Federal Court  Cour fédérale

Date: 20120411

Docket: T-459-11

Citation: 2012 FC 407

Ottawa, Ontario, April 11, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MEGA INTERNATIONAL COMMERCIAL BANK (CANADA)

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of the decision of the Financial Consumer Agency of Canada (the "Agency" or "FCAC") dated January 10, 2011 whereby the Commissioner confirmed the finding of the Deputy Commissioner, dated November 22, 2010 that the Appellant, Mega International Commercial Bank (Canada) (the "Appellant" or "Mega"), has contravened subsections 6(2.1), (2.2) and (2.4) of the *Cost of Borrowing (Banks) Regulations*, SOR/2001-201 [*Regulations*] and imposed an administrative monetary penalty of $12,500.00.

1. Facts

[2] Mega is a chartered bank named in Schedule II to the *Bank Act*, SC 1991, c 46, and is a wholly-owned subsidiary of Mega International Commercial Bank Co. Ltd., an international bank based in Taipei, Taiwan. It serves the Chinese-speaking community through its Toronto head office and three additional branches located in Toronto and Vancouver.

[3] The Agency is an independent federal body created in 2001 pursuant to the *Financial Consumer Agency of Canada Act*, SC 2001, c 9 [*Act*], to consolidate and strengthen the oversight of consumer protection measures in federally regulated financial institutions and to expand consumer education in the financial sector. The Agency supervises and monitors Federally Regulated Federal Institutions ("FRFIs"), including domestic banks; foreign banks; foreign bank branches; federally incorporated or registered trust and loan companies; federally incorporated or registered life, property and casualty insurance companies; and retail associations.

[4] Pursuant to the *Financial Consumer Agency of Canada Designated Violations Regulations*, SOR/2002-101 [*Designated Violations Regulations*], a contravention of a "consumer provision" as defined in the *Act* is a violation of that *Act*. Among the provisions captured in the definition of "consumer provision" in the *Act*, is s. 454 of the *Bank Act*, the regulation-making authority pursuant to which the *Regulations* were made.

[5] Following the creation of the Agency in 2001, the *Regulations* were amended to implement the federal government's commitment to harmonize federal and provincial laws governing

disclosure in respect of the cost of consumer loans, lines of credit and credit cards. The Regulatory Impact Analysis Statement ("RIAS") relating to the 2001 amendments described the "Costs and Benefits" of the amendments as follows:

> The amended Regulations, in conjunction with equivalent rules to be implemented at the federal and provincial levels, will provide a level playing field among all financial institutions through uniform disclosure requirements in all jurisdictions. Standardized rules will make it easier for consumers to compare the costs of borrowing at different types of financial institutions.

[6] The *Regulations* were amended again on January 1, 2010. Those amendments were pre-published for public comment in the *Canada Gazette* on May 23, 2009 and published in the *Canada Gazette* on September 30, 2009. The 2010 amendments were intended to improve the clarity of consumer credit applications and contracts, by requiring all key information, such as interest rates, grace periods and fees, to be provided in information boxes set out at the beginning of applications and contracts for credit cards, loans and lines of credit.

[7] On October 2, 2009, the Agency sent an electronic information notice to all FRFIs regarding the 2010 amendments to the *Regulations*, informing them that they would be required to include information disclosure boxes in their disclosure documentation for lending products. The Agency included with its notice, a link to examples of information boxes that provided generic illustrations of the information boxes required by the *Regulations*. The boxes were to contain information such as interest rates, fees and penalties in a simple format at the beginning of each agreement, so that consumers would better understand the cost of borrowing. The October 2nd notice indicated that the Agency looked "forward to working with all FRFIs as they implement the new regulatory

requirements and guidelines", and concluded by inviting FRFIs having questions regarding the *Regulations*, to contact the FCAC's Compliance and Enforcement Branch.

[8] On November 3, 2009, the Commissioner sent a letter to all FRFIs, setting out the process that the Agency would follow to ensure compliance with the *Regulations*. The process contemplated three substantive steps:

a) By January 8, 2010, the Agency would provide a self-assessment compliance questionnaire to all FRFIs, to be completed and returned to the Agency within 2 weeks;

b) Any FRFI reporting that it was not fully compliant with *Regulations*, would be contacted by an Agency Compliance Officer to "discuss and clarify the issue"; and

c) The Agency would then assess what compliance actions were required, which "could include additional guidance from the FCAC to industry members, formal and/or informal compliance measures, or enforcement action".

[9] As previously mentioned, the amendments to the *Regulations* came into force on January 1, 2010. On January 7, 2010, the Agency sent the self-assessment questionnaire to all FRFIs. In respect of each section of the *Regulations*, the questionnaire required FRFIs to indicate whether it was "not applicable" or, if applicable, whether or not the FRFI was "fully compliant" with the *Regulations*.

[10] On January 21, 2010, the Appellant submitted its self-assessment to the Agency, advising that its information boxes were "fully compliant" with the *Regulations*. As the Appellant advised

the Agency that it was fully compliant, it was not contacted by the Agency to "discuss and clarify the issue".

[11] In a letter dated February 11, 2010, the FCAC requested that FRFIs which had self-assessed as fully compliant, provide the Agency with copies of their information boxes by February 22, 2010. The letter further stated:

> As part of our normal supervisory process, FCAC will continue to monitor any complaints we receive about your institution regarding any aspects of the new regulatory requirements. If such a situation arises, we will follow the normal FCAC compliance case process. The answers submitted in the self assessment questionnaire provided by your institution will be used to assist the officer in the consideration of that case.

[12] Mega submitted the required documentation on February 19, 2010. The Agency did not respond.

[13] On May 12, 2010, the Agency sent a letter to FRFIs, indicating that it had completed its assessment regarding compliance actions required to rectify any identified deficiencies, and reiterating that these actions could include additional guidance from the FCAC to industry members, formal and/or informal compliance measures, or enforcement action. Consistent with its Februray 11, 2010 letter to FRFIs, the Agency advised that it would not be providing draft reports regarding compliance with the *Regulations* to them for comment, because the facts used to prepare the reports had come from the FRFIs themselves (as opposed to from a third party complainant).

[14] On November 25, 2010, the Appellant received a Notice of Violation from the Agency stating that the Deputy Commissioner had "reasonable grounds to believe that the bank [had]

committed a violation" of the *Regulations* by failing to provide information boxes which complied with sections 6(2.1) and 6(2.4) of the *Regulations*. Included with the Notice was a detailed Compliance Report describing the basis of that belief. The Report stated that Mega a) does not have the prescribed left-hand side columns for mortgages and line of credit products as set out in the Schedules to the *Regulations*; b) added extra rows, changed the order of rows and changed the required terminology for the information box; and c) provided information boxes which omitted much of the required information in the right-hand side as set out in the Schedules.

[15] On December 16, 2010, Mega submitted written representations in response to the Notice.

2. The impugned decision

[16] On February 16, 2011, the Commissioner issued a Decision of Violation, confirming the Deputy Commissioner's Notice of Violation. After reviewing the facts and the key elements of the *Regulations*, she confirmed the decision of the Deputy Commissioner and found that Mega was not compliant with those *Regulations*. Her key findings are stated in the following paragraph:

> Mega did provide information boxes but the Bank deviated from the common format and language required by the *Regulations*. It used alternate terminology, left out some prescribed information and expanded or reorganized the information box material in ways not provided for by the *Regulations*. I do not disagree with the principle of giving information box treatment to matters other than that specified in the Schedules to the *Regulations*. But such treatment must be separate from and not take attention away from the format and all of the content of the required information boxes.

[17] As a result of the Appellant's violation of subsections 6(2.1), (2.2) and (2.4) of the *Regulations*, the Commissioner determined that all consumers entering into credit agreements did not benefit from a complete and accurate disclosure. The prescribed information enables consumers

to better understand their options in entering, renewing, renegotiating or refinancing a lending product. The Commissioner accepted the Appellant's submission that the actual number of affected consumers was minimal. Nevertheless, the Commissioner concluded that Mega was negligent in its failure to fully comply with the *Regulations* as they established a clear format and content requirements, and caused harm to its customers.

[18] Due to the Commissioner's belief that the Appellant made good faith efforts to comply with the *Regulations*, and that its actions and the prejudice to financial consumers were not grievous, she reduced the proposed monetary penalty from $25,000 to $12,500.

[19] On March 17, 2011, Mega filed a Notice of Appeal in this Court.

3. Issues

[20] Counsel for the Appellant and for the Respondent have submitted a number of issues to be determined on this appeal, the majority of which overlap. At the hearing, counsel for the Appellant indicated that he agreed with the following list of questions put forward by counsel for the Respondent:

a) What is the standard of review for the Commissioner's decision in this matter?

b) Was the Commissioner's decision made without according the Appellant procedural fairness?

c) Did the Commissioner err in concluding that the Appellant's information boxes violated the *Regulations*?

d) Did the Commissioner err in failing to properly apply the defence of justification or excuse?

e) Did the Commissioner err by failing to properly apply the defence of due diligence?

f) Did the Commissioner err in concluding that harm had been caused to the Appellant's customers by the Appellant's violation of the *Regulations?*

g) Did the Commissioner err in applying the criteria set out in section 20 of the *Act* before imposing a monetary penalty of $12,500.00?

4. The legislative and regulatory framework

[21] The relevant legislative and regulatory provisions are as follows:

Financial Consumers Agency of Canada Act, SC 2001, c 9	*Loi sur l'Agence de la consommation en matière financière du Canada*, LC 2001, c 9
"consumer provision" means	« disposition visant les consommateurs »
2. (a) paragraphs 157(2)(e) and (f), section 413.1, subsection 418.1(3), sections 439.1 to 459.5, subsections 540(2) and (3) and 545(4) and (5), paragraphs 545(6)(b) and (c), subsection 552(3) and sections 559 to 576.2 of the *Bank Act* together with any regulations made under or for the purposes of those provisions;	2. a) Les alinéas 157(2)e) et f), l'article 413.1, le paragraphe 418.1(3), les articles 439.1 à 459.5, les paragraphes 540(2) et (3) et 545(4) et (5), les alinéas 545(6)b) et c), le paragraphe 552(3) et les articles 559 à 576.2 de la *Loi sur les banques* et leurs règlements d'application éventuels;
…	…
3.(2) The objects of the Agency are to	3.(2) L'Agence a pour mission :
(a) supervise financial	a) de superviser les institutions

institutions to determine whether they are in compliance with

(i) the consumer provisions applicable to them, and

(ii) the terms and conditions or undertakings with respect to the protection of customers of financial institutions that the Minister imposes or requires, as the case may be, under an Act listed in Schedule 1 and the directions that the Minister imposes under this Act;

…

Regulations

19. (1) The Governor in Council may make regulations

(a) designating, as a violation that may be proceeded with under sections 20 to 31, the contravention of a specified consumer provision, or the non-compliance with

(i) a compliance agreement entered into under an Act listed in Schedule 1, and

(ii) terms and conditions, undertakings or directions referred to in subparagraph 3(2)(a)(ii).

(a.1) designating, as a violation that may be proceeded with under sections 20 to 31, the contravention of a specified provision of the *Payment Card Networks Act* or its regulations;

financières pour s'assurer qu'elles se conforment aux dispositions visant les consommateurs qui leur sont applicables, ainsi qu'à toutes conditions imposées par le ministre ou tous engagements exigés de sa part en vertu d'une loi mentionnée à l'annexe 1 relativement à la protection des clients des institutions financières ou à toutes instructions données par celui-ci en vertu de la présente loi;

…

Pouvoir réglementaire

19. (1) Le gouverneur en conseil peut, par règlement :

a) désigner comme violations punissables au titre des articles 20 à 31 la contravention à telle ou telle disposition visant les consommateurs, ainsi que le manquement :

(i) à un accord de conformité conclu en vertu d'une loi mentionnée à l'annexe 1,

(ii) à toute condition, à tout engagement ou à toute instruction visés à l'alinéa 3(2)a);

a.1) désigner comme violation punissable au titre des articles 20 à 31 la contravention à telle ou telle disposition de la *Loi sur les réseaux de cartes de paiement* ou de ses règlements;

(a.2) designating, as a violation that may be proceeded with under sections 20 to 31, the non-compliance with an agreement entered into under section 7.1;

a.2) désigner comme violation punissable au titre des articles 20 à 31 le manquement à un accord conclu en vertu de l'article 7.1;

…

…

Criteria for penalty

Critères

20. Except if a penalty is fixed under paragraph 19(1)(b), the amount of a penalty shall, in each case, be determined taking into account

20. Sauf dans le cas où il est fixé conformément à l'alinéa 19(1)b), le montant d'une pénalité est déterminé, dans chaque cas, compte tenu des critères suivants :

(a) the degree of intention or negligence on the part of the person who committed the violation;

a) la nature de l'intention ou de la négligence de l'auteur;

(b) the harm done by the violation;

b) la gravité du tort causé;

(c) the history of the person who committed the violation with respect to any prior violation or conviction under an Act listed in Schedule 1 within the five-year period immediately before the violation; and

c) les antécédents de l'auteur — violation d'une loi mentionnée à l'annexe 1 ou condamnations pour infraction à une telle loi — au cours des cinq ans précédant la violation;

(d) any other criteria that may be prescribed.

d) tout autre critère prévu par règlement.

…

…

Commission of violation

Violation

22. (1) Every contravention or non-compliance that is designated under paragraphs

22. (1) Toute contravention ou tout manquement désigné au titre de l'un des alinéas 19(1)a)

19(1)(a) to (a.2) constitutes a violation and the person that commits the violation is liable to a penalty determined in accordance with sections 19 and 20.

à a.2) constitue une violation exposant son auteur à une pénalité dont le montant est déterminé en conformité avec les articles 19 et 20.

Notice of violation

Procès-verbal

(2) If the Commissioner believes on reasonable grounds that a person has committed a violation, he or she may issue, and shall cause to be served on the person, a notice of violation.

(2) Le commissaire peut, s'il a des motifs raisonnables de croire qu'une violation a été commise, dresser un procès-verbal qu'il fait signifier à l'auteur présumé.

Contents of notice

Contenu du procès-verbal

(3) A notice of violation shall name the person believed to have committed a violation, identify the violation and set out

(3) Le procès-verbal mentionne, outre le nom de l'auteur présumé et les faits reprochés :

(a) the penalty that the Commissioner proposes to impose;

a) la pénalité que le commissaire a l'intention de lui imposer;

(b) the right of the person, within 30 days after the notice is served, or within any longer period that the Commissioner specifies, to pay the penalty or to make representations to the Commissioner with respect to the violation and the proposed penalty, and the manner for doing so; and

b) la faculté qu'a l'auteur présumé soit de payer la pénalité, soit de présenter des observations relativement à la violation ou à la pénalité, et ce dans les trente jours suivant la signification du procès-verbal — ou dans le délai plus long que peut préciser le commissaire — , ainsi que les modalités d'exercice de cette faculté;

(c) the fact that, if the person does not pay the penalty or make representations in accordance with the notice, the person will be deemed to have

c) le fait que le non-exercice de cette faculté dans le délai imparti vaut aveu de responsabilité et permet au commissaire d'imposer la

committed the violation and the Commissioner may impose a penalty in respect of it.

pénalité.

Payment of penalty

23. (1) If the person pays the penalty proposed in the notice of violation, the person is deemed to have committed the violation and proceedings in respect of it are ended.

Paiement

23. (1) Le paiement de la pénalité en conformité avec le procès-verbal vaut aveu de responsabilité à l'égard de la violation et met fin à la procédure.

Representations to Commissioner

(2) If the person makes representations in accordance with the notice, the Commissioner shall decide, on a balance of probabilities, whether the person committed the violation and, if so, may, subject to any regulations made under paragraph 19(1)(b), impose the penalty proposed, a lesser penalty or no penalty.

Présentations d'observations

(2) Si des observations sont présentées, le commissaire détermine, selon la prépondérance des probabilités, la responsabilité de l'intéressé. Le cas échéant, il peut imposer, sous réserve des règlements pris au titre de l'alinéa 19(1)b), la pénalité mentionnée au procès-verbal ou une pénalité réduite, ou encore n'imposer aucune pénalité.

Failure to pay or make representations

(3) A person who neither pays the penalty nor makes representations in accordance with the notice is deemed to have committed the violation and the Commissioner may, subject to any regulations made under paragraph 19(1)(b), impose the penalty proposed, a lesser penalty or no penalty.

Défaut de payer ou de faire des observations

(3) Le non-exercice de la faculté mentionnée au procès-verbal dans le délai imparti vaut aveu de responsabilité à l'égard de la violation et permet au commissaire d'imposer, sous réserve des règlements pris au titre de l'alinéa 19(1)b), la pénalité mentionnée au procès-verbal ou une pénalité réduite, ou encore de n'imposer aucune pénalité.

Notice of decision and right of appeal

(4) The Commissioner shall cause notice of any decision made under subsection (2) or (3) to be issued and served on the person together with notice of the right of appeal under section 24.

Avis de décision et droit d'appel

(4) Le commissaire fait signifier à l'auteur de la violation la décision prise au titre des paragraphes (2) ou (3) et l'avise par la même occasion de son droit d'interjeter appel en vertu de l'article 24.

Appeal to Federal Court

Appel à la Cour fédérale

Right of appeal

Droit d'appel

24. (1) A person on whom a notice under subsection 23(4) is served may, within 30 days after the notice is served, or within any longer period that the Court allows, appeal the decision to the Federal Court.

24. (1) Il peut être interjeté appel à la Cour fédérale de la décision du commissaire signifiée en conformité avec le paragraphe 23(4), et ce dans les trente jours suivant la signification de cette décision ou dans le délai supplémentaire que la Cour peut accorder.

Court to take precautions against disclosing

Huis clos

(2) In an appeal, the Court shall take every reasonable precaution, including, when appropriate, conducting hearings in private, to avoid the disclosure by the Court or any person of confidential information referred to in subsection 17(1) or (3).

(2) À l'occasion d'un appel, la Cour fédérale prend toutes les précautions possibles, notamment en ordonnant le huis clos si elle le juge indiqué, pour éviter que ne soient communiqués de par son propre fait ou celui de quiconque des renseignements confidentiels visés aux paragraphes 17(1) ou (3).

Powers of Court

Pouvoir de la Cour fédérale

(3) On an appeal, the Court may confirm, set aside or, subject to any regulations made under paragraph 19(1)(b), vary the

(3) Saisie de l'appel, la Cour fédérale confirme, annule ou, sous réserve des règlements pris au titre de l'alinéa 19(1)b),

decision of the Commissioner.	modifie la décision.
…	…
Due diligence available	Prise de précautions
28. (1) Due diligence is a defence in a proceeding in relation to a violation.	28. (1) La prise de précautions voulues peut être invoquée dans le cadre de toute procédure en violation.
Common law principles	Principes de la common law
(2) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence in relation to a consumer provision applies in respect of a violation to the extent that it is not inconsistent with this Act.	(2) Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une disposition visant les consommateurs s'appliquent à l'égard d'une violation sauf dans la mesure où ils sont incompatibles avec la présente loi.
Common law principles —	Principes de la common law —
Payment Card Networks Act	*Loi sur les réseaux de cartes de paiement*
(3) Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence in relation to a provision of the Payment Card Networks Act applies in respect of a violation to the extent that it is not inconsistent with this Act.	(3) Les règles et principes de la common law qui font d'une circonstance une justification ou une excuse dans le cadre d'une poursuite pour infraction à une disposition de la Loi sur les réseaux de cartes de paiement s'appliquent à l'égard d'une violation sauf dans la mesure où ils sont incompatibles avec la présente loi.

Financial Consumer Agency of Canada Designated Violations Regulations, SOR/2002-101	*Règlement sur les violations désignées (Agence de la consommation en matière financière du Canada)*, DORS/2002-101
Designation	Désignation
2. The following are designated as violations that may be proceeded with under sections 20 to 31 of the Act:	2. Sont désignés comme violations punissables au titre des articles 20 à 31 de la Loi :
(a) the contravention of any consumer provision; and	a) la contravention à toute disposition visant les consommateurs;
…	…
Cost of Borrowing (Banks) Regulations, SOR/2001-101	*Règlement sur le coût d'emprunt (banques)*, DORS/2001-101
6. (1) For the purpose of subsection 450(1) of the Act, a bank that grants credit must, in writing, provide the borrower with a disclosure statement that provides the information required by these Regulations to be disclosed.	6. (1) Pour l'application du paragraphe 450(1) de la Loi, la banque qui accorde un prêt doit remettre à l'emprunteur une déclaration écrite comportant les renseignements dont la communication est exigée par le présent règlement.
(2) A disclosure statement may be a separate document or may be part of a credit agreement or an application for a credit agreement.	(2) La déclaration peut être un document distinct ou faire partie de la convention de crédit ou de la demande de convention de crédit.
(2.1) For a disclosure statement that is part of a credit agreement in respect of a loan, a line of credit or a credit card or an application for a credit card,	(2.1) Dans le cas où la déclaration figure dans la convention de crédit portant sur un prêt, une marge de crédit ou une carte de crédit ou dans une

	demande de carte de crédit :
(a) the disclosure statement must be presented in a consolidated manner in a single location in that agreement or application; and	a) elle y est présentée d'un seul tenant;
(b) the applicable information box, as set out in one of Schedules 1 to 5, containing the information referred to in that Schedule, must be presented at the beginning of the agreement or application.	b) l'encadré informatif prévu à l'une des annexes 1 à 5, selon le cas, et contenant les renseignements visés à l'annexe applicable est présenté au début de la convention ou de la demande.

5. Analysis

a) What is the standard of review for the Commissioner's decision in this matter?

[22] Counsel for both parties agree, and properly so, that questions of procedural fairness are reviewable on the correctness standard (see, for ex., *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 and *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539). Accordingly, no deference is owed to the Commissioner if she infringed the Appellant's right to procedural fairness in coming to her decision.

[23] Counsel for the Appellant also agreed with counsel for the Respondent, at least in his oral submissions, that the applicable standard of review for all the other questions, with the exception of one, is the standard of reasonableness. The only question with respect to which there is a disagreement, therefore, is the one dealing with the defence of due diligence.

[24] It is by now well-established that there is often no need to proceed to a contextual analysis and to consider the factors identified in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. As recognized by the Supreme Court in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 [*Smith*] a reviewing judge may rely on the broad categories identified by *Dunsmuir*, above, to determine the relevant standard of review. As a result, the reasonableness standard will normally apply to a question related to (1) the interpretation of the tribunal's enabling or "home" statute or statutes closely connected to its function, with which it will have particular familiarity; (2) issues of fact, discretion or policy; or (3) a question of mixed law and fact (*Smith*, above at para 26).

[25] The first substantive issue listed above – did the Appellant's information boxes violate the *Regulations* – is clearly a question of mixed fact and law, as it requires the interpretation of the *Regulations* and their application to the facts of this case. As such, it is clearly reviewable on the standard of reasonableness. Moreover, the *Regulations* are closely connected to the Commissioner's functions under the *Act*, which is to protect the interests of consumers of financial services. The *Regulations* are part of a specialized regulatory regime over which the Commissioner has exclusive jurisdiction, and to that extent are akin to a "home" statute. Finally, it cannot be said that the interpretation of what is required under these *Regulations* is of central importance to the legal system. For all of these reasons, issue c), as well as issues d), f) and g), which are all issues of mixed law and fact, will be reviewed against the standard of reasonableness. Accordingly, this Court will only intervene if it can be shown that the decision of the Commissioner does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] The only remaining issue over which there is a disagreement as to the applicable standard of review is the one pertaining to the defence of due diligence. Counsel for the Appellant submitted that the Commissioner has not developed any expertise in that common law defence, and it should therefore be reviewed on the standard of correctness. I do not agree. There is no doubt in my mind that the applicability of a defence of due diligence raises legal issues that cannot easily be separated from the factual issues. Such issues clearly attract deference, and are not of the kind that fall within any of the categories which, under *Dunsmuir*, above, attract a standard of correctness. Indeed, the Commissioner's decision in that respect does not involve a constitutional matter or an issue of general law of central importance to the legal system as a whole, and it does not purport to draw jurisdictional lines between two or more competing specialized tribunals. As a result, I agree with the Respondent that this issue must also be reviewed against the standard of reasonableness.

b) Was the Commissioner's decision made without according the Appellant procedural fairness?

[27] The Appellant submits that the Agency failed to follow its established process of monitoring compliance to the new *Regulations* and therefore breached its duty of procedural fairness. Relying on the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Appellant argues, first and foremost, that the Agency breached Mega's legitimate expectation that its publicized process would be followed.

[28] Counsel for the Appellant relied heavily on the letter that the Commissioner sent to the FRFIs, dated November 3, 2009, which set out the process that it intended to follow in assessing contraventions to the *Regulations*. As previously mentioned in paragraph 8 of these reasons, the

Commissioner stated that 1) the Agency would circulate a self-assessment questionnaire which all FRFIs were to complete within two weeks; 2) the Compliance Branch would review the responses and a Compliance Officer would contact non-compliant institutions to discuss and clarify any issues; and 3) the Agency would then assess "what compliance actions will need to be taken to rectify any deficiencies" which could include additional guidance from the FCAC to industry members, formal and/or informal compliance measures, or enforcement action.

[29] The doctrine of legitimate expectations is an element of the principle of fairness. It is well established that fairness may require adherence to certain procedures when prior conduct creates for a person, a legitimate expectation that such procedures will be followed as a matter of course (see *Baker*, above at para 26; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 10, [2004] 2 SCR 650). If an administrative decision-maker states that it intends to follow a specified procedure, it will generally be unfair for it to act in contravention of representations as to procedure, unless that procedure conflicts with its duty. It is in the best interests of good administration and justice that promises made shall be kept. As Dubé J. stated in *Gaw v Canada (Commissioner of Corrections)* (1986), 2 FTR 122 at para 9, 36 ACWS (2d) 1: "[o]ne does not change the rules in the middle of the game…" (See also: *Martins v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 18, at para 5, 112 ACWS (3d) 556; *Basudde v Canada (Attorney Genera)*, 2002 FCT 782 at para 46, 222 FTR 115; *Brunico Communications Inc v Canada (Attorney General)*, 2004 FC 642 at para 20, 252 FTR 146).

[30] In his oral submissions, counsel for the Appellant argued it was implicit that the Agency would work with the banks and consult with them, even though there were no explicit

representations to that effect. Counsel for the Appellant further submitted that the Agency opted not to communicate with Mega, despite its assessment that Mega was non-compliant, thereby contravening step two of its established procedure as described above. Having carefully reviewed both the November 3, 2009 letter and the entire record, I am unable to find any commitment by the Agency, either explicit or implicit, upon which Mega could rely in support of its expectation that it would have an opportunity to remedy any deficiencies in its information boxes, prior to the issuance of a Notice of Violation. Quite to the contrary, I find that the Agency followed the process it committed to follow in its November 3, 2009 letter.

[31] Nowhere did the Agency state that it would be in touch with all FRFIs, in all circumstances, upon receipt of their self-assessment questionnaires. There would have been no point in consulting those FRFIs which had indicated that they were fully compliant with the *Regulations*. In fact, as pointed out by the Respondent, even those FRFIs which declared themselves "not fully compliant" and who therefore would have had a legitimate expectation to be contacted by the Agency, could not have had a legitimate expectation that they would be able to rectify any compliance issues before a Notice of Violation would be issued. As mentioned above, enforcement action was one of the compliance actions that could be taken by the Agency to rectify any deficiencies identified on the basis of the responses received.

[32] At best, the November 3, 2009 letter can be described as ambiguous, as conceded by counsel for the Respondent. However, when read in the broader context of the February 11 and May 12, 2010 letters, the picture that emerges is clearer: nowhere do we find in these letters a clear and unequivocal statement indicating that if an FRFI's information boxes are found to be non-

compliant, the FRFI will be contacted by the Agency and given an opportunity to correct any problem before a Notice of Violation is issued. The fact that Mega's representatives may have thought they would be contacted before a Notice of Violation was issued, is not sufficient for a legitimate expectation to arise. As the Federal Court of Appeal stated in *Genex Communications Inc v Canada (Attorney General)*, 2005 FCA 283 at para 193, [2006] 2 FCR 199:

> For the doctrine to operate, the agency's conduct in the exercise of its discretion "including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified" must have induced in the complainant a reasonable expectation that it will retain a benefit or be consulted before a contrary decision is taken: see Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539, at paragraph 131.

[33] Moreover, the duty of fairness is flexible and depends on an appreciation of the context of the particular statute and the rights affected. As such, several factors are relevant to determining the content of the duty of fairness, of which the legitimate expectations of the individual or corporation challenging the decision is only one among others. Of equal importance will be the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute pursuant to which the body operates, the importance of the decision to the individual or individuals affected, and the choices of procedure made by the agency itself (*Baker*, above at paras 21ff).

[34] The Appellant made much of the fact that the Agency's decision had the potential to negatively impact its reputation. Counsel contended that the stigma of violating a government statute is more damaging than a finding of liability as against an opposing party in an adversarial dispute.

[35] While corporations no doubt face potential economic consequences as a result of a regulatory board decision, and may even lose goodwill associated with their name, these consequences are not on a par with the impact a decision may have on the reputation of an individual and its attendant consequences, both in terms of dignity and livelihood. In that respect, it is quite telling that the Supreme Court only referred to the importance of the decision to the individual or individuals affected in *Baker*. As a result, I agree with the Respondent that corporations are not entitled to the same level of procedural fairness as individuals, and that tribunals charged with regulating economic activity are not held to the same standards as tribunals dealing with personal individual rights (see *Ciba-Geigy Canada Ltd v Canada (Patented Medicine Prices Review Board (T.D.)*, [1994] 3 FC 425 at para 23, aff'd in 83 FTR 2 n at para 8; See also *Sheriff v Canada (Attorney General)*, 2006 FCA 139 at para 30).

[36] Moreover, the Commissioner indicated in her decision that she did not intend to make her decision public, despite s. 31 of the *Act* permitting it. The fact that the Appellant violated the *Regulations* would therefore not have been known, had it not been for the fact that it decided to bring this appeal. It may therefore be said that, to some extent, any damage to the Appellant's reputation was self-inflicted.

[37] As for the nature of the decision and the process followed, the Appellant argues in favour of a high duty of fairness because the decision of the Commissioner is final and the monetary penalty is akin to a criminal fine. On the other hand, the Respondent submits that the Agency operates in an administrative manner which warrants a "less content-rich" level of procedural fairness.

[38] Even though the Commissioner's decision is final, the Appellant omits the fact that the Deputy Commissioner initially issued a Notice of Violation and granted the Appellant the opportunity to submit representations with respect to the violation, before the Commissioner issued her final decision. The Notice of Violation is not the equivalent of a finding of violation. In response to that Notice of Violation, the Appellant provided a detailed, 6-page submission to the Commissioner. The process followed by the Commissioner was consistent with sections 22 and 23 of the *Act*, and ensured that the Appellant knew the case it had to meet and had a full opportunity to respond to that case.

[39] I also agree with the Respondent that the process before the Commissioner does not resemble a court proceeding and is more akin to a regulatory/administrative process. The *Act* does not provide for or contemplate the filing of evidence, cross-examinations or oral hearings. The Commissioner is an expert tribunal, with the mandate to regulate a narrow sphere of economic activity. The Agency is not court-like in form or substance.

[40] Finally, I disagree with the Appellant's argument that an administrative penalty is necessarily similar to a criminal fine. This argument is not supported by case law. In order to determine if an administrative penalty amounts, in reality, to a penal sanction, one must review the objective of the Act, the purpose of the sanction and the process leading to the imposition of the sanction (*Martineau v Canada (Minister of National Revenue – M.N.R.)*, 2004 SCC 81 at para 24, [2004] 3 SCR 737). In my opinion, the nature of the administrative process is, *prima facie*, for the protection of the public in accordance with Parliament's policy decision (*R v Wigglesworth*, [1987]

2 SCR 541 at p 560). The Appellant has not submitted any evidence or presented any argument to the contrary.

c) Did the Commissioner err in concluding that the Appellant's information boxes violated the *Regulations*?

[41] The Appellant does not argue that its boxes contain all of the information contemplated by Schedules 1, 2 and 3 of the *Regulations*, or that the format of its boxes is the same as the format of the boxes set out in the Schedules. Rather, the Appellant takes issue with the Commissioner's interpretation of the *Regulations*, arguing that they provide FRFIs with discretion to decide on the formatting and content of their boxes.

[42] The Appellant argues that it adopted an interpretation of the regulatory scheme which was plausible on a plain reading of the text. It interpreted "the" in paragraph 6(2.1)(b) and 6(2.2)(b) of the *Regulations* as relating to "applicable" rather than to "information box". It also submitted that the language of paragraph 6(2.4) allows some discretion in the format of the information boxes as the specific format of the boxes provided in the Schedule were not mandatory. Finally, Mega relied on the Agency's October 2nd Notification, wherein the Agency provided what it stated were "examples of information boxes" which contained "generic illustrations of how the information boxes could appear … and what content should be included"; this would suggest that the information boxes were not prescribed, as the language is permissive rather than mandatory.

[43] While attractive, these arguments cannot be sustained. I am unable to agree with Mega that the language of the *Regulations* is permissive or discretionary. Quite to the contrary, s. 6(1) states

that banks granting credit "must" provide borrowers with disclosure statements which include an "information box" setting out certain key information. Schedules 1 through 5 then go on to set out in precise detail, the form and content the information boxes must have with respect to five types of credit agreements. Contrary to the permissive language used elsewhere in the *Regulations*, there is nothing permissive in s. 6(2.1)(b) and 6(2.2)(b), according to which an FRFI's information boxes "as set out in one of Schedules 1 to 5, containing the information referred to in that Schedule, must be presented at the beginning of the agreement or application". By way of example, this is to be contrasted with the use of the word "may", in paragraphs 6(2) and 6(3).

[44] The Schedules themselves are highly detailed and prescribed a particular form with specific information and terms. This would suggest that banks cannot pick and choose what information will be provided. The *Regulations* go as far as specifying the font sizes, spacing, margins, etc. that must be used in the information boxes (s. 6(2.4)), and is a further indication that banks are expected to adhere to a prescribed protocol in order to ensure uniformity of presentation.

[45] I agree with the Respondent that this reading of the *Regulations* is also consistent with the scheme of the regulatory regime that the Agency administers; one of the primary purposes being to ensure that consumers have the best information possible to allow them to make informed product choices. In the event that banks were allowed to use their own languages or even to order the boxes in a different way, consumers would be left with a much more complicated task when comparing costs of borrowing at different types of financial institutions. Accordingly, I find that a strict reading of the *Regulations* is more consistent with the overriding purpose of the *Act* and the *Regulations*.

[46] It is true that the October 2, 2009 letter from the Agency to FRFIs, suggests a certain degree of discretion in implementing the new *Regulations*. However, the language of that letter cannot supersede the legally-binding, unequivocal and mandatory nature of the *Regulations*. If Mega had any doubt as to what was required, it could easily have picked up the phone and requested information from the Agency. It was clearly neither prudent nor reasonable to rely on the ambiguous language of a single letter instead of complying with the clear stipulations of the *Regulations*.

[47] Having found that the Commissioner's interpretation of the *Regulations* was reasonable and, I dare say, correct, it is clear and undisputed that the Appellant's information boxes failed to comply with the *Regulations* in a number of ways. As found by the Commissioner, the Appellant's information boxes omitted much of the information required by Schedules 1, 2 and 3 of the *Regulations*; did not have the prescribed left-hand column as set out in Schedules 1, 2 and 3; and included extra rows, re-ordered rows and employed terminology that was different than that set out in the relevant schedules.

d) Did the Commissioner err in failing to properly apply the defence of justification or excuse?

[48] Relying on section 28(2) of the *Act*, which preserves the common law principles of justification and excuse as defences to alleged violations, the Appellant initially submitted in its written representations, that it meets the two-fold test of that defence, as developed in *R v Sault Ste. Marie (City)*, [1978] 2 SCR 1299 [*Sault Ste. Marie*] and *Résidences Majeau Inc v Canada*, 2010 FCA 28.

[49] At the hearing, however, counsel for Mega readily admitted that it could not rely on that defence, as the Appellant's misinterpretation of the *Regulations* is an error of law and not an error of fact. This is clearly the correct approach to take. Ignorance of the law cannot be an excuse. Counsel for the Respondent aptly drew the Court's attention in that respect to the decision of the Federal Court of Appeal in *Corporation de l'École Polytechnique v Canada*, 2004 FCA 127 at para 38, 132 ACWS (3d) 689 [*École Polytechnique*], where Justices Létourneau and Décary (for a unanimous Court) stated:

> This brief review of the legislation and case law leads to the following conclusion. Apart from exceptions, mistakes in good faith and reasonable mistakes of law as to the existence and interpretation of legislation are not recognized as defences to criminal offences, nor to strict liability offences or prosecutions governed by the rules applicable in strict liability.

e) Did the Commissioner err by failing to properly apply the defence of due diligence?

[50] Counsel for the Appellant argued that Mega exercised due diligence, which is a defence pursuant to s. 28(1) of the *Act*. It is claimed that the Chief Compliance Officer notified senior management and functional management at its four Canadian branches of the new requirements, that it modified its existing information boxes and agreements, and that all four Canadian branches reviewed the revised documents. The Appellant also developed and executed an implementation plan within the implementation start date of January 1, 2010, and participated in all monitoring activities required by the Agency. Finally, the Appellant translated and modified some wording in its new documents to ensure adequate translation in Chinese, the language of its clients.

[51] Unfortunately for the Appellant, these steps fall far short of demonstrating due diligence. This defence was articulated in *Sault Ste. Marie*, above at pp 1325-6 and will be available if it can be established that all reasonable steps to avoid a particular event have been taken. Various courts have noted that it is a heavy burden to meet (see, for ex., *Samson v Canada (Minister of National Revenue – M.N.R.)*, 2007 FC 975 at paras 35-36, 170 ACWS (3d) 67). In particular, it will not be sufficient to plead that an error has been made in good faith or that a party had no intention to infringe a statute (see *Canada (Superintendant of Bankruptcy) v MacLeod*, 2011 FCA 4, at para 34, 330 DLR (4th) 311; *École Polytechnique*, above at para 29). Similarly, the evidence presented to support this defence must relate to the specific offence at issue, and cannot merely establish that the party was generally acting lawfully. As the Ontario Court of Appeal stated in *R v Raham*, 2010 ONCA 206 at para 48, 99 OR (3d) 241:

> The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant's conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he or she was acting lawfully in a broader sense.

[52] In the present case, the Commissioner could reasonably conclude that not all reasonable steps have been taken to avoid the violation of the *Regulations*. The Appellant had a number of months within which to make the necessary amendments. However, the steps taken by the Appellant to comply with the new *Regulations* raise more questions than the Appellant cared to provide. The only steps identified by the Appellant were a review of the revisions to the Appellant's information boxes by senior management and functional managers in the Appellant's Toronto and Vancouver business units. In addition, a report to the Appellant's board of directors in mid-March 2010, some two and a half months after the *Regulations* came into force, simply confirmed the Appellant's belief that its information boxes were compliant.

[53] These steps do not provide many specifics as to what exactly the Appellant did, who did it, what expertise the Chief Compliance Officer and the senior management had in addressing and implementing the *Regulations*, on what basis they reached the view that the information boxes complied with the requirements of the *Regulations*, why they did not seek the Agency's input to ensure compliance when amending its information boxes, etc. This is a far cry from what a defence of due diligence requires. It substantiates the Appellant's claim that it made a good faith effort to comply with the information box requirements and had no intention of violating the *Regulations*, as found by the Commissioner. However, this is not sufficient to establish due diligence, which entails proof that the Appellant took all reasonable care to avoid committing the offence with which it is charged.

[54] It is true, as contended by the Appellant, that the Commissioner did not discuss the defence of due diligence in its decision. There was no need to do so once negligence had been established, since negligence amounts to a lack of due diligence. As the Supreme Court stated in *R v Chapin*, [1979] 2 SCR 121 at p 134:

> In my view the offence created by s. 14(1) is one of strict liability. It is a classic example of an offence in the second category delineated in the *Sault Ste. Marie* case. An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent.

f) Did the Commissioner err in concluding that harm had been caused to the Appellant's customers by the Appellant's violation of the *Regulations?*

[55] Counsel for Mega argued that the Commissioner erred in law in concluding that harm had been caused to Mega's customers, as there was no evidence that harm had occurred. Concluding that consumers did not receive the benefit of complete and accurate disclosure as set out in the *Regulations*, as did the Commissioner, does not amount to a finding of harm on a balance of probabilities. As there was no evidence that any customers were actually harmed by Mega's first version of information boxes, the Commissioner could not conclude that Mega's violations of the *Regulations* caused harm to its consumer clients.

[56] I agree with the Respondent that this is a much too narrow interpretation of harm. The *Regulations* are akin to consumer protection provisions, and their purpose is to provide customers with better information regarding financial products offered by competing banks, so that they are in a position to make informed choices. As such, it can be presumed that harm is established whenever a bank does not adhere to the requirements of the *Regulations*, thereby depriving their consumers of the information and disclosure to which they are entitled.

[57] The *Regulations* would lose much of their impact if harm had to be individualized and quantified, before a bank could be found in violation of its provisions. Such a prerequisite imposes an unduly heavy burden on the Agency, fails to recognize that harm in this context is hard to measure, and does not take into account that regulatory measures of this kind, are aimed at fostering the public good and a more leveled playing ground for customers of powerful financial institutions. It is indeed significant that the relevant provisions of the *Regulations* do not list actual harm to consumers as an element of the offence. As was found by the Federal Court of Appeal with respect to paragraph 74.01(1)(a) of the *Competition Act*, RSC 1985, c C-34 dealing with false or misleading

advertisements made to the public, I am of the view that whenever a breach of the *Regulations* has been made, there is *per se* harm to the consumers (see *Canada (Commissioner of Competition) v Premier Career Management Group Corp,* 2009 FCA 295 at paras 61-62, [2010] 4 FCR 413).

g) Did the Commissioner err in applying the criteria set out in section 20 of the *Act* before imposing a monetary penalty of $12,500.00?

[58] Finally, counsel for the Appellant submitted that the Commissioner erred in imposing an administrative monetary penalty on Mega. Relying on s. 20 of the *Act*, which sets out the criteria that the Agency must consider when deciding whether to impose a penalty, counsel argued that the Commissioner did not take into account the absence of harm, negligence, intention or prior violations and should not have penalized the Appellant.

[59] The Commissioner canvassed each of the above-mentioned factors enumerated in the *Act*, in reaching her decision. As was previously found, the Commissioner could reasonably determine that harm was done and that Mega was negligent. She also came to the conclusion that Mega has had no violations, they made a good faith effort to comply with the information box requirements and it was not their intention to be non-compliant. It is precisely because of her view that Mega's actions and the prejudice to financial consumers was not grievous, that she decided to reduce the penalty of $25,000 proposed by the Deputy Commissioner to $12,500, thereby cutting it by half.

[60] This kind of discretionary decision should not be reversed on appeal unless the reviewing court is convinced that it is not fit or clearly unreasonable. There is no basis to reach that conclusion in this case.

6. Conclusion

[61] For all of the foregoing reasons, the appeal is therefore dismissed and the decision of the Commissioner is upheld, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed, with costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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