

Charitable Fund-Raising Regulation: Subject to *Charter* Scrutiny?

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Introduction

On Monday, November 29, 1993, Child Find Alberta launched a \$1 million lawsuit against its professional, independently contracted fund raiser, alleging misappropriation of funds.¹ The fund raiser had conducted a door-to-door Christmas-card sales campaign for Child Find Alberta to raise money to search for missing or abducted children. The money raised was placed in a trust account, where it was to be held for the benefit of the children. However, according to Child Find Alberta, rather than doing this, the corporate fund raiser and its director made unauthorized, fraudulent withdrawals from the trust account for their own purposes. In addition to the claim for the misappropriated funds, Child Find Alberta stated that “beyond the monies taken, and in particular having regard to loss of public confidence and goodwill”, it would “continue to suffer damages for years to come”.²

A similar controversy occurred in 1965 when Robert Neville Talbot, an executive in the Calgary office of the Canadian Cancer Society, stole almost \$200,000 of Society funds. This theft outraged many Albertans, and caused one member of the Legislature to describe it as “the worst social crime in the history of the province which has reverberated across Canada”.³ This crime, in part, prompted a call for tighter legislative control on fund-raising activities.

In 1965, the Public Contributions Act, R.S.A. 1980, c. P-26, (*Act*) was enacted in substantially its current form. Its purpose is to prevent exactly the type of misappropriation of funds which occurred in 1993 and 1965. The *Act* requires

* As members of the firm of Milner Fenerty, the authors served as counsel to the intervenors in the *Epilepsy Canada* case discussed in this article, supporting the validity of the legislation. Peter J. Forrester has since joined the Department of Justice of the Alberta Government.

charities to obtain approval prior to soliciting charitable funds from the public. In so doing, the *Act* attempts to ensure that the approximately \$350 million donated annually by Albertans is utilized for the charitable purposes represented to the donor and not for some other purpose.

Notwithstanding the apparent benefit of public scrutiny, not all are convinced that the *Public Contributions Act* is the way to provide that accountability. On November 1, 1991 the Alberta Sports and Recreation Association for the Blind and Paralympic Sports Association issued a Statement of Claim against the Attorney General of Alberta and the City of Edmonton in which it sought a declaration that certain provisions of the *Act* constitute an impermissible infringement of section 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)* and are therefore of no force and effect.

An action challenging sections 3, 5, and 6 of the *Act* on the same grounds was subsequently launched against the Attorney General by Epilepsy Canada on January 11, 1993. Sections 3, 5 and 6 (Impugned Sections) read as follows:

3(1) No organization shall conduct a campaign to obtain funds for a charitable purpose unless it is authorized in writing to do so:

- (a) by the Director; or
- (b) in the case of a campaign to be conducted within the corporate boundaries of a city that has passed a by-law pursuant to s. 18, by the approving authority of that city,

and if the organization is a charitable promotion business, that organization must be licensed under the *Licensing of Trades and Businesses Act*.

(2) Where an organization enters into a charitable promotion contract, the organization shall insure that the charitable promotion business is licensed under the *Licensing of Trades and Businesses Act* and that the license will not expire until all accounts have been settled and the funds due to the organization have been provided to the organization.

5(1) The application for authorization shall state:

- (a) the name and address of the organization seeking to obtain funds;
- (b) the names, addresses and occupations of the officers of the organization;
- (c) the names, addresses and occupations of persons in charge of the campaign;
- (c.1) the name and address of the charitable promotion business with which the organization has entered into a charitable promotion contract;
- (d) the place or area in which the organization will attempt to obtain funds;
- (e) the objective of the campaign;
- (f) the duration of the campaign;
- (g) the budgeted expenses of the campaign, in detail;

- (h) the budgeted salaries, wages, subsistence and travelling expenses that will be paid to organizers, employees and campaign workers;
- (i) the purpose for which the money obtained will be used;
- (j) the estimated percentage of funds obtained that will be expended in Alberta for the services stated in the application to raise funds;
- (k) the proportion of the funds obtained in any annual canvass or campaign that will be placed in a sinking fund for long-term projects, to meet debentures and a reserve fund for programs of expansion; and
- (l) any other information that may be required.

(2) Where a charitable promotion contract has been entered into, a copy of the contract shall be submitted with the application for authorization.

6(1) An authorization given under this *Act* may, at the discretion of the authority giving it, be made valid for a limited time only or until revoked and an authority may be revoked at any time.

(2) An authorization may be refused or revoked by and in the discretion of the Director or the approving authority of a city, as the case may be,

- (a) if there is or will be a non-compliance with this *Act*, the regulations or any other applicable law,
- (b) if there is or there is likely to be a misuse of the funds collected,
- (c) if the amount to be actually applied to a charitable purpose is too little considering the total amount of the funds to be obtained,
- (d) if a campaign of a similar nature and to be conducted in the same period has previously been authorized,
- (e) if the Director of the approving authority of the city, as the case may be, is not satisfied at the honesty, integrity or bona fides of the persons conducting or to be conducting the campaign, or any of them, or
- (f) for any other reason considered by the Director or the approving authority of the city, as the case may be, to be sufficient and in the public interest.

After the actions were launched, a number of charities sought and received intervenor status in the actions.⁴ The charities intervened to support the *Act* and its pre-approval scheme. They sought status on the basis that they would bring a different perspective to the trial of the matters, as they were in the same position as the Plaintiff, but held fundamentally different views.

The trial of the *Epilepsy Canada* action proceeded in the spring of 1993 before Rowbotham J. It lasted approximately one week and explored the fundamental question of how charitable fund raising should be regulated in light of the *Charter*. On July 7, 1993 Rowbotham J. issued his decision upholding the legislation.⁵ That decision was appealed to the Alberta Court of Appeal and the decision was overturned.⁶ The Court of Appeal struck down key provisions of the *Act*, as being an unreasonable violation of freedom of expression.

Further, a decision was made by the Attorney General not to appeal this decision to the Supreme Court of Canada. The Court of Appeal's judgment now stands as the last word on the subject and will probably have a significant impact on how charitable fund raising is regulated in Canada. Given the ramifications of the decision, we will examine the issues and their resolution at trial and on appeal.

II. The Position of Epilepsy Canada

The Plaintiff, Epilepsy Canada, was a registered charity pursuant to the *Income Tax Act*. As a national organization, it canvassed for funds throughout Canada, including Alberta.

Epilepsy Canada challenged the Impugned Sections of the *Act* on the basis that those sections infringed freedom of expression under the *Charter*. Specifically, it argued that the *Act*'s requirement that a charity obtain approval in order to conduct a fund-raising campaign restricts freedom of expression unconstitutionally.

While Epilepsy Canada challenged the provisions of the *Act*, it did not allege that it had experienced problems with the *Act* or with the governmental authorities administering the *Act*. Rather, Epilepsy Canada's challenge was to the general nature of the pre-approval scheme. The argument was framed in terms of the test set out in *Irwin Toy Ltd. v. Quebec (Attorney General)*⁷. That case set out a two-step approach for determining whether freedom of expression has been limited. The first part of the test asks whether the restricted expression is of a type protected by section 2(b): "Where an activity conveys or attempts to convey a meaning it has expressive content and *prima facie* falls within the scope of the guarantee."⁸ The second part of the test asks whether the purpose or the effect of the Impugned Legislation is to restrict the freedom of expression.

Epilepsy Canada argued that a campaign to "obtain funds for a charitable purpose" was an expressive activity under the *Irwin Toy* test. It argued that by such a campaign Epilepsy Canada conveyed, or attempted to convey, the following meanings:

- (1) seeking support for research into epilepsy;
- (2) educating the public about the disease;
- (3) persuading others to adopt Epilepsy Canada's view with respect to what should be done to fight epilepsy;
- (4) persuading more people to volunteer time to the cause; and
- (5) informing the public that participants in the campaign believe in the cause and are taking steps to achieve its objective.

Epilepsy Canada then went to the second step of the test and argued that the purpose and effect of the *Act* were to restrict freedom of expression. Specifically, it reasoned that the only purpose which can be ascribed to section 3, which “requires charities to obtain prior approval for conducting charitable campaigns to obtain funds” is to prohibit people from expressing meanings such as the five points outlined above. Alternatively, Epilepsy Canada thought that the effect of the *Act* was to violate freedom of expression.

Epilepsy Canada argued that, through its charitable fund-raising campaigns, an opportunity for the exchange of ideas and the attainment of truth about the objectives of the charity was fostered. Further, it suggested that persons working for the charity, donors, and potential donors received an opportunity for social participation and self-fulfilment through the development and espousal or rejection of the objectives of the charity. Finally, it believed that the donors also achieved social participation and self-fulfilment by providing financial support to charities.

For all of these reasons, Epilepsy was of the view that the pre-approval scheme set out in the *Act* was a violation of its freedom of expression. Further, it argued that this violation of the *Charter’s* freedom-of-expression guarantee could not be upheld by section 1, which permits limits on rights that are “reasonable and demonstrably justified in a free and democratic society”. In making its section 1 argument the Plaintiff relied on the analysis in *The Queen v. Oakes*⁹. A four-part section 1 test was first described in that case. The *Oakes* test is conveniently summarized in Peter Hogg’s *Constitutional Law of Canada*:¹⁰

- A. Sufficiently Important Objective
 - 1. The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right.
- B. Proportionality
 - 1. Rational connection: the law must be rationally connected to the objective.
 - 2. Least drastic means: the law must impair the right no more than is necessary to accomplish the objective.
 - 3. Proportions effect: the law must not have a disproportionately severe effect on the person to whom it applies.

First, Epilepsy Canada addressed the question of whether the *Act* had an objective sufficiently important to warrant an override of Epilepsy Canada’s freedom of expression. Epilepsy Canada thought that the only motivation of the Legislature in enacting the *Act* was to prevent fraud. It reasoned that while these concerns are pressing and substantial, they are dealt with in the *Criminal Code* and are thus not pressing or substantial concerns in the provincial legislative context.

Epilepsy Canada then asserted that there was no rational connection between the requirement of prior approval for solicitation and the prevention of fraud and forgery.

As for the least intrusive portion of the test, Epilepsy Canada was of the view that a registry system was much less intrusive and just as effective as a prior-approval system.

Finally, Epilepsy Canada argued that the impact of the prior-approval process was disproportionate to the benefit intended, in that it required a charity to obtain prior approval from up to seven different authorities for soliciting throughout Alberta¹¹. The process also required that such approval be obtained in connection with each campaign sponsored by an organization.

III. The Response of the Attorney General and the Intervenors

The Attorney General and Intervenors (Defendants) agreed that Epilepsy Canada accurately described the section 2 test, but differed on its application. The Defendants contended that authorization or licensing schemes aimed at protection of the public do not *per se* violate section 2(b) of the *Charter*. Such legislation, the Defendants asserted, may be viewed as having a purpose other than interfering with the core principles associated with free speech. As such, any peripheral impact on speech should not result in the legislation being characterized as interfering with freedom of expression and being struck down because of an unconstitutional purpose.

As for the actual purpose of the *Act*, the Defendants argued that a plain reading of the *Act* reveals that it is to protect the public from fund-raising campaigns that might involve fraud, misrepresentation or misunderstanding due to lack of information. Further, the legislation is aimed at ensuring an orderly campaign process and enhancing the credibility of the charitable sector.

The Defendants argued that the freedom of expression of charitable organizations was not interfered with, but rather those organizations were free to discuss their nature and objectives with anyone. The *Act* only regulates the solicitation of funds from members of the general public.

Finally, the Defendants took the position that neither the purpose nor the effect of the *Act* was to restrict freedom of expression. The effect of the *Act* was to ensure authorization prior to solicitation of funds, not to restrict the expression of any matter of interest to a particular charitable organization or to the public.

In relation to section 1, the Defendants acknowledged that one cannot retrospectively apply to legislation a purpose under the Constitution different from that which originally animated the legislation. It was, however, the Defendants' position that they were entitled to introduce new evidence to establish that the

historical objective of the *Act* was reasonable in a free and democratic society.¹²

The evidence introduced at trial through a number of witnesses, including Wilbert Proskiw, Detective Donald Christal, Dr. Rainer Knopff, Dr. Edwin Johnston and Paul Nahirney illustrated that the *Act* was integral to providing a measure of protection to donors. The objective was to ensure that only *bona fide* campaigns proceeded and that funds raised were used for their intended purpose. The evidence also showed that without the *Act* donors would lack the basic information necessary to evaluate the claims of charities.

The Defendants went on to argue that the authorization scheme was rationally connected to the protection of the public, as a measure of protection is afforded to donors when only legitimate campaigns, involving reasonable rates of return, are allowed to proceed. Further, the Defendants disagreed with the Plaintiff's position that the *Act* did not prevent fraud. The evidence of Detective Christal referred to several instances where fly-by-night operators had conducted campaigns outside of the *Act* and were convicted of violations. In virtually every case, the offending activity had ceased and the offender had left the jurisdiction.

The minimum-impairment facet of the section 1 test did not represent a significant hurdle to the Defendants, as all charities may apply for prior approval under the *Act*. Further, if a charity's application is rejected, an appeal to the Board and then to the Court of Queen's Bench is available. The Defendants also pointed out that rejection under the *Act* was minimal, at 1.3 percent of applications for 1991 to 1992. In addition, the time taken to consider an application was relatively short and campaigns were authorized for a period of up to one year.

IV. Queen's Bench Trial Decision

Justice Rowbotham refused to grant the declaration sought by Epilepsy Canada. In his written decision, he went right to the point. Did the *Act* infringe section 2(b) of the *Charter* and was the infringement justified under section 1? After considering all of the evidence and submissions from the parties, Rowbotham J. wrote that: "the activity restricted in the process of charitable fund raising results, at least by implication, in an infringement of freedom of expression guaranteed by section 2(b) of the *Charter*. Sections 3, 5 and 6 are aimed directly at the control of this activity."¹³ He then went on to consider the section 1 arguments. On this question, he accepted the evidence of the Defendants:

The evidence adduced in the trial by the Attorney General and by the Intervenors has convinced me that there is a sound evidentiary basis for the enactment and continued

application of the *Public Contributions Act* in general and sections 3, 5 and 6 in particular. These sections are a reasonable impairment of free expression consistent with the orderly conduct of charitable campaigns in Alberta for the benefit of legitimate charities and of the public.¹⁴

V. Court of Appeal Decision

The Court of Appeal began its analysis by reasoning that seeking a donation, orally or otherwise, is to express oneself. Specifically, the Court said: “To ask for money is to express meaning deliberately.”¹⁵

Having decided that asking for money is a form of expression, the Court went on to find that to require a licence for that particular type of expression is a violation of the *Charter’s* section 2(b) freedom-of-expression guarantee. The Court of Appeal thus concurred with Rowbotham J. that the real issue was whether the prior approval system of the *Act* was saved by section 1.

In considering whether the prior approval scheme of the *Act* was a reasonable limit on freedom of expression under section 1, the Court held that the *Act* had the following four purposes:

- (a) to protect consumers from fraud;
- (b) to lend credibility to the charitable sector;
- (c) to promote the efficiency and productivity of charities; and
- (d) to promote a variety of charitable solicitations.

Of the four aims of the *Act*, the Court of Appeal found that only the first, prevention of fraud, was pressing and substantial, and therefore could be potentially the basis of limiting a constitutional right. The Court then went on to consider whether the prevention of fraud in and of itself met the section 1 test of being a reasonable limit on freedom of expression. In doing this, the Court found that the prior approval system was rationally connected to preventing fraud. The Court’s real concern was with what it called “the indiscriminate overbreadth” of the *Act*. That is, it found the prior approval of the *Act* to be broad and indiscriminate. The Court had a number of concerns in this regard.

First, the Court held that the “*Act* covers much more than fund-raising campaigns for charities. It is no way confined to charities, in either the legal or the popular sense.”¹⁶ Specifically, the Court thought that the *Act* could be read as applying to the fund-raising activities of political parties, lobby groups and individuals.

Secondly, the Court held that the ban on soliciting goods, money or financial assistance is extremely broad. The concern was with the portion of the *Act* which says that a campaign to obtain funds is one which involves solicitation

of “money, goods or financial assistance of any kind.”¹⁷ The Court speculated that this might extend, for example, to the donation of services, preventing suppliers from donating free services or maybe even volunteers from donating their time and talents.

Thirdly, the Court found unacceptable the prior-approval process which granted public officials a largely unfettered discretion. The Court disliked section 6, which sets out the grounds upon which the approving authority could refuse or revoke authority to conduct a campaign under the *Act*. Specifically, the Court condemned section 6(f) which allowed the authority to refuse or revoke authority for “any reason considered by the Director or the approving authority of the city, as the case may be, to be sufficient and in the public interest.”¹⁸ Cote J., writing for the Court, commented, “Maybe that does not permit the government or municipal official to refuse because of the colour of the applicant’s hair, but it does not exclude much else”.¹⁹

The Defendants took the position that any overbreadth in the legislation could be remedied by reading the legislation down or by simply striking out the offending sections but the Court chose not to exercise this option on the basis that the Alberta Legislature should be given the opportunity to rewrite the legislation and choose from the whole spectrum of choices available to it in re-enacting the Impugned Sections of the *Act*.

While the Court held that the Impugned Sections of the *Act* were void, it directed that the declaration to that effect should not come into force until the end of April of 1995 to allow the Legislature time to draft and pass replacement legislation should it so desire.

VI. Re-Analysis of the Act

Since the Supreme Court of Canada will not have an opportunity to consider the constitutional validity of the *Act*, a careful re-analysis of the Impugned Sections of the *Act* will be undertaken in the following portion of this article in the event the issues addressed in this case arise in the future.

Section 2(b) of the Charter

The first step as set out in *Irwin Toy* is to determine whether or not a particular activity, solicitation in this case, conveys a meaning. Clearly, conducting a campaign to obtain funds does convey a meaning. Specifically, it conveys to potential donors that the soliciting charitable organization wants their money. As such, *prima facie*, we are dealing with an expressive activity.

Both the Court of Queen’s Bench and the Court of Appeal concluded that the *Act* had the effect of restricting an expressive activity and thus satisfied the second step of the *Irwin Toy* test which involves a determination of whether

the purpose or effect of the government action is to restrict freedom of expression.²⁰

Section 1 of the Charter

Like other rights guaranteed by the *Charter*, section 2(b) is subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In determining whether a limit on a section 2(b) right is demonstrably justified, the Supreme Court of Canada has said that both the nature of the expression and the nature of the infringing legislation are to be taken into consideration. Justice McLachlin put it this way in *Rocket v. Royal College of Dental Surgeons of Ontario*:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the section 1 analysis permits the courts to have regard to special features of the expression in question... [N]ot all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.²¹

The allegation in this case is that the prior approval of the solicitation of funds from the public is an infringement of freedom of expression. This cannot be described as a serious infringement. Charities are free to express themselves in any way, at any time, and in any place, save that a charity must ensure that whenever donations are solicited, permission is first obtained. If the prior approval requirement is an infringement of section 2(b), it cannot be afforded the same protection which would be accorded other communication by a charity to the public, which the *Act* does not prevent in any way.

With this in mind, does the prior approval scheme set out in the *Act* meet the rigours of the section 1 test? The test was broken down into manageable pieces in *The Queen v. Oakes*.²² Each part of the test will be considered in turn.

(1) *Sufficiently Important Objective (Pressing and Substantial)*

The first part of the test requires the court to ascertain and evaluate the objective of the provisions in question. Specifically, only an objective which is sufficiently important to override a constitutionally guaranteed right will be upheld. Further, in order to be a sufficiently important objective, it must relate to concerns that are pressing and substantial in a free and democratic society.

At trial there was some dispute as to how the objective was to be determined. Epilepsy Canada took the position that the objectives in the minds of the legislators at the time of enacting the *Public Contributions Act* were the only justifications which could be considered under section 1 of the *Charter* today. The Plaintiff suggested that evidence led by the Defendants that postdated the

introduction of the *Act* should be rejected on the basis that it amounted to an attempt to apply retroactively a new purpose to the *Act*.

Was the Plaintiff correct? The case law suggests otherwise. Although courts will accept evidence of legislators' actual intent in enacting a particular piece of legislation, this is only one factor the court considers when determining purpose. In addition, even if the legislators have made statements as to their objectives in introducing legislation, these statements are often amorphous and ambiguous. More often than not, legislators' actual objectives are unknown. Professor Hogg does not consider this to be a significant problem: "Courts have not been troubled by this difficulty as much as one might expect. They usually assume that the statute itself reveals its objective, and they may pronounce confidently on the point even if there is no supporting evidence."²³ In addition, the government can draw upon *current* evidence to prove that the original objectives of the *Act* remain or have become pressing and substantial. This was explained in *Irwin Toy*:

In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place (see *Big M Drug Mart, supra*, at p. 335). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 769). It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.²⁴

In addition, even though the legislative objective as defined in a particular way ceases to be appropriate, a provision can still be upheld where it now performs a different function. This was the case in *The Queen v. Butler*²⁵, where obscenity laws were challenged under section 2(b), freedom of expression. The Supreme Court of Canada held that although the objective of "promotion of morality" is no longer pressing and substantial, "promotion of sexual equality" is. The Court said that this was a permissible change in the emphasis of the objective which, in general terms, was the protection of society from the harm caused by obscene materials.

In the context of the 1990s, the objectives of the Impugned Sections could be summarized as follows:

- (1) protecting the public from fraud, misrepresentation and inadequate presentation of information;

- (2) informing donors about the purpose for which the money will be used, thus enhancing the prospect for better-informed choices;
- (3) reducing situations where donors will be confused or misled about the nature of a charitable organization and the purpose for which donations will be used;
- (4) ensuring that a reasonable proportion of a donation will actually be used for the charitable purpose for which it is intended;
- (5) developing an orderly, fair environment for charities to operate in; and
- (6) lending legitimacy to charitable fund-raising campaigns operating under the *Act*.

These objectives have one overall goal: the reduction of the risk that funds donated to charity will be misappropriated. The regulatory framework established under the *Act* reduces the risk that charitable donations will be misused. This in turn reduces the risk to charities that donors will restrict their charitable giving in response to unfulfilled expectations. To reduce these risks, the Alberta Legislature had acted to prevent misleading fund-raising campaigns and the misappropriation of campaign funds. It had done so through the establishment of a prior approval process which does not allow fund-raising campaigns to proceed where there is an unacceptable risk of the public being misled or of donations being misused.

The governmental interest in preventing misleading fund-raising campaigns or the misappropriation of funds raised in such campaigns is substantial. By preserving public faith in charitable campaigns and charitable organizations the *Act* ensures a positive environment in which legitimate charities may flourish. Chief Justice Dickson made this point in *The Queen v. Oakes*, where he said “faith in social and political institutions which enhance the participation of individuals and groups in society” is a value which is essential to a free and democratic society.²⁶ The *Act* enhances the participation of donors in the charitable sector. It also discourages fund raisers from seeking personal gain through misconduct and protects the public from those who would misuse their donations.

The *Act* addresses problems which were well recognized in the fund-raising industry in Canada. For example, Donald Bourgeois states in *The Law of Charitable and Nonprofit Organizations*:²⁷

While not all third party fund raisers use unfair practices or cause problems for legitimate charitable and nonprofit organizations, a significant number do. They may fail to disclose their identity to the public, retain large commissions from the amounts collected, use high pressure tactics, make misleading misrepresentations or otherwise

jeopardize the integrity of charitable and nonprofit organizations as well as the reputation of legitimate professional fund raising consultants.

Finally, it should be noted that if the Alberta Legislature had not acted to address this problem, there would have been no federal legislation available to take up the slack. Short of the criminal justice system, there is no other law which can provide the public with an effective remedy to prevent abuse by fund raisers and the *Criminal Code* can only be employed after abuse has occurred. Of course, knowledge of possible sanctions can lead even unscrupulous people to obey the law so, clearly, the *Criminal Code* does have some effect.

It has also been the Alberta experience that shady operators did not even bother to apply for a licence. Since raising funds without a licence was an offence under the regulatory statute, these people could often be brought to justice without having to prove their activities were improper. Thus the regulation serves to separate the honest from the dishonest, just by its existence.

(2) *A Reasonable and Proportional Measure to Protect the Public*

The next portion of the *Oakes* test asks whether the Impugned Sections address the governmental concern in a proportionate manner. For example, while hate propaganda may be a pressing and substantial concern, it would be a disproportionate response to prevent people from talking to cure the problem. Having said this, it must be remembered that perfection is not the standard. Rather, the court must take into account reasonableness, flexibility and the need for some generality in legislation.²⁸

The courts determine whether the means utilized to achieve an objective are proportionate by applying a three-part test. They ask, is there a rational connection between the ends and the means of the *Act*, is the impairment of section 2(b) minimal, and is the impact on freedom of expression disproportionate to the purpose of the *Act*? Each of these questions will be considered in turn.

(a) *Rational Connection Between the Ends and the Means of the Act*

The prior-approval process, including the licensing and reporting requirements, is rationally connected to the *Act's* objectives of preventing misleading fund-raising campaigns and the misappropriation of campaign funds. Section 5 of the *Act* requires an application for authorization to include basic information relevant to a fund-raising campaign's scope, its organization, and the destination of any proceeds raised. This information can then be used for evaluating the application to determine if it has met the criteria set out in subsection 6(2) of the *Act*. Those criteria relate to illegality, misuse of funds, the application of funds towards a noncharitable purpose,²⁹ the co-ordination of multiple campaigns of a similar nature, the honesty of those conducting the

campaign and the public interest. If the information falls within one of these criteria, the application may not be allowed. The information required by section 5 and the criteria set out in subsection 6(2) are aimed directly at the *Act's* objectives.

The *Act* meets the standard set out by Sopinka J. in the *Queen v. Butler*³⁰: “In choosing its mode of intervention, it is sufficient that Parliament had a reasonable basis” for its choice.³¹ The Alberta Legislature had a reasonable basis for adopting a prior-approval process in which a certain degree of discretion is given to a public approving authority. A broad “public interest” discretion is rationally connected to the objectives of the *Act*. This issue was raised in *Police Services Union v. Port Moody Police Board*.³² In that case the British Columbia Court of Appeal held that regulations providing the Police Board with wide discretion when considering the association of police officers with worthy causes served the public by preserving the reputation of the police force. The Court was of the view that the broad language did not invalidate the regulations under section 1 of the *Charter*.

The concept of the “public interest” is well recognized in law and has been applied by the courts without difficulty.³³ As well, the testimony of Dr. Johnston, the intervenors’ expert, indicates that in practice the *Act* and the Calgary Approving Authority served the public interest. Applications for legitimate fund-raising campaigns receive routine approval, while those campaigns with obvious problems were either improved with the help of the Authority or denied.

(b) The Impairment of Section 2(b) is Minimal

The minimal impairment arm of the proportionality test does not mandate perfection and should not be applied in the abstract. Sopinka J. made this point in *The Queen v. Butler*³⁴: “It is not necessary that the legislative scheme be the ‘perfect’ scheme, but that it be appropriately tailored *in the context of the infringed right*.”

An analysis of the *Act* requires the balancing of competing claims and competing values. In such a case the Legislature will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away, without access to complete knowledge as to its precise location.³⁵ The courts should as a rule not involve themselves in drawing lines on a case-by-case basis. Political will may change from time to time and from jurisdiction to jurisdiction.³⁶ Judges are ill-equipped to usurp the role of the members of the Legislature and draw the line for them.

In considering the line drawn by the Legislature in this case, it is important to remember the *Act* does not regulate freedom of thought, opinion or belief.

Furthermore, “we are far removed from experiments in control and limitation of freedom of expression or of dictatorship which evoke the fear of social manipulation.”³⁷ The *Act* regulates the solicitation of funds, not thought, opinion or belief.

In our view, the legislative provisions are not overbroad. The criteria for allowing or refusing an authorization set out in section 6 of the *Act* are flexible and general and provide a limited scope for the exercise of a discretion informed by the data provided under section 5 of the *Act*. This approach is consistent with that approved in *The Queen v. Nova Scotia Pharmaceutical Society*:

[L]aws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances they may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.³⁸

If regulation of charitable solicitation is undertaken, it is hard to imagine a less restrictive scheme that would still achieve the public-interest objectives of the *Act*. The Legislature is entitled to protect those within society who may be misled and to otherwise ensure that fund raisers act fairly and honestly. Should a court force the Legislature to leave the public vulnerable and experiment with other forms of regulation? Not unless the *Charter* demands it and in this case the *Charter* does not. The Supreme Court of Canada has indicated that some deference is due when government acts to protect the public.³⁹ The *Public Contributions Act* constitutes such governmental action.

Further, the Court of Appeal’s main concern with overbreadth was in relation to the largely unfettered discretion granted by section 6(f) of the *Act*, as well as the broad definition of “financial assistance”. The Court of Appeal could have read down the legislation or simply struck out the offending portions of the *Act*. This would have maintained the prior-approval system as a constitutionally valid scheme.

(c) *The Impact on Freedom of Expression is not Disproportionate to the Purpose of the Act*

The *Act* does not impose an excessive burden on legitimate charitable fund raising. Evidence at the trial showed that fund raisers did not find it difficult to comply with the Impugned Sections. Furthermore, the Plaintiff tendered no evidence that the prior-approval process delayed the fund-raising campaigns of any charities. In fact, the evidence illustrated the opposite; approval can usually be had in a matter of days or weeks. The evidence disclosed that the Plaintiff had previously conducted three fund-raising campaigns in Alberta and had obtained approval under the *Act* for each one. The minor inconvenience of applying for approval should not attract *Charter* sanction.

We believe the *Act's* effects are not disproportionate to its objectives. The information required by section 5 of the *Act* is relevant to a determination of whether the proceeds of a fund-raising campaign will be misused or whether the campaign is inimical to the public interest. The essence of section 5 of the *Act* is not a limitation on what may be expressed but is, instead, a positive requirement that the whole (or at least the main elements) of the story be told. Subsection 6(2) of the *Act* does not impose a total ban on the solicitation of funds from the public but only comes into play if a fund-raising campaign involves illegality, a misuse of the funds collected, failure to apply sufficient funds towards a charitable purpose, unacceptable conflicts with other campaigns of a similar nature, a lack of honesty on the part of the persons conducting the campaign, or is otherwise not in the public interest. As well, one must not forget that the Impugned Sections do not in any way prevent charities from providing information to the public on any of their "charitable purposes" as defined in section 1(1)(b) of the *Act*. Charities are merely prohibited from including a request for funds unless an authorization has first been obtained under the *Act*.⁴⁰

The prior-registration requirement is not disproportionate to the harm the *Act* is intended to prevent. Once a donation is made, it is, for all practical purposes, too late to get it back. An individual donor's remedies are quite limited in instances where a fund raiser has engaged in misconduct.⁴¹ Any limit that the *Act* imposes on freedom of expression is outweighed by its benefits in ensuring that the public's faith in charitable institutions is preserved and that those who give to charities may be confident that their donations will be applied to do the good they intended. By contrast, legislation merely establishing a registry system or mandating disclosure does not provide any assurance to the public that a fund raiser has satisfied an authority knowledgeable in the area that a particular fund-raising campaign is legitimate.

(d) *Conclusion*

The impairment of section 2(b) rights alleged by the Plaintiff has a rational connection to the pressing and substantial purposes of the *Act*, has minimal impact on fund raisers and is proportionate to the good sought to be achieved. In light of these conclusions, can the prior approval process in the *Act* be justified in a free and democratic society? We believe an affirmative answer can be given considering that the evidence at trial established that the pre-authorization system works well, with little, if any, inconvenience for legitimate charities and considering that the need for regulation in this area has been well documented. There is ample Canadian authority for the conclusion that a society as large and complex as ours is entitled to require charities to pass a review process similar to that imposed under other consumer protection legislation such as the *Securities Act*.⁴²

VII. The Road Ahead

Since the Attorney General decided not to appeal the decision of the Alberta Court of Appeal, on April 30, 1995, the prior-approval system, as set out in the *Act* became an historical anomaly. The Alberta Legislature must now decide whether the prior-approval scheme should be re-enacted in some other form, whether another system of charitable regulation should be put in place or whether the *Act* should function without the Impugned Sections.⁴³

Finally, it should be remembered that Canadian society gives charities special privileges. Those privileges are reflected in law, as are corresponding responsibilities. In Alberta, the *Public Contributions Act* imposed a responsibility to register before conducting a fund-raising campaign. Epilepsy Canada says this responsibility as defined by the *Act* is too great. The donors to Child Find Alberta in 1993 and those to the Red Cross in 1965 would probably have a different opinion. Regardless of the opinions of the courts, and the ultimate decision of the Alberta Legislature, the judgment of the public as reflected in its support for charities will be the most definitive indicator of the appropriate level of regulation for charitable fund raising.

FOOTNOTES

1. Statement of Claim 9301-18578 Judicial District of Calgary, Court of Queen's Bench.
2. *Ibid.*, para. 13.
3. *The Edmonton Journal*, Tuesday, March 2, 1965, p.3.
4. In the *Epilepsy* action the Interveners included The Society for Treatment of Autism, The United Way of Calgary and Area, The Canadian Liver Foundation, The Canadian Red Cross Society and The Parkinson Society of Southern Alberta.

The cost of the intervention was not borne by the charities themselves but was underwritten by concerned third parties.

5. Reported at (1993), 11 Alta. L.R. (3d) 120.
6. (1994), 20 Alta. L.R. (3d) 44 at 47.
7. [1989] 1 S.C.R. 927.
8. *Ibid.*, at 968.
9. [1986] 1 S.C.R. 103.
10. Third edition, (Toronto: Carswell, 1992). See p. 35-17.
11. This seems to be the major complaint of Epilepsy Canada. In the January, 1994 issue of *Not-for-Profit News*, P.L. Wolstenhome outlined the position of Epilepsy Canada and highlighted this concern. Wolstenhome is associated with a professional fund raiser which helped Epilepsy Canada with fund raising and attended at the trial before Justice Rowbotham. It is interesting to note that in the article, he objects to the pre-approval powers given to the approving authorities under the *Act* and at the same time criticizes the *Act* for doing little to prevent abuse over the last 28 years, citing the fact that few convictions have been obtained. He misses the obvious conclusion that the *Act* has been effective in monitoring fund raising, thus avoiding the necessity to regulate fraud by after-the-fact charges.
12. See discussion of *The Queen v. Butler*, [1992] 1 S.C.R. 452, *infra*.
13. (1993), 11 Alta. L.R. (3d) 120, at 125.
14. *Ibid.*, at 127.
15. 20 Alta. L.R. (3d) 44 at 47.
16. *Ibid.*, at 50.
17. *Ibid.*, at 51.
18. *Ibid.*, at 53-54.
19. *Ibid.*, at 54.
20. *Irwin Toy*, *supra*, footnote 7, at 976.
21. [1990] 2 S.C.R. 232, 246-47.
22. *Supra*, footnote 9.
23. *Constitutional Law of Canada*, *supra*, footnote 10, 35-18.
24. *Irwin Toy*, *supra*, footnote 7, at 984.
25. *Supra*, footnote 12, at 103.
26. *Supra*, footnote 9, at 136.
27. (Toronto: Butterworths, 1990) at 135.
28. See *Irwin Toy*, *supra*, footnote 7, at 983 (a statutory standard can never specify all the instances in which it applies); *Canada v. Taylor*, [1990] 3 S.C.R. at 954-56 (use of wording from common law provides an intelligible standard); and *The Queen v. Butler*, *supra*, footnote 12 at 490 (a law will only be too vague or too

general, from a section 1 point of view, where it “is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools”).

29. The evidence presented in this case highlights the growing concern regarding the cost of fund-raising campaigns. Studies have demonstrated that the public would like to see fund-raising costs kept to a minimum but lacks the information or expertise to make meaningful judgments in this area. See “Poll Shows Most State Residents Won’t Donate to Charities with High Overhead Costs, But Are Unaware That Professional Solicitors Keep Most of Monies They Raise For Charity”, *News* from Attorney General Richard Blumenthal of Connecticut, U.S.A. (May 7, 1993) and Hodgkinson, “What We Know About Public Attitudes Toward Charitable Organizations”, Appendix 4 to Independent Sector, *Ethics and the Nation’s Voluntary and Philanthropic Community: Obedience to the Unenforceable* 136, 142 (1991). (Prepared for and presented to the Independent Sector Committee on Values and Ethics, Washington, D.C.).
30. *Supra*, footnote 12, at 502.
31. It is important to note that the *Charter* does not require the Legislature to address every aspect of the problem of abuse in the charitable-fund-raising sector at the same time or in the same enactment. *The Queen v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 772 (“legislature may select one phase of one field and apply a remedy there, neglecting the others”). See also *RJR MacDonald Inc. v. Canada*, [1993] Q.J. No. 1, at 38-39 (C.A.).
32. (1991), 78 D.L.R. (4th) at 84 and 101-02.
33. See footnote 3 and *The Queen v. Thomas Lipton Inc.*, 51 C.C.C. 3d 103, 124 (Ont. Prov. Ct. 1989) (“public interest”); *Canadian Shareowners Association Magazine*, 15 O.S.C.B. 617 (“public interest” test in section 24(1) of *Securities Act* (Ont.)) and *Re City of Portage la Prairie and Inter-City Gas Utilities*, 12 D.L.R. 3d 388, 395 (Man. C.A. 1970) (“public interest” test in *Public Utilities Board Act* (Man.)).
34. *Supra*, footnote 12, at 504-05.
35. See *Irwin Toy*, *supra*, footnote 7, at 990 and 993. (“[T]he Court is called upon to assess competing, social science evidence... The question is whether the government had a reasonable basis, on the evidence tendered, for concluding [that its action] impaired freedom of expression as little as possible given the government’s pressing and substantial objective.”)
36. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 338-39.
37. *RJR-MacDonald Inc.*, *supra*, footnote 31, at 43 and 44.
38. [1992] 2 S.C.R. at 641-42.
39. See *Rocket v. Royal College of Dental Surgeons*, *supra*, footnote 21, at 248-49 (“the fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference”) and *The Queen v. Thomas Lipton Inc.*, *supra*, footnote 33, at 120-24 (limits on health claims justified when such advertisements may mislead a majority or minority of the public and cause uninformed reliance on such claims and “consequences which are contrary to the public interest”).

40. See *The Queen v. Thomas Lipton Inc.*, *supra*, footnote 33, at 125-26 and *The Queen v. Institute of Edible Oil Foods*, 64 D.L.R. 4th 380, 382 (Ont.C.A.), where the Court has held consumer protection provisions were not in violation of the *Charter*.
41. See "Straining the Quality of Mercy and Abandoning the Quest for Informed Charitable Giving", 64 *So. Cal. L. Rev.* 605.
42. *Cicconi v. Alberta*, 86 D.L.R. 4th at 481 (regulation of commercial dealings), *Canadian Shareowners Association Magazine*, *supra*, footnote 33, at 663-65 (regulation of advertising of securities), *Police Services Union v. Port Moody Police Board*, *supra*, footnote 32 (regulation of solicitation of funds by police officers), *The Queen v. Thomas Lipton Inc.*, *supra*, footnote 33, at 120-24 (regulation of advertising of health products).
43. The Alberta government has now enacted replacement legislation. See p. 52 of this issue.