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# Ruling

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**Category:** Foreign Banks

**NOTICE\***

**Subject:** Business in Canada – Mortgage loan administration services

**No:** 2004 - 03

**Issue:** The issue was whether an entity that is associated with a foreign bank and that provides administration services to Canadian entities in respect of loan portfolios secured by mortgages on real property in Canada, was engaging in or carrying on business in Canada, and therefore subject to Part XII of the *Bank Act* (BA).

**Background:** A foreign entity that is an entity associated with a foreign bank (EAFB) inquired whether certain activities it conducts constitute engaging in or carrying on business in Canada. The EAFB has no offices or employees in Canada and its head office is located outside of Canada. However, employees of the EAFB periodically visit Canada to promote its services.

The EAFB provides mortgage administration services in respect of loan portfolios secured by mortgages on real properties in Canada. Under mortgage-servicing contracts negotiated and executed outside Canada, the EAFB provides, from offices outside Canada, a wide range of services to Canadian entities such as trusts, securitization vehicles and financial institutions. These include:

- (a) processing payments and arranging for them to be directed to the Canadian entity's account in Canada,
- (b) making servicer advances,
- (c) arranging for annual inspections of the properties,
- (d) ascertaining that all taxes, insurance premiums and other payments have been made on a timely basis, and
- (e) maintaining records pertaining to the loan documents, payments and other activities, and periodically sending reports to the Canadian entity.

In addition, the EAFB is sometimes required to perform special services in respect of mortgage loans in default, such as making demands on defaulted loans, renegotiating loan terms, initiating legal proceedings or foreclosure actions, taking possession and managing the property pending its sale. The EAFB does not directly provide these special services in Canada, but engages independent Canadian service providers (e.g. lawyer, real estate broker, manager) to do so, as permitted under its mortgage-servicing contracts.

The EAFB receives all payments outside of Canada for its services under mortgage-servicing contracts with Canadian entities.

**Considerations:** The BA provides that an entity associated with a foreign bank shall not, by itself or through a nominee or agent, engage in or carry on any business in Canada, except as permitted by Part XII of the BA.

The BA does not provide guidance on the factors that OSFI may take into account in determining whether an entity associated with a foreign bank is engaging in or carrying on business in Canada. As such, in making its determination, OSFI generally assesses the particulars of each case against factors comparable to those often considered by judicial bodies in interpreting the concept of “carrying on business in Canada” under other statutes such as the *Income Tax Act*. Furthermore, since the particulars of each case can vary, OSFI will assess only those factors that it considers relevant to the case at issue.

In this case, OSFI considered the following factors to be relevant to its determination:

**1. *Where the agreements are executed***

All mortgage-servicing contracts between the EAFB and Canadian entities are negotiated and executed outside of Canada.

**2. *The location of the operation***

The EAFB has no offices or employees in Canada and its head office is located outside Canada.

**3. *Where the services are delivered and paid***

Apart from occasional visits to Canada to promote its services, the EAFB provides all services to the Canadian entities from its offices outside of Canada. Where special services are required to be performed in respect of mortgage loans in Canada, the EAFB engages independent Canadian service providers to perform such services in accordance with the terms of its mortgage-servicing contracts with the Canadian entities.

The EAFB does not receive payment in Canada for the services that it provides to Canadian entities. When it advances funds to the Canadian entities, it does so from outside Canada.

**4. *The relationship between the EAFB and the Canadian service providers***

The EAFB only uses service providers in Canada to provide special services in respect of mortgage loans in default. The service providers are not affiliated with the EAFB and do not work exclusively for the EAFB. In performing their functions, they are required to meet the same servicing standards that are set out in the EAFB’s mortgage-servicing contracts with the Canadian entities. Although the EAFB must approve a service provider’s course of action when a mortgage loan requires special servicing, the service provider acts in its own name or in the name of the Canadian entity, in accordance with its own procedures and with minimal oversight by the EAFB.

**5. *The relationship between the activities in Canada and outside Canada***

The main task of the EAFB under the mortgage-servicing contracts is to provide a wide range of mortgage administration services to Canadian entities. The EAFB’s services

primarily involve servicing the terms of the mortgage loans prior to default, but may also include special services in respect of mortgage loans in default. While the EAFB's services are rendered outside of Canada, the terms of some mortgage-servicing contracts permit the EAFB to engage Canadian service providers to provide special services in respect of mortgage loans in default. These special services do not constitute a separate profit-making activity for the EAFB.

**Conclusion:** OSFI concluded that the EAFB was not itself engaging in or carrying on business in Canada, nor was it doing so through a nominee or agent. The EAFB has no presence in Canada. When the EAFB is required by the Canadian entities to provide special services in respect of mortgage loans in default, the EAFB engages Canadian service providers to provide the services. These service providers are not agents or nominees of the EAFB: they perform the special services in accordance with their own procedures and with minimal oversight by the EAFB. The services performed by the Canadian service providers do not constitute a separate profit-making activity for the EAFB and are ancillary to the main services that the EAFB provides to Canadian entities. Therefore, the EAFB's activities are not subject to Part XII of the BA.

**Legislative References:**

Subsection 510(1) of the BA provides that, except as permitted by Part XII of the BA, a foreign bank or an entity associated with a foreign bank shall not

- (a) in Canada, engage in or carry on any business that a bank is permitted to engage in or carry on under the BA, or any other business;
- (b) maintain a branch in Canada for any purpose;
- (c) establish, maintain or acquire for use in Canada an automated banking machine, a remote service unit or a similar automated service, or in Canada accept data from such a machine, unit or service; or
- (d) acquire or hold control of, or a substantial investment in, a Canadian entity.

Subsection 510(3) of the BA provides that, for the purposes of Part XII of the BA, an entity associated with a foreign bank is deemed to be carrying out or to have carried out anything prohibited by subsection 510(1) if it is carried out by a nominee or agent of the entity associated with the foreign bank acting as such.

**Table of Concordance:** The legislation of other federal financial institutions does not contain similar provisions.

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| <p>* Rulings describe how OSFI has applied or interpreted provisions of the federal financial institutions legislation, regulations or guidelines to specific circumstances. They do not negate the need to obtain any necessary approval of the transaction under the relevant federal financial institutions legislation. Rulings are not necessarily binding on OSFI's consideration of subsequent transactions as these transactions may raise additional or different considerations. Legislative references in a Ruling are not meant to substitute provisions of the law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Ruling's publication.</p> |
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