PROCEDURAL FAIRNESS AND THE COMPLIANCE PROGRAM [1]

The Supreme Court of Canada recently dealt with issues surrounding questions of procedural fairness in the case of *Baker* v. *Canada* [1999] 2 S.C.R. 817. The Court sought to provide guidance to courts as to how they should approach judicial review of administrative decision- making on both procedural and substantive grounds.

As the case outlines in some details the factors to be taken into consideration, it is perhaps easiest to review when a duty of fairness arises, then to look at the decision in *Baker*, and finally to outline some more specific circumstances that may apply within the charitable context in light of material already developed by the Department of Justice's Constitutional and Administrative Law Section regarding the development of regulatory laws.

The question as to when a general duty of fairness will arise was discussed by Justice L'Heureux-Dubé in *Board of Education of the Indian Head School Division 19 of Saskatchewan* v. *Knight* [1990] 1 S.C.R. 653. Justice L'Heureux-Dubé indicated that, "the existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of the decision on the individual's rights. This Court has stated in *Cardinal* v. *Director of Kent Institution* that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body."

The regulation of charities, and particularly decisions involving their registration or deregistration, implicate fairly important areas of public policy and social welfare. Further, the Canada Customs and Revenue Agency has final decision-making power (subject to judicial review or appeal), and it may be argued that the nature of these decisions can have important consequences with regard to the rights of the charitable organization and the individuals involved with it both as organizers and beneficiaries of the work the charity is involved in. It may be suggested, therefore, that these factors weigh in favour of the application of varying levels of procedural fairness within the regulation of charities, particularly where the decisions can involve the continued existence of the charity itself. The level of fairness demanded is considered in more detail in the decision of the Supreme Court in *Baker*.

[1] This paper was prepared at a time when the Table was considering the possibility of employing an administrative tribunal, in the administration of the compliance program

BAKER v. *CANADA*

The *Baker* case asked the Supreme Court to determine what level of procedural fairness was required in the consideration as to whether "humanitarian and compassionate" circumstances existed that might affect a decision to deport an individual.

After deciding that the decision in question was one to which procedural fairness requirements applied, Justice L'Heureux-Dubé went on to consider the factors that would affect the content of the duty of fairness. She indicated that while the level of fairness required needed to be determined in light of the facts of the particular case, that,

> "underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker." (p. 837)

The (non-exhaustive) list of factors outlined by Justice L'Heureux-Dubé was as follows:

(i) that the more the process of decision making resembled judicial decision-making, the more likely it would be that procedural protections similar to those of a trial-style proceeding would be required;
(ii) the nature of the statutory scheme, such as whether there is an appeal mechanism within the statute, or when a decision is a final determination of a matter;
(iii) that the greater the importance of the decision to the lives of the individual(s) affected, the greater the process safeguards that would be required;
(iv) that where a party has a 'legitimate expectation' surrounding the usual practices or promises to be followed by an administrative decision-maker, "fairness may require more extensive procedural rights than would otherwise be accorded" (p. 840) although such protections would be limited to procedural, and not substantive rights; and
(v) that some level of deference should be given to the procedures chosen by an administrative decision-maker, particularly where the statute provides for this, or where the agency has some particular expertise in determining procedures appropriate to it's mandate.

In applying these factors to the case in *Baker*, Justice L'Heureux-Dubé noted that where important interests of a party are affected, "in a fundamental way [they] must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered" (p. 843), although this could be addressed through written, as well as oral submissions depending on the circumstances.

She went on to state that while there is no traditional common law rule requiring the giving of reasons for administrative decisions, that giving reasons reduces, "the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal…" (Justice Estey in *Northwestern Utilities Ltd.* v. *City of Edmonton* [1979] 1 S.C.R. 684) Justice L'Heureux-Dubé emphasized that written reasons should be considered to be a requirement of procedural fairness where, "the decision has important significance for the individual, [or] when there is a statutory right of appeal…" (p. 848)

Finally, Justice L'Heureux-Dubé gives a lengthy perspective on the appropriate standard for courts in reviewing discretionary administrative decisions according to the "pragmatic and functional" approach to judicial review developed in *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048.

As outlined in this decision, all of these considerations would need to be taken into account in determining the appropriate levels of procedural fairness to be accorded to an individual or charity within the charitable regulatory scheme.

APPLICATION OF PROCEDURAL FAIRNESS PRINCIPLES TO THE PROPOSED COMPLIANCE PROGRAM

Tier 1 - Advice - Support

There would appear to be no issues raised at this point.

Tier 2 - Negotiated Settlements

This implies that both the regulator and the charity have had the opportunity to discuss the matter and 'make their case' and thus would likely not involve any procedural fairness issues beyond this.

Publicity

The sanctions paper indicates that the charity would be warned in advance of the proposed publicity and that the regulator would have "procedures in place to promptly correct published information", and that a charity could appeal to "the tribunal for a stay".

Depending on the perceived impact of such a publication on a given charity, it may be necessary to provide the charity with an opportunity to present submissions as to why the publicity sanction should not be imposed.

Tier 3 - Financial Penalties and Suspension

The sanctions paper indicates that these would be imposed by the tribunal only after the charity had had the opportunity to make submissions on the question, and that the charity would have an appeal to a court on questions of law or mixed law and fact.

If established, such a tribunal and its members would need to meet the requirements of being authorized by statute, hearing and considering the arguments of all parties involved, having the required level of independence, and being free from bias. Given the indication that an appeal mechanism would exist, it is likely that this would require a duty for the tribunal to give reasons for its decision as well.

Tier 4 - De-registration

The sanctions paper indicates that de-registration would only be imposed by the tribunal after submissions by the charity, and that an appeal would lie to a court on a question of law or mixed fact and law.

The procedural fairness requirements would be the same as under tier 3, and would likely be strictly examined by any reviewing court both due to the higher scrutiny given to the removal of rights and privileges and also because it is the heaviest sanction that could be imposed upon a charity.

Annulments

The sanctions paper indicates that an organization could appeal to the tribunal if it disagreed with the annulment by the regulator and that an appeal on questions of law, or mixed fact and law would lie to a court.

Given the experience in the field of citizenship law with moves to annul citizenship based on the submission of false information, it is possible that such a process would require the ability for the charity to make submissions and for the decision-maker to demonstrate that it had considered these arguments in making its decision. If the tribunal were involved, the procedural protections would apply as above. Further, if an appeal to a court were provided, this would likely require the provision of reasons both by the original decision-maker and also by the tribunal.

Orders

The sanctions paper indicates that an order would be issued by a tribunal and would have immediate effect but that the charity could apply for a stay.

The procedural fairness requirements would vary in accordance to what the order in question purported to do. Protections could include a delay in the operation of the order, a requirement that advance notice be given to the charity, that the regulator would be required to demonstrate

that it had complied with all legislative steps necessary for the issuance of an order, be subject to judicial review, etc.

DESIGNING REGULATORY LAWS THAT WORK, AND THE USE OF ADMINISTRATIVE MONETARY PENALTIES

Cease and Desist or Compliance Orders

It is suggested that any tribunal should have the power to order a group to cease and desist from conduct that violates the legislative scheme, or the ability to apply to a court for such an order. The procedural safeguards that would be necessary would vary according to the impact of the order, and may include a period of delay before the coming into effect of the order, the need for such an order to be open to court review, a notice requirement before the issuance of such an order, etc.

An order to comply with the legislative scheme is the positive equivalent of the cease and desist order, and would be subject to the same procedural safeguards.

Licence Suspension or Revocation

The ability to suspend or revoke a licence may be preceded by administrative warnings or modification of licence conditions and may entail the ability to require the charity to fulfill certain conditions before having the licence reinstated.

Such a capability creates substantial power in the hands of a regulator. It should be noted that courts will generally require strict compliance with procedural fairness where licence cancellation is proposed whether such procedural protections are provided in the legislation or not.

Enforcement of Administrative Orders

Legislation may provide for the regulator to apply to a court for an order to comply with requirements of the act. Failure to comply with such a court order would then constitute contempt of court.

Seizure/Forfeiture

In the charitable context, such a power may be necessary in extreme cases to prevent the dissipation of a charity's assets. The regulator would be required at a minimum to demonstrate that all legislative steps had been complied with before obtaining such an order.

Administrative Monetary Penalties (AMPs)

Where such a power is desired to be introduced into a regulatory scheme, the scheme will need to include the following:

1) a definition of the prohibitions to be dealt with as administrative violations;
2) adequate powers for the agency to detect violations;
3) a procedure for issuing a notice of violation and that the notice should include the options that are then open to the accused;
4) a process for evidentiary review;
5) enforcement powers; and
6) direction as to who is to assess any penalties, how this is to be done, and what review process may be available.

The use of AMPs and other non-criminal sanctions for regulatory offences is generally viewed to be in response to the inefficiency of attempting to utilize criminal prosecutions for such incidents. In assessing AMPs, legislation may permit the regulator to seek to recover costs caused by the prohibited conduct and to remove any economic benefit obtained. The intent of AMPs should be to act as a deterrent, and not as a punitive measure in order to protect against infringing upon the criminal law sphere.

In establishing an administrative scheme involving monetary penalties, questions that would need to be addressed include:

1) whether the penalty would be implemented by the regulator itself or a tribunal;
2) issues of what level of procedural fairness would be required regardless of who is applying the sanction:
3) the applicability of rights protected under the *Charter*, and/or the *Bill of Rights;* and
4) issues regarding onus and burden of proof in demonstrating that an offence has been committed as well as whether infractions would be determined on the basis of strict or absolute liability.