Federal Court Cour fédérale

Date: 20220425

Docket: T-232-21

Citation: 2022 FC 598

2022 FC 598 (CanLII)

Ottawa, Ontario, April 25, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

RE/MAX ALL-STARS REALTY INC.

Appellant

and

FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an appeal filed under subsection 73.21(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* SC 2000, c 17 [the *Act*]. Re/MAX All-Stars Realty Inc. [the Appellant] is seeking to quash a decision dated January 8, 2021 [Decision], made by the Director and Chief Executive Officer [Director] of the Financial Transactions and Reports

Analysis Centre of Canada [FINTRAC or the Respondent]. The Director concluded the Appellant had committed a serious violation of the *Act*, and assessed an administrative monetary penalty valued at $31,350.00.

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[2] The Appellant filed this appeal in the form of an application for judicial review. However, the Respondent correctly notes it must proceed as a statutory appeal. The Court has jurisdiction to consider an appeal of the Decision pursuant to subsection 73.21(1) of the *Act,* which creates a right of “appeal”. However, where the Court has jurisdiction to consider an “appeal” of a decision, judicial review of that decision is prohibited by section 18.5 of the *Federal Courts Act,* RSC, 1985, c F-7. Despite the irregularity in the form of originating notice used by the Appellant, and having regard to Rule 3 of the *Federal Courts Rules,* SOR/98-106, I will treat this proceeding as if it had been properly commenced as a statutory appeal.

II. Facts

[3] The Appellant operates a real estate brokerage business, with its head office in Markham, Ontario. The Appellant’s President is Mr. Daniel Sarafian [Mr. Sarafian].

[4] According to the record, the Appellant employed 301 agents and staff in 2018.

[5] On August 14, 2018, FINTRAC advised the Appellant it was selected for a compliance examination pursuant to the *Act* and its associated regulations.

[6] The purpose of a FINTRAC compliance examination is set out in FINTRAC's Notice letter of August 14, 2018. The purpose of the examination was to assess the extent to which the Appellant's compliance program, reporting, record keeping and client identification policies and practices meet the legislative and regulatory requirements:

> Pursuant to section 62 of the Act, an authorized FINTRAC compliance officer may undertake a compliance examination with the purpose to assess the extent to which your organization's compliance program, reporting, record keeping and client identification policies and practices meet the legislative and regulatory requirements. Moreover, this examination also aims to assist your organization in meeting its legal obligations should issues or gaps be identified.
>
> As was agreed during our telephone conversation, we will hold a compliance interview via a telephone call on November 20, 2018, beginning at 10:00 AM. During this interview, we will review FINTRAC's mandate and ensure that you are familiar with our examination process. Subsequent telephone calls may be required to conduct interviews with various key personnel.
>
> <u>To ensure an efficient and effective examination and in accordance with section 63.1 of the Act, your organization is required to provide us with the documentation and records listed below, in the form and manner as detailed in the attached Appendix, no later than September 17, 2018.</u>
>
> [Emphasis added]

A. *FINTRAC's request for documents and the Appellant's compliance*

[7] In a Notice letter dated August 14, 2018, FINTRAC required the to provide documentation to enable the efficient and effective examination by FINTRAC of the Appellant's compliance regime under the *Act*. Ten types of documentation were required; each was described in the Notice letter of August 14, 2018.

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[8] FINTRAC gave the Appellant until September 17, 2018 as the deadline to provide this required information. This would give FINTRAC sufficient time to prepare for its compliance examination interview meeting with the Appellant. The compliance examination interview was initially scheduled for November 20, 2018.

[9] As of September 17, 2018, the FINTRAC had not received any of the information or documentation required from the Appellant.

[10] On October 9, 2018, an employee of the Appellant contacted FINTRAC seeking clarification on some items as she was preparing part of the required information.

[11] FINTRAC responded the same day – October 9, 2018 – advising the Appellant how to send the required documentation in secure fashion.

[12] On November 8, 2018, FINTRAC wrote the Appellant to advise it had not received any of documents required almost three months previously.

[13] On November 13, 2018, the same employee sent FINTRAC four of the ten sets of documents required – items 6, 7, 8 and 10.

[14] However, items 1, 2, 3, 4, 5, and 9, which were required by FINTRAC, were not provided.

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[15] The employee in the same email told FINTRAC that the missing documents would be provided by Daniel Sarafian, the Appellant's President and Compliance Officer for FINTRAC purposes. This email also set out the documents provided by the Appellant:

> From the list of the document requirements I have addressed to following:
>
> 6. Financial Statements in PDF format via email
>
> 7. We currently employ 301 individuals at Re/Max All-Stars Realty Inc. (Agents and Staff)
>
> 8. Trust Deposit Journal in PDF format via email
>
> 10. List of all closed deals in period of January 1, 2018 to June 30, 2018
>
> The rest of the points (1.2.3.4.5.9) for documentations will be covered by Daniel Sarafian.
>
> [Emphasis added]

[16] While one of the missing compliance documents (item # 2) was provided on January 9, 2019, the remaining five sets were not provided until October 8, 2020 – more than two years after FINTRAC requested them in its Notice letter of August 14, 2018.

[17] FINTRAC says and I agree that the six missing sets of documents included "key" documents in terms of the Appellant's compliance measures. It is obvious from the description of these documents that they deal with the Appellant's compliance with the *Act*. The missing documents were:

> 1. Copy of your most recent version of compliance policies and procedures, including those that pertain to special measures for identifying clients, keeping records and monitoring financial transactions in respect of the activities that pose a high risk, as required under the PCMLTFA.

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> 2. Copy of your documented assessment of risks related to money laundering and terrorist financing offences, as required under the PCMLTFA.
>
> 3. Copy of the last documented internal and/or external review of your compliance policies and procedures, risk assessment and ongoing compliance training program that have been completed to date, as required under the PCMLTFA. Also include any assessment reports to senior officers that were issued upon the completion of the reviews.
>
> 4. Copy of the ongoing training program that has been provided to your staff and/or agents in relation to your obligations under the PCMLTFA.
>
> 5. An organizational chart of Re/Max All-Stars Realty Inc.
>
> 9. Any unusual transactions records flagged for suspicion but not filed for the period January 1, 2018 to June 30, 2018 inclusive.

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B. *The compliance examination*

[18] After being rescheduled, FINTRAC conducted its compliance examination interview of the Appellant on January 8, 2019. During this compliance examination, and for scheduling and personal reasons, Mr. Sarafian advised FINTRAC that Mr. Michael Scriven [Mr. Scriven] was appointed the Appellant’s compliance officer to deal with the compliance documents. Mr. Sarafian left the examination interview, leaving the compliance examination to Mr. Scriven.

[19] As of the conclusion of the compliance examination, neither Mr. Sarafian nor Mr. Scriven had provided items 1, 2, 3, 4, 5 or 9 required by the Notice letter dated August 14, 2018.

[20] However, the next day January 9, 2019, the Appellant provided a Risk Assessment Form indicating their real estate brokerage may be exposed to money laundering and terrorist financing

offences. This document corresponded to item #2 from the list of required documents in the Notice letter dated August 14, 2018.

[21] On June 7, 2019, FINTRAC's representative Mr. Shaun McWeeney [Mr. McWeeney] advised Mr. Scriven by telephone that FINTRAC had found the Appellant non-compliant because of the Appellant's failure to provide the required documentary material set out in FINTRAC's Notice letter of August 14, 2018.

[22] The Appellant alleges Mr. Scriven does not "recall" this telephone call. However, this point was not raised by the Appellant until its memorandum of fact and law dated August 17, 2021 filed in this proceeding. Specifically this phone call was referred to twice in FINTRACs communications with the Appellant, without objection or dispute, first in its Examination Findings letter dated August 22, 2019, and later in its Notice of Violation dated July 14, 2020. I find on a balance of probabilities this phone call took place as FINTRAC states on June 7, 2019.

[23] Notably, the Appellant still had not provided the missing five sets of documents on or before the June 7, 2019 telephone call between FINTRAC and the Appellant.

[24] Indeed, the Appellant had still not provided the missing five sets of documents on or before FINTRAC sent the Appellant its Examination Findings letter dated August 22, 2019.

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[25] The August 22, 2019 Examination Findings letter notified the Appellant that an administrative monetary penalty [AMP] might be imposed because of the Appellant's failure to provide required documentation:

> As a result of the deficiencies, FINTRAC is considering an administrative monetary penalty (AMP). If you have any additional information with respect to the deficiencies cited in Appendix l that was not provided to FINTRAC at the time of the examination, please forward it, in writing, to my attention within five (5) days from the receipt of this letter. We will consider any additional information submitted within the period specified above and provide a written response. If no additional information is provided, we will base our decision to issue an AMP on the information obtained during the examination.

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[26] As noted, FINTRAC's Examination Findings letter of August 22, 2019 also informed the Appellant it had five business days from receipt to provide any additional information that was not provided to FINTRAC at the time of the compliance examination more than 8 months earlier on January 8, 2019.

[27] On August 28, 2019, Mr. Scriven emailed FINTRAC requesting until September 30, 2019 to provide the outstanding documentation. The Appellant conceded at the hearing that this correspondence is ambiguous and I agree. On the one hand it suggests Mr. Scriven was under the impression he would receive a detailed list of the outstanding documents still required by FINTRAC. But more tellingly in my view, on the other hand it indicates Mr. Scriven now sees the list of documents to be delivered was in fact set out in FINTRAC's original Notice letter of August 14, 2018.

[28] Mr. Scriven also indicated he had suffered recent significant health issues and would need an extension of time to be able to comply with their request.

[29] Notably, Mr. Scriven did not say when his health issues arose, or how long they lasted.

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[30] On August 30, 2019, FINTRAC advised Mr. Scriven that additional time would not be granted and the file would be forwarded to the administrative penalties team for follow up in terms of administrative penalty.

[31] The Appellant had not filed the missing five sets of documents by the time of FINTRAC’s correspondence of August 30, 2019.

[32] On July 14, 2020 – almost a year later and again without receiving anything further from the Appellant – FINTRAC issued a Notice of Violation to the Appellant pursuant to section 73.13 of the *Act.* The Notice of Violation identified the Appellant’s failure to provide required documentation as a violation FINTRAC had reasonable grounds to believe the Appellants had committed, and advised the Appellant it proposed to impose an administrative monetary penalty of $31,350.00.

[33] The purpose of the Notice of Violation was to give the Appellant notice of and an opportunity to make submissions on whether it had committed the alleged violation, and to comment on the proposed administrative penalty.

[34] The violation set out in the Notice of Violation was the Appellant's failure to provide the information required by the Notice letter of August 14, 2018:

> Pursuant to section 73.13 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* FINTRAC has determined that RE/MAX All-Stars Realty Inc. is a real estate broker and committed the following violation:
>
> i. Failure to provide, in accordance with a notice dated August 14, 2018, documents or other information reasonably required by an authorized person, which is contrary to subsection 63.1(2) of the *Proceeds of Crime (Money Laundering*) and *Terrorist Financing Act*.

[35] On October 8, 2020, and October 22, 2020, Mr. Sarafian made representations to the Director disputing the violation. It appears the Appellant provided the outstanding five sets of documents as stated in his letter dated October 1, 2020 (delivered on October 8 and resent October 22, 2020):

> I have now directed Mr. Scriven to complete the outstanding compliance items as soon as possible. These include the compliance policies and procedures, ongoing training program and company risk assessment. Copies of these are enclosed in this written representation/response.

[36] Mr. Sarafian also admitted the Appellant had not provided the information required in accordance with the FINTRAC's Notice letter of August 14, 2018.

III. Decision under review

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[37] On January 8, 2021, the Director found on a balance of probabilities that the Appellant had violated subsection 63.1(2) of the *Act.* The Director then assessed and imposed an administrative monetary penalty on the Appellant in the amount of $31,350.00.

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[38] In accordance with subsection 73.15(2) of the *Act*, the Director indicated consideration had been given to two matters: 1) whether the Appellant committed the violation, and 2) if so, whether the proposed penalty of $31,350.00, a lesser penalty or no penalty should be imposed.

[39] On the issue of whether the Appellant committed the violation, the Director noted that on August 14, 2018, FINTRAC sent the Notice letter regarding the compliance examination to the Appellant. This letter constituted notice served under subsection 63.1(1) of the *Act* requiring the Appellant to provide specified documents related to its operations and compliance program to FINTRAC by September 17, 2018. Therefore, in failing to provide any of the required documents by September 17, 2018, the Appellant did not provide the documents in accordance with the notice served under subsection 63.1(1) of the *Act*.

[40] The Director noted that although the Appellant subsequently provided some of the required documents, some certain “key” documents had not been provided by the time FINTRAC concluded the compliance examination in June 2019.

[41] The Appellant does not contest that it committed the violation. That said, and following a review of the Notice of Violation and the representations made by the Appellant, the Director determined on a balance of probabilities that the Appellant committed the violation.

[42] On the issue of whether the proposed penalty, a lesser penalty, or no penalty should be imposed, the Director noted the violation set out in the Notice of Violation is a serious violation, with penalties ranging between $1 to $100,000 per violation pursuant to paragraph 5(b) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292 [*AMP Regulations*]. The Notice of Violation proposed a penalty of $31,350.00 for this violation, a sum FINTRAC determined in accordance with criteria set out in section 73.11 of the *Act* and section 6 of the *AMP Regulations*.

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[43] The Director considered Mr. Scriven's illness and accepted his illness may have prevented the Appellants from responding to the August 22, 2019 Examination Findings letter. However, the Director did not find this relevant because the Appellant was in receipt of the Notice letter served under subsection 63.1(1) of the *Act* for over a year [it was dated August 14, 2018] and FINTRAC provided multiple opportunities to provide the required documents throughout the examination process. Mr. Scriven was not appointed the Appellant's compliance officer until the day of the compliance examination on January 8, 2019, almost four months after the deadline specified in the notice. Moreover, the Appellants did not mention this issue until Mr. Scriven's August 28, 2019 email to FINTRAC. The Director found there was no explanation or justification for why the Appellants did not provide the required documents in the period of more than one year between receiving the notice and receiving the Examination Findings letter. The Appellant's failure to provide required documents within the specified period demonstrated unwillingness to comply with the *Act*, thereby hindering FINTRAC's ability to fulfil its statutory mandate. Therefore, the Director found Mr. Scriven's illness neither reduced the amount of the

penalty needed to encourage the Appellant's compliance with the *Act* and its regulations, nor reduced the harm done by the violation.

[44] The Director considered the Appellant's submissions that it eventually completed the outstanding required documents and included them with its representations. However, the harm already occurred when FINTRAC concluded the examination process without access to these documents. The Director took into account the fact the Appellant provided some of the required documents after the deadline specified in the notice, but before the end of the examination process and applied a 5% reduction to the base penalty to reflect the limited mitigation of the harm done.

[45] The Director considered the Appellant's compliance history, noting this was its first violation and reduced the base penalty to 33% of its original amount.

[46] The Director considered the Appellant's ability to pay, including the Appellant's submission that it is a "relatively small business" and that "a fine of this magnitude, especially during these COVID19 times which have impaired our company income, would be very difficult for both the company and for [Mr. Scriven] personally". However, the representations provided no evidence to demonstrate there has been an impairment to the Appellant's income to such an extent that paying the proposed penalty would have a punitive effect on the entity. Therefore, the Director did not make further reduction to the total penalty and imposed the administrative penalty of $31,350.00.

IV. Issues

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[47] In my view the issues are:

1) What is the standard of review for this appeal?

2) Did FINTRAC breach the Appellant's right to procedural fairness?

3) Did the Director err in finding that the Appellant had violated subsection 63.1(2) of the *Act*? and

4) Did the Director err in imposing an administrative monetary penalty in the amount of $31,350.00?

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V. Standard of Review

A. *Palpable and overriding error is appellate test for alleged errors of fact or mixed fact and law*

[48] The Appellant submits the standard of review on this appeal is reasonableness. It takes this position because appeals against decisions by FINTRAC were treated by the Federal Court as applications for judicial review, see *Homelife/Experience Realty Inc. v Canada (Finance)*, 2014 FC 657 [per Strickland J] at para 31; *Max Realty Solutions Ltd. v Canada (Attorney General),* 2014 FC 656 [per Strickland J] at para 31 [*Max Realty #1*]*; Max Realty Solutions v Canada (Financial Transactions and Reports Analysis Centre*), 2016 FC 620 [per Barnes J] at para 4 [*Max Realty #2*]; *Kabul Farms Inc. v Canada*, 2015 FC 628 [per Fothergill J] at para. 28 [*Kabul Farms FC*], affirmed in *Canada v Kabul Farms Inc.*, 2016 FCA 143 [per Stratas JA] at para 7 [*Kabul Farms FCA*].

[49] However, FINTRAC submits and I agree the Supreme Court of Canada has more recently determined that where, as here, Parliament provides a statutory right of appeal, a reviewing

Court must apply the appellate standards of review: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 37:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[50] Respectfully, I agree with FINTRAC because *Vavilov* was decided after the earlier FINTRAC decisions cited above. *Vavilov* decides that where Parliament provides for a statutory right of appeal a reviewing Court must apply appellate standards of review, unless Parliament provides for a different standard of review. Parliament did not provide a different standard of review.

[51] Because the Director's Decision on whether the Appellant committed a violation of subsection 63.1(2) of the *Act* is a question of mixed fact and law, as are the Decisions to impose a penalty and the appropriate amount of that penalty, and given that the Appellant has not raised an extricable question of law, in my view the applicable appellate standard of review in this case

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is whether the Director committed a palpable and overriding error. This test is set out in *Housen v Nikolaisen,* 2002 SCC 33 and confirmed in *Vavilov* at para 37 which for convenience I will set out again:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.
>
> [Emphasis added]

B. *What is meant by palpable and overriding error for questions of fact and mixed fact and law?*

[52] Justice Stratas in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon*] explains what the Appellant must show to establish a palpable and overriding error in an appeal:

> [46] Palpable and overriding error is a highly deferential standard of review*: H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 2006 CanLII 37566 (ON CA), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman, supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the

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> outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [Emphasis added]

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[53] This description of palpable and overriding error for alleged errors of fact and mixed fact and law has been adopted by both the Federal Court and Federal Court of Appeal. See most recently: *Ladouceur v Banque de Montréal*, 2022 FC 440 [per Pentney J] at para 15; *Fasken Martineau Dumoulin LLP v Gentec,* 2022 FC 327 [per St-Louis J] at para 37; *Toronto Regional Real Estate Board v IMS Incorporated,* 2021 FC 1239 [per Pallotta J] at para 13.

C. *Procedural Fairness*

[54] I agree with the parties that procedural fairness is reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43; and see *Violator no. 10 v Canada (Attorney General),* 2018 FCA 150 [per de Montigny JA] at para 21 [*Violator no. 10*]. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

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[55] I also understand from *Vavilov* at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[56] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. <u>Relevant legislation</u>

[57] Section 63.1 of the *Act* establishes the requirement for reporting entities such as the Appellant to provide FINTRAC with any documents or information necessary to permit FINTRAC to conduct an examination of the reporting entity for the purpose of ensuring compliance with Part 1 or 1.1 of the *Act* [i.e., a compliance examination]. Section 63.1 of the *Act* states:

Information demand	**Demandes d'information**
63.1 (1) For an examination under subsection 62(1), an authorized person may also serve notice to require that the person or entity provide, at the place and in accordance with the time and manner stipulated in the notice, any document or other information relevant to the administration of Part 1 or 1.1 in the form of electronic data, a printout or other intelligible output.	**63.1 (1)** La personne autorisée peut en outre, dans le cadre d'un examen visé au paragraphe 62(1), par avis signifié, exiger de la personne ou entité qu'elle fournisse, au lieu et selon les modalités de temps ou autres qui sont précisés dans l'avis, tout document ou autre information utile à l'application de la partie 1 ou 1.1, sous forme de données électroniques ou d'imprimé, ou sous toute autre forme intelligible.
Obligation to provide information	**Obligation de fournir de l'information**
(2) The person or entity on whom the notice is served shall provide, in accordance with the notice, the documents or other information with respect to the administration of Part 1 or 1.1 that the authorized person may reasonably require.	**(2)** La personne ou l'entité à qui l'avis est signifié doit fournir, en conformité avec celui-ci, les documents ou autre information que la personne autorisée peut valablement exiger quant à l'application de la partie 1 ou 1.1.

[58] Subsection 73.15(2) of the *Act* establishes the Director's authority to make the Decision under appeal in this proceeding:

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Representations to Director	**Présentation d'observations**
73.15(2) If the person or entity makes representations in accordance with the notice, 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 paragraph 73.1(1)(c), impose the penalty proposed, a lesser penalty or no penalty.	**73.15(2)** Si des observations sont présentées conformément au procès-verbal, le directeur détermine, selon la prépondérance des probabilités, la responsabilité de l'intéressé. Le cas échéant, il peut, sous réserve des règlements pris en vertu de l'alinéa 73.1(1)c), imposer la pénalité mentionnée au procès-verbal ou une pénalité réduite, ou encore n'imposer aucune pénalité.

[59] Subsection 73.21(1) of the *Act* establishes the right of the Applicant to appeal to this Court. Subsection 73.21(5) establish the Federal Court's powers on appeal of a decision of the Director. Subsections 73.21(1) and (5) state:

Right of appeal	**Droit d'appel**
73.21 (1) A person or entity on which a notice of a decision made under subsection 73.15(2) or 73.19(2) is served, in respect of a serious violation or very serious violation, may, within 30 days after the day on which the notice is served, or within any longer period that the Court allows, appeal the decision to the Federal Court.	**73.21 (1)** S'agissant d'une violation grave ou très grave, il peut être interjeté appel à la Cour fédérale de la décision prise au titre des paragraphes 73.15(2) ou 73.19(2), selon le cas, dans les trente jours suivant la signification ou dans le délai supplémentaire que la Cour peut accorder.
…	…
Powers of Court	**Pouvoir de la Cour fédérale**
(5) On an appeal, the Court may confirm, set aside or, subject to any regulations	**(5)** Saisie de l'appel, la Cour fédérale confirme, annule ou, sous réserve des règlements

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made under paragraph 73.1(1)(c), vary the decision of the Director.	pris en vertu de l'alinéa 73.1(1)c), modifie la décision.
[Emphasis added]	[Je souligne]

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VII. Analysis

A. *Did FINTRAC breach the Appellant's right to procedural fairness?*

[60] Both parties agree that the required level of procedural fairness in this case is "moderate" as set out in *Violator no. 10, supra* at para 39.

[61] The Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at paras 23-28 enumerates a non-exhaustive list of factors that affect the content of the duty of fairness. The following factors are in issue: 1) nature of the decision being made and the process followed in making it; 2) the importance of the decision to the individuals affected; 3) the legitimate expectations of the Appellant.

(1) Nature of the decision and the process followed

[62] The Appellant submits the Director breached principles of procedural fairness by making her Decision based on findings of Mr. McWeeney, the Regional Compliance Officer who conducted the compliance examination on January 8, 2019. The Applicant alleges, contrary to the Notice of Violation, that Mr. Scriven was informed by FINTRAC at the compliance examination on January 8, 2019 that it would send him a specific list of documents required. Mr.

Scriven also alleges he does not “recall” a conversation on June 7, 2019 in which the examination findings were relayed to him.

[63] However, I note the Appellant has not supplied any evidence to support of these allegations.

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[64] I have already found FINTRAC and the Appellant had a phone conversation on June 19, 2019, and did so at para 22 above: “The Appellant alleges Mr. Scriven does not “recall” this telephone call. However, this point was not raised by the Appellant until its memorandum of fact and law dated August 17, 2021 filed in this proceeding. Specifically this phone call was referred to twice in FINTRACs communications with the Appellant, without objection or dispute, first in its Examination Findings letter dated August 22, 2019 and later in its Notice of Violation dated July 14, 2020. I find on a balance of probabilities this phone call took place as FINTRAC states on June 7, 2019.”

[65] With respect, I am also not persuaded Mr. Scriven was informed by FINTRAC at the compliance examination on January 8, 2019 that it would send him a specific list of documents required. No notes to this effect were provided by the Appellant. Nor is any explanation given as to why FINTRAC would take this position given FINTRAC set out what was required in its Notice letter of August 14, 2018. Nor do I find the Appellant had difficulty producing the remaining five sets of documents: they were produced October 8, 2020, in response to the Notice of Violation dated July 14, 2020. There is no transcript of the compliance examination.

[66] Turning to the nature of the Decision and the process followed, I am unable to find procedural unfairness. The Decision made by FINTRAC concerned whether the Appellant failed to provide FINTRAC with information and documents necessary to conduct the compliance examination. In order to permit FINTRAC to properly conduct the compliance examination, the Appellant was required to provide the information and documents to FINTRAC no later than the date of the examination. If on the date of the examination, in this case January 8, 2019, the Appellant had not provided the required information and documents, the Appellant could be in violation of subsection 63.1(2) of the *Act*.

[67] If the Appellant had provided FINTRAC with documents required to conduct its compliance examination, the Examination Findings letter could have outlined any deficiencies FINTRAC found in the Appellant's compliance program.

[68] However, the Appellant failed to provide the required documents by September 17, 2018, the original deadline, and thereafter continued to be non-compliant until October 8, 2020 when it finally provided what it says are the remaining five sets of documents. These came far too late to be assessed by FINTRAC. Importantly, because of the Appellant's failure to comply, FINTRAC was not able to determine what if any deficiencies were in the Appellant's compliance program.

[69] FINTRAC found the Appellant's failure to provide the requested information in accordance with the Notice letter dated August 14, 2018, was itself a deficiency. The effective date of that deficiency was the date of the compliance examination, January 8, 2019. That was

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the deadline for compliance in connection with which, however, the Appellant did not comply until October 8, 2020. It is beyond dispute the documents were required well before then.

[70] In my view the Appellant, which has the onus in this respect, has failed to demonstrate a palpable and overriding error in terms of the Director's finding that the Appellant had violated its obligation to provide required documentation on time. I reiterate the Appellant admits this point; in the circumstances it could not credibly do otherwise.

[71] In this respect, FINTRAC made a factual determination that the Appellant failed to provide the requested information in accordance with the Notice, a failure which interfered with FINTRAC's compliance activities and the fulfilment of its mandate under subsection 40(e) of the *Act*. FINTRAC provided the Appellant an opportunity to inform FINTRAC of any factual errors in their determination that the Appellant had not complied with the Notice. In doing so, in my view FINTRAC discharged its duty of fairness owed to the Appellant at this stage of the decision-making process.

[72] The Appellant also submits Mr. Scriven had health issues and in denying Mr. Scriven's request for additional time to provide information, the Appellant's right to procedural fairness was breached. However, I note Mr. Scriven's health issues did not prevent him from participating in the compliance examination on January 8, 2019, and did not prohibit him, or anyone else on behalf of the Appellant, from providing the requested documents in accordance with the Notice of August 14, 2018, that is before or well before or even after the examination;

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item# 2, for example was provided January 9, 2019. Nothing further was provided until October, 2020.

(2) Importance of the decision to the individuals affected

[73] The Appellant submits the Decision to impose a monetary penalty is important because "it paints the picture that they were not willing to work together with FINTRAC to ensure compliance with the *Act* painting them in a negative way publicly that could potentially affect their name and business relationships, especially with financial institutions and the Real Estate Council of Ontario that governs them."

[74] I note the Appellant did not raise this issue with FINTRAC after receipt of the Notice of Violation. Instead it is first raised in the Appellant's Memorandum in this appeal. Not surprisingly, FINTRAC did not address this issue.

[75] That said, I note in *Baker* that the Supreme Court holds the following with regards to the "importance of the decision to the individual affected" factor:

> 25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at p. 1113:
>
>> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave

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> > and permanent consequences upon a professional career.
>
> As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council*, *ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:
>
> > In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.
>
> The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[76] I find no merit in this aspect of the Appellant's procedural unfairness argument. Respectfully, other than its bald submission, the Appellant has not provided or pointed to any submissions or evidence as to how its non-compliance would paint it in a negative way publicly thereby potentially affecting its name and business relationships. This issue invites the Court to speculate on possible harm, which it is not prepared to do.

[77] I also note this argument could have been, but was not advanced by the Appellant in the submissions it made after receipt of the Notice of Violation.

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[78] In addition, I note the Appellant declared it had some 301 agents and staff in 2018. In the absence of any evidence in this respect, I am unable to assess palpable and overriding error in terms of the financial impact the fine of $31,350.00 would have on this Appellant. Tellingly, in my view, the Appellant made no such submissions to FINTRAC either.

(3) Legitimate expectations of the Appellant

[79] The Appellant also submits it had a legitimate expectation that FINTRAC would communicate more with them and that FINTRAC would consider Mr. Scriven's illness in affording him more time to attend to his duties. Therefore, it submits the procedure followed by FINTRAC was unfair.

[80] FINTRAC replies that at the compliance examination on January 8, 2019, it told the Appellant that failure to provide required compliance documents constituted non-compliance that would be cited in its Examination Findings letter even if the outstanding documentation were provided to FINTRAC after the completion of the examination. This assertion is set out in FINTRAC's Findings letter of August 22, 2019. I note the Appellant did not dispute the accuracy of this statement in any of its responses to the Examination Findings letter. On the record before me, I find it more probable than not that FINTRAC cautioned the Appellant to this effect.

[81] The purpose of the Examination Findings letter was to advise the Appellant of FINTRAC's findings, and give the Appellant an opportunity to respond to those findings. This was confirmed by Mr. McWeeney in his e-mail exchange with Mr. Scriven of August 30, 2019.

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[82] In my view, the five days provided for in the Examination Findings letter of August 22, 2019 was not an opportunity for the Appellant to correct the deficiency because by then the time to comply had come and gone. Instead, the purpose of the Examination Findings letter was to provide an opportunity for the Appellant to demonstrate the findings in the letter were factually incorrect.

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[83] In my view, it is not plausible for the Appellant to have a legitimate expectation it would be granted additional time to provide the required documents. It might have had an expectation, but in my view it lacked a *legitimate* expectation in these circumstances. It was told everything it needed to provide in the Notice letter of August 14, 2018. All it had to do was comply in a far more timely manner.

[84] Considering these *Baker* factors, I conclude the duty of procedural fairness FINTRAC owed to the Appellant was not breached.

B. *Did the Director make a palpable and overriding error in finding the Appellant violated subsection 63.1(2) of the Act?*

[85] The Appellant submits the Director erred in concluding it had committed a violation considering communications with FINTRAC were largely unclear regarding timelines. Moreover, FINTRAC did not accommodate Mr. Scriven despite the serious medical issues he faced. Therefore, the Appellant submits the Director erred in concluding the Appellant committed a violation.

[86] Given this is a statutory appeal, the Appellant must show FINTRAC made a palpable and overriding error, as discussed above. I am unable to find any palpable or overriding error in terms of the Director finding the Appellant violated subsection 63.1(2) of the *Act*.

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[87] Respectfully, the Director explicitly considered Mr. Scriven's illness and accepted his illness may have prevented the Appellants from responding to the August 22, 2019 Examination Findings letter. However, in my view this illness was irrelevant because the Appellant was in receipt of the Notice letter of August 14, 2018, served under subsection 63.1(1) of the *Act*, for over a year. Indeed, Mr. Scriven was not appointed compliance officer until the day of the examination on January 8, 2019, almost four months after the deadline specified in the Notice letter. The Appellant was given multiple opportunities to provide the required documents throughout the examination process and the Director fully considered Mr. Scriven's illness as evidenced by the reasons for the Decision. There is no palpable and overriding error in this determination.

[88] FINTRAC submits, and I agree that the Appellant's failure to provide the requested documents constitutes a violation of subsection 63.1(2) of the *Act*:

Obligation to provide information	**Obligation de fournir de l'information**
63.1(2) The person or entity on whom the notice is served <u>shall provide</u>, in accordance with the notice, the documents or other information with respect to the administration of Part 1 or 1.1 that the authorized person may reasonably require.	**63.1(2)** La personne ou l'entité à qui l'avis est signifié <u>doit fournir</u>, en conformité avec celui-ci, les documents ou autre information que la personne autorisée peut valablement exiger quant à l'application de la partie 1 ou 1.1.

[Emphasis added] [Je souligne]

[89] The Appellant was issued a Notice letter on August 14, 2018, setting out ten (10) items of information and/or documents FINTRAC required to properly assess the Appellant's compliance with Parts 1 and 1.1 of the *Act*. The Notice required the Appellant to provide the requested items no later than September 17, 2018.

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[90] However, the Appellant, notwithstanding extension of the date of the compliance examination, failed to provide items 1, 2, 3, 4, 5, and 9 prior to the conclusion of the compliance examination on January 8, 2019. The items the Appellant failed to produce for examination on January 8, 2019 included all of the documents pertaining to the Appellant's compliance regime. They were in my view and I find them to have been "key" to the compliance examination. They were not provided until October 8, 2020, by which time they were clearly out of time and non-compliant.

[91] Therefore, absent the required documents by the prescribed deadline, the Director did not make a palpable and overriding error when she concluded the Appellant had committed a violation of subsection 63.1(2) of the *Act*.

C. *Did the Director err in imposing an administrative monetary penalty in the amount of $31,350.00?*

[92] The Appellant submits that because the decision to levy a penalty was unreasonable and incorrect, the Director erred in making a decision to levy a penalty as against them. The Appellant did not make further submissions on this issue in its written or oral submissions.

[93] I note at the outset that the reasonableness test proposed is not the appropriate standard of review in this statutory appeal. The test in relation to the determinations of monetary penalty is also clear and palpable error, as they involve alleged errors of fact and or mixed fact and law.

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[94] FINTRAC submits the Director's assessment of monetary penalty did not entail palpable and overriding error. I agree. The Director took into account all factors required to be considered under section 73.11 of the *Act*: the harm done by the violation, the history of compliance of the Appellant, and that penalties have as their purpose to encourage compliance with the *Act*, rather than to punish:

Criteria for penalty	**Critères**
73.11 Except if a penalty is fixed under paragraph 73.1(1)(c), the amount of a penalty shall, in each case, be determined taking into account that penalties have as their purpose to encourage compliance with this Act rather than to punish, the harm done by the violation and any other criteria that may be prescribed by regulation.	**73.11** Sauf s'il est fixé en application de l'alinéa 73.1(1)c), le montant de la pénalité est déterminé, dans chaque cas, compte tenu du caractère non punitif de la pénalité, celle-ci étant destinée à encourager l'observation de la présente loi, de la gravité du tort causé et de tout autre critère prévu par règlement.

[95] Regarding harm done by the violation, the Director found:

> 19. Re/MAX All-Stars Realty Inc.'s failure to provide the required documents within the specified period, nor afterwards, demonstrated unwillingness to comply with the *Act*. This failure caused significant harm by preventing FINTRAC from verifying Re/MAX All-Stars Realty Inc.'s compliance with its obligations under Parts 1 and 1.1 of the *Act* during the examination, since FINTRAC could not access key components of Re/MAX All-Stars Realty Inc.'s compliance program. The violation therefore hindered FINTRAC's ability to fulfil its statutory mandate.

[96] FINTRAC's "Guide on harm done assessment for violations of other compliance measures", available on FINTRAC's website explains the nature of the harm caused by a violation of subsection 63.1(2), and states that such violations warrant a maximum base penalty of $100,000, less any reductions resulting from mitigating factors. The Director considered mitigating factors, i.e. the completion of outstanding documents. Therefore, the Director's findings on the harm caused by the Appellant were consistent with this publicly accessible Guide.

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[97] Regarding the Appellant's compliance history, the Director appropriately found this was the first violation of subsection 63.1(2) by the Appellant, and accordingly reduced the base penalty to 33% of the original amount proposed:

> 23. Re/MAX All-Stars Realty Inc. submits that the entity has always been compliant with the *Act* during Mr. Sarafian's lengthy period of ownership and that this is the first time it has committed a violation.
>
> 24. The proposed penalty considered Re/MAX All-Stars Realty Inc.'s compliance history by reducing the base penalty to 33% of its original amount, because this was the first violation of its kind Re/MAX All-Stars Realty Inc. had committed. Re/MAX All-Stars Realty Inc.'s representations do not provide any reasons why I should vary this approach. I find that the proposed penalty accurately takes into account Re/MAX All-Stars Realty Inc.'s history of compliance with the Act and its regulations.

[98] Regarding the purpose of penalties is to encourage compliance with the *Act*, rather than to punish, the Director found the amount of penalty proposed in the Notice of Violation ($31,350.00) was necessary to encourage future compliance with the *Act*:

> 25. …The severity of the violation, which impeded FINTRAC from fulfilling its mandate, makes a penalty of the amount

> proposed in the Notice [of Violation] necessary to encourage compliance with the *Act*.

[99] The Director considered the relevant legislation and applied it to the record. In the circumstances outlined above, neither individually nor collectively do I find palpable and overriding error in the Director's Decision to impose an administrative penalty against the Appellant, and to assess it in the amount of $31,350.00.

VIII. Conclusion

[100] The Appellant has failed to establish its right to procedural fairness was breached. It has also failed to establish the Director made a palpable and overriding error in terms of finding the Appellant committed a violation of the *Act*, or in assessing a monetary penalty was appropriate, or in assessing the amount of that penalty. Therefore, this appeal must be dismissed.

IX. Costs

[101] The parties agreed that costs in an all-inclusive lump sum amount of $10,000.00 should be awarded in favour of the successful party to this appeal. I appreciate this joint submission. And I agree costs should be awarded to the successful litigant. However, I must also consider the reasonableness of the proposed amount. Given the relative brevity of the record and jurisprudence, and in my discretion, a reasonable lump sum is $7,500.00 in this case; I will make such an award in favour of the Respondent.

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JUDGMENT in T-232-21

THIS COURT'S JUDGMENT is that:

1. This appeal is dismissed.
2. The Appellant shall pay to the Respondent its costs in the all-inclusive lump sum amount of $7,500.00.

"Henry S. Brown"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-232-21
STYLE OF CAUSE:	RE/MAX ALL-STARS REALTY INC. v FINANCIAL TRANSACTIONS AND REPORTS ANALYSIS CENTRE OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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DATED:	APRIL 25, 2022

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