

Court File No. T-2545-23

FEDERAL COURT

BETWEEN

COMMUNITY TRUST COMPANY

and

ATTORNEY GENERAL OF CANADA

Respondent

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FEDERAL COURT COUR FÉDÉRALE	
NOV 30 2023 Appellant	D É P O S É
NICOLE HRADSKY	
TORONTO, ON	1-

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NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

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 Toronto, Ontario.

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 341A prescribed by the Federal Courts Rules and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B 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.

November 30, 2023

**NICOLE HRADSKY
REGISTRY OFFICER
AGENT DU GREFFE**

Issued by:

(Registry Officer)

Address of local office: 180 Queen Street West, Suite 200
Toronto ON M5V 3L6

TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto ON M5H 1T1

Respondent

AND TO: **FINANCIAL CONSUMER AGENCY OF CANADA**
The Secretariat
427 Laurier Avenue West
5th Floor, Enterprise Building
Ottawa, ON K1R 1B9
Tel: 1-866-461-3222
Email: FCAC.Secretariat-Secretariat.ACFC@fcac-acfc.gc.ca

APPEAL

THE APPELLANT APPEALS to the Federal Court from the order of the Commissioner (the “**Commissioner**”) of the Financial Consumer Agency of Canada (the “**FCAC**”) dated October 31, 2023 (the “**Decision**”), by which the Commissioner: (a) found the Appellant, Community Trust Company (“**CTC**”), in breach of section 6(2.1)(b) (“**Violation #1**”) and section 8(1)(p) (“**Violation #2**”) (collectively, the “**Violations**”) of the *Cost of Borrowing (Trust and Loan Companies) Regulations* (the “**Regulations**”) made under the *Trust and Loan Companies Act*; (b) imposed a penalty of \$1.6 million (the “**Penalty**”) upon CTC in respect of Violation #1; and (c) required CTC to enter into a Compliance Agreement with the FCAC in respect of Violation #2 and all outstanding compliance issues.

THE APPELLANT ASKS that the Court grant an order:

- (a) setting aside the Decision;
- (b) in the alternative, varying the decision by
 - (i) setting aside the finding that CTC is liable for Violation #2; and
 - (ii) setting aside or substantially reducing the Penalty;
- (c) requiring the Commissioner to repay any monies paid to her by CTC pursuant to the Decision, to the extent the Decision is set aside or varied, with prejudgment and judgment interest, as applicable;
- (d) costs of this appeal; and
- (e) such further and other relief as counsel may advise and/or this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. Factual Background

A. The Parties

1. CTC was incorporated on September 7, 1975 as a provincial trust company. It became a federally regulated financial institution on June 1, 2004. Since then, it has provided numerous financial and trustee services to individuals and corporate entities across Canada, including residential mortgages and guaranteed investment certificates at highly competitive rates. CTC was acquired by Questrade Financial Group (“**ParentCo**”) on April 16, 2019. Pursuant to the *Financial Consumer Agency of Canada Act* (the “**Act**”), CTC is regulated by the FCAC.

2. The Respondent, the Attorney General of Canada, represents the interests of the FCAC.

B. The Complaint

3. On January 23, 2020, CTC received a customer complaint (the “**Complaint**”) regarding the discharge of the customer’s mortgage and the balance owing at maturity. The Complaint alleged that the customer’s balance at maturity was greater than the customer expected it to be. On February 6, 2020, CTC provided an explanatory response to the Complaint directly to the customer.

4. On February 28, 2020, CTC was notified that the Complaint had been escalated to the Ombudsman for Banking Services and Investments (“**OBSI**”) for investigation. Between March 19, 2020 and November 16, 2020, CTC and OBSI engaged in ongoing conversations, meetings and information exchanges. On November 19, 2020, as a result of the investigation, the OBSI sent a closing letter to the customer regarding the Complaint, confirming that CTC had offered to settle the Complaint (which ultimately was finalized on November 29, 2020).

5. Following settlement of the Complaint, CTC made significant organizational changes to bolster its compliance program. A new Chief Compliance Officer and Deputy Chief Compliance Officer were appointed in November 2020 and December

2020, respectively. On December 1, 2020, changes were made to CTC's annual percentage rate ("APR") calculation and cost of borrowing disclosure ("**COB Disclosure**") under the Regulations to address the issues that were identified through the Complaint relating to the Annual Maintenance Fee and the Discharge Statement Fee.

C. The FCAC Investigation

6. On February 10, 2021, CTC was informed by the FCAC that it had received a report from OBSI on February 5th, entitled *Summary Report – Systemic Bank Issue Reported by External Complaint Body* (the "**OBSI Report**"). The OBSI Report stated that the "COB and APR do not appear to be clearly disclosed or correctly calculated in the Cost of Borrowing Disclosure document for mortgage loans with terms longer than one year which may be contrary to sections 5(1) and 6(4) of the *Cost of Borrowing (Trust and Loan Companies) Regulations*." One of the issues identified by the OBSI Report was that CTC purportedly charged a "discharge statement fee for all mortgages" without disclosing the fee to customers.

7. On February 10, 2021, the FCAC contacted CTC about the OBSI Report. A summary of the FCAC's concerns was provided to CTC, which CTC undertook to look into.

8. On April 9, 2021, in response to the FCAC's concerns, CTC submitted a Reportable Compliance Issue report ("**RCI #1**") to the FCAC. The three issues that formed the basis of RCI #1 related to fees charged, including the Annual Maintenance Fee and the Discharge Statement Fee.¹ RCI #1 referred to three legislative provisions under the Regulations:

- (a) Section 5(1) ("**Subissue #1**");

¹ CTC notes that this fee has been given various names by the parties, including a Mortgage Discharge Statement Fee, a Discharge Statement Fee, a Mortgage Statement Fee and a Mortgage Statement Discharge Fee. CTC refers to this fee in the Information Box as a Discharge Statement Fee. It is referred to as a Mortgage Loan Statement Fee (with clarifying language) in the Schedule of Additional Costs.

- (b) Section 8(1)(i) (“**Subissue #2**”); and
- (c) Section 8(1)(q) and Schedule 1, Information Box (“**Subissue #3**”).

9. RCI #1 was acknowledged by the FCAC on April 23, 2021. On April 29, 2021, the FCAC opened individual investigation files for each subissue, as follows:

- (a) Subissue #1 – 403961;
- (b) Subissue #2 – 403965; and
- (c) Subissue #3 – 403971.

10. After the submission of RCI #1, CTC conducted further internal investigations and identified issues that led to the submission of additional RCIs.

11. On December 6, 2022, the FCAC opened a new investigation case file number (418110) under RCI #1, which was in addition to the other ongoing investigations under RCI #1. The investigation under case file number 418110 corresponded to CTC’s Market Conduct Obligation under section 6(2.1)(b) of the Regulations and Subissue #3.

D. The Notice of Breach

12. On December 22, 2022, the Manager of FCAC’s Enforcement Division issued a Notice of Breach for investigation cases 403961, 403965, 403971 and 418110. The Notice of Breach alleged that CTC failed to comply with the following sections of the Regulations:

- (a) Section 5(1), with respect to Subissue #1;
- (b) Section 8(1)(i), in relation to Subissue #2; and
- (c) Sections 8(1)(q) and 6(2.1)(b), in relation to Subissue #3.

13. Subsequently, in a telephone meeting on January 5, 2023, CTC was advised for the first time that FCAC was of the opinion that there had also been a breach of section 8(1)(p) of the Regulations.

14. On the same day, the FCAC sent a Request for Information to CTC, in which it began referring to the fee at issue under Subissue #3 as a “Mortgage Statement Discharge Fee” [emphasis added]. CTC responded to the Request for Information on January 13, 2023, in which it clarified that the fee in question has never been called a Mortgage Statement Discharge Fee. Rather, the fee is referred to as a Discharge Statement Fee in CTC’s Information Box and a Mortgage Loan Statement Fee in its Schedule of Additional Costs.

15. On February 15, 2023, the FCAC opened another investigation (file number 418892) under RCI #1. This investigation corresponded to CTC’s Market Conduct Obligation under section 8(1)(p) of the Regulations and Subissue #3. No Notice of Breach was ever issued to CTC for a breach of this provision.

E. The Notice of Violation

16. On April 5, 2023, a Notice of Violation was issued to CTC by the Deputy Commissioner of the FCAC pursuant to section 22(2) of the Act, with an accompanying Compliance Report that was dated the same day as the Notice of Violation. The Notice of Violation set out two alleged violations by CTC:

- (a) **Violation #1:** From January 1, 2010 to November 30, 2020, CTC failed to provide borrowers who entered into a fixed interest rate mortgage agreement with an Information Box, as set out in Schedule 1, containing all the information referred to in that Schedule, including the types and amounts of “Other Fees”, contrary to section 6(2.1)(b) of the Regulations; and
- (b) **Violation #2:** From January 20, 2007 to November 30, 2020, CTC failed to provide borrowers who entered into a fixed interest rate mortgage agreement with an initial disclosure statement which included

the existence of a fee to discharge a security interest and the amount of the fee on the day that the statement was provided, contrary to section 8(1)(p) of the Regulations.

17. The Notice of Violation proposed administrative monetary penalties for CTC pursuant to section 22(1) of the Act, as follows:

- (a) **Violation #1:** \$1,600,000; and
- (b) **Violation #2:** \$1,550,000.

18. As of April 5, 2023 (i.e., the date of the Notice of Violation), CTC had identified and reimbursed financially impacted customers for issues relating to Subissue #3 (i.e., the subissue giving rise to both Violation #1 and Violation #2). With respect to clients whom CTC was unable to locate, CTC made a charitable donation to financial literacy, with the concurrence of the FCAC, totalling the sum of the funds owed to such clients.

F. CTC's Submissions to the FCAC

19. In response to the Notice of Violation issued against it, CTC filed written representations to the Commissioner on June 5, 2023.

20. CTC admitted the facts underlying Violation #1.

21. With respect to Violation #2, CTC submitted that the FCAC breached its duty of procedural fairness by failing to follow the process it had explicitly outlined in its own Supervision Framework and in several prior FCAC decisions. In particular, the FCAC never issued a Notice of Breach relating to Violation #2 prior to the Notice of Violation, which would have given CTC notice that a Compliance Report may be forthcoming and that identified issues requiring remediation. Additionally, the FCAC then issued the Compliance Report on the same day as the Notice of Violation, rather than prior to it, which deprived CTC of the ability to make submissions to the Deputy Commissioner about why the Compliance Report did not support a Notice of Violation. CTC therefore argued that the proceedings commenced in respect of Violation #2 were

a nullity and that the FCAC was unable to restart proceedings against CTC as a result of the passage of the two year limitation period in section 30(1) of the Act.

22. In addition, CTC submitted that the \$100 fee at issue did not breach section 8(1)(p) of the Regulations, since it is a fee to produce a statement and not to discharge a security interest. Therefore, Violation #2 was not made out.

23. On the issue of penalty, CTC made the following submissions:

- (a) The FCAC in the Notice of Violation proposed penalties that were in excess of the \$500,000 maximum for any acts that occurred prior to April 30, 2020 (i.e., 95% of the alleged violations). Section 19(2) of the Act was amended on April 30, 2020 to increase the maximum allowable penalty to \$10 million, but there is no indication Parliament intended for such amendment to have retroactive or retrospective effect;
- (b) The FCAC in the Notice of Violation applied the wrong legal test under section 20 of the Act, which sets out how the amount of a penalty shall be determined;
- (c) The FCAC in the Notice of Violation fettered its statutory discretion by treating its guidelines on how to apply section 20 of the Act as though they were binding on it;
- (d) The FCAC in the Notice of Violation proposed to levy two penalties against CTC, but that the Act only authorizes one penalty per hearing and to impose more than one penalty per hearing would run afoul of the rule against double jeopardy;
- (e) The factors under section 20 of the Act supported a significantly reduced quantum of penalty from the penalties proposed by the FCAC in the Notice of Violation.

24. CTC also requested that, in the event the Commissioner determined the alleged Violations were made out, she should exercise her remedial discretion to not impose a

penalty and instead require CTC to enter into a global Compliance Agreement with the FCAC, or alternatively to greatly reduce the quantum of any penalty.

2. The Decision

25. The Commissioner released her decision on October 31, 2023.

26. The Commissioner found CTC liable for Violation #1 based on its admission of liability for it.

27. The Commissioner also found CTC liable for Violation #2. In doing so, the Commissioner dismissed CTC's claims that it was not afforded procedural fairness, primarily on the basis that, even if the FCAC did not follow its own process, CTC had sufficient time to respond to the Notice of Violation. As well, the Commissioner found that the \$100 fee at issue in Violation #2 was governed by section 8(1)(p) of the Regulations.

28. The Commissioner imposed the Penalty for Violation #1. In doing so, she held that the Violations were continuing acts that started before and ended after the legislative amendments to section 19(2) of the Act, so the \$10 million maximum penalty in the Act applied. She also disagreed that the FCAC staff's reliance on the FCAC's own internal guidelines, the Administrative Monetary Penalties Framework, fettered her discretion. As well, the Commissioner held that \$1.6 million was an appropriate penalty for Violation #1 based on the factors set out in section 20 of the Act and the Administrative Monetary Penalties Framework.

29. The Commissioner decided not to impose a penalty for Violation #2. Instead, the Commissioner held that a Compliance Agreement between CTC and the FCAC addressing all outstanding reportable compliance issues (including those in Violation #2) was appropriate.

3. Errors Committed by the Commissioner

30. The Commissioner erred in law, improperly exercised her discretion and made palpable and overriding errors of fact in the Decision.

31. First, in finding that CTC committed Violation #2, the Commissioner erred in her interpretation of the Regulations. Section 8(1)(p) of the Regulations requires disclosure of any fee to discharge a security interest. The \$100 fee at issue in Violation #2 was not a fee to discharge a security interest, but rather a fee to produce a mortgage statement. This mortgage statement may be provided in circumstances that do not involve the discharge of a mortgage or other security interest. CTC charges a separate fee (\$495) to discharge a security interest, which was at all material times disclosed in accordance with section 8(1)(p) of the Regulations. In any event, the \$100 fee was also disclosed to customers within the Schedule of Additional Costs at all times relevant to Violation #2. The Commissioner failed to consider or properly weigh relevant evidence of this in the record.

32. Second, in finding that CTC committed Violation #2, the Commissioner also erred in holding that CTC was afforded sufficient procedural fairness by the FCAC. CTC had a legitimate expectation that the FCAC would follow its own Supervision Framework and prior FCAC decisions, by issuing a Notice of Breach for Violation #2 and the Compliance Report before the Notice of Violation. The FCAC's failure to do so deprived CTC of its right to procedural fairness and rendered all proceedings with respect to Violation #2 a nullity. Since more than two years have now passed since the subject matter that would give rise to a Notice of Violation for section 8(1)(p) came to the FCAC's attention, any proceeding relating to this is now statute-barred by the two-year limitation period in section 30(1) of the Act.

33. Third, in imposing the Penalty, the Commissioner erred in applying the amended version of section 19(2) of the Act, which states that the maximum penalty for a violation of the Act and/or Regulations is \$10 million. Approximately 95% of the conduct giving rise to Violation #1 occurred prior to April 30, 2020, when the maximum allowable penalty under section 19(2) of the Act was \$500,000, and the conduct was not a continuing status or characteristic but consisted of a series of discrete acts which occurred each time CTC entered into its fixed interest rate mortgage agreements with borrowers. Parliament did not intend for the legislative amendments

to have retroactive or retrospective effect, so only those portions of Violation #1 that occurred after April 30, 2020 are eligible for a maximum penalty of \$10 million.

34. Fourth, in imposing the Penalty, the Commissioner improperly fettered her discretion by adopting the FCAC staff's reliance on the FCAC's Administrative Monetary Penalties Framework in assessing the quantum of penalty for CTC. Section 20 of the Act vests the Commissioner with a broad discretion in determining the amount of a penalty, and requires that this be determined pursuant to the section 20 factors "in each case". This discretion was unlawfully fettered by her strict reliance on the FCAC's Administrative Monetary Penalties Framework, which is a guideline rather than a regulation or legally binding instrument.

35. Fifth, in imposing the Penalty, the Commissioner applied the wrong legal test. Section 20 of the Act sets out five specific factors which must be considered together when determining the amount of a penalty, as the Commissioner's own prior decisions recognize. However, the Commissioner treated each individual factor under section 20 as its own unique consideration which gave rise to a specific portion of the Penalty under the "levels" established for the factors by the Administrative Monetary Penalties Framework. This siloed approach to the section 20 factors is contrary to Parliament's intent, and prevented particular factors under section 20 from supporting a reduction in the overall penalty, as opposed to merely being assigned a relative value of \$0. The Commissioner's assessment of the quantum of the Penalty was therefore wrong in law.

36. Sixth, in imposing the Penalty, the Commissioner applied a disproportionate penalty that is excessive and contrary to the non-punitive purpose of penalties under section 20.1 of the Act. She applied the factors set out in section 20 of the Act in a manner that was contrary to the evidence and failed to give sufficient consideration to CTC's submissions.

4. The Statutory Basis for the Appeal

37. Pursuant to section 24 of the Act, CTC may appeal the Decision as of right to the Federal Court.

38. CTC will rely on such further and other grounds as it may advise and this Honourable Court may permit.

THE FOLLOWING LEGISLATIVE PROVISIONS will be relied on at the hearing of the appeal:

- (a) the *Financial Consumer Agency of Canada Act*, SC 2001, c 9, as amended;
- (b) the *Trust and Loan Companies Act*, SC 1991, c 45, as amended;
- (c) the *Cost of Borrowing (Trust and Loan Companies) Regulations*, SOR/2001-104, as amended;
- (d) the *Federal Courts Act*, RSC 1985, c F-7, as amended;
- (e) the *Federal Courts Rules*, SOR/98-106, as amended; and
- (f) such further and other legislative provisions as counsel may advise and/or this Honourable Court may permit.

November 30, 2023

MCCARTHY TÉTRAULT LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Brandon Kain
Tel: 416-601-7821
bkain@mccarthy.ca
Adam H. Kanji
Tel: 416-601-8145
akanji@mccarthy.ca

Tel: 416-362-1812

Solicitors for the Appellant

TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto ON M5H 1T1

Respondent

AND TO: **FINANCIAL CONSUMER AGENCY OF CANADA**
The Secretariat
427 Laurier Avenue West
5th Floor, Enterprise Building
Ottawa, ON K1R 1B9
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- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPEAL

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
Toronto Dominion Centre
66 Wellington Street West
Toronto ON M5K 1E6

Brandon Kain
Adam Kanji

Tel: 416-362-1812
Fax: 416-868-0673

Solicitors for the Appellant,
Community Trust Company

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of NOV 30 2023 A.D. 20 _____

Dated this _____ day of NOV 30 2023 20 _____

