Federal Court Cour fédérale

Date: 20240226

Docket: T-575-22

Citation: 2024 FC 309

Ottawa, Ontario, February 26, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MONTECRISTO JEWELLERS INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an appeal pursuant to subsection 73.21(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Act]. The Appellant, Montecristo Jewellers Inc, seeks to quash the decision of the Director and Chief Executive Officer [Director] of the Financial Transactions and Reports Analysis Centre of Canada [FINTRAC]. The Director found that Montecristo Jewellers Inc. had committed four violations of the Act and imposed a total administrative monetary penalty of $222,750.

[2] For the reasons that follow, the Appeal is dismissed with respect to three of the four violations.

I. Overview

[3] The Appellant, Montecristo Jewellers Inc [MJI], is a jewellery business with three locations in the Vancouver area.

[4] On September 3, 2019, FINTRAC notified MJI by letter that FINTRAC would be examining MJI to assess MJI's compliance with Parts 1 and 1.1 of the version of the Act in force at the relevant time, which was from October 1, 2018 to March 31, 2019 [Compliance Period]. FINTRAC conducted the examination, including interviews with employees, in October 2019. FINTRAC notified MJI of its initial findings (including alleged deficiencies) via letter in June 2020. MJI disputed these alleged deficiencies. In October 2021, FINTRAC issued a formal Notice of Violation [NOV] to MJI identifying four violations of the Act and the applicable regulations.

[5] On February 17, 2022, the Director of FINTRAC issued a decision confirming that MJI had committed all four violations. The Director imposed an administrative monetary penalty [AMP] totalling $222,750.

II. Overview of Statutory Framework

[6] In *Violator no 10 v Canada (Attorney General)*, 2018 FCA 150 [*Violator no 10*], the Federal Court of Appeal described the Act and the role of FINTRAC at paras 3-6:

> [3] FINTRAC was established under section 41 of the Act. Subsection 40(b) provides that its object is to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities. To this end, FINTRAC collects and analyzes information concerning certain financial transactions that it considers relevant to money laundering activities or the financing of terrorist activities and may disclose this information to the appropriate police force and to other agencies listed in subsection 55(3) of the Act.
>
> [4] The Act provides that the entities listed in section 5, [redacted], are required to put in place certain mechanisms and programs, keep certain records, and produce various reports to FINTRAC with respect to financial transactions carried out in the course of their activities. Section 7 provides, among other things, that entities subject to the Act must report every financial transaction in respect of which there are "reasonable grounds to suspect that the transaction is related to the commission . . . of a money laundering offence . . . [or] a terrorist activity financing offence."
>
> [5] Given the crucial role reporting entities play in the collection of the information necessary for the effective operation of the system, section 62 of the Act provides that FINTRAC may take compliance measures and examine the records and inquire into the business and affairs of any of these entities for the purpose of ensuring compliance with their obligations under the Act. If, after such an examination, FINTRAC believes that there are reasonable grounds to suspect that the entity has violated its legal obligations, the Act enables FINTRAC to issue a notice of violation identifying the violation(s) that the entity examined is accused of and the penalty that FINTRAC intends to impose (see subsection 73.13(2) and section 73.14 of the Act). The notice of violation also specifies the right of the entity to make representations to the director of FINTRAC (subsection 73.13(1)).
>
> [6] If the entity makes representations, the director of FINTRAC shall decide, on a balance of probabilities, whether the Act was violated and, if so, the amount of the penalty to be imposed

> (subsection 73.15(2)). The amount of the penalty is determined taking into account that penalties have as their purpose to encourage compliance with the Act rather than to punish, the harm done by the violation and any other criteria prescribed by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, S.O.R./2007-292 (the Regulations).

[7] As noted in *Violator no 10*, FINTRAC is responsible for ensuring that businesses required to report certain transactions [reporting entities], such as MJI, comply with the Act. If FINTRAC believes that a reporting entity has violated its legal obligations under the Act, FINTRAC may issue a NOV to a reporting entity and impose penalties.

[8] The relevant provisions of the Act and the General Regulations are set out in Annex A.

[9] The regulations that are applicable to the issues that arise in this appeal are:

- *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 (in force from June 17, 2017-June 24, 2019) [General Regulations];
- *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations*, SOR/2001-317 (in force from June 17, 2017-May 31, 2020) [STR Regulations]; and
- *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulation*, SOR/2007-292 (in force from June 17, 2017-May 31, 2020) [AMP Regulations].

[10] This appeal focuses on the Director's findings regarding the alleged failure of MJI to fulfill its obligations under section 7 (the obligation to report suspicious transactions) and

subsection 9.6(1) (the obligation to establish and implement a compliance program) of the Act, and the related obligations under the General Regulations.

III. Background

[11] FINTRAC previously examined MJI in 2013 and 2015 and found that MJI had violated certain provisions of the Act; however, FINTRAC exercised its discretion and did not impose any penalties at those times.

[12] On September 3, 2019, FINTRAC notified MJI by letter that FINTRAC would examine MJI's compliance with the Act for the specified Compliance Period. The letter noted that examinations are part of FINTRAC's mandate to assess the effectiveness of compliance programs of reporting entities. The letter noted that the examination may include interviews with MJI's key employees and added, "this examination also aims to assist your organization in meeting its legal obligations should we identify any issues".

[13] On October 15, 2019, FINTRAC again notified MJI that it would visit MJI's retail stores to conduct interviews to assess its compliance with Parts 1 and 1.1 of the Act and the regulations. The letter noted that interviews would be conducted to assess "your organization's anti money laundering/counter terrorist financing training program that you have in place". The letter also advised MJI to inform its employees of the upcoming interviews.

[14] On October 22 and 23, 2019, FINTRAC conducted the examination and interviewed some MJI employees.

[15] On June 22, 2020, FINTRAC sent its findings [examination findings] by letter to MJI, stating that FINTRAC identified four deficiencies and was considering imposing penalties. FINTRAC invited MJI to provide additional information or make submissions within 60 days.

[16] On August 20, 2020, FINTRAC granted MJI an extension until September 30, 2020 to reply to the examination findings. On September 30, 2020, MJI's accountant responded to the examination findings and provided additional information to FINTRAC.

[17] On January 13, 2021, FINTRAC responded to MJI and confirmed its original findings of four deficiencies and advising that FINTRAC was still considering proposing an AMP.

[18] On October 15, 2021, FINTRAC issued the NOV to MJI identifying four violations (described in detail in Part IV below) that FINTRAC had reasonable grounds to believe MJI had committed. FINTRAC proposed a penalty of $222,750.

[19] Upon receipt of the NOV, MJI subsequently sought additional documents from FINTRAC directly and through an Access to Information and Privacy [ATIP] request. FINTRAC refused MJI's request for an extension of time to make representations on the NOV pending receipt of the requested documents. FINTRAC did not reply to MJI's request for additional documents. MJI requested that the Director of FINTRAC review the NOV and the proposed AMP and also alleged a breach of procedural fairness regarding FINTRAC's non-disclosure of documents.

[20] On February 17, 2022 – more than two years after FINTRAC had conducted the employee interviews – the Director of FINTRAC issued her decision, upholding the NOV and imposing the AMPs as proposed in the NOV.

[21] On March 15, 2022, MJI filed the appeal of the Director's decision and sought additional disclosure of documents from FINTRAC pursuant to Rules 317-318 of the *Federal Courts Rules*, SOR/98-106.

[22] The Certified Tribunal Record [CTR] provided to MJI included several documents that were considered by the Director but had not previously been provided to MJI. In particular, the CTR included a summary of the interviews of employees during the examination period and a recommendation from FINTRAC's Review and Appeals Unit [RAU] to the Director, dated February 15, 2022, suggesting a proposed AMP of a lesser amount ($198,000).

[23] On April 11, 2022, MJI again requested additional documents. In late April, FINTRAC disclosed some documents, including: an earlier recommendation from RAU to the Director to remove Violation #4, dated February 8, 2022; internal email correspondence; and, a legal opinion prepared for FINTRAC regarding its AMP regime.

[24] On June 17, 2022, MJI received additional documents in response to their ATIP request, including a copy of the redacted summary of the employee interviews. The Court subsequently granted MJI's motion for production of the unredacted summary of the employee interviews.

[25] In October 2022, MJI amended their notice of appeal to address the additional documents it had received.

IV. The Decision under Appeal

[26] On February 17, 2022 the Director issued her decision. The Director recounted the history of interactions between MJI and FINTRAC up until the point of her decision. The Director then addressed each violation set out in the NOV, summarized the evidence, and addressed MJI's submissions and possible defences. The Director made findings for each violation. The Director then considered the penalty for each violation, taking into account the applicable range of penalties, guidelines and MJI's submissions.

A. *Violation #1*

[27] The Director summarised Violation #1 as follows:

> i. Failure of a person or entity to report financial transactions that occurred in the course of its activities and in respect of which there are **reasonable grounds to suspect that the transactions are related to the commission of the attempted commission of a money laundering** or terrorist financing offence that occurred during the period of October 1, 2018 to March 31, 2019, which is contrary to section 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and subsection 9 (1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Suspicious Transaction Reporting Regulations.* [Emphasis added.]

[28] The Director noted that Violation #1 is based on MJI's failure to report two suspicious purchases made by the same person. During the Compliance Period, Ms. Y bought a $16,000

necklace on October 28, 2018, and a $12,800 necklace on November 4, 2018. For both transactions, Ms. Y paid $9,500 in cash and the remainder on credit card. FINTRAC determined that this constituted "structuring" a transaction in a way to shield the cash portion of the transaction from the reporting requirements for transactions over $10,000.

[29] The Director noted that FINTRAC had conducted some further investigation, including an internet and telephone search of Ms. Y, and found that she was linked to human trafficking.

[30] The Director did not rely on the information gathered from FINTRAC's internet or telephone search, but rather, considered the nature of the transactions, the similar purchases and payment structure, and other circumstances. The Director addressed MJI's submissions in response to the NOV, including that MJI did not have reasonable grounds to suspect a money laundering offence, that Ms. Y described the second purchase as a gift, and that it was not unusual for MJI's clientele to pay partly in cash with the balance on a credit card.

[31] The Director found that there were reasonable grounds to suspect that the transactions of Ms. Y were related to the commission of a money laundering offence and found that MJI did not report the transaction to FINTRAC.

B. *Violation #2*

[32] The Director summarized Violation #2 as:

> ii. 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, that occurred during the period of October 1, 2018 to March 31, 2019, which is contrary to subsection 9.6(1) of the *Act*, and paragraph 71(1)(b) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations (the Regulations).*

[33] The Director found that although MJI's policies and procedures describe its obligation to identify the formation of business relationships and to conduct ongoing monitoring of any high-risk business relationships, the policies and procedures did not set out the process regarding how MJI employees would comply in practice with such obligations. The Director concluded that MJI's policies and procedures did not comply with subsection 9.6(1) of the Act and paragraph 71(1)(b) of the General Regulations and found, on a balance of probabilities, that MJI had committed the violation.

C. *Violation #3*

[34] The Director summarised Violation #3 as:

> iii. 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, that occurred during the period of October 1, 2018 to March 31, 2019, which is contrary to subsection 9.6(1) of the *Act*, and paragraph 71(1)(c) of the *Regulations.*

[35] The Director noted that Violation #3 focuses on MJI's inadequate assessment of its own risks. Initially, FINTRAC had found that MJI failed to account for three of the prescribed risk factors: (a) its products and delivery channels; (b) its geographic location; and (c) its clients and business relationships. The Director found that MJI had not adequately assessed and documented its risk based on MJI's failure to account for two of the prescribed factors ((b) and (c)).

[36] The Director accepted MJI's explanation for its characterisation of risks related to retail jewellery (i.e., (a) products and delivery channels). The Director noted that MJI's consideration of this factor might have been based on now outdated information, but concluded that MJI did not fail to consider its products and delivery channels in assessing risk.

[37] However, with respect to its client and business relationships, the Director noted that FINTRAC had determined, as indicated in the NOV, that MJI failed to consider that two clients in particular are global buyers, who ship items to Hong Kong for resale in China. FINTRAC noted that Hong Kong is known to be a tax haven where trade-based money laundering is prevalent. FINTRAC had determined that based on the high-volume purchases of these two clients, MJI should have been prompted to reconsider MJI's risk rating.

[38] The Director found that MJI's description of its own customer base as "mobile" did not capture:

> … the commercial nature of the purchases for the purpose of resale, the international shipment of the jewelry to a higher-risk jurisdiction, nor the very high frequency and total value of the purchases conducted by the two clients. Since, as a result of these factors, the risk associated with the two clients [the clients that shipped to Hong Kong] was higher than that described in MJI's risk assessment, the conclusions in MJI's assessment did not accurately reflect its actual clients.

[39] The Director further found that if the risk posed by these two clients was high, MJI would also have been required to develop and apply policies and procedures to take enhanced measures to mitigate the risk, which it did not do.

[40] With respect to the geographic location factor, the Director concluded that MJI's global assessment of its geographic location failed to account for the specific characteristics, including crime trends and client bases, of its three retail premises.

[41] The Director acknowledged MJI's submission that, based on its own assessment, its customer base was similar in all three locations and that crime in the area surrounding one of its locations did not create an increased risk; however, the Director found that MJI failed to document this in its risk assessment.

D. *Violation #4*

[42] The Director summarised Violation #4 as:

> iv. Failure of a person or entity that has employees, agents or mandataries 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, that occurred during the period October 1, 2018 to march 31, 2019, which is contrary to subsection 9.6(1) of the *Act*, and paragraph 71(1)(d) of the *Regulations.*

[43] The Director's decision notes that FINTRAC interviewed 13 employees, ten of whom conducted sales transactions. FINTRAC initially determined that MJI's compliance training program (consisting of the Training Manual, Policies and Procedures Manual and Training Manual, and "Training Program for Montecristo Jewellers") did not comply with the Regulations with respect to STRs, the 24-hour rule and "structuring".

[44] The Director noted that FINTRAC had identified the following problems:

1. Although MJI's compliance training program stated that there was no minimum amount for submitting a STR, seven of 10 interviewees did not know this and four did not know the process to alert the compliance officer about a suspicious transaction;

2. Although MJIs compliance training program referred to the obligation to submit a large cash transaction report for two or more transactions by the same person made within 24 hours that total $10,000 or more, four of the ten interviewees were not aware of this obligation; and,

3. Although "structuring" was referred to in MJI's compliance manual, the Manual did not adequately discuss structuring as an indication of a suspicious transaction. The NOV noted that only one of the 10 interviewees was familiar with the concept.

[45] The Director considered MJI's submissions that its compliance training program included all the required elements, that it was written and ongoing and had been implemented through mandatory staff training. The Director also addressed MJI's submissions that the violation was based on a lack of comprehension by employees, which is not a statutory requirement, and that FINTRAC's assessment failed to consider that English was not the first language of some of MJI's employees.

[46] The Director found that MJI's compliance training program was not effective because "it resulted in a significant lack of employee understanding about several key areas of MJI's obligations". The Director noted the lack of employee understanding was related to, in particular, the STR requirements that apply to transactions of any value, the "24-hour" rule, and the potential for structured transactions to be suspicious. The Director found that the training program did not fulfill the purpose of ensuring compliance with subsection 9.6(1) of the Act.

[47] The Director relied on the interviews as an adequate assessment of the employees' understanding of MJI's obligations. The Director noted that FINTRAC had advised MJI that it would conduct interviews to assess the effectiveness of the training program and employees' understanding of policies and procedures and their knowledge of money laundering activities as related to MJI's business.

[48] The Director noted that MJI had raised a due diligence defence with respect to all four violations. However, the Director found that MJI had not taken all reasonable steps to avoid committing the violations, noting that MJI had failed to identify specific measures it had taken to prevent each violation from occurring.

[49] The Director concluded that MJI failed to develop and maintain a written, ongoing compliance training program, and that on a balance of probabilities, MJI committed Violation #4.

E. *The Penalties Imposed*

[50] With respect to each violation, the Director addressed whether the proposed penalty, a lesser penalty, or no penalty at all should be imposed. For each violation, the Director noted the applicable range of the AMP for the type of violation, the base amount applied, the reduction applied, and the reason for the reduction.

(1) AMP imposed for Violation #1

[51] With respect to Violation #1, the Director confirmed the penalty proposed in the NOV of $165,000, which reflected the imposition of the base amount of $500,000 reduced to 33%. The NOV explained how the AMP Policy had been applied; noted that FINTRAC had not identified any mitigating factors that would reduce the harm; and, noted that FINTRAC reduced the proposed penalty to 33%, taking into account MJI's compliance history and that this was MJI's first such violation.

[52] The Director found that Violation #1 was very serious, with a prescribed range of penalties from $1-$500,000. The Director considered MJI's submissions, including that MJI disputed the violation, arguing that MJI did not have reasonable grounds to suspect that the transactions were suspicious, that the amounts of the transactions were relatively small, and that FINTRAC had failed to articulate the harm resulting from MJI's failure to report.

[53] The Director noted that the submission of a STR is a critical element of the regime; the failure to submit a STR deprives FINTRAC of financial intelligence related to a transaction.

[54] The Director found that the factors raised by MJI did not reduce the harm done nor indicate the penalty was punitive. The Director found that the reduction of the penalty to 33% adequately took into account MJI's compliance history.

(2) AMP imposed for Violation #2

[55] With respect to Violation #2, the Director confirmed and imposed the penalty of $16,500 as proposed in the NOV.

[56] The Director noted that the NOV explained how FINTRAC arrived at the proposed penalty. FINTRAC assessed the harm arising from the violation as Level 3 (the second lowest level within the Guide on harm done assessment for compliance program violations), imposed a base level amount of $50,000, then reduced it to 33% to take into account that this was MJI's first such violation, MJI's compliance history, and non-punitive adjustments.

[57] The Director considered MJI's submissions, which were similar to those for Violation #1.

[58] The Director noted that the deficiency in MJI's policies and procedures related to business relationships and ongoing monitoring was not a documentation problem. The Director found that the deficiency affected MJI's practical compliance because MJI did not have a method to track business relationships formed through submitted STRs.

[59] The Director concluded that the reduction of the base penalty to 33% adequately took into account MJI's compliance history and the non-punitive nature of penalties. The Director added that FINTRAC had previously identified a similar deficiency by MJI in 2015 that did not result in a penalty.

(3) AMP imposed for Violation #3

[60] With respect to Violation 3, the Director confirmed the $16,500 penalty proposed in the NOV. The Director again noted that the NOV explained how the AMP was determined, including FINTRAC's use of the "Guide on harm done Assessment for compliance regime violations" and the AMP Regulations. The Director noted that FINTRAC identified this as a serious violation with the range of penalties prescribed in the AMP Regulations of $1-$100,000 per violation. FINTRAC assessed the harm as Level 3 and imposed a base amount of $50,000, which was reduced to 33%, resulting in a proposed penalty of $16,500.

[61] The Director addressed the submissions of MJI, including that no penalty or a minor penalty should be imposed and Violation #3 could not have contributed to Violation #1 because Ms. Y was a different type of client and the risk factors associated with her client profile were considered by MJI in its risk assessment.

[62] The Director concluded that the description of harm in the NOV was accurate. The Director noted that MJI failed to consider its clients and business relationships, and geographic location due to the serious flaws in its risk assessments related to these factors. The Director found that Level 3 harm adequately captured this type of non-compliance.

[63] The Director agreed that, as set out in the NOV, MJI's failure to accurately and practically consider that any of its individual clients may have posed a high risk hindered MJI in taking measures that could have led it to report the suspicious transaction of Ms. Y (i.e.,

Violation #1) . The Director found that the base penalty of $50,000 took into account the harm, and the reduction to 33% (resulting in the $16,500 penalty) took into account MJI's history of compliance and the non-punitive nature of the penalty.

(4) AMP imposed for Violation #4

[64] With respect to Violation #4, the Director confirmed the penalty proposed in the NOV of $24,750. The Director noted that FINTRAC characterised this as a serious violation with a range of penalties of $1-$500,000.

[65] The Director noted that FINTRAC considered that Violation #4 (failure… to… maintain an ongoing compliance training program) may have contributed to Violation #1 (failure to submit a STR). The Director further noted that this led FINTRAC to assess the harm as Level 2 and impose the base amount of $75,000, then apply the reduction to 33%, resulting in a penalty of $24,750. The Director noted that the reduction took into account MJI's compliance history and the non-punitive nature of penalties.

[66] The Director considered MJI's submissions, including that no penalty or a minor penalty should be imposed to recognise that an employee's retention of knowledge is not within MJI's control. The Director found that the employees' lack of understanding resulted from MJI's failure to ensure that they understood their obligations, the indicators and the risk factors of money laundering or terrorist financing. The Director found that MJI's training program was deficient, which may have contributed to Violation #1; Ms. Y's transactions were structured and

the type of transactions that the employees did not understand to be an indication of possibly suspicious behaviour.

[67] The Director agreed that the NOV captured the harm done by Violation 4 as Level 2.

[68] The Director concluded that the reduction of the base penalty to 33% adequately took into account MJI's history of compliance and the non-punitive nature of the penalties.

V. The Issues

[69] MJI argues that:

- The Director committed a palpable and overriding error in concluding that MJI committed all four violations of the Act and in assessing the AMPs;
- The Director failed to apply the correct legal test of "reasonable grounds to suspect" in finding that MJI should have reported a suspicious transaction (Violation #1), which is an extricable legal issue reviewable on the correctness standard;
- The Director fettered her discretion in assessing and imposing the AMPs by rigidly adhering to AMP policies and by failing to take into account the relevant considerations;
- FINTRAC and the Director breached the duty of procedural fairness owed to MJI by not disclosing the employee interview notes until ordered to do so and by relying on inadequate and inaccurate summaries of the interview notes;
- The Director exceeded her jurisdiction and erred in law in her interpretation of the Act and Regulations, which led the Director to erroneously find, based on employee comprehension, that MJI did not comply with the requirement to have a training program.

[70] MJI asks the Court to:

- Allow the appeal;
- Quash the Director's decision;
- Declare that FINTRAC's decision-making process that led to the decision breaches the principles of procedural fairness and the penalty-assessing process that led to the decision is unlawful;
- Declare that MJI did not commit any of Violations #1-4 or in the alternative, exercised due diligence;
- Further, or in the alternative, vacate the penalties or, in the further alternative, vary them to the statutory minimum; and,
- Award MJI its costs of this appeal.

VI. The Standard of Review

[71] Section 73.21 of the Act provides for a statutory right of appeal, which triggers the appellate standard of review. The appellate standard of review for questions of fact and questions of mixed fact and law is palpable and overriding error (*Re/MAX All-Stars Realty Inc v Financial Transactions and Reports Analysis Centre of Canada*, 2022 FC 598 [*Re/Max*] at paras 49-51; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 29; *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37; *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]). For questions of law and mixed questions of fact and law where a legal question is readily extricable, the standard of review is correctness (*Re/Max* at para 51; *Housen* at paras 8, 27-28).

[72] Whether an entity has committed a violation of the Act and what constitutes a reasonable AMP is reviewable on the palpable and overriding error standard (*Re/Max* at paras 51, 86).

[73] The palpable and overriding error standard was described by the Federal Court of Appeal in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46::

> [46] Palpable and overriding error is a highly deferential standard of review… "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the 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.

[74] Where issues of procedural fairness are raised, the Court's review focuses on whether the procedure followed by the decision-maker was fair having regard to all of the circumstances; "[a] court … asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54.

[75] As noted more recently by the Federal Court of Appeal in *Brown v Canada (Attorney General)*, 2022 FCA 104 at para 13:

> [13] … On questions of procedural fairness and natural justice, the Court must assess the procedures and safeguards required, and if there is a breach, the Court must intervene (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54). For want of a better description, the approach is sometimes referred to as the "correctness standard".

[76] The scope of the duty of procedural fairness owed in the circumstances is variable and informed by several factors (established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21, 174 DLR (4th) 193 [*Baker*].

[77] MJI notes that the appellate standard of palpable and overriding error does not apply to extricable questions of law, which demand the correctness standard. MJI submits that several of the Director's findings raise extricable questions of law.

[78] The Respondent submits that the appellate standard of review of palpable and overriding error applies to the Director's findings that MJI committed four violations and to the Director's assessment of the penalties. The Respondent acknowledges that the Director's finding regarding Violation #4 also raises an issue of statutory interpretation. The Respondent agrees that the correctness standard applies to matters of statutory interpretation and any breach of procedural fairness, if established.

VII. The Appellant's Submissions

[79] MJI disputes all the Violations and argues that the Director committed palpable and overriding errors, exceeded her jurisdiction, and misinterpreted the statutory provisions. The specific arguments are set out with respect to each violation.

[80] MJI also argues that the Director erred by failing to consider MJI's due diligence defence for Violations #2, 3, and 4. MJI submits that it acted on its reasonable belief and took reasonable

steps to comply (citing *Violator no 10* at para 59, citing *R v Sault Ste Marie*, 1978 CanLII 11 (SCC) at 1326).

[81] With respect to the penalties imposed, MJI generally argues that the Director fettered her discretion in assessing and imposing all the AMPs. MJI argues that the Director rigidly adhered to FINTRAC's policies on AMPs, narrowed the definition of harm, and failed to apply the principle that penalties are meant to encourage compliance rather than punish.

[82] MJI submits that the total penalty should be set aside, or alternatively, reduced to the statutory minimum, which is $1.

A. *Violation #1: Failure to submit a STR*

[83] MJI submits that the Director erred by finding that MJI failed to submit a STR regarding the two purchases made by Ms. Y.

[84] MJI submits that the STR requirement is triggered by "reasonable grounds to suspect" that the transaction at issue is related to the commission of a money laundering or terrorism offence. MJI argues that, although the Director cited the test as "reasonable grounds to suspect", she did not apply the correct test. MJI argues that the alleged failure to apply the correct test is a question of law to be determined on the correctness standard. MJI relies on jurisprudence in criminal law matters, including *R v Mackenzie*, 2013 SCC 50 [*Mackenzie*].

[85] MJI argues that to trigger the STR requirements, the employee or the business must have the reasonable grounds to suspect that a transaction should be reported; a mere suspicion or hunch is not enough. MJI submits that their employee who sold the necklaces to Ms. Y had no such grounds.

[86] MJI notes that FINTRAC pointed to Ms. Y's purchase as meeting two out of 98 of the "indicators" set out in MJI's 2018 Policy and Procedures Manual to suggest the transactions were suspicious. MJI submits that the strict application of any particular indicator match does not trigger the STR obligation. MJI argues that the "reasonable grounds to suspect" test requires nuance and judgment of the employee.

[87] MJI submits that applying the two indicators to support reasonable grounds to suspect a money laundering offence would overlook that their South Asian clientele customarily pay partly in cash and partly on credit; this is a cultural norm and did not raise MJI's employee's suspicion.

[88] MJI argues that, contrary to FINTRAC's finding that MJI's employee should have had a "hunch", a hunch is not equivalent to reasonable grounds to suspect. MJI also disputes FINTRAC's suggestion that MJI should have done more to inquire about Ms. Y.

[89] MJI also disputes the Director's finding that Ms. Y's two purchases constituted a pattern of suspicious behavior, noting that Ms. Y made two purchases a week apart, which does not constitute a pattern.

[90] MJI also argues that FINTRAC's withholding of the employee interview notes prior to the Director's decision deprived MJI of the opportunity to make submissions to the Director on Violation #1, which amounts to a breach of procedural fairness.

[91] Regarding the AMP imposed for Violation #1, MJI submits that the Director fettered her discretion in several ways: by applying a rigid formula (contrary to *Kabul Farms Inc v Canada*, 2016 FCA 143 [*Kabul Farms FCA*], failing to consider the amount of the alleged suspicious transaction, and failing to consider the lack of harm and other mitigating factors.

[92] MJI elaborates that the Director fettered her discretion by applying the Guide on harm done to automatically assess the harm as Level 1 rather then Level 2, which has a base amount half of that of Level 1. MJI disputes that the violation resulted in a complete loss of financial intelligence, which is the criteria for Level 1 harm. MJI submits that Ms. Y's two purchases were her only purchases and could not have resulted in further STRs. MJI submits that only Level 2 harm would be justified in the alleged circumstances – i.e., the loss of additional financial intelligence.

[93] MJI also argues that the penalty is punitive because it is at the highest end of the range. MJI notes that penalties are not designed to be punitive but are intended to encourage compliance. MJI submits that any penalty should be proportional to the alleged value of the violation.

B. *Violation #2: Failure to develop and apply written compliance policies for tracking business relationships and ongoing monitoring*

[94] MJI argues that the Director exceeded her statutory authority by determining that MJI's policies and procedures failed to "set out how it would in practice track the formation of business relationships in order to attain compliance with associated requirements" or "set out how it would conduct ongoing monitoring of high-risk business relationships".

[95] MJI submits that the Act and regulations do not require that a reporting entity have a process for employees to follow to ensure compliance as the Director suggests. MJI submits that the Director failed to consider that tracking of business relationships is only required if applicable (subsection 71(1) of the General Regulations). MJI argues that it did not form any business relationships during the Compliance Period and, therefore, no recording was required.

[96] MJI further submits that its 2018 Policies and Procedures Manual fulfilled its statutory obligations. MJI states the Manual required it to track when it entered business relationships and keep a record of these relationships. The Manual noted the purpose of the record; provided examples of how staff could record business relationships and instructions for employees to seek further direction from the compliance officer; contained a summary of the compliance officer's obligations; and, contained MJI's policy for keeping records that may trigger the formation of a business relationship.

[97] Alternatively, MJI argues that the Director misinterpreted the requirements of the regulations and erred in finding that MJI committed Violation #2.

[98] MJI argues that the requirement regarding ongoing monitoring is only triggered if a reporting entity considers the risk of money laundering offences to be high in the course of its business. MJI submits that the Director erred by finding that it failed to meet this obligation, given that MJI does not consider itself to be at high risk of money laundering offences.

[99] MJI also disputes the AMP. MJI again submits that the Director fettered her discretion by applying a rigid formula and not taking into account other factors, or in the alternative, that she erred. MJI disputes that Violation #2 may have contributed to Violation #1 (the failure to file a STR). MJI argues that the necklace sales to Ms. Y did not constitute a business relationship, and had no relation to Violation #2. MJI argues that, because it did not have any business relationships during the Compliance Period, the Director erred by imposing a penalty for Violation #2.

C. *Violation #3: Failure to adequately assess and document risks*

[100] MJI argues that the Director erred in finding that MJI failed to take its clients and business relationships and geographic location into account when conducting its risk assessment. MJI argues that the Director imposed requirements not found in the Act or the regulations.

[101] MJI acknowledges that reporting entities are required to assess and document risks of money laundering. MJI submits that its Manual describes, under the heading “Customer and Business Relationships”, that MJI has an extensive list of repeat customers with long standing relationships, which MJI assessed as low-medium risk, and other walk-in or mobile customers, which MJI assessed as medium risk.

[102] MJI submits that the NOV focused only on purchases made by two clients. MJI disputes FINTRAC's allegation that MJI failed to consider that these two clients are high volume global buyers who ship items to Hong Kong, and that this should have prompted MJI to reconsider its risk assessment.

[103] MJI also disputes the Director's confirmation of FINTRAC's finding. MJI submits that the Director erred in finding that there was a requirement to conclude that a client is at a higher risk due to the factors cited (i.e., that their purchasers are commercial and intended for resale, their shipments are international, or their purchases have a high total value). MJI argues that these factors have no bearing on the level of risk. MJI adds that it had not assessed the two customers as high-risk clients nor did the Director find that the two customers were high risk clients, therefore, the Director exceeded her authority in finding a violation.

[104] MJI further argues that the Director did not provide sufficient justification for her findings. The Director did not cite an authority requiring MJI to treat Hong Kong and China as higher-risk jurisdictions, or a requirement to take measures to mitigate against risk unless MJI considers the risk to be high.

[105] MJI also disputes that it failed to take into account its geographic location. MJI submits that its Manual describes its locations as not being in high crime areas and, as such, are low risk. MJI disputes that MJI should have assessed each storefront location separately and in more detail.

[106] MJI again argues that the Director erred in law by exceeding the scope of her authority to require a higher level of "granularity" – i.e., to account for specific characteristics of a retail location, including crime trends and client bases.

[107] Alternatively, MJI argues that the Director's findings are unintelligible and unjustified and constitute a palpable and overriding error.

[108] With respect to the AMP for Violation #3, MJI again submits that the Director fettered her discretion by applying a rigid formula and by failing to reduce the AMP given that the Director only confirmed two of three "failures" noted in the NOV. MJI also submits that the Director erred in concluding that Violation #3 may have contributed to Violation #1, because the two violations involved different types of clients and this should have been a factor in assessing the penalty.

D. *Violation #4: Failure to develop and maintain a written ongoing compliance training program for employees*

[109] MJI submits that the Director erred in law by misinterpreting subsection 9.6(1) of the Act and paragraph 71(1)(d) of the General Regulations, and exceeded her statutory authority by finding that MJI's training program for employees was not effective. MJI submits that paragraph 71(1)(d) does not require that a training program be effective, rather, the requirement is that the training program be written, ongoing, and contain all the required elements. MJI submits that paragraph 71(1)(e) addresses testing for effectiveness.

[110] MJI notes that the RAU recommendation stated, “paragraph 71(1)(d) [of the General Regulations] does not contain a requirement to ensure the effectiveness of training on an ongoing basis”. MJI submits that the Director erroneously found otherwise.

[111] MJI adds that the requirement imposed by the Director would be too onerous on reporting entities. MJI submits that in order to comply, an employer would need to do much more than train its employees, provide policies and procedures, and measure effectiveness every two years (as required by paragraph 71(1)(e) of the General Regulations). MJI submits that in order to ensure that employees fully retain the information at all times, they would have to train and test continuously and dismiss otherwise excellent employees with a poor recollection of the training material. MJI notes that it provided the annual in-person training for MJI employees in January (noting that FINTRAC’s interviews were conducted ten months later in October), and the next training was scheduled for the following January. MJI also explains that the employees had the written material in two languages for self-study and reference in the interim and had access to MJI’s Compliance Officer.

[112] Alternatively, MJI argues that the Director’s finding is not supported by the evidence. First, MJI submits that FINTRAC’s interviews were not a test of their employees’ actual performance in the workplace where the necessary resources were at hand. MJI notes that FINTRAC required the employees to answer from memory and posed complex and confusing questions.

[113] MJI points to the interview notes, which reveal that FINTRAC only asked employees "What is the amount in which you must report a suspicious transaction report to FINTRAC?". MJI notes that there is no particular amount, and that this question was designed to confuse the employee and make them feel foolish.

[114] MJI also points to the question, "Have you heard of the term 'structuring'?". MJI submits that this question focused on a label rather than a concept. MJI submits that the summary of the interviews does not capture the nuances of the answers provided taking into account that the employees may have struggled with the questions posed in English.

[115] MJI argues that a lack of employee understanding should not be regarded as non-compliance.

[116] Second, MJI argues that the Director's erroneous finding – that the employee's lack of understanding, including about the STR requirements, demonstrates that MJI's compliance training program was not effective – was based on "grossly inaccurate and incomplete" interview notes.

[117] MJI further argues that FINTRAC and the Director breached the duty of procedural fairness by not providing MJI with the employee interview notes, which affected their ability to make submissions to FINTRAC and to the Director.

[118] MJI disputes the AMP imposed for Violation #4. MJI submits that the Director fettered her discretion by narrowing the definition of harm. MJI notes that the Director characterised the harm at Level 2, which should only apply when a training program is missing priority elements. MJI submits that the Director did not make such a finding, but rather, found that MJI's employees did not understand some aspects of the training program.

[119] MJI more generally argues that the Director applied a rigid formula and sought to justify the penalty by relying on a non-existent connection between Violation #4 and Violation #1.

VIII. The Respondent's Submissions

[120] The Respondent submits that the Director did not err on issues of mixed fact and law or on issues of law; the Director identified and applied the correct legal tests under the Act and regulations, did not exceed her statutory authority, and did not make any palpable and overriding errors in applying the law to the facts.

A. *Violation #1: Failure to submit a STR*

[121] The Respondent submits that the Director did not err in finding that, on a balance of probabilities, there were reasonable grounds to suspect that Ms. Y's purchases were related to the commission or attempted commission of a money laundering offence and that MJI committed Violation #1.

[122] The Respondent notes that MJI's arguments focus on FINTRAC's NOV findings, rather than the Director's decision and reasons, which are the subject of the present appeal.

[123] The Respondent explains that FINTRAC considered two indicators of suspicious transactions as set out in MJI's own manual, which is not improper. The Respondent notes that FINTRAC's own guidance on "reasonable grounds to suspect" is based on jurisprudence from the Federal Court of Appeal; in the context of detecting money laundering, the published list of indicators helps reporting entities assess whether there are reasonable grounds to suspect.

[124] The Respondent emphasizes that the Director did not base her finding on MJI's failure to recognize the two indicators. The Respondent notes that the facts that support the Director's finding; the structure of the payments appeared to avoid reporting obligations and the timing of the transactions was conspicuous, particularly considering it was the only cash transaction in the entire Compliance Period where a client paid more than $9,000 in cash. The Director also noted the similarities in the transactions and the payment structure.

[125] The Respondent argues that MJI's subjective view of whether there were reasonable grounds to suspect is not the standard. The Respondent notes that "reasonable grounds to suspect" is a lower threshold than "reasonable and probable grounds", and is based on the objective facts and the totality of the circumstances.

[126] The Respondent submits that the "reasonable grounds to suspect" threshold involves "the sensitive consideration of facts and careful fact-finding, tasks that normally entail a broad range

of acceptable and defensible decision-making" (citing *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 94..

B. *Violation #2: Failure to develop and apply written compliance policies for tracking business relationships and ongoing monitoring*

[127] The Respondent submits that the Director did not err in finding on a balance of probabilities that MJI failed to comply. The Respondent notes that paragraph 71(1)(b) of the General Regulations requires reporting entities to develop and apply written policies and procedures to conduct ongoing monitoring of business relationships, including where there is a high risk of a money laundering offence.

[128] The Respondent argues that because MJI had the potential to enter high-risk business relationships, it also had an obligation to have a procedure in place to conduct ongoing monitoring of its business relationships.

[129] The Respondent notes that a business relationship forms with a client the second time that the reporting entity is required to verify the client's identity within a five-year period. A client's identity must be verified when the client conducts a cash transaction of $10,000 or more and for any suspicious transaction, which would also trigger a STR. The Respondent notes that MJI's Manual is silent regarding how it would track when a client's identity has been verified.

[130] The Respondent submits that MJI should have had a corresponding procedure in place to monitor its business relationships.

[131] The Respondent submits that MJI's position that it is only required to have a process in place to track the relationship once the business relationship has formed would result in MJI not knowing when it had entered the business relationship and consequently failing to record the relationship. The Respondent adds that when a business relationship materializes, MJI would not have a process in place to record or monitor that relationship, inevitably leading to a period of non-compliance.

C. *Violation #3: Failure to adequately assess and document risks*

[132] The Respondent submits that the Director did not err in concluding that MJI failed to assess and document the risk associated with its clients and business relationships given that some may be high risk. The Respondent notes that there is no requirement that a clear connection between the clients and money laundering exists, only that there is a risk.

[133] With respect to the Director's finding that MJI's consideration of its geographic location on a global basis was insufficient, the Respondent points out that MJI's locations are in two different cities (Burnaby and Vancouver). MJI failed to assess whether its customer base was different in each and, therefore, whether its risk was different in each location. The Respondent submits that MJI's assessment that repeat customers were low risk, and other "rather mobile customers" may be medium risk is insufficient because MJI did not consider that some of its clients could be high risk.

D. *Violation #4: Failure to develop and maintain a written ongoing compliance training program for employees*

[134] The Respondent submits that the Director correctly interpreted the Act and General Regulations; an ineffective training program does not meet the requirements in paragraph 71(1)(d) of the General Regulations or subsection 9.6(1) of the Act. The Respondent also submits that the Director did not err in relying on the employee interviews to find that MJI's training program was not effective.

[135] The Respondent argues that MJI misinterprets paragraph 71(1)(d); MJI's interpretation is inconsistent with the Government's intention and would render the provision meaningless (citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 para 21, 36 OR (3d) 418 [*Rizzo*]). The Respondent submits that if the training program need not be effective, the object and purpose of the Act is defeated.

[136] The Respondent submits that the evidence on the record, including the employee interview notes, demonstrates that MJI did not implement an effective training program. The Respondent points out that the 90% of the employees who were interviewed did not know what "structuring" was, which is significant because recognizing the structuring of a transaction is essential for complying with the requirement to file a STR.

[137] The Respondent submits that the employee interviews were a fair way to assess the effectiveness of MJI's training program and the knowledge of its employees during the

Compliance Period. The Respondent notes that only three employees expressed challenges with English, and only with respect to one question (i.e., “Have you heard of the term ‘structuring”?).

[138] The Respondent disputes that the summary of the employee interviews relied on by the Director was an inadequate or inaccurate reflection of the responses noting that there is no discrepancy between the summary and the unredacted interview notes.

[139] The Respondent disputes that FINTRAC or the Director breached the duty of procedural fairness. The Respondent submits that sufficient information was provided to MJI; MJI knew the substance of the information that FINTRAC and the Director were relying on. The Respondent also notes that MJI made submissions in response to Violation #4 to FINTRAC and the Director disputing that the employee’s comprehension was a requirement.

[140] The Respondent adds that given the results of the interviews, the Director did not err in finding that on a balance of probabilities MJI committed the violation.

[141] The Respondent submits that MJI had substantially the same information as the Director – as set out in the NOV and initial findings MJI knew the allegations and had the opportunity to make submissions to FINTRAC and the Director, and did so.

[142] The Respondent submits that the due diligence defence is not available to MJI. In order to meet the high threshold for due diligence, MJI must demonstrate that it took all reasonable steps

to prevent each violation (citing *Violator no 10*) and it did not. The Respondent argues that the mere existence of a policy, procedure, or training program is not enough.

E. *The Director did not err in applying the AMP policies and imposing the AMPs*

[143] The Respondent submits that the imposition of a penalty under the statutory framework is a question of mixed fact and law; the appellate standard of review of palpable and overriding error applies.

[144] The Respondent submits that MJI's allegation that the Director fettered her discretion is an issue of procedural fairness, but disputes that the Director fettered her discretion and points to the careful analysis conducted.

[145] The Respondent submits that in deciding an AMP, the Director is owed a high degree of deference (citing *Re/Max* at paras 52-53). The Respondent submits that the Director's reasons show that she applied the criteria set out in the Act and AMP Regulations, provided MJI with the opportunity to make submissions on the proposed penalties, and explained her methodology.

[146] The Respondent disputes MJI's reliance on *Canada v Kabul Farms Inc.*, 2016 FCA 43 [*Kabul Farms FCA*] in support of its allegation that the Director erred in assessing the AMPs. The Respondent notes that since *Kabul Farms FCA*, FINTRAC has subsequently revised its AMP policies and processes, and published tables of the base amounts explaining how penalties are determined.

IX. The Appeal is dismissed with respect to Violations #1, #2 and #3; the Appeal is allowed with respect to Violation #4

[147] The Director did not make any palpable or overriding errors with respect to finding that MJI had, on a balance of probabilities, committed three of the four violations (Violations #1, #2 and #3).

[148] However, the Court finds that the Director misinterpreted subsection 71(1)(d) of the General Regulations and imposed an additional requirement for effective compliance training as measured by employee comprehension, which is not found in that provision. This is an error of law. As a result, the Director also erred in finding that on a balance of probabilities, MJI committed violation #4.

A. *Violations #1, #2 and #3*

[149] The appellate standard of review for a question of mixed fact and law is highly deferential. The Court does not intervene unless a palpable and overriding error is found. As noted above, for a question of law or a breach of procedural fairness, no deference is owed.

[150] In *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 62 [*Mahjoub*], the Federal Court of Appeal described a "palpable error" as an obvious error and provided some examples:

> [62] … Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper

> inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[151] The Federal Court of Appeal described "overriding" as "an error that affects the outcome of the case" (*Mahjoub* at para 64).

[152] With respect to Violations #1, #2 and #3, the Director of FINTRAC did not make findings unsupported by the evidence before her or based on improper inferences. The Director did not err in finding that, on a balance of probabilities, MJI committed these violations.

[153] The "balance of probabilities" is a persuasive burden and means more likely than not. It does not require the Director to be certain that the violation occurred. There was sufficient evidence before the Director to base her findings and impose the AMPs.

(1) Violation #1

[154] The Director did not err in finding that MJI failed to file a STR. Given the circumstances – i.e., the high cost of the two purchases by Ms. Y, the proximity in time of the two purchases, the similarity of the goods purchased, Ms. Y's explanation for her two purchases, the structure of the payments, and that Ms. Y was a "walk-in" customer not previously known to MJI – the Director did not err in concluding that there were reasonable grounds to suspect that Ms. Y's transactions were related to the commission or attempted commission of a money laundering offence.

[155] Section 7 of the Act requires that every reporting entity shall report every financial transaction "that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that (a) the transaction is related to the commission or attempted commission of a money laundering offence". Contrary to MJI's submission, paragraph 7(a) does not suggest that it is the reporting entity's view (or their employee's view) of whether there are reasonable grounds to suspect that determines the obligation. Section 7 does not say, "in respect of which the *entity* has reasonable grounds to suspect". The standard is objective; if there are reasonable grounds to suspect, then the reporting entity must report. A reporting entity must be alert to the circumstances or factors that would lead a reasonable person in similar circumstances to suspect the transaction is related to money laundering.

[156] The jurisprudence that has interpreted the threshold of "reasonable grounds to suspect" is in the context of criminal offences. However, the definitions and distinctions with other thresholds applied in the criminal law context provide guidance in the current context. A reasonable suspicion is more than a mere suspicion and is less than a belief based on reasonable and probable grounds (*R v Kang Brown*, 2008 SCC 18 at para 75.

[157] MJI relies on *MacKenzie*, where the Supreme Court of Canada stated at para 41 that:

> [41] … the hallmark of reasonable suspicion, as distinguished from mere suspicion, is that "a sincerely held subjective belief is insufficient" to support the former (*Kang-Brown*, at para. 75, *per* Binnie J., citing P. Sankoff and S. Perrault, "Suspicious Searches: What's so Reasonable About Them?" (1999), 24 C.R. (5th) 123, at p. 125). Rather, as Karakatsanis J. observes in *Chehil*, reasonable suspicion must be grounded in "objectively discernible

> facts, which can then be subjected to independent judicial scrutiny" (para. 26).

[158] However, MJI appears to focus on its employees' subjective assessment of the circumstances, which is not the standard. MJI's interpretation would permit it to ignore objective factors and rely on an employee's own view (who may not have grasped the concept) to avoid the STR requirement.

[159] Contrary to MJI's submissions, the Director did not find that a "hunch" or a mere suspicion would be enough to trigger the requirement for a STR. The Director considered the objective facts. The Court finds that the Director stated and applied the correct test of reasonable grounds to suspect.

[160] The Director did not rely on the indicators as FINTRAC did, although the indicators remain relevant considerations for a reporting entity. The Director relied on the objective facts and found that there were reasonable grounds to suspect and that MJI did not report any STR. The Director considered MJI's arguments and due diligence defence but found that, on a balance of probabilities, MJI failed to file a STR when it was required to do so by law.

[161] Contrary to MJI's submission, the failure of FINTRAC to disclose the summary of the employee interviews did not result in a breach of the duty of procedural fairness with respect to Violation #1. Violation #1 was based on the two transactions to Ms. Y. Although the employees' lack of understanding about STR's likely contributed to the violation, MJI's submissions

disputing the violation focused on the objective facts as noted above and not on the employee interviews.

[162] As a result, the Director did not err in finding that on a balance of probabilities, MJI committed Violation #1.

(2) Violation #2

[163] The Director did not err in finding that MJI failed to apply written compliance policies and procedures. The General Regulations require that reporting entities have both policies *and* procedures to track and monitor its business relationships (under paragraph 71(1)(b)). The finding in Violation #2 is linked to the finding in Violation #3 (regarding MJI's failure to conduct an adequate risk assessment, which arose from their failure to consider relevant factors, including its clients and business relationships). As explained below, the Director did not err in finding that, on a balance of probabilities, MJI committed Violation #3.

[164] As the Respondent notes, a business relationship is formed when a customer conducts a large cash transaction of $10,000 or more, or when a reporting entity needs to verify a client's identity to file a STR. MJI should have considered the likelihood of either circumstance arising in its business. MJI sells expensive jewelry and precious stones; the likelihood that a customer may make a large transaction in cash or a suspicious transaction is higher than for other types if businesses that do not involve high priced goods.

[165] The Director also did not err in finding that MJI failed to implement procedures to track business relationships. The Director considered MJI's arguments and due diligence defence but found, on a balance of probabilities, that MJI committed the violation.

(3) Violation #3

[166] The Director did not err in finding that MJI had not conducted an adequate risk assessment as required by subsection 9.6(1) of the Act and paragraph 71(1)(c) of the General Regulations. The Director's reasons explain that she considered whether and how MJI had taken into account the relevant factors, including geographic location, products and delivery channels, and clients and business relationships.

[167] With respect to MJI's consideration of its products and delivery channels, the Director found that, although the current information (i.e., information available at the Director at the time of the decision) may indicate that MJI's assessment of its products and delivery channels was inaccurate, MJI did not fail to consider this factor when assessing its risk at the relevant time based on information available to MJI. The Director disagreed with RAU's determination that MJI had failed to consider this risk factor.

[168] However, the Director still found that MJI had failed to adequately consider its clientele and its different geographic locations in assessing its overall risk; this was sufficient to find that MJI had committed Violation #3 on a balance of probabilities.

[169] As noted above, the Director explained that MJI's descriptions of its "mobile" customers failed to capture the practices of two clients who frequently purchased for international resale and shipped high value merchandise. The Director did not err in finding that MJI had not accurately assessed its clients.

[170] The Director also did not err in finding that if the risk were high (i.e., if it had done an adequate assessment and so concluded), MJI was also required to take measures to mitigate the risk.

[171] With respect to the geographic location factor, the Director did not err in finding that MJI's global assessment was inadequate in assessing risk given that there were variations across its three locations, including its clientele.

[172] Based on the evidence before her, the Director did not err in concluding that MJI had not conducted an adequate risk assessment and on a balance of probabilities had committed Violation #3. Again, the Director considered MJI's submissions and the due diligence defence but found that MJI had not taken all reasonable steps to avoid committing the violation.

B. *Violation # 4*

[173] Whether the Director erred in finding that MJI committed Violation #4 requires consideration of: how paragraph 71(1)(d) of the General Regulations should be interpreted, which is a question of law; whether there was sufficient evidence to support the Director's finding; and, whether FINTRAC breached the duty of procedural fairness owed to MJI in the

circumstances by not providing the notes of the employee interviews to MJI prior to the Director's decision.

(1) The interpretation of paragraph 71(1)(d)

[174] The Court finds that the Director erred in her interpretation of paragraph 71(1)(d), which requires reporting entities to implement a written, ongoing compliance training program for employees.

[175] The Director's reasons do not explain whether or how she interpreted paragraph 71(1)(d) and its scope; that is, there is no reference to principles of statutory interpretation. The Director cites the statutory provision, noting, "a person or entity that has employees, agents or mandataries or other persons authorized to act on their behalf must develop and maintain a written, ongoing compliance or training program for those employees, agents of mandataries or other persons".

[176] The Director then explains that although MJI had produced their training manuals that addressed the basic requirements, FINTRAC had concluded, based on the employees' interview responses, that MJI's training program did not comply with the requirement due to the employees' lack of knowledge about STRs, the 24-hour rule, and structuring. The Director acknowledges MJI's submissions that paragraph 71(1)(d) does not include any requirement to ensure the employees' comprehension. However, the Director does not acknowledge that the RAU had recommended no violation be found pursuant to paragraph 71(1)(d) because the effectiveness of a training program is addressed in paragraph 71(1)(e). Although the Director is

not bound by the RAU report, RAU raised the interpretation of the provision, as did MJI. However, the Director did not directly address how paragraph 71(1)(d) should be correctly interpreted.

[177] The Director agreed with FINTRAC that the compliance training program was not effective because of the lack of employee understanding about STRs, the 24 hour rule, and structuring and, as such, that the training program did not fulfil the purpose of subsection 9.6(1) of the Act [every… entity shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this part and Part 1.1].

[178] The Court notes that the Act delegates many detailed requirements to be set out in regulations, all or many of which are intended to ensure that a reporting entity complies with the Act.

[179] It is logical to expect that a reporting entity's efforts to comply with paragraph 71(1)(d) – i.e., to develop and implement a training program that is reduced to writing in several manuals and addresses the required topics – should also be effective. An effective training program would guard against the entity's failure to comply with other requirements imposed by the Act and Regulations. In the present case, it appears that MJI's employees' lack of understanding of STRs and structuring resulted in Violation #1, and could have led to other violations. However, the issue is whether the ineffectiveness of the training program as evidenced by the employees' lack of understanding constitutes a separate violation pursuant to paragraph 71(1)(d).

[180] In *Lukács v Air Canada Rouge LP*, 2023 FC 1358 at paras 43-44, Justice Heneghan described the "basic principles" of statutory interpretation: first, the text should be considered in both English and French; second, the Supreme Court of Canada's guidance in *Rizzo* should be followed.

[181] In *Rizzo* at para 21, the Supreme Court noted its preference for Professor Drieger's approach [Elmer Driedger in *Construction of Statutes* (2nd ed 1983)], stating,

> 21. … [Driedger] recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their **grammatical and ordinary sense harmoniously** with the scheme of the Act, the object of the Act, and the intention of Parliament. [Emphasis added.]

[182] The Supreme Court added at para 22 that the *Interpretation Act* should also be relied on, which directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

[183] The purpose of the Act (and a large and liberal construction) would suggest that all compliance programs required by the regulations should be effective to ensure that the reporting entity complies with every aspect of the Act. However, there are many regulations imposing specific requirements. Interpreting one requirement largely and liberally without considering the other specific requirements could duplicate and confuse an entity's obligations pursuant to each

subsection or paragraph and expose the entity to additional violations based on the same failure or conduct.

[184] Subsection 71(1) of the Regulations requires an entity to implement the applicable compliance program in several specific ways – by appointing a responsible person; developing and applying written compliance policies and procedures that are kept up to date; assessing and documenting risk, taking into consideration several factors; developing and maintaining a compliance training program; and, instituting and documenting a review of the policies and procedures, the risk assessment and the training program to test their effectiveness. All these requirements (and those addressed in other provisions) are intended to promote and reflect the purpose of the Act, but each impose different and specific requirements.

[185] As noted, Violations #2 and #3 focus on MJI's failure to meet the requirements for developing and applying written compliance policies and procedures and for documenting risk.

[186] The specific requirements for a compliance training program and for the review and testing of all compliance programs – including training programs – are prescribed by paragraphs 71(1)(d) and (e) and are set out below:

Compliance	**Respect de la loi et du présent règlement**
71 (1) For the purpose of subsection 9.6(1) of the Act, a person or entity referred to in that subsection shall, as applicable, implement the compliance program referred to in that subsection by	**71 (1)** Pour l'application du paragraphe 9.6(1) de la Loi, toute personne ou entité visée à ce paragraphe met en œuvre, selon le cas, le programme de conformité visé à ce

	paragraphe de la façon suivante :
…	[…]
(d) if the person or entity has employees, agents or mandataries or other persons authorized to act on their behalf, developing and maintaining a written, ongoing compliance training program for those employees, agents or mandataries or other persons; and	**d)** si elle a des employés, des mandataires ou d'autres personnes habilitées à agir en son nom, élaborer et mettre à jour à leur intention un programme écrit de formation continue axée sur la conformité;
(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.	**e)** établir un mécanisme d'examen visant à évaluer l'efficacité des principes et des mesures, de l'évaluation des risques et du programme de formation — lequel examen doit être effectué aux deux ans par un vérificateur interne ou externe ou, si elle n'en a pas, par elle-même — et conserver les documents à l'appui.

[187] Reading paragraph 71(1)(d) in its ordinary and grammatical sense leads to the conclusion that the requirement demands only that an "ongoing compliance training program" for employees be developed and maintained in a written format. The French version conveys the same requirements.

[188] Reading paragraph 71(1)(d) in the context of section 71 and in the context and harmoniously with the scheme of the Act requires that the other specific provisions be taken into account, and leads to the same conclusion.

[189] Each paragraph in subsection 71(1) imposes specific requirements. Paragraph 71(1)(e) requires the review and testing of all compliance programs, including the compliance training program; the entity must conduct a review every two years to test the effectiveness of their training program.

[190] Section 71(1)(e) clearly requires a review of the compliance training program to test its effectiveness. If a similar requirement is read into paragraph 71(1)(d), a reporting entity would be required to do all that (d) specifically requires and also test the effectiveness of their training program frequently, rather than every two years as the Act specifically requires. While this may be in an entity's best interest in order to guard against other failures, it is not required by paragraph 71(1)(d).

[191] If Parliament intended that paragraph 71(1)(d) also include the requirement that the compliance training program be effective as evidenced by the ongoing testing of employees' knowledge, this could and should have been stated.

[192] While it is true that the October 15, 2019 letter from FINTRAC to MJI stating that interviews would be conducted to "assess [MJI's] anti money laundering and counter-terrorist financing training program…", suggests that employee knowledge would be examined, this does not dictate how the statutory provision should be interpreted. [The Court notes that the Director stated that the letter indicated that the interviews were to "assess the effectiveness of the training program and employee's understanding of policies and procedures and their knowledge of money laundering activities"; however, this is not completely accurate. Regardless, the words of

the statute, not the letter, are at issue.] There are many reasons for FINTRAC to interview employees, including to advise the entity on weaknesses that expose it to other violations. As FINTRAC noted in the September 2019 letter, FINTRAC's examination "also aims to assist your organization in meeting its legal obligations should [FINTRAC] identify any issues".

[193] The Respondent pointed to FINTRAC's guidelines in support of the Respondent's submission that the purpose of the compliance training requirement is to ensure that employees know how and when they must comply with their obligations and the overall purpose of the Act. However, contrary to the Respondent's submissions, FINTRAC's guidelines draw a clear distinction between the components of the training program and the two year review of programs to test their effectiveness. Moreover, FINTRAC's guidelines are not law and do not assist in the correct interpretation of paragraph 71(1)(d).

[194] The Court finds that the Director incorrectly interpreted the scope of paragraph 71(1)(d) and imposed an additional requirement not found in that paragraph.

(2) The Director erred in finding that MJI committed Violation #4

[195] The Director's error in interpreting the scope of paragraph 71(1)(d) leads to the conclusion that the Director erred in finding that MJI committed Violation #4. As a result, it is not necessary to determine if the Director's finding that the training program was not effective is supported by the evidence. It is also not necessary to determine whether FINTRAC's failure to provide the summary of the employee interviews to MJI is a breach of procedural fairness.

[196] However, the Court observes that FINTRAC did not disclose the employee interview notes – even in a redacted form – to MJI prior to the Director making her determination. Although the examination findings and the NOV provided MJI with sufficient information to know the basis of Violation #4 and "the case to meet" and MJI provided submissions in response disputing the requirement for an effective training program, a better practice would have been for FINTRAC to provide the interview notes to MJI before the Director concluded that their training program was not effective.

X. FINTRAC's general process was procedurally fair

[197] MJI does not allege that FINTRAC's overall process for examining compliance is procedurally unfair.

[198] MJI's allegation of a breach of procedural fairness relates to the lack of disclosure by FINTRAC of the summary of the employee interview notes and the accuracy of the summary, which was relied on by the Director.

[199] In *Baker*, Justice L'Heureux Dubé emphasized that the scope or content of the duty of procedural fairness must be determined in the specific context of each case. Justice L'Heureux Dubé reiterated that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair, impartial and open process "appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[200] The Court observes that consideration of the *Baker* factors (including the nature of the decision, the process followed by FINTRAC and the Director, the importance of the decision, and the legitimate expectations of MJI) all support that the overall process in this case was procedurally fair. MJI was advised of FINTRAC's examination and its scope well in advance. MJI received the examination findings describing the deficiencies, the confirmation of the findings, and the detailed NOV, which set out the allegations and the basis for each, and later, the confirmation of the violations.

[201] In *Violator no 10* at para 46, the Federal Court of Appeal considered whether FINTRAC's general process is procedurally fair and focused on the disclosure of relevant information. The Court of Appeal noted that the substance of the information provided is more important than a particular document.

[202] MJI had the substance of the information relied on by FINTRAC in order to make submissions in response, both to FINTRAC and the Director. It does not appear that MJI was thwarted in its ability to dispute the violations.

[203] As noted above, FINTRAC did not disclose the summary of the employee interviews to MJI. Although MJI's submissions raised similar arguments to FINTRAC and to the Director as it has on this Appeal, after receiving the interview notes, as noted, it would have been a better practice for FINTRAC to have provided MJI with the summary of the employee interviews before the Director made her decision. No reason has been offered for why FINTRAC withheld the employee interview notes.

[204] As noted above, the employee interviews were not the basis for Violation #1; the lack of timely disclosure of the interview notes has no bearing on the Director's finding that MJI failed to submit a STR.

[205] With respect to MJI's allegations that the summary of the employee interviews was "grossly inaccurate" or inadequate, this is not borne out by the documents on the record.

XI. The Director did not err in assessing and imposing the AMPs for Violations #1, #2 and #3

[206] The Director did not fetter her discretion or make any palpable and overriding errors in her assessment or imposition of the penalties for Violations #1, #2 and #3.

[207] As set out above in the summary of the Director's decision, at paragraphs 52-70, the Director provided a thorough explanation of how she determined the penalty for each violation.

[208] The Court and the Federal Court of Appeal have previously raised concerns about FINTRAC's imposition of penalties starting from base amounts that were not known or publicly available or provided to the entity and were not part of the record before the Court.

[209] In *Kabul Farms FCA*, the Federal Court of Appeal found that a fact-based, discretionary decision made on the basis of a proper methodology is not automatically "unreasonable" (at that time, the standard of review for FINTRAC decisions was reasonableness). The concern in *Kabul Farms FCA* was not the Director's reliance on the methodology, but rather, the lack of

information about the base amounts, reductions, or other guidelines applied and relied on by FINTRAC in applying the methodology.

[210] The error found in *Kabul Farms FCA* has since been addressed. FINTRAC has revised its guidelines and policies regarding AMPs and made them available to the public and to entities faced with a NOV.

[211] Contrary to MJI's contention, the Director did not fetter her discretion by relying on a "rigid" formula or by narrowing the concept of harm. The Director's decision reflects her consideration of all relevant factors: the harm done by each violation, MJI's history of compliance with the Act, the purpose of the penalties to encourage compliance rather than to punish, and MJI's submissions. The Director's application of the guidelines and policies (i.e., the "Administrative monetary penalties policy", the "Guide on harm done assessment for suspicious transaction reports violations", and the "Guide on harm done assessment for compliance program violations") is not an error. These are intended to provide guidance to FINTRAC and do not dictate a particular outcome. The Director's reasons demonstrate that she grappled with the assessment of each penalty with reference to the AMP Regulations and policies and more importantly, the facts before her; she did not simply adopt FINTRAC's proposals without scrutiny.

[212] MJI contends that the Director fettered her discretion by assessing the harm from Violation #1 as "Level 1" rather then "Level 2", because the failure to report Ms. Y's purchases as suspicious resulted only in the loss of additional financial intelligence (if any loss occurred),

and not a complete loss of financial intelligence. Contrary to this submission, the Director did not fetter her discretion, but rather, considered all the factors, including all of MJI's submissions disputing the penalty. Disagreeing with MJI does not constitute fettering of discretion. Moreover, the Director explained that the failure to submit a STR is one of the most serious violations because it deprives FINTRAC of financial intelligence related to a transaction that would otherwise escape FINTRAC's analysis; i.e. the complete loss of financial intelligence.

[213] MJI also argues that the Director fettered her discretion by confirming the penalty recommended by FINTRAC for Violation #3, despite that the Director only agreed with two of the three "failures" cited by FINTRAC as demonstrating an inadequate assessment of risk. This argument overlooks that the adequacy of the risk assessment depends on several non-exhaustive factors, any one of which could, depending on the circumstances, support a finding a failure to assess and document the risk of a money laundering or terrorist financing offence.

XII. Conclusion

[214] With respect to Violations #1, #2 and #3, the Court finds that the Director did not make any palpable or overriding errors, exceed her jurisdiction, or fetter her discretion in finding that, on a balance of probabilities, MJI had committed three violations of the Act. The Director's reasons addressed the statutory requirements, the evidence, and MJI's submissions.

[215] The Court also finds that the Director did not fetter her discretion or make any palpable and overriding errors in assessing and imposing the AMPs for Violations #1, #2 and #3.

[216] The Court finds that the Director erred in law in her interpretation of paragraph 71(1)(d) of the General Regulations regarding Violation #4 and, as a result, erred in finding that MJI had not complied with the requirement to have a written, ongoing compliance training program as evidenced by the full comprehension of employees. The subsequent finding that MJI had committed Violation #4 is an error. The Director's decision with respect to Violation #4 and the penalty imposed are quashed.

[217] Costs generally are awarded to the successful party. In the present case, that success is divided; the Appellant is successful with respect to one violation and the Respondent is successful with respect to three violations.

[218] The Appellant and Respondent should seek to reach an agreement on costs and advise the Court within 20 days of the issuance of this decision whether such an agreement has been reached. If no agreement is reached, the Court will then invite submissions and impose page limits and filing deadlines.

JUDGMENT in file T-575-22

THIS COURT'S JUDGMENT is that:

1. The Appeal is dismissed with respect to Violations #1, #2 and #3 and the penalties imposed for those violations.

2. The Appeal is allowed with respect to Violation #4.

3. The Director's decision with respect to Violation #4 and the imposition of a penalty for Violation #4 is quashed.

4. The Appellant and Respondent shall seek to reach an agreement on costs and shall advise the Court within 20 days, failing which the Court will issue Directions regarding submissions on Costs.

"Catherine M. Kane"
Judge

ANNEX A
Excerpts from the Act and the General Regulations

1. Relevant excerpts of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (version in force from December 13, 2018 to June 20, 2019) are set out below:

Object	**Objet**
3 The object of this Act is	**3** La présente loi a pour objet :
(a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including	a) de mettre en œuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :
(i) 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,	**(i)** imposer des obligations de tenue de documents et d'identification des clients aux fournisseurs de services financiers et autres personnes ou entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités susceptibles d'être utilisées pour le recyclage des produits de la criminalité ou pour le financement des activités terroristes,
(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and	**(ii)** établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,

(iii) establishing an agency that is responsible for ensuring compliance with Parts 1 and 1.1 and for dealing with reported and other information;

(iii) constituer un organisme chargé du contrôle d'application des parties 1 et 1.1 et de l'examen de renseignements, notamment ceux portés à son attention au titre du sous-alinéa (ii);

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves;

b) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

(c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity; and

c) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes;

(d) to enhance Canada's capacity to take targeted measures to protect its financial system and to facilitate Canada's efforts to mitigate the risk that its financial system could be used as a vehicle for money laundering and the financing of terrorist activities.

d) de renforcer la capacité du Canada de prendre des mesures ciblées pour protéger son système financier et de faciliter les efforts qu'il déploie pour réduire le risque que ce système puisse servir de véhicule pour le recyclage des produits de la criminalité et le financement des activités terroristes.

…

[…]

Application of Part

Application

5 This Part applies to the following persons and entities:	**5** La présente partie s'applique aux personnes et entités suivantes :
…	[…]
i) persons and entities engaged in a prescribed business, profession or activity;	**i)** les personnes et entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'une activité, si l'entreprise, la profession ou l'activité est prévue par règlement;
…	[…]
Record keeping	**Tenue de documents**
6 Every person or entity referred to in section 5 shall keep records in accordance with the regulations.	**6** Il incombe à toute personne ou entité visée à l'article 5 de tenir des documents conformément aux règlements.
Verifying identity	**Vérification d'identité**
6.1 Every person or entity referred to in section 5 shall verify the identity of a person or entity in accordance with the regulations.	**6.1** La personne ou entité visée à l'article 5 est tenue de vérifier l'identité d'une personne ou entité conformément aux règlements.
Transactions if reasonable grounds to suspect	Opérations à déclarer
Transactions if reasonable grounds to suspect	**Opérations à déclarer**
7 Subject to section 10.1, every person or entity referred to in section 5 shall, in accordance with the regulations, report to the Centre every financial transaction that occurs or that is attempted in the course of their activities and in respect	**7** Il incombe, sous réserve de l'article 10.1, à toute personne ou entité visée à l'article 5 de déclarer au Centre, conformément aux règlements, toute opération financière qu'on a effectuée ou tentée dans le cours de ses activités et à l'égard de

of which there are reasonable grounds to suspect that

laquelle il y a des motifs raisonnables de soupçonner qu'elle est liée à la perpétration — réelle ou tentée —, selon le cas :

(a) the transaction is related to the commission or the attempted commission of a money laundering offence; or

a) d'une infraction de recyclage des produits de la criminalité;

(b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence.

b) d'une infraction de financement des activités terroristes.

Compliance program

Programme de conformité

9.6 (1) Every person or entity referred to in section 5 shall establish and implement, in accordance with the regulations, a program intended to ensure their compliance with this Part and Part 1.1.

9.6 (1) Il incombe à toute personne ou entité visée à l'article 5 d'établir et de mettre en œuvre, en conformité avec les règlements, un programme destiné à assurer l'observation de la présente partie et de la partie 1.1.

Risk assessment

Évaluation de risques

(2) The program shall include the development and application of policies and procedures for the person or entity to assess, in the course of their activities, the risk of a money laundering offence or a terrorist activity financing offence.

(2) Le programme doit notamment prévoir l'élaboration et la mise en application de principes et de mesures permettant à la personne ou à l'entité d'évaluer, dans le cours de ses activités, les risques de perpétration d'infractions de recyclage des produits de la criminalité et d'infractions de financement des activités terroristes.

Special measures

Mesures spéciales

(3) If, at any time, the person or entity considers that the risk referred to in subsection (2) is high, or in the prescribed circumstances, the person or entity shall take the special measures referred to in the regulations.

(3) La personne ou entité prend les mesures spéciales prévues par règlement dans les circonstances réglementaires ou si, à un moment donné, elle estime que les risques visés au paragraphe (2) sont élevés.

Regulations

Règlements

73 (1) The Governor in Council may, on the recommendation of the Minister, make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of this Act, including regulations

73 (1) Le gouverneur en conseil peut par règlement, sur recommandation du ministre, prendre toute mesure qu'il estime nécessaire à l'application de la présente loi, et notamment :

(a) respecting dealing in virtual currencies;

a) régir le commerce de monnaie virtuelle;

(b) respecting the keeping of records referred to in section 6;

b) régir la tenue des documents visée à l'article 6;

(c) respecting the verification of the identity of persons and entities referred to in section 6.1;

c) régir la vérification de l'identité des personnes et entités visée à l'article 6.1;

(d) respecting the reports to the Centre referred to in section 7 and subsections 7.1(1) and 9(1);

d) régir les déclarations à faire au Centre en application de l'article 7 et des paragraphes 7.1(1) et 9(1);

(e) respecting the determination of whether a person is a person described in any of paragraphs 9.3(1)(a) to (c);

e.1) et **e.2)** [Abrogés, 2017, ch. 20, art. 434]

(f) respecting the measures referred to in subsections 9.3(2) and (2.1);

f) régir les mesures visées aux paragraphes 9.3(2) et (2.1);

(g) respecting the measures referred to in subsection 9.4(1);	**g)** régir les mesures visées au paragraphe 9.4(1);
(h) respecting the program referred to in subsection 9.6(1);	
(i) respecting the special measures referred to in subsection 9.6(3);	
…	[…]
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.

2. Relevant excerpts from section 71 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 (in force from June 17, 2017-June 24, 2019) are set out below:

Compliance	**Respect de la loi et du présent règlement**
71 (1) For the purpose of subsection 9.6(1) of the Act, a person or entity referred to in that subsection shall, as applicable, implement the compliance program referred to in that subsection by	**71 (1)** Pour l'application du paragraphe 9.6(1) de la Loi, toute personne ou entité visée à ce paragraphe met en œuvre, selon le cas, le programme de conformité visé à ce paragraphe de la façon suivante :
(a) appointing a person — who, where the compliance	**a)** nommer une personne chargée de sa mise en œuvre,

program is being implemented by a person, may be that person — who is to be responsible for the implementation of the program;

étant entendu que si le programme est mis en œuvre par une personne, celle-ci peut s'en charger elle-même;

(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;

b) élaborer et appliquer des principes et des mesures de conformité écrits qui sont mis à jour et, dans le cas d'une entité, approuvés par un de ses dirigeants;

(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

c) évaluer — en fonction de ses besoins — les risques visés au paragraphe 9.6(2) de la Loi et conserver les documents à l'appui, en tenant compte des critères suivants :

(i) the person's or entity's clients and business relationships,

(i) les clients et relations d'affaires de la personne ou de l'entité,

(ii) the person's or entity's products and delivery channels,

(ii) ses produits et moyens de distribution,

(iii) the geographic location of the person's or entity's activities,

(iii) l'emplacement géographique de ses activités,

(iii.1) any new developments in respect of, or the impact of new technologies on, the person's or entity's clients, business relationships, products or delivery channels or the geographic location of their activities,

(iii.1) les nouveaux développements ou l'impact de nouvelles technologies à l'égard des clients ou des relations d'affaires de la personne ou de l'entité, de ses produits ou moyens de distribution ou de l'emplacement géographique de ses activités,

(iii.2) in the case of an entity that is referred to in any of paragraphs 5(a) to (g) of the

(iii.2) s'agissant d'une entité visée à l'un ou l'autre des alinéas 5a) à g) de la Loi, les

Act, any risk resulting from the activities of an entity that is affiliated with it and that is referred to in any of those paragraphs or from the activities of a foreign entity that is affiliated with it and that carries out activities that are similar to those of entities referred to in any of those paragraphs, and

risques découlant des activités d'une entité du même groupe visée par l'un ou l'autre de ces alinéas ou des activités d'une entité étrangère du même groupe qui exerce des activités semblables à celles des entités visées à l'un ou l'autre de ces alinéas,

(iv) any other relevant factor;

(iv) tout autre critère approprié;

(d) if the person or entity has employees, agents or mandataries or other persons authorized to act on their behalf, developing and maintaining a written, ongoing compliance training program for those employees, agents or mandataries or other persons; and

d) si elle a des employés, des mandataires ou d'autres personnes habilitées à agir en son nom, élaborer et mettre à jour à leur intention un programme écrit de formation continue axée sur la conformité;

(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.

e) établir un mécanisme d'examen visant à évaluer l'efficacité des principes et des mesures, de l'évaluation des risques et du programme de formation — lequel examen doit être effectué aux deux ans par un vérificateur interne ou externe ou, si elle n'en a pas, par elle-même — et conserver les documents à l'appui.

(2) For the purposes of the compliance program referred to in subsection 9.6(1) of the Act, every entity referred to in that subsection shall report the following in written form to a

(2) Pour l'application du programme de conformité visé au paragraphe 9.6(1) de la Loi, toute entité visée à ce paragraphe fait rapport, par écrit, des éléments ci-après à un de ses dirigeants dans les

senior officer within 30 days after the assessment:	trente jours suivant l’évaluation :
(a) the findings of the review referred to in paragraph (1)(e);	**a)** les conclusions de l’examen visé à l’alinéa (1)e);
(b) any updates made to the policies and procedures within the reporting period; and	**b)** la mise à jour des principes et des mesures au cours de la période visée par le rapport;
(c) the status of the implementation of the updates to those policies and procedures.	**c)** l’état d’avancement pour mettre en œuvre les mises à jour des principes et des mesures.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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