the following arguments outlined and summarized as follows:
- a. Section 2(b) of the *Charter* guarantees the fundamental right to freedom of belief, opinion and expression for all Canadians;<sup>4</sup>
  - b. A free and democratic society in which all members can participate and express their social, moral and political views requires a high tolerance for and robust protection of expression in general and political expression in particular;
  - c. The purpose and object of human rights legislation in general and the *Code* in particular is to discourage discrimination;
  - d. The Respondent’s actions leading to this appeal fall within the classification of political expression. The Respondent was engaging in public dialogue;
  - e. The interpretation of s. 14 of the *Code* by the Tribunal and the Saskatchewan Court of Queen’s Bench unnecessarily and severely limits and restricts the section 2(b) *Charter* rights of the Respondent and of ARPA Canada and its supporting communities in particular, and all Canadians in general;
  - f. Section 14(1)(b) of the *Code* is *void ab initio* in that it is *ultra vires* of the Provincial Legislature;
  - g. If this Honourable Court finds that s. 14(1)(b) is not *ultra vires* of the province, its limitation on free expression is nevertheless unconstitutional as it is not demonstrably justified in a free and democratic society;
  - h. Section 14(1)(b) fails the section 1 *Charter* analysis<sup>5</sup> on the questions of vagueness, rational connection, minimal impairment, and proportionality;
  - i. S. 14(1)(b) of the *Code* unduly infringes on and categorically bans the political, moral and social perspectives of many Canadians from the public sphere and thus cannot be saved by section 1 of the *Charter*.

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<sup>3</sup> *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. [*Charter*].

<sup>4</sup> Section 2(b) of the *Charter* reads: “Everyone has the following fundamental freedoms: [...] (b) freedom of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;”

<sup>5</sup> Section 1 of the *Charter* reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

**A. Is it the state's role to limit the peaceful expression of political views of individuals when those views are deemed offensive by some?**

8. ARPA Canada holds that state may only limit expression in specific circumstances. ARPA Canada recognizes that the *Criminal Code* already limits the expression of hate propaganda, inciting genocide, as well as uttering threats, criminal harassment and other violent forms of expression.<sup>6</sup> The state ought not to limit the peaceful expression of citizens engaging in public dialogue or in the political process.
9. The historical approach in Canada to freedom of expression, and in particular, freedom of *political* expression, is to give it much deference. This is a positive right in law. The *Charter* recognizes and protects the fundamental “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.<sup>7</sup>
10. This Court defined “expression” in *Irwin Toy Ltd. v. Quebec (Attorney General)*<sup>8</sup> as: “Activity is expressive if it attempts to convey meaning.”<sup>9</sup> *Political* expression, then, is any activity that attempts to convey meaning on any issue of a political nature.
11. ARPA Canada submits that political expression deserves constitutional protection “because it serves individual and societal values in a free and democratic society”.<sup>10</sup>
12. The freedom to debate moral, social, political and public policy issues is foundational in a true democracy. As stated by constitutional lawyer and theorist Peter Hogg: “Perhaps the most powerful rationale for the constitutional protection of freedom of expression is its role as an instrument of democratic government.”<sup>11</sup>
13. This Court recognized in *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*:<sup>12</sup>

Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and

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<sup>6</sup> *Criminal Code*, R.S. C. 1985, c. C-46, ss. 264 (criminal harassment); 264.1 (uttering threats); 318 (advocating genocide); 319 (incitement of and promotion of hatred); 366 (forgery); 423 (intimidation).

<sup>7</sup> *Charter*, *supra* note 3, s. 2(b).

<sup>8</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

<sup>9</sup> *Ibid.* at 968.

<sup>10</sup> *Ford v. Quebec*, [1988] 2 S.C.R. 712 at 764.

<sup>11</sup> Hogg, Peter W., *Constitutional Law of Canada*, looseleaf, 5<sup>th</sup> ed. (Toronto: Carswell, 2007) vol. 2 at pp. 43-7.

<sup>12</sup> *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [*Dolphin Delivery*].

protection. [...] [f]reedom of speech and expression has been recognized as essential features of Canadian parliamentary democracy.<sup>13</sup>

14. The importance of protecting political, moral and social commentary or opinion precedes the Canadian jurisprudence that affirms it and has been recognized by political philosophers. In his treatise *On Liberty*, John Stuart Mill stated:

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

All silencing of discussion is an assumption of infallibility. [...] Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.<sup>14</sup>

15. An integral component of a free and democratic society is the freedom not only to voice one's political, moral and social commentary or opinion, but also the freedom to disagree and even offend.<sup>15</sup>

#### The Respondent's Expression as Political Speech

16. The Respondent distributed a number of flyers for which he was investigated and fined. The flyers in question addressed political, moral, social and public policy issues such as public education curriculum and advertising standards.<sup>16</sup>
17. The Appellant describes these flyers as "hate expression". ARPA Canada respectfully submits however, that these flyers were the expression of the Respondent's political, moral, social and religious commentary and opinion.
18. As in *Canadian Human Rights Commission v. Taylor*, so also in this case:

[t]he significance of the infringement of the right at issue... is most serious. The limitation touches expression which may be relevant to social and political issues. Free expression on such matters has long been regarded as fundamental to the working of a free democracy and to the maintenance and preservation of our most

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<sup>13</sup> *Ibid.*, at 12 and 15.

<sup>14</sup> Gray, John, ed., *John Stuart Mill On Liberty* (Oxford: Oxford University Press, 2008) at pp. 21 - 23.

<sup>15</sup> *Boucher v. The King*, [1951] S.C.R. 265 at 288.

<sup>16</sup> The Saskatoon Public School Board's decisions on including homosexuality in the elementary school curriculum; the way in which post-secondary education institutions taught future teachers about homosexuality; and, acceptable advertising standards in Canada as they related to a specific periodical.

fundamental freedoms. The right to express oneself freely on such matters is not lightly to be trammelled; a limitation on such expression must be proportionate to the evil and sensitive to the need to preserve as much freedom of expression as may be compatible with suppressing that evil.<sup>17</sup>

19. It is important that individuals in Canada be able to speak openly and freely about their concerns regarding government policies. This is what the Respondent was doing, and this is what supporters of this proposed Intervener exercise their freedom to do as well.
20. ARPA Canada will argue that the state's role in monitoring public dialogue and debates cannot include the subjective evaluation on the part of state officials regarding the "offensiveness" of the content of these discourses.

**B. Does section 14(1)(b) of the *Code* violate s. 2(b) of the *Charter*?**

21. Section 14(1)(b) of the *Code* reads as follows:

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

[...] (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.<sup>18</sup>

22. ARPA Canada submits that s. 14(1)(b) is a subjective standard and not enforceable. The *Code* fails to define essential terms for a proper and complete understanding and enforcement of the section. Specifically, the *Code* does not define "hatred", "ridicules", "belittles" and "otherwise affronts the dignity". Additionally, section 14(1)(b) prohibits any expression which may contravene the *Code* in the future. There is an absurdity to the prospect of being punished for an offence not yet committed or for harm not yet realized.
23. This Court established in *R. v. Big M Drug Mart*<sup>19</sup> that both the purpose and effect of an Act are useful in determining if a piece of legislation is unconstitutional.<sup>20</sup> Although the

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<sup>17</sup> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 163 [*Taylor*].

<sup>18</sup> *Code*, *supra* note 2, s. 14(1)(b).

<sup>19</sup> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*Big M*].

<sup>20</sup> *Ibid.* at 81.

intent and purpose of the *Code* may line up with *Charter* values, the effect of s. 14(1)(b) is a violation of the *Charter* and its values as interpreted by this Court.

24. As conceded by the Appellants, enforcing section 14(1)(b) of the *Saskatchewan Human Rights Code* results in the violation of the individual's section 2(b) *Charter* rights.

**C. Is this *Charter* violation saved by section 1 of the *Charter*?**

25. The *Oakes* test<sup>21</sup> sets out a two-part test by which the Courts can determine if the infringement of a *Charter* right can be saved by s. 1 of the *Charter*.<sup>22</sup>

26. The Appellants have not established that the legislation meets the components set out in the *Oakes* test. This proposed Intervener will, if granted intervener status, argue that section 14(1)(b) cannot, in law, meet any of the four components of the *Oakes* test.

**D. Does section 14(1)(b) of the *Saskatchewan Human Rights Code* meet a pressing and substantive objective?**

27. Peter Hogg explains that “political speech is at the core of s. 2(b) of the *Charter*, and could be curtailed under s. 1 only in service of the most compelling governmental interest.”<sup>23</sup>

28. The object of the *Code* is twofold.<sup>24</sup> These objects must, of course, be interpreted within the limits of the *Charter* and the division of powers in the *Constitution Act, 1867*.<sup>25</sup> By purporting to eliminate any speech (political or otherwise) that may be deemed offensive by some, the *Code* is seeking not to discourage discrimination but rather to remove any possibility of disagreement or controversy by seeking to impose a state-dictated standard of thought, belief, opinion and expression.

29. The Appellant points to an increase in *hate crimes* as evidence of the pressing need for this section to be enforced as at the Tribunal level.<sup>26</sup> The province has no authority to pass laws to combat hate crimes, which are governed by the *Criminal Code*. Criminal law

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<sup>21</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

<sup>22</sup> *Ibid.* at 138, 139.

<sup>23</sup> *Hogg, supra* note 11 at pp. 43-8.

<sup>24</sup> To promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

<sup>25</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act*], s. 91, 92.

<sup>26</sup> Appellant's Factum, at 38.

is the exclusive jurisdiction of the federal government.<sup>27</sup> Furthermore, ARPA Canada submits that the Appellant failed to point to an increase in actual discrimination in the workplace, in the provision of goods and services or in accommodation. Rather, the Appellant seeks to justify the impugned provision by looking for legislative authority that is outside of the provincial jurisdiction.

30. This Court's jurisprudence has established that there is "an extensive provincial power to regulate speech or assembly in local parks and streets, and to regulate speech in the media that comes within provincial jurisdiction, including films, live theatre, books, magazines, newspapers, tapes and records." However, "that power does not extend to the denial of political speech [emphasis added]".<sup>28</sup>

31. In *Saumur v. City of Québec*,<sup>29</sup> this Court determined that the municipal government did not have the authority to regulate or require police permission for pamphleting in city streets as the bylaw in question related to speech which was in the exclusive jurisdiction of the federal government. In fact, this Court has stated that even "Parliament itself could not abrogate this right of discussion and debate."<sup>30</sup>

32. The *Code* was designed to combat discrimination in employment, residential accommodation and the provision of services. These all fall under the provincial head of power. However, political, moral and social commentary or opinion is beyond the reach of provincial legislatures, and any regulation of political speech therefore, is *ultra vires*. Therefore, section 14(1)(b) does not meet a legitimate pressing and substantive objective.

**E. Is the prohibition against any expression "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons" rationally connected to the objective of the *Code*?**

33. The term "hatred" is a vague term which can only be subjectively defined and applied. Hatred was defined by Dickson C.J. in the *Taylor* decision as being "unusually strong and deep-felt emotions of detestation, calumny and vilification."<sup>31</sup> Hatred is an *emotion* of one person in relation to another person and is not an easily measurable action.

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<sup>27</sup> *Constitution Act*, *supra* note 25, s. 91.

<sup>28</sup> *Hogg*, *supra* note 11 at pp. 43-5.

<sup>29</sup> *Saumur v. City of Québec* [1953] 2 S.C.R. 299 [*Saumur*].

<sup>30</sup> *Switzman v. Elbling*, [1957] S.C.R. 285 at 328 [*Switzman*].

<sup>31</sup> *Taylor*, *supra* note 17 at 61.



34. “Criticism” is distinct from hate speech and has been defined as “the expression of disapproval of someone or something on the basis of perceived faults or mistakes.”<sup>32</sup> By its very nature, criticism is both confrontational (even at times offensive) and a necessary component of democracy.
35. ARPA Canada maintains that for an individual to express their political, moral and social commentary, opinion or criticism is not equivalent to the expression targeted by Parliament when it enacted legislation prohibiting hate speech.
36. Despite this, ARPA Canada respectfully submits that even if political, moral and social commentary or opinion can be considered “hate speech”, such expression falls outside of the jurisdiction and mandate of the *Code*.
37. The objective of the *Code* is to discourage discrimination, but there is no rational connection between prohibiting an individual from voicing their opinion and discouraging discrimination even if that opinion may cause a person “to be exposed to hatred or ridicule”.
38. The broad prohibition against any potentially offensive expression is too vague, and thus fails the rational connection test. In order for the section 14(1)(b) prohibition against political speech to be rationally connected to its objective, it must sufficiently be defined such that its connection can properly be measured. It is a principle of fundamental justice in Canada that a statute is “void for vagueness” if its prohibitions are not clearly defined.<sup>33</sup> A vague law does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement.

**F. Does Section 14(1)(b) minimally impair Freedom of Expression?**

55. Legislation which prohibits political, moral and social commentary or opinion does not minimally impair the fundamental freedom to thought, belief, opinion and expression. ARPA Canada respectfully submits that where certain speech, which is not criminally prohibited, is found to be offensive by others, the remedy is not prohibition by the State, but counter-speech by the citizen.

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<sup>32</sup> *The Oxford English Dictionary*, s.v. “criticism” available online: <<http://www.oxforddictionaries.com>>.

<sup>33</sup> *Hogg*, *supra* note 11 at pp. 38-16.

56. A complete prohibition on speech which may be deemed to be offensive and the abolition of freedom of thought, belief, opinion and expression cannot be considered to minimally impair one's section 2(b) *Charter* rights.

57. As this Court noted in *RJR-MacDonald Inc. v. Canada (Attorney General)*,<sup>34</sup> complete bans or denials of rights will be more difficult to uphold than partial ones. Complete bans will only be saved when the state shows that it is absolutely necessary to further its objective.<sup>35</sup>

**G. Is the severe effect of section 14(1)(b) on those to whom it applies disproportional?**

58. While freedom of expression ought to be such that all citizens feel free to speak their mind openly and candidly, the threat of possible prosecution is sure to stifle or chill debate, most certainly on contentious issues. As expressed in *Taylor*:

[t]he chilling effect of leaving overbroad provisions “on the books” cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of a criminal prohibition, the vagueness of the law means it may well deter more conduct than can legitimately be targeted, given its objectives.<sup>36</sup>

59. ARPA Canada respectfully submits that when enforced, section 14(1)(b) of the *Code* may result in a complete and total removal of an individual's section 2(b) *Charter* rights and is therefore disproportional to its objective. The definition of hate expression is so subjective that any speech will inevitably offend someone.

60. By permitting section 14(1)(b) of the *Code* to remain in effect and to be enforced according to the dictates of different Tribunal panelists, this Court would effectively endorse a regime which is authorized to subjectively discriminate against individuals with unpopular or offensive political, moral, social or religious opinions.

61. It is important to note that in this case, there are no competing *Charter* rights at issue and therefore no balancing of rights need be done. The fundamental freedom of belief, opinion, thought and expression will inevitably conflict with the legislated right; the fundamental freedom, by virtue of being a *Charter* right, must supersede the newly

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<sup>34</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 [RJR].

<sup>35</sup> *Ibid.* at 163.

<sup>36</sup> *Taylor*, *supra* note 17 at 151.

minted rights created by the legislature.

Conclusion

62. If leave to intervene is granted, ARPA Canada intends to elaborate on the above-noted arguments in a manner which will establish that section 14(1)(b) of the *Code* substantially violates section 2(b) of the *Charter* and that its effect is not proportional to its objective and consequently, cannot be saved under section 1 of the *Charter*.

**PART IV – COSTS**

63. ARPA Canada does not seek costs in this motion, nor will it seek costs in its ultimate intervention should leave be granted. If granted leave to intervene, ARPA Canada will not seek to supplement the record and will not raise new legal issues. Its intervention therefore should not materially increase the costs of the parties.

64. ARPA Canada is a not-for-profit organization with limited financial resources. ARPA Canada therefore requests that its motion for leave to intervene and its intervention (should leave be granted) not attract any liability for costs.

**PART V – ORDER SOUGHT**

65. ARPA Canada requests an order granting it leave to intervene in this appeal and to file a factum not to exceed 20 pages in length. ARPA Canada also requests an order granting the right to make oral submissions of not more than 20 minutes in length.

66. ARPA Canada requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of April 2011.



**VINCENT DAGENAIS GIBSON LLP/s.r.l.**

325 Dalhousie Street, Suite 600

Ottawa, Ontario K1N 7G2

**ALBERTOS POLIZOGOPOULOS**

Tel : 613-241-2701

Fax : 613241-2599

Counsel for the Proposed Intervener, The  
Association for Reformed Political Action Canada

**PART VI – TABLE OF AUTHORITIES**

	<b>Jurisprudence</b>	<b>Paragraphs</b>
1	<i>Boucher v. The King</i> , [1951] S.C.R. 265.	15
2	<i>Canada (Human Rights Commission) v. Taylor</i> , [1990] 3 S.C.R. 892.	18, 33, 58,
3	<i>Ford v. Quebec</i> , [1988] 2 S.C.R. 712.	11
4	<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927.	10
5	<i>R. v. Big M Drug Mart</i> , [1985] 1 S.C.R. 295.	23
6	<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103.	25
7	<i>Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.</i> , [1986] 2 S.C.R. 573.	13
8	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> [1995] 3 S.C.R. 199.	57
9	<i>Saumur v. City of Québec</i> [1953] 2 S.C.R. 299.	31
10	<i>Switzman v. Elbling</i> , [1957] S.C.R. 285.	31
	<b>Legislation</b>	
11	<i>Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c.11.	6, 7, 9
12	<i>Constitution Act, 1867</i> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.	28, 29
13	<i>Criminal Code</i> , R.S. C. 1985, c. C-46.	8
14	<i>The Saskatchewan Human Rights Code</i> S.S. 1979, c. S-24.1.	6, 7, 21,
	<b>Secondary Sources</b>	
15	John Gray, ed., <i>John Stuart Mill On Liberty</i> (Oxford: Oxford University Press, 2008).	14
16	Peter W. Hogg, <i>Constitutional Law of Canada</i> , looseleaf, 5 <sup>th</sup> ed. (Toronto: Carswell, 2007) vol. 2.	12, 27, 30, 38

## PART VII – LEGISLATION AT ISSUE

### Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1

14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

[...]

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)**

THE HONOURABLE )  
JUSTICE ) \_\_\_\_\_, THE \_\_\_<sup>TH</sup> DAY OF \_\_\_\_\_, 2011  
)  
)

BETWEEN:

**SASKATCHEWAN HUMAN RIGHTS COMMISSION**

Appellant

- and -

**WILLIAM WHATCOTT**

Respondent

- and -

**THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA**

Intervener

**ORDER**

**THIS MOTION**, made by the Intervener, The Association for Reformed Political Action (ARPA) Canada ("ARPA Canada"), for an Order for intervener status, was heard this \_\_\_ day of \_\_\_\_\_ 2011 at Ottawa, Ontario.

**ON READING** the Notice of Motion dated April 28<sup>th</sup> 2011 and the Affidavit of Mark H. Penninga, sworn April 26<sup>th</sup> 2011,

1. **THIS COURT ORDERS** that ARPA Canada is hereby granted status as an

Intervener in this matter and shall file a factum not exceeding 20 pages on a date no later than \_\_\_\_\_, 2011, and will present oral arguments of no more than 20 minutes total.

2. **THIS COURT FURTHER ORDERS** that there be no costs for this Motion.
3. **THIS COURT FURTHER ORDERS** that upon completion of this matter, there be no costs ordered for or against ARPA Canada.

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