Federal Court  Cour fédérale

Date: 20170511

Docket: T-381-14

Citation: 2017 FC 416

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 11, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

VIOLATOR NO. 10

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC JUDGMENT AND REASONS
(Confidential Judgment and Reasons issued on April 27, 2017)

I. Nature of the matter

[1] This is an appeal filed under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Act] in which Violator no. 10 seeks to have varied, set aside or vacated a decision rendered on January 10, 2014, by the deputy director of the Financial Transactions and Reports Analysis Centre of Canada [FINTRAC]. The deputy director

concluded that the appellant had committed three violations of the Act and assessed a total administrative monetary penalty of $[redacted].

[1] For the following reasons, I find that the deputy director's conclusions as to the commission of violations are reasonable and should not be set aside. However, the decision-making process leading to imposition of the administrative penalties lacks justification, transparency and intelligibility such that the penalties assessed are unreasonable and should be subject to reassessment by FINTRAC.

II. Facts

A. *Procedural framework*

[2] FINTRAC was established under section 41 of the Act with the objective of facilitating the detection and prevention of money laundering and terrorist financing. To this end, FINTRAC collects and analyzes information concerning entities listed in the Act that perform financial transactions. The Act imposes certain obligations on them, and FINTRAC is responsible for overseeing compliance with these obligations.

[3] These reporting entities, the appellant being among them, are listed in section 5 of the Act. They are required to put in place certain mechanisms and programs with respect to recordkeeping, verifying identity and reporting of suspicious transactions (Part I of the Act). Section 62 provides that FINTRAC may take measures to ensure compliance with the Act and examine the records and activities of prescribed entities.

[4] Under subsection 73.13(2) of the Act, FINTRAC may, if it believes on reasonable grounds that a violation has been committed, issue a notice of violation setting out the facts of the violation and the penalty that FINTRAC intends to impose. The entity examined may then submit representations to the director concerning the facts alleged and penalties to be assessed.

[5] If representations are submitted, then the director of FINTRAC determines, on a balance of probabilities, whether the Act has been violated. If applicable, he or she then determines whether a penalty should be assessed and sets the amount thereof.

B. *Background*

[6] Violator no. 10 is [redacted] within the meaning of the regulations and [redacted] of the Act.

[7] In a letter dated March 15, 2012, FINTRAC informed the violator that its establishments would be subject to a compliance review to determine whether the program in place met legislative requirements with respect to reporting, recordkeeping and verifying the identities of clients.

[8] According to the letter, the review would take place in the appellant's [redacted] between May 1 and 11, 2012, and cover the period between July 1 and December 31, 2011.

[9] Following the review, FINTRAC conducted a closing interview, during which any problems identified during the review were explained to the appellant, which had the opportunity to ask questions and make comments.

[10] The appellant was advised of the results of the review by letter dated November 16, 2012. Four problems were identified.

[11] In January 2013, the appellant wrote to FINTRAC seeking additional information and clarifications concerning two of the four problems identified in the letter setting out the review results. FINTRAC provided the clarifications requested.

[12] In February 2013, the appellant submitted its representations to FINTRAC concerning the four problems identified along with supporting documentation and an action plan for each problem. This submission contained 59 pages.

[13] On September 12, 2013, FINTRAC issued a notice identifying three violations, the first of the four problems having not led to a notice of violation. The notice also proposed total administrative monetary penalties in the amount of $[redacted]. The appellant was given 30 days to submit new representations concerning the three violations identified.

[14] The appellant wrote to FINTRAC and submitted that the level of detail supplied to date was insufficient to allow it to [TRANSLATION] "understand the basis of the decision." It asked

FINTRAC to provide additional documents and grant an extension for submitting representations to the director.

[15] FINTRAC refused the appellant's request in full and reminded the appellant that it had been informed repeatedly of the problems identified and had in its possession all information required to submit, by the prescribed deadline, its representations concerning the violations identified and penalties proposed.

[16] The appellant consequently submitted its written representations and numerous additional documents to the deputy director of FINTRAC. The present appeal concerns the decision that ensued.

III. Decision under review

[17] Upon reviewing the entire file and the appellant's representations, the deputy director concluded, on a balance of probabilities, that the appellant had committed the violations described in the notice. She consequently assessed total administrative monetary penalties in the amount of $[redacted]. The three violations were:

- Failure to establish a regulatory review mechanism and to retain supporting documents, in violation of subsection 9.6(1) of the Act and paragraph 71(1)(*e*) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 [the Regulations] (violation no. 1);

- Failure to report a suspicious transaction, in violation of section 7 of the Act (violation no. 2);

- Failure to report, in the prescribed manner, transactions related to [redacted], in violation of subsection 9(1) of the Act [redacted] (violation no. 3).

IV. Issues and standard of review

[18] In my opinion, this appeal raises three questions which I formulate as follows:

A. *Was the deputy director's decision made in breach of the principles of procedural fairness?*

B. *Did the deputy director err in concluding that the appellant had committed three violations of the Act, in light of the appellant's defence of due diligence?*

C. *Did the deputy director err in assessing total administrative monetary penalties of $[redacted]?*

[19] The standard of review applicable in matters of procedural fairness is correctness (*Mission Institution v. Khela*, 2014 SCC 24, at para. 79).

[20] The standard of review applicable to decisions made by the deputy director pursuant to the Act is reasonableness. An appeal filed against a decision by FINTRAC is further treated by this Court as an application for judicial review of said decision (*Homelife/Experience Realty Inc. v. Canada (Finance)*, 2014 FC 657 at para. 31; *Max Realty Solutions Ltd. v. Canada (Attorney General)*, 2014 FC 656 at para. 31 [*Max Realty 2014*]; *Max Realty Solutions v. Canada (Financial Transactions and Reports Analysis Centre)*, 2016 FC 620 at para. 4; *Kabul Farms Inc. v. Canada*, 2015 FC 628 at para. 28, conf. by *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at para. 7 [*Kabul Farms FCA*]).

[21] Where the reasonableness standard applies, this Court's role is to determine whether the decision falls within a "range of possible, acceptable outcomes which are defensible in respect of

the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47). If the process followed was consistent with the principles of justification, transparency and intelligibility, then this Court cannot substitute for the deputy director's conclusions its own appreciation of the appropriate solution (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59; *Max Realty 2014*, cited above at para. 32).

V. Analysis

A. *Was the deputy director's decision made in breach of the principles of procedural fairness?*

[22] The appellant argues that the decision-making process followed in this case was faulty and inappropriate because the deputy director did not have the necessary independence and the appellant was not provided with all of the evidence.

[23] The appellant submits that since the regime is associated with the perpetration of serious criminal offences (money laundering and terrorist financing), publicity surrounding the issuance of a notice of violation to entities not involved in criminal activities of this nature could unduly tarnish their reputations. According to the appellant, this requires a high degree of procedural fairness and a strict standard with respect to disclosure of evidence. The appellant asserts that it did not benefit from full disclosure of the information used by the deputy director and thus did not have the opportunity to understand the basis of the problems, violations and penalties.

[24] It adds that in the present case, the deputy director did not personally review the appellant's file but instead blindly accepted the recommendation of the senior officer of reviews and appeals, Julie Éthier.

[25] With respect, I do not share the appellant's view.

[26] The nature and scope of the duty of fairness vary depending on the circumstances of the case, the statutory provisions, the interests at stake and the nature of the matter to be decided (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para. 22). A number of factors are to be taken into account in determining requirements for procedural fairness: 1) the nature of the decision being made and the process followed in making it; 2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; 3) the importance of the decision to the individuals affected; 4) the legitimate expectations of the person challenging the decision; and 5) the choices of procedure made by the agency itself, particularly where entrusted to do so under law (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21-28).

[27] In the case at hand, the Act makes a clear distinction between criminal offences and administrative violations, which are mutually exclusive (section 73.12 of the Act). Subsection 72.23(1) of the Act provides that "a violation is not an offence." A proceeding in respect of a violation is consequently administrative rather than criminal. With regard to the administrative category, I find that fewer procedural safeguards are necessary since the decision does not imply that the appellant committed or facilitated the perpetration of a penal or criminal

offence. In this respect, the facts alleged are unlikely to have the repercussions on the appellant's reputation that it claims.

[28] Moreover, the process followed is more akin to an administrative regulatory process than a judicial process, and the Act provides for appeal before this Court. Although the present appeal is tantamount to an application for judicial review, the associated factors provide an argument for a lesser duty of procedural fairness.

[29] Additionally, the economic consequences on a corporation of a decision by a regulatory body do not have the same potential impact as a decision on the reputation of an individual. In this sense, "corporations are not entitled to the same level of procedural fairness as individuals" (*Mega International Commercial Bank (Canada) v. Canada (Attorney General)*, 2012 FC 407 at para. 35).

[30] However, since the Act imposes a relatively significant maximum penalty, I would classify the duty of procedural fairness as moderate in the circumstances (*Kabul Farms FCA*).

[31] I do not find that the appellant has successfully demonstrated that the deputy director lacked independence in the process of reviewing the file.

[32] In administrative law, it is widely recognized that a decision-maker may delegate certain tasks to subordinates as long as he or she reserves the right to make the final decision.

[33] The appellant cites the fact that Ms. Éthier's analysis and recommendations constitute the crux of the reasons for the deputy director's decision and that the latter did not even bother to check the designated box to indicate that she accepted the recommendations before signing the report. According to the appellant, this shows a lack of independence.

[34] I do not believe that this fact alone demonstrates that the deputy director did not conduct an independent review of the file to determine the appellant's responsibility. In her decision, the deputy director states the following:

> [TRANSLATION] I have carefully reviewed the file in light of the observations you submitted and find on a balance of probabilities that [violator no. 10] has committed the violations described in the notice.

[35] She also states why she accepted the recommendations as submitted. There is nothing to lead me to conclude that she did not personally examine the appellant's file or that the resulting conclusions were not her own.

[36] I find that simple delegation of tasks, such as preparing a summary of collected evidence, evaluating material facts or formulating a recommendation, is insufficient to demonstrate a lack of independence.

[37] I also find that disclosure was adequate.

[38] The appellant submits that with respect to violation no. 2, FINTRAC failed to disclose all of the facts upon which the deputy director based her decision. The appellant claims that the

details of the suspicious transaction [redacted] were not provided, preventing it from making an adequate defence.

[39] First, at the closing interview for the review, the problems identified were explained to the appellant, which had the opportunity to clarify certain points, ask questions and make comments. At this interview, violation no. 2 was discussed, and [redacted] was identified as the subject of the missing suspicious transaction report. The facts of the appellant's violation were documented, and it was noted that the appellant was [TRANSLATION] "aware that a client is suspected of participating in illicit activities," [redacted]. FINTRAC listed its supporting information, including media coverage linking the client to an investigation by the Royal Canadian Mounted Police and [redacted] indicating that it had cooperated with the police in an investigation of this client.

[40] Following the closing interview, the appellant received a letter dated November 16, 2012, documenting the results of the review. In this letter, the facts of violation no. 2 were set out once again.

[41] On January 7, 2013, the appellant requested additional information and clarifications concerning the problems identified in the letter setting out the review results. FINTRAC responded to this letter to explain the facts on which its conclusions were based.

[42] The appellant then provided a written response to FINTRAC providing its representations addressing the four problems as well as significant documentation and action plans for each problem. On reading the appellant's response, it is clear that it had the opportunity to provide a full and complete response concerning the problems identified by FINTRAC.

[43] With respect to violation no. 2 and the suspicious transaction involving the client identified by FINTRAC, the appellant had the opportunity to submit arguments against the evidence collected, which it did.

[44] Therefore, I do not see how a process that offered the appellant multiple opportunities to obtain information about the allegations against it, to ask questions about them and to make representations could have violated the right to procedural fairness. Consequently, I find that disclosure was sufficient in this case.

B. *Did the deputy director err in concluding that the appellant had committed three violations of the Act, in light of the appellant's defence of due diligence?*

[45] The appellant submits that it showed due diligence in fulfilling its obligations with respect to reporting, recordkeeping, [redacted] and assessing and mitigating risks. It consequently alleges that the deputy director's findings of non-compliance with the Act and Regulations are unfounded and unreasonable.

[46] With respect to violation no. 1, the appellant states that a compliance program was in place and that although certain aspects of the process were not fully documented, the appellant

had developed an *a posteriori* action plan to ensure the documentation of all future review and revision mechanisms.

[47] With respect to violation no. 2, the appellant maintains that the responsibility to report suspicious transactions had been delegated to [redacted].

[48] Lastly, with respect to violation no. 3, the appellant submits that it had measures in place designed specifically to ensure [redacted], all of this supplemented by a monitoring and verification mechanism.

[49] The appellant consequently argues that it was diligent in its efforts to comply with its obligations under the Act and that in this context, the deputy director's conclusions are not reasonable and her decision should be vacated.

[50] Like the respondent, I do not find that the appellant has shown that it took every precaution to ensure compliance with the requirements of the Act.

[51] In *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at page 1326, the Supreme Court of Canada describes the due diligence defence as follows:

> 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.

[52] The burden of establishing this defence is significant and is entirely upon the invoking party. That party "must establish that he or she has taken all reasonable steps to ensure that the declarations are accurate. . . This is a difficult burden to discharge." (*Cata International Inc. v. Canada (Minister of National Revenue)*, 2004 FC 663 at para. 22).

[53] In *Office of the Superintendent of Bankruptcy v. MacLeod*, 2011 FCA 4, the Federal Court of Appeal discusses the scope of this defence and the criteria applicable to the appellant:

> The appellant had to establish that all reasonable steps were taken to avoid committing the specific infractions listed (*MacLeod*, cited above, at para. 37);
>
> Evidence presented to support due diligence must relate specifically to each of the three violations in question rather than the appellant's conduct in a larger sense (*MacLeod*, cited above, at para. 33);
>
> The fact that the infractions related to a small portion of the appellant's overall business is not relevant (*MacLeod*, cited above, at para. 31);
>
> Innocent good faith in the making of unintentional errors is not tantamount to due diligence (*MacLeod*, cited above, at para. 34);
>
> The fact that the infractions may have resulted from administrative errors on the part of the appellant's staff is not relevant (*MacLeod*, cited above, at para. 35); and
>
> The fact that prejudice was not caused to third parties is not relevant (*MacLeod*, cited above, at para. 36).

[54] These criteria are applicable *mutatis mutandis* to the appellant and are not met.

[55] With regard to violation no. 1, the appellant concedes that it had not fully documented its last compliance review. Even if a significant part of the process is documented and even if the appellant put an action plan in place for the future, a violation of the Act was committed.

[56] As the Federal Court of Appeal states in *MacLeod*, it is not enough to claim to have met the majority of requirements; due diligence must be established in relation to the specific offence in question (*MacLeod*, cited above, at para. 33). Compliance with the Act in a broad sense is not sufficient to show that the appellant took reasonable steps to avoid committing the violation with which it is charged (*R. v. Raham*, 2010 ONCA 206, cited in *MacLeod*, cited above, at para. 33). As a result, I am of the view that the deputy director concluded reasonably that the appellant had committed violation no. 1.

[57] I arrive at the same conclusion with respect to violation no. 2.

[58] The client identified by FINTRAC appears to be [redacted].

[59] In its representations, the appellant reported that prior to August 31, 2011, it did not know that this client was [redacted]. In her decision, the deputy director cites the fact that [redacted], a suspicious transaction report should have been filed concerning this client [redacted].

[60] I agree with the appellant that it is entirely appropriate to question what FINTRAC did during all these years with [redacted].

[61] However, I do not find that this excuses the appellant from submitting one or more suspicious transaction reports concerning this client. I also do not find that it was unreasonable for the deputy director to conclude that in addition to large cash transaction reports, a suspicious transaction report should have been filed concerning this client [redacted].

[62] Lastly, with regard to violation no. 3, the appellant acknowledges that concerning [redacted].

[63] The appellant argues that it had put measures in place specifically intended to ensure that [redacted]. In its letter/action plan dated February 15, 2013, the appellant alleges that a large percentage of the reports analyzed were compliant and that the small number of deficient reports was the result of oversight or human error on the part of certain employees. This argument fails to meet the high standard for establishing a due diligence defence.

[64] I consequently find that it was open to the deputy director to conclude as to the occurrence of this violation.

C. *Did the deputy director err in assessing total administrative monetary penalties of $[redacted]?*

[65] The appellant argues essentially that the administrative monetary penalty imposed in this case was unfounded and arbitrary. It observes that the methodology FINTRAC used to determine the penalties has been roundly criticized in multiple decisions of this Court and, recently, by the Federal Court of Appeal in *Kabul Farms FCA*. According to the appellant, the deputy director's decision exhibits the same shortcomings.

[66] In particular, the appellant submits that the entire process was not sufficiently justified and that the deputy director's explanations were brief and vague.

[67] Due to these shortcomings, it is impossible to determine how the deputy director arrived at the penalty amounts assessed, just as it is impossible to understand the source of the percentage increases and decreases applied.

[68] The respondent argues, meanwhile, that the process followed in this case should be evaluated in light of the reasons given by the deputy director rather than based on the position expressed by the Federal Court of Appeal in *Kabul Farms FCA*, since the FINTRAC decision under review in that judgment was rendered nearly three years prior to the decision presently under review. As for the rest, the respondent cites the percentage decreases and increases applied by the deputy director without a detailed explanation of their underlying logic.

[69] I share the appellant's opinion concerning this matter and do not see how the decision under review might be distinguished from that roundly criticized in *Kabul Farms FCA*.

[70] The criteria that the deputy director was supposed to consider in evaluating the advisability of assessing a penalty for each violation observed and, where applicable, the amount of these penalties, are set out in section 73.11 of the Act and in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292 [Administrative Monetary Penalties Regulations].

[71] First, the amount of any penalty is determined taking into account that penalties have as their purpose to encourage compliance with the Act rather than to punish and are based on the harm done by the violation and any other criteria prescribed by regulation. The Administrative

Monetary Penalties Regulations prescribe taking into account the history of compliance, list violations considered minor, serious or very serious and set the maximum penalties that can be assessed for each violation of the Act.

[72] In the case of each violation observed by the deputy director, she used as a starting point for her calculation of the penalty to be assessed against the appellant the maximum penalty set by the Administrative Monetary Penalties Regulations. However, all that is known is that violation no. 1 is, according to the scale, classified as serious, violation no. 2 as very serious and violation no. 3 as minor.

[73] With respect to violation no. 1, although she takes into account the fact that the majority of the review done by the appellant was documented and that the appellant had implemented an action plan for the future, the deputy director assesses a penalty of $[redacted] (out of a maximum of $100,000). There is no way to understand the reasoning followed other than to consider that the starting point is simply the regulatory maximum.

[74] With respect to violation no. 2, the deputy director indicates that [TRANSLATION] "the general purpose of the penalty, which is to encourage compliance with the Act, must be associated with the requirement also expressed in section 73.11 that the penalty not be punitive in nature." However, she concludes that the action plan implemented by the appellant following the FINTRAC review cannot be considered for the purposes of assessing a penalty. I find this to be highly contradictory. She concludes further that she does not have to explain or individualize

the notion of harm caused by the violation and, without further explanation, imposes the maximum regulatory penalty of $[redacted].

[75] Determination of the penalty associated with violation no. 3, although classified as minor, is just as surprising. The deputy director indicates that since this violation was nonetheless predetermined as having considerable impact, the penalty [TRANSLATION] "was adjusted to the lowest level corresponding to 50% of the maximum penalty." Where is this minimum prescribed? The Court does not have the least idea. What is certain is that it is prescribed neither by the Act nor by the Administrative Monetary Penalties Regulations. It must therefore come from some secret internal FINTRAC guide or scale. In any event, this criterion is totally extraneous to the Act and the Administrative Monetary Penalties Regulations.

[76] At no time did the deputy director consider the possibility of not imposing any administrative monetary penalty, although she had the discretion to do so.

[77] Moreover, it is impossible to know what the justification was for adjusting the penalty amounts based on the impact of the violation, increasing the overall penalty to take into account the history of compliance and decreasing the overall penalty amount to take into account the appellant's ability to pay. As noted by Justice David Stratas in *Kabul Farms FCA*, at paragraph 32, "for all we know [those] percentages might have been plucked out of the air or adopted for reasons extraneous to the legislation."

[78] The total amount established for the penalties calculated by the deputy director was $[redacted]. This amount was increased by 5 per cent to reflect the appellant's history of compliance and then decreased by 10 per cent to reflect its ability to pay. The decision does not indicate whatsoever how the deputy director arrived at these percentage increases and decreases or what factors or criteria she took into consideration. It is consequently impossible to determine whether an intelligible, transparent and justifiable decision-making process preceded the assessment of the penalties.

[79] For these reasons, I find that the assessment of an administrative monetary penalty of $[redacted] for the three violations identified was unreasonable under the circumstances.

VI. Conclusion

[80] Therefore, the appeal is allowed in part, and the penalty assessed by the deputy director is vacated essentially for the same reasons as those expressed by the Federal Court of Appeal in *Kabul Farms FCA*. The file will be returned to the deputy director of FINTRAC for redetermination of the advisability of assessing an administrative monetary penalty against the appellant for each of the violations observed and, where applicable, to set their quantum in accordance with the Act and the Administrative Monetary Penalties Regulations.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The appellant's appeal is allowed in part;
2. The administrative monetary penalty in the amount of $[redacted] assessed against the appellant by the Financial Transactions and Reports Analysis Centre of Canada is vacated;
3. The file is returned to the deputy director of the Financial Transactions and Reports Analysis Centre of Canada for redetermination of the advisability of assessing an administrative monetary penalty against the appellant for each of the violations observed and, where applicable, to set their quantum in accordance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292;
4. The parties having agreed to pay their respective costs, no costs are awarded.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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