Federal Court of Appeal  Cour d'appel fédérale

Date: 20180813

Docket: A-168-17

Citation: 2018 FCA 150

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

VIOLATOR NO. 10

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montreal, Quebec, on April 18, 2018.

Judgment delivered at Ottawa, Ontario, on August 13, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: NADON J.A.
BOIVIN J.A.

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PUBLIC VERSION OF REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant is appealing the decision rendered by Justice Gagné (the judge) of the Federal Court on April 27, 2017 (2017 FC 416). The Federal Court found that the deputy director of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) did not make a reviewable error in finding that the appellant had committed three violations of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the Act). However, it

decided to vacate the administrative monetary penalty that had been imposed on the appellant and return the file to the deputy director of FINTRAC for redetermination of this issue only. This appeal concerns only the Federal Court's decision to confirm the three violations.

[2] For the reasons that follow, I am of the opinion that the Federal Court did not err in finding that the deputy director's decision was not unreasonable, and that there was no breach of the principles of procedural fairness in the process by which that decision was made.

I. THE FACTS

[3] FINTRAC was established under section 41 of the Act. Subsection 40(*b*) provides that its object is to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities. To this end, FINTRAC collects and analyzes information concerning certain financial transactions that it considers relevant to money laundering activities or the financing of terrorist activities and may disclose this information to the appropriate police force and to other agencies listed in subsection 55(3) of the Act.

[4] The Act provides that the entities listed in section 5, [redacted], are required to put in place certain mechanisms and programs, keep certain records, and produce various reports to FINTRAC with respect to financial transactions carried out in the course of their activities. Section 7 provides, among other things, that entities subject to the Act must report every financial transaction in respect of which there are "reasonable grounds to suspect that the transaction is related to the commission . . . of a money laundering offence . . . [or] a terrorist activity financing offence."

[5] Given the crucial role reporting entities play in the collection of the information necessary for the effective operation of the system, section 62 of the Act provides that FINTRAC may take compliance measures and examine the records and inquire into the business and affairs of any of these entities for the purpose of ensuring compliance with their obligations under the Act. If, after such an examination, FINTRAC believes that there are reasonable grounds to suspect that the entity has violated its legal obligations, the Act enables FINTRAC to issue a notice of violation identifying the violation(s) that the entity examined is accused of and the penalty that FINTRAC intends to impose (see subsection 73.13(2) and section 73.14 of the Act). The notice of violation also specifies the right of the entity to make representations to the director of FINTRAC (subsection 73.13(1)).

[6] If the entity makes representations, the director of FINTRAC shall decide, on a balance of probabilities, whether the Act was violated and, if so, the amount of the penalty to be imposed (subsection 73.15(2)). The amount of the penalty is determined taking into account that penalties have as their purpose to encourage compliance with the Act rather than to punish, the harm done by the violation and any other criteria prescribed by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, S.O.R./2007-292 (the Regulations).

[7] The facts giving rise to this appeal are not in dispute and can be briefly summarized.

[8] In a letter dated March 15, 2012, the appellant was informed that its establishments would be subject to a compliance examination under section 62 of the Act. That examination

took place in the four establishments in question between May 1 and May 11, 2012, and covered the period from July 1 to December 31, 2011.

[9] Following the examination, FINTRAC officials met with the appellant's employees on September 6, 2012, for a closing interview to explain to them the problems identified and answer their questions. The appellant was then notified of the findings of the compliance examination in a letter dated November 16, 2012. The letter identified four problems, which had been discussed during the exit interview.

[10] On January 7, 2013, the appellant wrote to FINTRAC to request clarifications on two of the problems identified in the findings letter. FINTRAC responded to that request for clarification on January 16, 2013. The appellant then submitted a reply to the compliance examination letter, in which it made representations concerning the four problems identified and submitted an action plan for each problem.

[11] After considering the appellant's reply, FINTRAC issued a notice of violation on September 12, 2013, in which three of the violations were retained. The notice of violation also specified the amount of the administrative monetary penalty that FINTRAC proposed to impose and informed the appellant that it had 30 days to make written representations to the director of FINTRAC.

[12] On September 25, 2013, the appellant wrote to FINTRAC and submitted that the level of detail provided in the compliance examination letter and the notice of violation was insufficient

to allow it to understand the basis of the decision and to review the notice of violation. The appellant requested all of the documents and information used in FINTRAC's decision-making process as well as an extension of time for making representations to the director. FINTRAC refused the appellant's requests in a letter dated October 1, 2013, on the grounds that the appellant had been informed repeatedly during the examination process of the problems FINTRAC officials had identified and therefore had in its possession all of the information necessary for making its representations. The appellant consequently made its written representations and attached numerous documents and a book of authorities on October 15, 2013.

[13] The deputy director of FINTRAC, to whom the director had delegated decision-making authority, examined the appellant's representations and made her decision on January 10, 2014. She concluded that the appellant had committed the three violations identified in the notice and imposed an administrative monetary penalty of [redacted]. It is that decision by the deputy director that the appellant appealed before the Federal Court under section 73.21 of the Act.

II. Impugned decision

[14] In Federal Court, the appellant argued that the deputy director's decision had been made in breach of the principles of procedural fairness because the deputy director lacked the necessary independence and the appellant was not provided with all of the evidence. After noting that the violations the appellant was accused of were administrative rather than criminal, that the process followed was more akin to an administrative process than a judicial process, that the Act provides for an appeal and that corporations are not entitled to the same level of procedural

fairness as individuals, the Federal Court nevertheless concluded that the duty of procedural fairness was “moderate” given the significance of the maximum penalties set out in the Act.

[15] In applying that standard, the Federal Court stated that it was of the opinion that the mere delegation of tasks by an administrative decision-maker was not sufficient to demonstrate a lack of independence; the fact that the deputy director retained the recommendation as submitted does not mean that she did not personally examine the file or that the resulting conclusions were not her own.

[16] As for the disclosure of the evidence, the Federal Court found that it was adequate. The appellant alleged that it had not been provided with the details of the suspicious transaction a client had participated in on August 31, 2011, which apparently prevented it from adequately defending itself on this violation of the Act. However, the Federal Court noted the many opportunities the appellant had to obtain information about the allegations against it and to ask questions about them. The Court found that the written representations the appellant submitted to the deputy director clearly showed that it had had the opportunity to make full answer and defence concerning the problems identified by FINTRAC in its examination.

[17] The appellant also argued that the deputy director’s findings were unfounded and unreasonable because it had exercised due diligence in fulfilling its obligations. On the basis of consistent case law to the effect that the burden of establishing this defence is significant, the Federal Court examined each of the three violations and found that the appellant had not demonstrated that it had taken all of the necessary precautions to ensure compliance with the

requirements of the Act. It was not sufficient to fulfill most of these requirements; it also had to demonstrate that it had taken reasonable measures to avoid committing the violations it was accused of.

[18] Nevertheless, the Court ultimately found that the penalty the deputy director imposed had to be vacated and that the file had to be returned to her for redetermination. The Federal Court found that the methodology FINTRAC used to determine the penalties had the same flaws as those this Court identified in *Canada v. Kabul Farms Inc.*, 2016 FCA 143, [2016] F.C.J. No. 480 (Q.L.) [*Kabul Farms*], since it was impossible to determine whether an intelligible, transparent and justifiable decision-making process preceded the imposition of penalties. This aspect of the Federal Court decision is not disputed before this Court.

III. Issues

[19] The issues the parties raise are essentially the same. I will adopt the wording suggested by the respondent and will summarize the issues as follows:

A. What standard of review should be applied to the deputy director's decision in this case?
B. Is the deputy director's decision unreasonable?
C. Was there a breach of the principles of procedural fairness in the process that resulted in the decision under appeal?
D. Did the deputy director commit a reviewable error in finding that the appellant had committed the three violations at issue, namely in the application of the due diligence defence?

IV. Analysis

A. *What standard of review should be applied to the deputy director's decision in this case?*

[20] Both parties agree on the applicable standards of review. Given that the statutory appeal in Federal Court from the deputy director's decision can be likened to a judicial review, it is appropriate first to verify whether the judge correctly identified the standard of review and second to determine whether she applied it correctly: see *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paragraph 38, [2015] 2 S.C.R. 3; *Violator No. 10 v. Canada (Attorney General)*, 2016 FCA 42 at paragraphs 8-9, [2016] F.C.J. No. 176 (Q.L.); *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraph 18, 386 N.R. 212; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 45-47, [2013] 2 S.C.R. 559. Moreover, I note that this is the approach taken by this Court and the Federal Court in the specific context of appeals from FINTRAC decisions: see *Max Realty Solutions Ltd. v. Canada (Attorney General)*, 2014 FC 656 at paragraph 31, 458 F.T.R. 160; *Homelife/Experience Realty Inc. v. Canada (Finance)*, 2014 FC 657 at paragraph 31, 458 F.T.R. 180; *Max Realty Solutions v. Canada (Financial Transactions and Reports Analysis Centre)*, 2016 FC 620 at paragraph 4; *Kabul Farms Inc. v. Canada*, 2015 FC 628 at paragraph 28, aff'd. *Kabul Farms Inc.* at paragraph 7.

[21] In this case, I think that the judge was correct to apply the correctness standard of review to the issues of procedural fairness. These are issues where deference is not required: *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 S.C.R. 502. In fact, as this Court recently noted in *Canadian Pacific Railway Company v. Canada (Attorney General)*,

2018 FCA 69, the question of whether the requirements of procedural fairness have been met does not lend itself well to an analysis based on the choice of a standard of review, to the extent that procedural fairness concerns the way in which an administrative decision-maker arrived at a decision, whereas the standard of review is instead related to the outcome of the decision-maker's deliberations. Consequently, an administrative decision-maker is not entitled to make a mistake in this regard.

[22] The judge was also justified in applying the reasonableness standard of review to the deputy director's decision on the commission of the violations and the due diligence defence. To arrive at her conclusion, the deputy director had to analyze the specific facts of this case on the basis of the extensive knowledge she acquired of the specialized regime of the Act. That decision is entitled to deference and can be invalidated only if it can been demonstrated that it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law or if it does not have the qualities that make a decision reasonable (justification, transparency and intelligibility): see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190.

B. *Is the deputy director's decision unreasonable?*

[23] In its memorandum, the appellant argued that the judge erred by failing to consider the fundamental nature of the Act in her analysis. According to the appellant, the Act is based on a cooperative approach between FINTRAC and the reporting entities, which is inconsistent with the accusatory and contradictory process FINTRAC officials followed in the compliance examination in this case. However, in no way does the appellant specify how this alleged flaw

might undermine the deputy director's decision, and it did not return to this argument at the hearing. I also note that this argument was not raised in the notice of appeal.

[24] Regardless, I consider this claim to be without merit. While FINTRAC's *Examination Handbook for Compliance Officers* acknowledges the need to maintain constructive relationships with reporting entities, the fact remains that section 62 of the Act provides for compliance measures pursuant to which the FINTRAC director may issue a notice of violation if there are reasonable grounds to believe that a violation of the Act has been committed (section 73.13 of the Act). In my opinion, these two aspects of the Act (collaboration and penalty for a violation) are complementary and necessary for meeting Parliament's objectives.

[25] The appellant also criticizes the deputy director and the Federal Court for failing to consider an audit report from the Office of the Privacy Commissioner (the Office of the Commissioner), according to which FINTRAC's database contains more personal information than required for the performance of its mandate. The appellant argues that this report justified the prudence it showed before filing a suspicious transaction report.

[26] Once again, this argument does not hold water. The fact that the Privacy Commissioner may have had concerns about the appropriateness of FINTRAC accepting and retaining personal information in its database is in no way relevant to the issue of whether the appellant was justified in failing to report a suspicious transaction in this case. In fact, the examples provided by the Office of the Commissioner to support its concerns were related to transactions with a value that did not exceed $10,000 or did not clearly show reasonable grounds to suspect that the

transactions at issue were associated with money laundering or the financing of terrorist activities. Such is not the case here.

[27] In short, I find that the judge was justified in dismissing the appellant's first argument.

C. *Was there a breach of the principles of procedural fairness in the process that resulted in the decision under appeal?*

[28] The appellant's main argument before both the Federal Court and this Court concerns procedural fairness. First, it argues that the judge erred by stating that FINTRAC's duty of procedural fairness to the appellant was "moderate" and cites *Kabul Farms* and *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 [*Maple Lodge*] to demonstrate that it should have been entitled to a high level of procedural fairness. It continues by claiming that if the judge had correctly identified the level of procedural fairness it was entitled to expect, she would have necessarily concluded that the deputy director did not conduct an independent examination of its case and that it was not afforded a complete disclosure of the evidence.

[29] *Maple Lodge* can be dismissed from the outset because the violations at issue in that case were absolute liability violations for which a defence of due diligence cannot be made. In this case, section 73.24 of the Act expressly provides that due diligence is a defence in a proceeding in relation to a violation identified by FINTRAC, and this is one of the arguments the appellant raises to attack the decisions of the deputy director and of the Federal Court. Clearly, the

requirements of procedural fairness will be higher when such a defence is unavailable, but that is not the case here.

[30] As the Supreme Court has reiterated numerous times, the rules of natural justice and the duty to act fairly are variable standards, the content of which depends on the circumstances of the case, the applicable statutory scheme, the nature of the interests at stake and the issues to be decided: *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at paragraph 22, 140 D.L.R. (4th) 577; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 682, 69 D.L.R. (4th) 489; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at pages 895-896, 62 D.L.R. (4th) 385. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*], the Supreme Court specified (non-exhaustively) the factors that may be considered in determining the requirements of procedural fairness in a given situation.

[31] As previously mentioned, the Federal Court considered those factors in its analysis of the content of the duty to act fairly. Consisting of the nature of the decision sought and the process followed to arrive at that decision, the judge noted that the appellant's alleged violations are administrative rather than criminal. The Act clearly provides that such violations are not offences (subsection 73.23(1)) and that if a contravention can be proceeded with either as a violation or as an offence, proceeding in one manner precludes proceeding in the other (section 73.12). Therefore, the appellant is not likely to be stigmatized by the imposition of an administrative

monetary penalty in the same way as it could have been if convicted of a criminal offence. This first criterion thus supports a lesser degree of procedural fairness.

[32] It is true that in *Kabul Farms*, this Court stated that the administrative monetary penalty proceeding in that case was akin to a disciplinary proceeding where the potential significance to the person accused of misconduct was high. However, it did not infer that reporting entities must under all circumstances benefit from a high level of procedural fairness, much less that potential violators are entitled to be provided with all of the evidence. It should be noted that in that case, it is not the evidence relating to the alleged violations that was at issue, but rather the formulas, guidelines and analyses the director used to determine the amount of the administrative monetary penalty.

[33] I would add that, in my view, the procedure used here cannot be likened in all respects to a disciplinary process. First, as this Court stated in *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, 268 D.L.R. (4th) 543, it is the importance that a disciplinary proceeding may have for the person involved and the repercussions it may have on his or her reputation that calls for a high level of procedural fairness. After noting that this Court has on a number of occasions refused requests for disclosure of all documents related to an investigation in cases involving potential economic hardship for the appellant companies, and after distinguishing the situation in that case, where an individual's right to work or professional reputation was at stake (at paragraphs 29-30), the Court wrote the following at paragraph 40:

> First, as to the nature of the decision being made, the Court in *Baker* commented that the closer an administrative process is to a judicial process, the more procedural fairness is likely to be required. While the procedures before the Superintendent are informal (depending on the circumstances and a consideration

> of fairness), the Trustees do face the possible cancellation or suspension of their licences; consequences that affect both their income and professional reputation. Accordingly, the importance of the decision to the Trustees does, as per *Baker*, suggest that a higher level of procedural fairness is required (see *Kane*, *supra* at paragraph 31).

[34] Moreover, the appellant is a corporation, and the economic consequences that may result from an administrative penalty do not have the same impact as a disciplinary sanction on an individual. I cannot but agree with the judge when she states, on the basis of a decision I rendered when I sat on the Federal Court, that corporations are not entitled to the same level of procedural fairness as individuals: see *Mega International Commercial Bank (Canada) v. Canada (Attorney General)*, 2012 FC 407 at paragraph 35, 407 F.T.R. 232, which she cites at paragraph 30 of her reasons. I do not deny that an administrative monetary penalty, especially when it results in a large amount of money, may damage a company's image to some extent. The fact remains that such an impact has nothing to do with the consequences that a penal or disciplinary sanction may have on an individual. In short, the criterion of the importance of the decision to the individuals involved does not weigh in favour of a high level of procedural fairness.

[35] That being said, the judge nevertheless took into account that the Act imposes a relatively significant maximum penalty to qualify her evaluation and conclude that the degree of procedural fairness is moderate rather than minimal. I consider this evaluation to be entirely justified in the circumstances, especially when the other factors listed in *Baker* are considered.

[36] In fact, the process set out in the Act is closer to an administrative process than a judicial process. In addition to the compliance examination procedure being informal and allowing the

reporting entity to make representations to FINTRAC before and after the notice of violation is issued, the Act does not set out any of the steps that characterize a judicial process, such as the filing of evidence, the possibility of cross-examination or the right to be heard in an adversarial proceeding. Moreover, FINTRAC's decision is not definitive because the right to appeal to the Federal Court is expressly provided for (section 73.21 of the Act).

[37] Lastly, the appellant was not taken by surprise with regard to the procedure followed and cannot claim that its legitimate expectations were not met with respect to the process or the outcome. Representatives of the appellant were present on the days examinations were conducted at the various establishments as well as at the exit interview, where the problems identified were discussed. The appellant was then informed of the results of that examination and once again of the problems that had previously been identified. The appellant was invited to make written representations about the problems FINTRAC identified, which resulted in FINTRAC abandoning one of the four violations in the notice that followed. Lastly, the appellant was able to make other written representations after receiving the notice, prior to the deputy director making the final decision. The process developed is in all respects consistent with the Act.

[38] In its written representations, the appellant claimed that FINTRAC compliance officers made misrepresentations by saying during a visit to one of the establishments that [TRANSLATION] "the chances of a recommendation of a penalty are slim." However, a careful reading of the notes on which the appellant relies reveals that this statement is incomplete. What was actually reported is the following: [TRANSLATION] "the chances of a recommendation of a

penalty are slim if the same type of problems observed during the 2008 examination are identified during this examination."

[39] In short, I am of the view that the judge did not commit a reviewable error in finding that the required level of procedural fairness in this case was "moderate". This evaluation does not contradict decisions rendered by this Court in similar matters and is entirely consistent with the approach the Supreme Court proposes in *Baker*. In other words, the procedure FINTRAC followed did not breach the requirements of procedural fairness, even on the assumption that the required level of fairness was higher than the level the judge adopted.

[40] The appellant's first argument in its written representations was that the deputy director had not conducted an independent examination of the file and simply fully adopted and blindly approved the recommendation of a senior officer of FINTRAC. It claims that the deputy director thus abdicated her role and left it to a subordinate to make the decision that she alone had the authority to make.

[41] The judge was correct to reject that allegation. The Supreme Court has long recognized that administrative decision-makers are not required to personally perform all of the tasks conferred upon them by the legislation, and that they may delegate to administrative staff certain tasks upon which informed decision-making necessarily depends, such as the gathering and analyzing of evidence: see *The Queen v. Harrison*, [1977] 1 S.C.R. 238 at pages 245-246, 66 D.L.R. (3d) 660 [*Harrison*]. This was precisely the situation in the Supreme Court's decision in

Baker, where a senior immigration officer had made the impugned decision on the Minister's behalf on the basis of notes that a subordinate immigration officer had given him.

[42] In a modern and complex state like ours, as the Supreme Court reiterated more than forty years ago in *Harrison*, it is unreasonable to expect that the person designated in the legislation to perform certain duties will perform all of them personally. Such a requirement would cause chaos, lead to interminable delays and be inefficient. Justice Rothstein (then of the Federal Court) stated the following in *Armstrong v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [1994] 2 FC 356 at paragraph 59, 73 F.T.R. 81 (affirmed by this Court in [1998] 2 FC 666):

> Fourth, it is not realistic for the Commissioner to make appeal decisions in discharge matters without delegating to his subordinates some of the work involved in preparing the material in a manner to enable him to expeditiously perform his function. In this case, Sgt. Swann states, in her affidavit, that she spent approximately 250 hours reviewing and preparing the résumé. It is to be expected that the Commissioner of the RCMP would require such assistance, it not being practical for him to expend that amount of time reviewing the material in discharge, grievance or disciplinary matters appealed to him. Such delegation does not, of itself, imply that the Commissioner did not put his mind, independently, to the decision-making process.

[43] What is essential is that the person designated to make a decision or his or her delegate personally consider the file and adopt the recommendations that have been made. In other words, the decision-maker designated in the legislation is always responsible for making the final decision after obtaining sufficient knowledge of all aspects of the issue. That is precisely what the deputy director did in this case. In the decision she sent to the appellant on January 10, 2014, she wrote the following:

> [TRANSLATION]
>
> I have carefully examined the file in light of the representations you submitted and find on a balance of probabilities that [redacted] committed the violations described in the notice. Consequently, I impose the administrative penalty of [redacted].

[44] Unless there is an attempt to challenge that statement or dispute its veracity with credible evidence, I do not see how the deputy director's decision could be disputed on the ground that she apparently unlawfully sub-delegated her decision-making authority. The appellant did not even attempt to prove this and did not return to this argument at the hearing. Consequently, this first allegation of a breach of the principles of procedural fairness must be rejected.

[45] Secondly, the appellant criticizes FINTRAC for failing to provide it with all of the information in its possession despite repeated efforts to obtain that information, which prevented it from properly defending itself. This issue was apparently particularly problematic in relation to the second violation. Not only did FINTRAC fail to explain to the appellant why the notice mentions only one undisclosed suspicious transaction while the compliance examination letter refers to several transactions carried out by a client between July 28 and August 31, 2011, but also the appellant apparently did not learn of some of the documents and information on which FINTRAC based its decision until after the decision was made.

[46] In light of the evidence, I consider this allegation to be unfounded. I share the judge's opinion that disclosing the information on which the deputy director based her decision was more than sufficient to enable the appellant to make full answer and defence to the alleged violations. What is important is not that all the documents to which the deputy director may have

had access to make her decision were provided to the appellant, but that the substance of the information on which she based her decision was communicated to it.

[47] The appellant refers to press clippings of which it was unaware until it received the certified record in Federal Court. For one, this concerns just one press clipping published in two different formats. Moreover, the appellant filed in its reply to the compliance examination letter another newspaper article that refers to the same information as that contained in the press clipping that it claims it did not receive a copy of, that is, the [redacted] status of the client for which it was accused of failing to report suspicious transactions, the purported investigation into it by the RCMP, and the large amounts [redacted] of the appellant [redacted]: Appeal Book at page 944. Moreover, in its letter of January 16, 2013, in response to the appellant's requests for clarification, FINTRAC referred to [TRANSLATION] "articles in Montreal daily newspapers that echoed" the statements of the appellant's chief executive officer: Appeal Book at page 963. Under the circumstances, it is difficult to understand how the appellant can claim that it was not provided with the relevant information.

[48] I do not attach any importance to the two other suspicious transaction reports, which have no connection with the client at issue here. In addition to the fact that they were filed by the appellant itself after it learned from the media that some of its clients had been arrested, these statements were discussed with FINTRAC officials, who drew therefrom the conclusion (which was shared with the appellant's staff) that the appellant had the ability to conduct such a media analysis: Appeal Book at pages 122-123.

[49] The appellant also criticizes FINTRAC for failing to provide it with the details of a police investigation conducted after the examination period and to which the deputy director refers in her decision. Firstly, I note that the [redacted] statement to which the appellant refers is a document that belongs to the appellant and that it filed in support of its reply to the compliance examination letter: Appeal Book at pages 945-946. Moreover, FINTRAC officials stated, in response to a request for clarification, that the entries demonstrating the appellant's cooperation in a police investigation into the client for which it is accused of failing to submit a suspicious transaction report were indeed those found in its [redacted] system: Appeal Book at page 963.

[50] Lastly, the appellant argues that it was unaware of the circumstances on which FINTRAC relied to reach conclusions related to the [redacted] and the profession of the client in question until after it received the deputy director's decision and the certified record. The examination letter of November 16, 2012, sent to the appellant, though less detailed, referred to the same elements as the reasons for the decision (client's occupation not corresponding with its [redacted], police investigation, media coverage). It is true that the client's [redacted] (in absolute and relative terms) is made more explicit in the reasons for the decision; the fact remains that the examination letter expressly mentioned that the client was [redacted].

[51] In short, I find that the appellant had all of the information it needed to respond to FINTRAC's concerns and put forward a full defence in response to the violations of which it was accused. Moreover, the appellant was not deprived of this opportunity, as evidenced by the substantial written representations it submitted to FINTRAC on October 15 and 28, 2013. I am not convinced that the process followed breached the appellant's right to procedural fairness.

[52] The question that remains is whether, as the appellant argues, the violation of which it was accused was a [TRANSLATION] "moving target" in the sense that FINTRAC first accused it of failing to report suspicious transactions the client performed between July 28 and August 31, 2013, to conclude ultimately that it had violated section 7 of the Act by failing to report a specific transaction on August 31, 2011. During the hearing, counsel for the appellant made that argument vigorously.

[53] A careful review of the record does show that there was some uncertainty in this regard. While the letter of November 16, 2012, communicating the results of the compliance examination refers to suspicious transactions by the client [redacted] without mentioning specific dates or even a period, the notice mentioned just one suspicious transaction on August 31, 2011. Lastly, the deputy director based her finding that the appellant violated section 7 of the Act on transactions the client performed between July 28 and August 31, 2011. The respondent was unable to explain why the transaction on August 31, 2011, was identified in the notice.

[54] It certainly would have been preferable for FINTRAC to be more consistent in identifying the suspicious transactions the appellant is accused of failing to report. However, I do

not think that this uncertainty resulted in the appellant's right to be heard and to defend itself against the alleged violations being breached.

[55] A careful review of the record shows that the appellant was properly informed of the fact that FINTRAC was accusing it of failing to report suspicious transactions, not only for the August 31 transaction, but also for a series of transactions that took place between July 28 and August 31, 2011. A document that was disclosed to the appellant following a Federal Court order and that sets out the facts that should have made the appellant suspicious about certain transactions the client in question performed, contains the following passages:

> "There was not a single alert on any of the transactions conducted over the entire history of [redacted] file with [redacted]."
>
> "[redacted] is conducting transactions today at [redacted] on an ongoing basis today in continually higher aggregate amounts."
>
> "…the financial transactions conducted at [redacted] by [redacted] ought to have given rise to suspicion to the employees at [redacted]. (…) this suspicion ought to have resulted in filing suspicious transactions reports with FINTRAC."
>
> "This situation, involving a frequent [redacted] patron, [redacted], displayed a number of indicators of suspicious transactions, which are listed on FINTRAC's public website on Guideline 2: Suspicious Transactions, when conducting 15 reportable transactions at your [redacted] locations during the examination scope timeframe."
>
> "Due to the indicators described above, FINTRAC finds it reasonable that an entity in your circumstances would have submitted 15 suspicious transaction reports to FINTRAC."
>
> "[redacted] staff were asked why suspicious transaction reports were not submitted on the transactions conducted by [redacted] by FINTRAC staff in the course of the examination. No satisfactory answer was given. We will ask a final time, why were suspicious transaction reports not submitted for these transactions?"
>
> Appeal Book, Volume V, at pages 1146-1459.

[56] These excerpts are entirely consistent with the written statements the appellant filed in support of its representations to the FINTRAC director on October 15, 2013. In those statements, three of the appellant's senior executives who participated in the exist interview on September 6, 2012, report that they do not remember the FINTRAC representatives specifying which transaction(s) should have been reported as suspicious.

[57] In fact, there is every indication that it was the series of transactions performed by the suspicious client between July 28 and August 31, 2011, that were the focus of FINTRAC investigators. There is also every indication that the appellant was informed of this situation as well as of the indicators that led the FINTRAC officials to believe that those transactions should have been reported. Lastly, there seems to be nothing to distinguish the transaction identified in the notice from all of the other transactions performed during the period FINTRAC was investigating; arbitrarily selecting one particular transaction rather than two or several of them is inconsequential. Under the circumstances, I find it difficult to understand how the appellant can reasonably claim that it was not provided with all of the information it needed to make a defence, or that it had been misled as to what it was really being accused of. Moreover, the appellant never specified how it had been prejudiced by the fact that the deputy director based her decision on the series of transactions rather than on one in particular, and how that could have been damaging to its defence. Therefore, I consider the "moving target" argument to be without merit.

D. *Did the deputy director commit a reviewable error in finding that the appellant had committed the three violations at issue, namely in the application of the due diligence defence?*

[58] In its written representations, the appellant argued that the judge erred in her articulation and application of the due diligence defence test. It criticizes the judge for having essentially transformed the liability regime set out in the Act into a regime of absolute liability by requiring practically perfect conduct that goes well beyond the requirements in the case law.

[59] Section 73.24 of the Act provides for the possibility of a due diligence defence and subsection 2 specifies that "[e]very rule and principle of the common law that renders any circumstance a justification . . . applies in respect of a violation" (to the extent that it is not inconsistent with the Act). Although she did not cite that provision, the judge correctly cited the following excerpt from *R v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at page 1326, 85 D.L.R. (3d) 161, where the Supreme Court stated the following about the due diligence defence:

> The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[60] In this case, the appellant is clearly relying on the second alternative and pleading that it took reasonable steps to ensure the effective operation of the system. The judge rejected that claim with regard to each of the violations for which the appellant was found responsible, in light of the relevant case law. I find that the judge correctly interpreted the applicable legislation and did not err in her assessment of the facts.

[61] It is well established that a party wishing to rely on the due diligence defence has a heavy burden of proof: see *Cata International Inc. v. Canada (Minister of National Revenue)*, 2004 FC 663 at paragraph 22; *Samson v. Canada (National Revenue)*, 2007 FC 975 at paragraph 35, [2007] F.C.J. No. 1272 (Q.L.). It is not sufficient to plead forgetfulness or an error made in good faith, or even administrative errors made by staff: *Office of the Superintendent of Bankruptcy v. MacLeod*, 2011 FCA 4 at paragraphs 34-35, 330 D.L.R. (4th) 311 [*MacLeod*].

[62] In this case, the appellant argues that it was very diligent with regard to the first violation to the extent that it established a compliance program and made updates. However, the appellant conceded that, as the judge noted, the review of its policies and procedures was not [TRANSLATION] "fully documented" and that no final report on these reviews was submitted to FINTRAC officials. Under the circumstances, the judge could conclude that the appellant had violated subsection 9.6(1) of the Act and paragraph 71(1)(*e*) of the Regulations, even though the appellant documented many of its processes and established an action plan for the future. It is not sufficient to demonstrate that most of the requirements of a statutory regime have been met; the due diligence defence relates to the commission of a specific act (*MacLeod* at paragraph 33; *R v. Raham*, 2010 ONCA 206 at paragraph 48, 99 O.R. (3d) 241). Similarly, establishing an action plan for the future is of no help; it is at the time the violation was committed that it must be demonstrated that due diligence was exercised, and not after.

[63] With regard to the second violation, the appellant claims that it has a cutting-edge monitoring system and fully trained and qualified technicians. This tells us nothing, however, about why it considered it unnecessary to report the transactions of the client in question. The

fact that the monitoring technician found that the [redacted] and in accordance with the procedures does not give us any information on why the appellant concluded that there were no reasonable grounds to suspect a suspicious transaction, much less on the steps it took to avoid suspicious transactions being reported to the extent possible.

[64] Lastly, the appellant argued that it had implemented measures developed specifically to ensure that clients' professions were collected [redacted], as well as a monitoring mechanism to ensure the process was followed. This obligation results from subsection 9(1) of the Act and [redacted], which provide that a [redacted] must report in the manner prescribed transactions in which a sum of $10,000 or greater is [redacted]. The required information includes the client's occupation or profession.

[65] FINTRAC officials [redacted] reported in the notice [redacted] cases where the profession of a client reported in the statement was inadequate or missing. Moreover, it appears that this same problem had been identified in a 2008 compliance examination, as the deputy director noted in her decision. In this context, the appellant could not make a due diligence defence relying on only the training and supervision of its employees; this was clearly insufficient to demonstrate that it had taken all reasonable measures to prevent this violation from recurring. As for the establishment of a [redacted] list of professions in late March 2013, this occurred after the compliance examination period.

[66] Therefore, the judge did not err in finding that the grounds the appellant raised for a due diligence defence do not meet the high degree required by the jurisprudence for such a defence to be allowed.

V. Conclusion

[67] For all of the above reasons, I find that the appeal should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Richard Boivin J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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