Federal Court  Cour fédérale

Date: 20140704

Docket: T-1869-09

Citation: 2014 FC 656

Ottawa, Ontario, July 4, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MAX REALTY SOLUTIONS LTD.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Appellant, Max Realty Solutions Ltd. (Max Realty), has appealed a decision of the Deputy Director (Director) of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) dated October 7, 2009, made pursuant to section 73.15(2) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (Act). The Director found that Max Realty committed four violations of the Act and the *Proceeds of Crime (Money*

Laundering) and Terrorist Financing Regulations, SOR/2002-184 (Regulations). The appeal is brought pursuant to subsection 73.21 of the Act.

[2] By Order of Prothonotary Aalto dated September 27, 2010, Mr. Shahin Mirkhan, principal of Max Realty, was granted leave to represent Max Realty at the hearing of this matter. By Order of Prothonotary Aalto dated November 16, 2011, the style of cause of this matter was changed from Homelife Real Estate Solutions Ltd. to Max Realty Solutions Ltd. in order to reflect a change of corporate name.

[3] This matter was heard together with *Homelife / Experience Realty Inc v Canada (Minister of Finance et al)*, T-27-10.

[4] Max Realty seeks an order of this Court setting aside the decision of the Director. For the reasons that follow, the decision of the Director relating to the commission of the offences was reasonable and shall not be set aside. However, due to a lack of intelligibility in the decision and its reasons on the record, it is not possible for the Court to understand how the amount of the penalty was reached, whether mitigating or aggravating factors were considered and what principles of sentencing were applied. As such, that aspect of the decision was unreasonable.

Legislative Background

[5] The Act is described in its preamble as one intended to facilitate combating the laundering of proceeds of crime and the financing of terrorist activities and to establish

FINTRAC. Its stated objectives include the implementation of specific measures to detect and deter money laundering and the financing of terrorist activities as well as to facilitate the investigation and prosecution of offences relating to such activity (subsection 3(a)). This includes establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities (subsection 3(a)(i)). Part 1 of the Act, "Record Keeping, Verifying Identity, Reporting of Suspicious Transactions and Registration", applies to persons and entities engaged in a business, profession or activity described in regulations made under subsections 73(1)(a) or 73(1)(b) while carrying out the activities described in the regulations (section 5). The Governor in Council may make regulations, amongst other things, designating contraventions of Part 1 as violations under the Act and addressing applicable penalties (subsection 73.1(1)).

[6] In that regard, section 37 of the Regulations states that every real estate broker or sales representative is subject to Part 1 of the Act when they act as an agent in respect of the purchase or sale of real estate.

[7] Accordingly, real estate brokers or agents are required to establish and implement, in accordance with the Regulations, a program intended to ensure their compliance with Part 1 (subsection 9.6(1)). This includes the development and application of policies and procedures so that the person or entity can assess, in the course of their activities, the risk of a money laundering or a terrorist activity financing offence (subsection 9.6(2)).

[8] For the purposes of compliance with subsection 9.6(1) of the Act, the Regulations require the implementation of a compliance program:

> (a) appointing a person who is responsible for the implementation of the program;
>
> (b) developing and applying written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer;
>
> (c) assessing and documenting, in a manner that is appropriate for the person or entity, the risk referred to in subsection 9.6(2) of the Act, taking into consideration
>
> i. the clients and business relationships of the person or entity;
>
> ii. the products and delivery channels of the person or entity;
>
> iii. the geographic location of the activities of the person or entity; and
>
> iv. any other relevant factor.
>
> (d) if the person or entity has employees, agents or other persons authorized to act on their behalf, developing and maintaining a written ongoing compliance training program for those employees, agents or persons; and
>
> (e) instituting and documenting a review of the policies and procedures, the risk assessment and the training program for the purpose of testing their effectiveness, which review is required to be carried out every two years by an internal or external auditor of the person or entity, or by the person or entity if they do not have such an auditor.

Factual Background

[9] Max Realty is a real estate broker or agent.

[10] FINTRAC was established pursuant to the Act, as an independent agency that, amongst other things, collects, analyses, assesses and discharges information in order to assist with the detection, prevention and deterrence of money laundering and of the financing of terrorist activities and compliance with Part I (sections 40 and 41).

[11] The following factual background is based on the materials provided in the Appeal Book.

[12] On December 16, 2008, the Regional Compliance Officer of FINTRAC wrote to Max Realty (at the time Homelife Real Estate Solutions Ltd.) advising that it had been selected for a compliance examination in order to verify compliance with the requirements of Part 1 of the Act and the Regulations (notice of examination). The examination would be conducted on February 4, 2009. The letter stated that the objective of the examination was to assess the extent to which Max Realty's compliance regime, reporting, maintenance of client records and client identification policies and practices met the legislative requirements. The letter also requested that FINTRAC be provided with specific documentation at least one week in advance of the examination, including copies of Max Realty's:

- compliance policies and procedures, including those that pertain to special measures for high risk;
- ongoing training program provided to Max Realty's staff and/or agents in relation to its obligations under the Act;
- Max Realty's documented assessment of risks related to money laundering and terrorist financing;
- any documented internal or external review of Max Realty's compliance policies and procedures, risk assessment and ongoing training program that have been completed to date.

[13] The notice of examination also advised that there would be an examination of certain records relating to transactions conducted by Max Realty between July 1, 2008 and December 31, 2008 and other documents.

[14] The date on which the examination was ultimately conducted is not clear from the record but is understood to have been February 20, 2009.

[15] On March 16, 2009, Max Realty received a letter from the Regional Compliance Officer listing eight deficiencies identified as a result of the compliance examination. The letter advised that FINTRAC was committed to achieving compliance by taking a cooperative approach and, therefore, requested that Max Realty, within thirty days, provide an action plan identifying the steps it had taken to rectify the compliance issues, after which a follow up verification examination might be conducted. The letter asked that Max Realty note that independent of other compliance actions, deficiencies such as those cited in the letter could lead to civil or criminal penalties.

[16] On June 29, 2009, FINTRAC issued a Notice of Violation stating that, pursuant to subsection 73.13 of the Act, it had determined that Max Realty had committed the five violations listed and that it had therefore imposed an administrative monetary penalty in the amount of $33,750.00. The listed violations all arose from the first deficiency listed in FINTRAC's March 16, 2009 letter. The Notice of Violation stated that Max Realty had the right to have the violations and the penalty reviewed by making representations to the Director by July 29, 2009.

[17] An undated letter from Mr. Ali Mirkhan, bearing a fax transmission date of July 24, 2009 and addressed to whom it may concern, described the compliance efforts Max Realty had made including: many attempts to educate its staff and employees; attending seminars at Homelife's head office; having a lawyer come and speak to its agents and staff; and, utilization of

FINTRAC's website for information. Further, since the compliance examination, it had implemented the changes required including the appointment of Mr. Ali Mirkhan as the individual responsible to ensure compliance. The letter also stated that Mr. Ali Mirkhan developed and added a compliance policy, including rules and regulations for FINTRAC, had informed all employees and agents, and, that Max Realty has ongoing training in its office. The letter requested that the penalty be reviewed and that Max Realty be permitted to demonstrate that it made the required changes.

Decision Under Appeal

[18] October 7, 2009, the Director issued a Notice of Decision to Max Realty concerning the violations described in the Notice of Violation.

[19] The Director stated that having reviewed the Notice of Violation, supporting documentation as well as the representations made by Max Realty, she had determined, on a balance of probabilities, that it had committed the following four violations:

1. Failure of a person or entity to appoint a person to be responsible for the implementation of a compliance program, which is contrary to subsection 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and paragraph 71(1)(a) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (Violation #1);
2. Failure of a person or entity to develop and apply written compliance policies and procedures that are kept up to date and, in the case of an entity, are approved by a senior officer, which is contrary to subsection 9.6(1) of *the Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and paragraph 71(1)(b) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (Violation #2);
3. Failure of a person or entity to assess and document the risk referred to in subsection 9.6(2) of the Act, taking into consideration prescribed factors, which is contrary to subsection 9.6(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing*

Act and paragraph 71(1)(c) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (Violation #3); and

4. Failure of a person or entity that has employees, or agents or other persons authorized to act on their behalf to develop and maintain a written ongoing compliance training program for those employees, agents or persons, which is contrary to subsection 9.6(1) of *the Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and paragraph 71(1)(d) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations* (Violation #4).

[20] The Director determined that the facts did not support the conclusion that Max Realty committed the fifth violation contained in the Notice of Violation. Therefore, that violation was withdrawn and, accordingly, FINTRAC imposed a lesser penalty of $27,000, payable in lieu of the penalty set out in the Notice of Violation.

Issues

[21] Max Realty, represented by Mr. Shahin Mirkhan who is not a lawyer, did not identify any issues on this appeal.

[22] The Respondent, the Attorney General, identified the following two issues which I agree are appropriate:

1. What is the proper standard of review of a decision of the Director made pursuant to subsection 73.15(2) of the Act?
2. Did the Director err in concluding that Max Realty had committed the four violations set out in her decision of October 7, 2009 and imposing an administrative monetary penalty of $27,000?

ISSUE 1: What is the proper standard of review of a decision of the Director made pursuant to subsection 73.15(2) of the Act?

Max Realty's Position

[23] Max Realty does not make submissions on the appropriate standard of review.

Attorney General's Position

[24] The Attorney General submits that the appropriate standard of review is reasonableness. When considering whether an administrative decision-maker is entitled to deference, a reviewing court should consider factors such as: the existence of a privative clause; a discrete and special administrative regime in which the decision-maker has special expertise; and, the nature of the question of law. Further, deference is generally appropriate where an administrative decision-maker is interpreting its own home statute or statutes that are closely connected to its function and with which the decision-maker has particular familiarity (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 45, 47-49, 55 and 60 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paras 15-16).

[25] FINTRAC is a specialized body that possesses subject-matter expertise and experience in relation to the prevention of money laundering and terrorist activity financing. Determining whether a reporting entity has complied with the Act is an issue that falls within the Director's

specialized expertise and she should, accordingly, be afforded deference. The Director has the authority to impose administrative monetary penalties against reporting entries that fail to comply with the Act. Further, the questions she was required to determine were primarily questions of fact. That is, whether on the balance of probabilities, as of the date of the examination, Max Realty had met the requirements of the Act. Accordingly, deference is owed. This is also the case if these are viewed as questions of mixed fact and law (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses*]) and even where the range of acceptable outcomes available is narrow, being restricted to either "yes" or "no" answers (*HBC Imports v Canada (Border Services Agency*), 2013 FCA 167 at paras 9-10).

[26] The Director was interpreting her own statute or statutes closely connected to her function with which she has familiarity. Determining compliance with the Act falls squarely within her expertise. There was no privative clause and the right of appeal is not determinative. Further, these are not questions of central importance to the legal system as a whole but were specific to Max Realty. All of these factors lead to the standard of reasonableness.

Analysis

[27] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference to be afforded a particular category of question. If it has not, then the Court must engage the second step, which is to determine the appropriate standard having regard to the nature of the question, the expertise of the tribunal, the presence or absence of a privative clause, and the purpose of the tribunal (*Dunsmuir*, above, at paras 51-64; *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48).

[28] In this case, there is no jurisprudence resolving the degree of deference to be afforded to the particular question before this Court, being a decision made pursuant subsection 73.15(2) of the Act. Indeed, the Respondent confirmed when appearing before me that this and T-27-10 were the first appeals of this kind to be heard by the Court.

[29] At the hearing, the Court inquired if there were other decisions concerning appeals of non-compliance violations and the imposition of monetary administrative penalties in other administrative compliance regimes which might assist in determining the appropriate standard of review. Counsel for the Attorney General referred the Court to *Mega International Commercial Bank (Canada) v Canada (Attorney General)*, 2012 FC 407 [*Mega*]. *Mega* concerned an appeal of the decision of the Financial Consumer Agency of Canada whereby its commissioner confirmed the finding of the Deputy Commissioner that *Mega* had contravened certain of the provisions of the *Cost of Borrowing (Banks) Regulations made under the Financial Consumer*

Agency of Canada Act, SC 2001, c 9. It imposed an administrative monetary penalty of $12,500 as a result of the non-compliance.

[30] Justice de Montigny stated the following with respect to the standard of review:

> [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.

[31] In my view, the same considerations apply in this case. The function of FINTRAC, and the Director, is to assess compliance with the requirements of the Act and Regulations, to detect

and deter money laundering and the financing of terrorism. It is a specified regime over which FINTRAC has jurisdiction. The question before the Director was whether Max Realty complied with the subject provisions of the Regulations which is a question of mixed fact and law as it required that the Director interpret the requirements of those provisions and apply the facts of this case to them to determine whether there had been compliance. Though worded as an appeal, this is a type of judicial review and attracts the standard of reasonableness (also see *Doyon v Canada (Attorney General)*, 2009 FCA 152; *Rowan v Ontario (Securities Commission)*, 2012 ONCA 208 provided as a part of the Respondent's post hearing submissions).

[32] Where the standard of reasonableness applies, the role of the Court 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*, above, at para 47). As long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The court should not interfere with the decision unless this standard is not met.

ISSUE 2: Did the Director err in concluding that Max Realty had committed the four violations set out in her decision of October 7, 2009 and imposing an administrative monetary penalty of $27,000?

Max Realty's Position

[33] Max Realty submits, in essence, that it exercised due diligence in carrying out its obligations to comply with the Act and Regulations as it took all reasonable steps under the

circumstances to avoid the violations. Further, that the Director failed to consider its letter of explanation.

[34] As to Violation #1, Max Realty submits that when it filed its initial application with FINTRAC it was required to identify a compliance officer and that its application would not have been accepted had it not done so. Further, the notice of examination was directed to Mr. Ghovanloo. Accordingly, FINTRAC knew of the identity and existence of Max Realty's compliance officer. Later, Mr. Ali Mirkhan was also added as an officer.

[35] As to Violation #2, as a franchisee, Max Realty was supplied with an Office Compliance Manual and policies by its head office at Homelife in September 2008.

[36] As to Violation #3, Max Realty did consult with a lawyer and had the Canadian Real Estate Association (CREA) Risk Assessment form.

[37] As to Violation #4, Max Realty's compliance officer trained its agents. As well, Max Realty invited a lawyer to attend at its offices on two occasions to train its staff.

[38] Max Realty states that there were no clear and stated guidelines from FINTRAC to assist brokers and agents in complying with the law and regulations. The regulatory requirements were new and, at the time of the compliance examination, real estate brokers and agents were still struggling to understand their implications and requirements. Further, Max Realty is a small real estate business and a penalty of this magnitude will put it out of business.

Attorney General's Position

[39] The Attorney General submits that the evidence before the Director clearly supported her decision and was therefore reasonable.

[40] Regarding Violation #1, the Attorney General submits that, based on the March 16, 2009 letter from FINTRAC, a compliance officer had not been appointed at the time of the examination on February 20, 2009. That letter afforded Max Realty an opportunity to demonstrate that this was incorrect but it did not do so. Further, the July 24, 2009 letter from Mr. Ali Mirkhan did not contest that there was no compliance officer in place prior to the examination and confirmed that he was appointed only after the examination.

[41] As to Violation #2, the Attorney General submits that at the time of the examination, Max Realty provided FINTRAC with a single page document entitled "New Office Regulations", but that this does not constitute a compliance policy and procedure that meets the legislative requirements. Further, following FINTRAC's March 16, 2009 letter, Max Realty did not make representations about the alleged absence of written compliance policies and procedures. It was only after the Notice of Violation was issued that Max Realty provided its July 24, 2009 letter stating that it had developed and added a compliance policy, however, a copy of that policy was not attached to the written representations.

[42] While by Order dated December 19, 2012 Prothonotary Aalto granted leave to include the Office Compliance Manual in the record on this appeal, he did so without prejudice to the

Attorney General's right to oppose its admissibility. In that regard, the Attorney General strenuously opposed the admissibility of the document entitled "*Proceeds of Crime (Money Laundering) and Terrorism Financing Act and Regulations – 2008 Homelife Real Estate Solutions Ltd., Brokerage – Office Compliance Manual*" (Office Compliance Manual) because it was not provided at the compliance examination nor was it attached to Max Realty's July 24, 2009 response. There were no representations as to its existence prior to the examination and no explanation as to why it had not been provided in response to FINTRAC's letter of March 16, 2009. The Attorney General submits that it is therefore plain and obvious that it did not exist on the date of the examination and should not be admitted into evidence.

[43] Alternatively, even if the Office Compliance Manual did exist on the date of the examination, it is not a compliance policy within the meaning of the Act, but is simply a reiteration of the obligations imposed by the Act and Regulations. It does not refer to Max Realty, other than in the header, nor does it explain how it will meet those obligations. There is also no evidence that the manual is up to date and approved by a senior officer as required by the Regulations.

[44] On Violation #3, the Attorney General states that Max Realty had not conducted, in the course of its activities, an assessment of the risk of money laundering or terrorist financing offences occurring in the course of its business. While Max Realty asserts in its factum that the CREA Risk Assessment for Brokerage Form has been duly accomplished, there is no evidence to support this position. While Max Realty sought leave to add this document to the appeal record, this was denied as Prothonotary Aalto stated that it "…came into existence after the issue in this

proceeding arose and is therefore not probative or relevant to any facts relating to the issues in dispute."

[45] On Violation #4, the Attorney General states that Max Realty failed to develop and maintain an ongoing written compliance training program for its employees, agents and other persons authorized to act on their behalf. Max Realty was asked to provide this information in advance of the compliance examination. It advised FINTRAC that staff had attended a training session concerning "the importance of Fintrac and PCMLTFA" and provided a hand-out titled "FINTRAC Requirements Simplified Seminar." The Attorney General submits that this document was similar to the Office Compliance Manual as it simply reiterates obligations arising pursuant to the Act and Regulations with no direct guidance on how Max Realty will meet those obligations in the context of its business operations and its own compliance policy and procedures. Accordingly, it does not meet the requirements of the Act.

[46] The Attorney General states that Max Realty did not specifically raise a due diligence defence in the written representations to the Director and, therefore, it should not be permitted to challenge the decision on this ground. However, even if this Court decides to entertain the defence of due diligence, the evidence on the record does not demonstrate that the defence has been met.

[47] In *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299 at 1326 [*Sault Ste Marie*], the Supreme Court of Canada stated that the due diligence defence would be "available if the accused reasonably believed in a mistakenly 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." Here, Max Realty has not asserted a belief in a mistaken set of facts so the defence is limited to it being able to establish that it took all reasonable steps to avoid the violations. Further, in *Canada (Superintendent of Bankruptcy) v MacLeod*, 2011 FCA 4 at para 33, the Federal Court of Appeal confirmed that where a defence of due diligence is asserted, evidence must be presented to support it and must relate to the specific offences at issue. Therefore, Max Realty must establish the defence for each of the four violations, which it has not done.

[48] Regarding Violation #1, there is no evidence to suggest that Max Realty took any reasonable steps to appoint Mr. Ali Mirkhan as its compliance officer prior to the examination. On Violation #2, the only evidence which existed at the time of the examination, the New Office Regulation, does not contain specific guidance on how compliance will be achieved. This does not constitute "taking all reasonable steps to avoid the violation". On Violation #3, the FINTRAC Requirements Simplified Seminar conducted by a lawyer contained a blank CREA Risk Assessment Form. This demonstrates that Max Realty was aware of the requirement to conduct a risk assessment yet there is no evidence of any attempt to complete the risk assessment prior to the examination. On Violation #4, the only evidence is that Max Realty sent some employees to a seminar but there is no evidence that it took steps to 'develop' or 'maintain' its own compliance training program. For these reasons, due diligence has not been established.

Analysis

[49] As a preliminary point, the Attorney General states that Max Realty did not specifically raise a due diligence defence in its written representations to the Director and, therefore, it should not be permitted to challenge the decision on a ground that was not raised before the Director.

[50] In my view, some context is required to address this submission. Part 4.1 of the Act addresses notices of violation, compliance agreements and penalties. Notices of Violation must set out: the violations; the proposed penalty; the right to pay the penalty or to make representations to the Director with respect to the violations and the proposed penalty within thirty days of service of the notice; and, that if neither action is taken then the person or entity will be deemed to have committed the offence (Act, subsection 73.14(1)). If representations are made, the Director shall decide, on a balance of probabilities, whether the person or entity committed the violation and, if so, may, subject to any regulations made under subsection 73.1(1)(c), impose the penalty proposed, a lesser penalty or no penalty. If no payment or representations are made then the person or entity is deemed to have committed the violation, the proposed penalty will be imposed and the Director will issue a notice of decision (Act, subsection 73.15) which, in the event of a serious or very serious violation, will include a notice of the right to appeal. The right to appeal to this Court is contained in subsection 73.21 of the Act which also states that on appeal, the Court may confirm, set aside or, subject to any regulations made under subsection 73.1(1)(c), vary the decision of the Director.

[51] Following this is subsection 73.24 which states:

> 73.24(1) Due diligence is a defence *in a proceeding* in relation to a violation.
>
> (2) Every rule and principle of the common law that renders any circumstance a justification or an excuse in relation to a charge for an offence applies in respect of a violation to the extent that it is not inconsistent with this Act.
>
> [emphasis added]

[52] Given this, it is not apparent to me that when a person or entity is issued a Notice of Violation and elects to make representations to the Director "with respect to the violation", that they are required to explicitly reference a due diligence defence within those representations. In that regard, I note that in *Cactus Cafe Turner Road Ltd v British Columbia (Liquor Control and Licensing Branch)*, 2010 BCSC 1691 at paras 79-81, Justice Cullen determined that a liquor inspector had erred by failing to properly consider a due diligence defence and thereby breached procedural fairness. Further, the Nova Scotia Court of Appeal, in a case where the Minister argued a due diligence defence was only available on the offence, and not where the offence was "deemed" to have occurred through non response of a party, found that a failure to consider this was a breach of procedural fairness (*Guild Contracting Specialties (2005) Inc v Nova Scotia (Occupational Health and Safety Appeal Panel)*, 2012 NSCA 94 at paras 2, 49-54). Given this, in my view, because the Director is aware that a due diligence defence is available, it is incumbent upon him or her, even in the absence of an explicit reference to that defence, to consider whether the submissions established the defence.

[53] Given this, and because this is a proceeding in relation to the violation, I am doubtful that, as I understood to be suggested by the Attorney General, the due diligence defence is lost

on appeal if not explicitly plead in the submissions to the Director. However, this question need not be decided in this case. That is because, as set out below, the evidence simply did not establish that due diligence had been exercised.

[54] As to the substance of the issue before the Court, FINTRAC wrote to Max Realty on December 16, 2008 advising of the compliance examination and requested copies of its compliance policies and procedures, ongoing training program and assessment of risks. The record before me contains no response to that request. On March 16, 2009, FINTRAC wrote to Max Realty advising of the results of the compliance examination. It listed the deficiencies it had identified and requested that Max Realty provide an action plan identifying which steps it had undertaken to rectify the compliance issues within thirty days, which would have been by April 16, 2009. The record contains no response to that request. The Notice of Violation was issued on June 29, 2009 and provided thirty days within which the Applicant could make representations pertaining to the violations and the fine.

[55] On July 24, 2009, Mr. Ali Mirkhan responded. This reply was not substantive nor did it provide any supporting documentation. It stated that the office had made many attempts to educate its staff and employees, there was attendance at seminars at the Homelife head office, that a lawyer had spoken in Max Realty's office to agents and staff, and, Max Realty had used the FINTRAC website for information. Further:

> "Unfortunately, after meeting with her [FINTRAC] we had to come to realize there we had missed some requirements. We have been notified and have since then implemented the changes that is required for your needs. Yet we are still charged with a fine, we have *after the interview* with FINTRAC representative, appointed a person to be responsible, Ali Mirkhan who is also the person that

> developed and added a compliance policy including rules and regulations for FINTRAC into our office policies. We have informed our employees and agents, and have ongoing training programs in our office.
>
> We were informed that these needed to be implemented to our company rules, and we have tried to oblige at every request that is made of our company. Please review the penalty that is made to the office and allow us to show you that we have made changes that is required."
>
> [emphasis added]

[56] Violation #1 concerned the failure to appoint a person to be responsible for the implementation of a compliance program. Max Realty submits that it had appointed Mr. Hootan Ghovanloo at the time of the examination and that, subsequently, it was Mr. Ali Mirkhan who was responsible for the compliance program. It submits that Mr. Ghovanloo's appointment is demonstrated by the fact that FINTRAC's letter advising of the examination was directed to him. Therefore, FINTRAC knew, at that time, who held the compliance officer position. Further, Max Realty contends that its FINTRAC application would not have been accepted if a compliance officer had not been identified when the application was submitted. The Attorney General points out that the December 16, 2008 letter states that it was a follow up to a telephone conversation of the previous day. Accordingly, the fact that the letter was directed to Mr. Ghovanloo is not evidence that he was previously known to FINTRAC as Max Realty's compliance officer.

[57] The Appeal Book contains copies of the documents described as having been obtained by FINTRAC during the compliance examination. These do not include any document appointing Mr. Ghovanloo or any other person as Max Realty's compliance officer. However, it should also

be noted that the December 16, 2008 FINTRAC letter, while requesting various documents, did not request written confirmation of the appointment.

[58] Max Realty submitted that Mr. Ghovanloo's name was included in the original FINTRAC application, however, a copy of that application was not contained in the Appeal Book. Max Realty submitted that it could not locate a copy of the application, but that it had requested that FINTRAC provide a copy. The Appeal Book did not include a certified tribunal record, or similar, by which FINTRAC would have disclosed all relevant documents in its possession. Thus, while it is a requirement that a compliance officer be appointed (Act, subsection.9.6(1); Regulations, subsection.71(1)(a)) and it appears that this information and any updates or clarifications to it are to be registered with FINTRAC (*Proceeds of Crime (Money Laundering) and Terrorist Financing Registration Regulations*, SOR/2007-121, sections 4, 5, 7), it is unknown if FINTRAC received an application from Max Realty and if that application named a compliance officer. Although Max Realty submitted that Mr. Shahin Mirkhan filed an affidavit relating to the registration of Mr. Ghovanloo as the compliance officer, there is no such affidavit or similar evidence contained in the Appeal Book concerning this issue. The Appeal Book contains an agreement as to its content and a certification of completeness signed by Mr. Shahin Mirkhan as the representative of Max Realty.

[59] The rather unsatisfactory result is that the only evidence is the July 24, 2009 letter from Max Realty which indicates that Mr. Ali Mirkhan was appointed after the compliance examination and makes no reference to a prior officer. Given this, the Director's finding, on a balance of probabilities, that a compliance officer had not been appointed at the time of the

examination is reasonable as it was within the range of reasonable and possible outcomes based on the facts and the law (Act, subsections 73.13(2), 73.15(2)).

[60] As to due diligence, in *Sault Ste Marie*, above, the Supreme Court of Canada articulated the defence of due diligence as "…being 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".

[61] In that regard, it must also be recalled that:

> 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 (*Macleod*, above, quoting from *R v Raham*, 2010 ONCA 206 at para 48).

[62] In the context of Violation #1, the FINTRAC Requirements Simplified Seminar, which was prepared by a lawyer, points out that real estate brokerage companies must appoint someone in their office, usually the manager or the broker, as a compliance officer and lists the duties of that position. Thus, Max Realty was aware of this requirement. It has not, however, provided satisfactory evidence that it took reasonable steps to avoid committing the violation by appointing an officer prior to the examination date. Accordingly, the due diligence defence was not established.

[63] Violation #2 pertained to Max Realty's failure to develop and apply written compliance policies and procedures that are kept up to date and are approved by a senior officer. The

December 16, 2008 letter from FINTRAC specifically requested that it be provided, in advance of the examination, with a copy of Max Realty's compliance policies and procedures including those that pertain to special measures for high risk. There is no evidence that such a policy was provided as requested. The documents contained in the Appeal Book did not include a compliance policy and procedure manual. And, the July 24, 2009 letter from Mr. Ali Mirkhan responding to the notice of violation indicated that he had developed and added a compliance policy but did not provide a copy.

[64] The examination was for compliance and that an advance copy of the compliance policy had been specifically requested by FINTRAC but was not provided; its absence was listed as a deficiency in FINTRAC's March 16, 2009 letter which also requested that within thirty days it be provided with an action plan for bringing Max Realty into compliance; and, Mr. Ali Mirkhan's subsequent response to the Notice of Violation indicated that he had developed and added the policy after the examination but did not provide a copy of that document. It can, therefore, reasonably be inferred that, even if the compliance policy existed at the time of the examination (apparently having been generated by Homelife's head office), it was not then in Max Realty's possession. Accordingly, in my view, the document is not admissible. Even if it were, I agree with the Respondent that it is not a compliance policy within the meaning of the Act but simply reiterates the obligations imposed by the Act and Regulations without explanation as to how Max Realty will comply with them.

[65] As to the one page "New Office Regulations", this document concerns the administration of real estate transactions. In that regard, it makes only two brief references to FINTRAC both

listing only "FINTRAC, Individual Identification" as one of the forms to be completed and signed as part of the transaction. It is not a FINTRAC compliance policy.

[66] Given this, the Director's decision that there was a violation of this requirement was reasonable. And, in the absence of any evidence that reasonable steps were taken by Max Realty to implement a policy in its office before the examination date, the due diligence defence was not made out.

[67] Violation #3 concerned the failure to assess and document the risk referred to in subsection 9.6(2) of the Act, taking into consideration the prescribed factors set out in subsection 71(1)(c) of the Regulations. The only evidence on the record before me concerning the risk assessment is the CREA Risk Assessment Form which was contained in the documents obtained by FINTRAC during the compliance examination. This is a blank form with no information entered onto it. While Max Realty submitted that a completed "Risk Assessment for Brokerage Form" had been duly accomplished, that document was ruled inadmissible as it was dated after the compliance examination.

[68] Given these facts, the Director's decision, on the balance of probabilities, that there had been a violation was reasonable. Further, in the absence of any evidence that reasonable steps were taken to effect a risk assessment before the examination date, the due diligence defence was not made out.

[69] Violation #4 concerned the failure to develop and maintain a written ongoing compliance training program for employees, agents or persons. The Appeal Book contains a document obtained by FINTRAC during the compliance examination entitled "Training Program". This states that a lawyer provided training at the Homelife Real Estate head office in August where the Deal Secretary, Mariam Kottab, was trained on the importance of FINTRAC and PCMLTFA. A second training session by the same lawyer occurred in Max Realty's office in September 2008 which was attended by agents. A copy of the FINTRAC Requirement Simplified Seminar prepared by the lawyer is also contained in the Appeal Book. This describes FINTRAC and its requirements, suspicious transactions, the penalties for failure to comply and provides various forms for reference. In my view, the seminar would comprise an aspect of compliance training. However, it is not a written, ongoing compliance training program and is merely an element of what might be included in the implementation of such a program.

[70] Accordingly, the Director's decision that, on the balance of probabilities, there had been a violation was reasonable. While there is evidence that Max Realty took some steps to train its staff, these do no amount to reasonable steps to effect an ongoing compliance training program and, accordingly, the due diligence defence was not established.

[71] The Respondent asserts that Max Realty may not rely on the first branch of the due diligence test because it has not claimed that it reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. I would note that, in any event, to succeed on this branch, a defendant must have a reasonable belief. Here, Max Realty was aware of the FINTRAC requirements but, by its own admission, did not take them as seriously as it

should have. In my view, Max Realty failed to fully inform itself of the compliance measures required of it. Therefore, it did not reasonably believe its compliance efforts met the legislative requirements.

[72] Max Realty also submits that the Director failed to consider the letter of explanation that it provided in response to the Notice of Violation. However, the Director recognized those submissions at the outset of the decision:

> Further to the observations you have submitted to the Director of the Financial Transaction and Reports Analysis Centre of Canada (FINTRAC) concerning the Notice of Violation issued to Homelife Experience Realty on June 29, 2009, we are hereby providing you with this Notice of Decision.

[73] In *Newfoundland and Labrador Nurses*, above, the Supreme Court of Canada held that under the reasonableness standard of review reasons need not be perfect nor follow a particular form as long as they allow the parties and the reviewing court to understand why a decision was made. In this case, while the decision does not state why the Director did not accept the reasons provided in the letter of explanation, it confirms having considered those submissions. And, significantly, the information that was before the Director supports her findings.

[74] Given all of the foregoing, in my view, the Director's decision with respect to the commission of the violations falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above).

[75] As to the penalty, Mr. Ali Mirkhan's letter of July 29, 2009 did ask that the penalty be reviewed. The Act stipulates that the amount of the penalty shall in each case be determined by

considering that the purpose of the penalty is to encourage compliance with the Act, rather than to punish, and taking into account the harm done by the violation, which could be an aggravating or mitigating factor (ss. 73.11). Further, classification and amounts of penalties may be prescribed by regulation (s.73.1). This is affected by the *Proceeds from Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292 (Penalties Regulations). These state that violations are classified as minor, serious or very serious (subsection 4(1)) and that the range of penalties for violations is $1-$1,000 for a minor violation, $1-$100,000 for a serious violation and $1-$500,000 for a very serious violation (section 5). Compliance history is also to be taken into account (section 6). The Schedule to the Penalties Regulations classifies violations of section 9.6(1) of the Act and subsections 71(1)(a), (b), (c), and (d) of the Regulations as being serious offences.

[76] Here, while the Director found that the facts did not support a finding that the fifth violation had been committed and, therefore, withdrew that violation and accordingly imposed a lesser penalty of $27,000, rather than the $37,500 stated in the Notice of Violation, there is no evidence that the Director considered Max Realty's request that the penalty be revisited. There is also no explanation as to why this penalty was chosen, what factors were considered in sentencing, whether the use of a compliance agreement was considered, nor whether the exercise of the discretion afforded to the Director to impose the penalty proposed, a lesser penalty or no penalty was considered (subsection 73.15(2)).

[77] The Attorney General acknowledges that this is the first appeal of this kind and that the Penalties Regulations did not come into force until December 30, 2008. Further, that subsequent

notices of violations issued in other matters have provided a more fulsome fine analysis. Also, that there is an internal fine policy which was not provided to Max Realty, but which has subsequently been distributed to other violators. The policy apparently contains guidance for fines imposed based on the amount of harm caused, compliance history, as well as the size of the entity and its ability to pay.

[78] In *Lemire v Canadian Human Rights Commission*, 2014 FCA 18, the Federal Court of Appeal stated at paragraph 102 that, "In truth, the considerations relevant to sentencing may overlap with those governing the imposition of an administrative penalty since both are designed to prevent statutorily prohibited conduct." The difficulty here is that Max Realty in part, and although not explicitly, is contesting the amount of the fine. Without any reasons, or even reference to fines imposed in comparable circumstances, the Court cannot determine if the fine imposed on the Appellant is reasonable or not.

[79] For that reason, while the decision as to the commission of the violations is confirmed, the fine is set aside, and the question of the amount of the fine is remitted back to the Director and reasons for the amount of any fine subsequently imposed are to be provided to Max Realty.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the October 7, 2009 decision of the Director of FINTRAC that Max Realty Solutions Ltd has committed four violations of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 is denied with respect to those convictions;
2. The decision will be returned to the Director for a redetermination of the quantum of the fine imposed; and
3. Given the mixed outcome, there shall be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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