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T-556-21

FEDERAL COURT OF CANADA

COUR FÉDÉRALE
FEDERAL COURT
DÉPOSÉ
MAR 31 2021
ILEANA CARMONA
FILED
MONTREAL, QC
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BETWEEN:

CHÂTEAU D'IVOIRE STORES INC.

Appellant

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL
(Section 73.21 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (the "Act") and Rule 337 of the *Federal Courts Rules*)

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T-556-21

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(Section 73.21 of the Act and Rule 337 of the *Federal Courts Rules*)

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at 30 McGill Street, Montréal, Québec.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor, or where the Appellant is self-represented, on the Appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the decision appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: ~~March 30, 2021~~ MAR 31 2021

Issued by: L'ORIGINAL A ÉTÉ SIGNÉ PAR ILEANA CARMONA HAS SIGNED THE ORIGINAL

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(Service is effected by filing the original and two paper copies at the Registry in accordance with Rule 133 of the *Federal Court Rules* and with article 48 of the *Federal Courts Act*)

Director and Chief Executive Officer
Financial Transactions and Reports
Analysis Centre of Canada
234 Laurier Avenue West
24th Floor
Ottawa, Ontario K1P 1H7

(Service is effected by filing the original and two paper copies at the Registry in accordance with Rule 133 of the *Federal Court Rules* and with article 48 of the *Federal Courts Act*)

NOTICE

1. **THE APPELANT CHÂTEAU D'IVOIRE STORES INC. ("CHÂTEAU D'IVOIRE") APPEALS** to the Federal Court from a decision of the Director and Chief Executive Officer (the "**Director**") of the Financial Transactions and Reports Analysis Centre ("**FINTRAC**") issued in file no. RAU-2020-0008/AMP-2019-0002 and dated 1 March 2021, pursuant to section 73.15(2) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "**Act**"), by which the Director confirmed a cumulative $206,910 in administrative monetary penalties against Château d'Ivoire, for five alleged violations of the Act (the "**Alleged Violations**") during the period of 1 May to 31 October 2018 (the "**Decision**").

2. **CHÂTEAU D'IVOIRE ASKS** that this Court:

   (a) **ALLOW** its Appeal;

   (b) **QUASH** the Decision;

   (c) **DECLARE** that FINTRAC's decision-making process that led to the Decision breaches the principles of procedural fairness and fundamental justice and is inconsistent with section 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 ("***Bill of Rights***");

   (d) **DECLARE** that FINTRAC's penalty-assessing process that led to the Decision is based on an illegal regime and therefore unlawful;

   (e) **DECLARE** that Château d'Ivoire did not commit any of the Alleged Violations or **ALTERNATIVELY DECLARE** that Château d'Ivoire has exercised due diligence by taking all necessary precautions to ensure compliance with the requirements of the Act to prevent each of the Alleged Violations, including in accordance with Section 73.24 of the Act, and consequently cannot be held liable for any of the Alleged Violations, or **ALTERNATIVELY VACATE** the administrative monetary penalties imposed on Château d'Ivoire, or **ALTERNATIVELY VARY** the

administrative monetary penalties imposed on Château d'Ivoire to the statutory minimum or as the Court finds just;

AND IN ANY CASE,

(f) **GRANT** such further and other relief as may be deemed just; and

(g) **AWARD** Château d'Ivoire its costs on such a scale as may be deemed just.

THE GROUNDS OF APPEAL are as follows:

I. STATUTORY PROVISIONS

3. Château d'Ivoire relies *inter alia* on sections 2, 7, 9, 9.6, 73(1), 73.11, 73.13, 73.14, 73.15 and 73.24 of the Act; sections 9, 39.2 and 71 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184 (the "**Regulations**"); sections 4, 5 and 6 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292; and subsection 2(e) of the *Bill of Rights*.

II. THE STANDARD OF REVIEW

4. As established by the majority in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("**Vavilov**"), the standard of review on an appeal provided for by legislation follows ordinary appellate standards of review: questions of law apply the standard of correctness, while questions of fact or mixed fact and law apply the standard of palpable and overriding error. Procedural fairness issues remain subject to the standard of correctness.

5. It necessarily follows from *Vavilov* that a decision subject to appeal must call for a high degree of procedural fairness. To hold otherwise would ignore Parliament's deliberate choice of appellate review and would assimilate this Court's appellate oversight to an ordinary judicial review.

III. THE BREACH OF PROCEDURAL FAIRNESS

6. While the outer boundaries of procedural fairness may be the subject of debate, there is no question that the Director must disclose to Château d'Ivoire the material that was made available to her for the purposes of her decision so that Château d'Ivoire could know the case it had to meet and rebut it.

7. By breaching this minimal guarantee of fairness, the Decision not only flew in the face of principles of fundamental justice but also was inconsistent with the due process protection of subsection 2(e) of the *Bill of Rights*, a quasi-constitutional statute.

8. For instance, Château d'Ivoire was provided with "Compliance Violation Findings" and subsequently a "Notice of Violation", upon which it based its "Contestation". For four of the five Alleged Violations, the Decision states that the Director consulted "the Notice and the representations"; however, with regard to the largest violation of those four (in monetary penalty terms), the Decision expressly rejects Château d'Ivoire's submission by relying on a "compliance file" which was never disclosed to Château d'Ivoire. For the other Alleged Violation, the Decision acknowledges that the Director reviewed "*documents, including the Notice and the representations*". Yet Château d'Ivoire was never provided with these documents, nor were extracts of FINTRAC's website cited in the Decision ever put to Château d'Ivoire.

9. Further, on issues of which Château d'Ivoire did have notice and therefore was able to make submissions, the Decision simply ignores the submissions.

10. The above also violates Château d'Ivoire's right to an independent decision by the Director and/or her delegate. For instance, since the Decision blindly adopts material and conclusions from the "Compliance Violation Finding", the Notice of Violation, the "compliance file" and "documents" the Director has effectively delegated her authority to the FINTRAC staff who prepared the Notice of Violation pursuant to subsection 73.13(2) of the Act. This contradicts the scheme

established in the Act, which sets up the Decision (pursuant to subsection 73.15) as a second level of review.

IV. FINTRAC'S OVERREACHING INTERPRETATION OF THE ACT AND REGULATIONS

11. With regard to four of the Alleged Violations, the Decision unlawfully rewrites the Act and Regulations.

12. With the sole exception of s. 9(1) of the Act and 39.2 of the Regulations, the provisions of the Act and Regulations at issue do not prescribe precise standards, including for example:

(a) pursuant to subsection 9.6(1) of the Act and paragraph 71(1)(b) of the Regulations, an entity must establish written compliance policies and procedures that are kept up to date and approved by a senior officer;

(b) pursuant to subsections 9.6(2) and 9.6(1) of the Act and paragraph 71(1)(c) of the Regulations, an entity must assess and document, in a manner that is appropriate for the person or entity taking into consideration a list of six factors, the risk of a money laundering offence or a terrorist activity financing offence;

(c) pursuant to subsections 9.6(1) of the Act and paragraph 71(1)(d) of the Regulations, an entity must develop and maintain a written, ongoing compliance training program for those individuals authorized to act on its behalf; and

(d) pursuant to section 7 of the Act, an entity must report to the Centre every financial transaction in respect of which there are reasonable grounds to suspect that it is related to the commission or the attempted commission of a money laundering offence or terrorist activity financing offence.

13. Further, the Act grants the authority *exclusively* to the Governor in Council to make regulations in regard to the requirements of the Act (notably at paragraph 2(1)[*prescribed*] and subsection 73(1)).

14. Yet the Decision purports to supplement the Act and Regulations with more stringent requirements. For instance, regarding to the first set of provisions above, the Decision states:

> Though the Act and Regulations do not specify the contents for policies and procedures, the 2017 examination Findings Letter provided clear explanations to CI as to how its policies and procedures were non-compliant and included guidance on how to address the deficiencies.

15. By treating FINTRAC'S guidance as authority, the Director usurps the power of the Governor in Council to make regulations and acted *ultra vires* her authority under the Act.

16. Further, the Director's supplements to the Act are arbitrary, incoherent and unjustifiable. The Act expressly stipulates that "*penalties have as their purpose to encourage compliance with this Act rather than to punish*" (at section 73.11). This has at least two implications:

    (a) the Director must show some deference to Château d'Ivoire's judgment exercised in good faith as to the appropriate compliance policies, self-assessment and training program in its own particular context; and

    (b) the burden is not on Château d'Ivoire to prove that it complied with the Act, but on FINTRAC to show that it breached its obligations.

17. Yet the Decision simply ignores Château d'Ivoire's judgment, as well as the facts it raised, and dismisses Château d'Ivoire's submissions out of hand. Moreover, the Decision's attempts to apply section 7 of the Act to purportedly "*suspicious*" transactions rely more on an alleged lack of information in Château d'Ivoire's records than any facts that would make the transactions suspicious.

18. Further, there is no issue that Château d'Ivoire:

(a) acted at all times in good faith;

(b) considerably expanded its compliance programs after a previous examination by FINTRAC;

(c) produced a new compliance program that even in FINTRAC's view was far superior to its predecessor; and

(d) expressly asked FINTRAC staff to review its revised compliance program on two separate occasions, only to be rebuffed.

19. For FINTRAC to refuse to review Château d'Ivoire's compliance program *proactively*, only to later review it *retroactively* and impose penalties based on stipulations not found in the Act or Regulations, cannot be reconciled with penalties' purpose of "*encourag[ing] compliance*" and FINTRAC's role in general, in particular vis-à-vis the reporting entities, who act as its information collection agents.

20. In the alternative, were these additions not *ultra vires* the Director's authority, they would constitute misinterpretations of the Act and Regulations, reliance upon irrelevant facts and failure to consider relevant facts, all of which are errors of law.

V. FINTRAC'S FLAWED APPLICATION OF THE ACT

21. Not only does the Decision misinterpret the Act and the Regulations, it commits key errors of law in applying the Act and Regulations.

22. First and foremost, the Decision gives no consideration to Château d'Ivoire's due diligence. Subsection 73.24(1) of the Act expressly provides that due diligence is a defence against penalties under the Act, and Château d'Ivoire expressly raised that defence. As described above, Château d'Ivoire acted diligently and proactively to produce a compliance program that would meet the requirements imposed by the Act and Regulations. However, the Decision simply copy-pastes Château

d'Ivoire's uncontested submissions and then ignores them without specifying what actions would have to be taken by a diligent luxury jewelry store. The Act cannot permit such an approach and the lack of justification, *a fortiori* given FINTRAC's role in general.

23. Second, the Decision both considers irrelevant facts and refuses to consider relevant ones. This is especially apparent with regard to the purportedly suspicious transaction:

(a) the Decision treats the use of cheques as objective a ground to suspect that transactions were related to the commission of a money laundering or terrorist activity financing offence, solely because it is a "*method of payment that [Château d'Ivoire] dislikes*";

(b) the Decision treats the use of a PO box, in this case *on a First Nations reserve*, as a ground to suspect that transactions were related to the commission of an money laundering or terrorist activity financing offence. This position is not only absurd, since many reserves use PO boxes primarily or exclusively, but also has the discriminatory effect of making reserve status a ground for suspicion; and

(c) the Decision treats the description of a customer as a "business man" as a ground to suspect that transactions were related to the commission of a money laundering or terrorist activity financing offence, which is not only absurd on its face—the term says no less about a customer's buying capacity than, say, "lawyer" or "accountant"—but also transforms an unauthorized and meritless complaint as to Château's records into a case for baseless suspicion.

VI. THE ILLEGAL PENALTY REGIME

24. The Decision set penalties based upon FINTRAC's own pre-established regime – namely a set of mathematical formulae – that is contrary to the Act and

Regulations, fetters the Director's discretion and systematically fails to take all relevant factors into account.

25. The formulae in question start with the maximum penalty imposable for a typical level of "harm", where "harm" is pre-determined by the identity of the violation rather than the specific circumstances of the alleged violation and evidence thereof, then provide a fixed percentage decrease for compliance history (33% for only one past violation, 67% for none) and the possibility of a further decrease for mitigating factors.

26. FINTRAC's general approach to the penalty calculation has been roundly criticized by the judiciary, notably in *Canada v. Kabul Farms Inc.*, 2016 FCA 143, and *Violator no. 10 v. Canada (Attorney General)*, 2017 FC 416.

27. Despite the foregoing, FINTRAC's penalty regime still suffers from many fatal defects, including but not limited to the following:

    (a) the criterion of harm remains divorced from actual or potential harm, particularly since it does not individualize the notion of harm;

    (b) the penalty amount calculation always starts at the regulatory maximum;

    (c) there is no real possibility of issuing the minimum prescribed fine of 1; and

    (d) there is no real possibility of declining to issue a penalty – indeed, the Decision gives it no consideration – even though the Director has discretion to do so under subsection 73.15(2) of the Act.

28. Further, in applying the above unlawful formulae, the Director failed to give consideration to relevant and undisputed facts, such as:

    (a) Château d'Ivoire's diligent, good faith efforts to comply with the Act;

(b) the necessity of using judgment to comply with the Act, such that four of the Alleged Violations amount to FINTRAC disagreeing with Château d'Ivoire's judgment calls; and

(c) further compliance efforts implemented by Château d'Ivoire following the FINTRAC review.

29. Had the Director taken these considerations into account rather than rigidly applying a mathematical formula already criticized by this Court, the fines could not have been imposed.

PART II - PLACE OF APPEAL

30. Château d'Ivoire proposes that this Appeal be heard in Montréal.

PART III - DOCUMENTS

31. Château d'Ivoire intends to ask the Director to send a certified copy of material that is not in the possession of Château d'Ivoire but is in the possession of the Director (including the "compliance file" and all other material relating to FINTRAC's examination of Château d'Ivoire), after taking the necessary steps with the Director and the Registry to ensure that any documents sent to the Registry in accordance with 317, 318 and 350 of the *Federal Court Rules* will be kept under seal and not made public.

32. Château d'Ivoire reserves its right to amend this Notice of Appeal, including in light of the material to be transmitted.

Montréal, March 30, 2021

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ACKNOWLEDGMENT OF RECEIPT

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01-04-21

Signature **Date**