

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250116

Docket: A-336-23

Citation: 2025 FCA 9

**CORAM: STRATAS J.A.
LOCKE J.A.
MACTAVISH J.A.**

BETWEEN:

BANK OF AMERICA, NATIONAL ASSOCIATION

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 16, 2025.

Judgment delivered from the Bench at Toronto, Ontario, on January 16, 2025.

REASONS FOR JUDGMENT OF THE COURT BY:

MACTAVISH J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on January 16, 2025).

MACTAVISH J.A.

[1] Under section 141.02 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, a financial institution that is a “qualifying institution” (or QI) may claim input tax credits above a prescribed rate if the institution applies to the Minister of National Revenue to review its input tax credit allocation methodology and the Minister gives her approval.

[2] A Bank is a QI if it meets a two-part test in its two previous financial years: having an Adjusted Tax Credit Amount that equals or exceeds \$500,000.00, and a tax credit rate that equals or exceeds the prescribed rate of 12%: *Input Tax Credit Allocation Methods (GST/HST) Regulations*, S.O.R./91-45, subsections 3 and 4.

[3] An application under section 141.02(18) of the Act must be filed at least 180 days prior to the start of the fiscal year to which the method will apply, consistent with the pre-approval purpose of the section 141.02(18) regime. Where the deadline is missed, an application may be made for the Minister to exercise her discretion pursuant to section 141.02(19)(b)(ii) to allow a late filing.

[4] The Minister refused to exercise her discretion to accept the late filing of applications by the Bank of America, National Association, primarily based on the Bank's failure to exercise due care with respect to its filing obligations. In a decision reported as 2023 FC 1496, the Federal Court dismissed the Bank's application for judicial review of the Minister's decision, finding that her decision was both reasonable and fair.

[5] The Bank now appeals from the Federal Court's decision, asserting that the Minister treated it unfairly by initially accepting its applications for late filing, only to later reject these applications on reconsideration. The Bank further contends that the Minister's decision was substantively unreasonable as the Minister applied the wrong test in determining whether an extension of time should be granted.

[6] Given that the Bank did not raise its reconsideration argument before the Federal Court, the standard of review issue does not arise, as there is no decision on this question for this Court to review on appeal.

[7] An appellate court will ordinarily not consider an issue that was not raised in the court of first instance, as the factual record relating to the issue may be incomplete, and it may be unfair to the respondent to do so: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 21-26; *Oleynik v. Canada (Attorney General)*, 2020 FCA 5 at paras. 70-72, leave to appeal to SCC refused, 76225 (15 October 2020).

[8] We do not agree that the Bank's reconsideration argument raises a question of procedural fairness: it goes, rather, to the substantive reasonableness of the Minister's decision, and there is no merit to the argument in any event. The letters that the Bank now asserts constitute initial decisions by the Minister to accept its applications for late filing are nothing more than acknowledgements of receipt. While they trigger a time period for the Minister to respond to the applications, they do not affect the Bank's legal rights, nor do they impose legal obligations on it or have prejudicial effects: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paras. 29-30; *1099065 Ontario Inc. (c.o.b. Outer Space Sports) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 47.

[9] In assessing the reasonableness of the Minister's decision, this Court must "step into the shoes" of the Federal Court, and determine whether it appropriately selected and properly applied the standard of review: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at

para. 12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.

[10] The Bank contends that the decision to reject its applications for late filing was unreasonable as the Minister applied the wrong test in rejecting its applications, given the scheme and underlying purpose of section 141.02 of the Act. Rather than focussing on the Bank's diligence in filing its section 141.02 applications, the Bank says that the Minister should have applied the four-part test applicable to extensions of time under section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c-F-7. That is, the Minister should have considered whether the Bank had a continuing intention to pursue its application, whether the application had some merit, whether there was any prejudice to the respondent as a result of the Bank's delay and whether the Bank had a reasonable explanation for its delay: *Canada v. Hennelly*, [1999] F.C.J. No. 846, 244 N.R. 399.

[11] There are two problems with the Bank's argument. The first is that this Court has already determined that it is reasonable for the Minister to have regard to the diligence of a taxpayer in circumstances such as this: *Denso Manufacturing Canada, Inc. v. Canada (Minister of National Revenue)*, 2021 FCA 236. The second is that even if the Bank were correct, and the Minister applied the wrong test in denying its applications for late filing, it was still required to provide a reasonable explanation for its delay under the *Hennelly* test, which it failed to do.

[12] The Minister found that the Bank had failed to exercise the requisite degree of care in this matter. This was a factually suffused finding that provided a reasonable basis for the Minister's

decision to deny the Bank's applications for late filing, and the Bank has not shown any reversible error with respect to this factually suffused finding. Consequently, the appeal will be dismissed with costs.

“Anne L. Mactavish”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-336-23

STYLE OF CAUSE: BANK OF AMERICA,
NATIONAL ASSOCIATION v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 16, 2025

**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
LOCKE J.A.
MACTAVISH J.A.

DELIVERED FROM THE BENCH BY: MACTAVISH J.A.

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