



Ruling

Category: Foreign Banks

NOTICE*

Subject: Business in Canada – Realization of security interests

No: 2004 – 06

Issue: The issue was whether a foreign bank (FB), that had taken measures to enforce and realize on security interests that a Canadian borrower had granted to the foreign bank, was engaging in or carrying on business in Canada and therefore subject to Part XII of the *Bank Act* (BA).

Background: A FB had made, from outside Canada, a loan to a Canadian entity (Canco) on the security of Canco's assets. Canco had delivered to the FB security agreements giving the FB the right to appoint a Canadian receiver to liquidate Canco's assets.

Canco became insolvent. The FB appointed a Canadian receiver to liquidate Canco's remaining assets. The FB made an advance to the receiver to permit it to carry out the liquidation.

The FB did not acquire control of, or a substantial investment in, Canco in the course of the realization of its security interests.

Considerations: The BA provides that 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 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". Further, since the particulars of each case may vary, OSFI will assess only those factors that it considers relevant to the case at issue.

In this case, OSFI considered the relationship between the activities of the FB in Canada and outside Canada to be the only factor relevant to its determination. The FB's activities in Canada were limited to taking measures to collect on its loan to Canco by:

- (a) liquidating Canco's assets as provided for in the securities agreements that Canco had delivered to the FB; and
- (b) making an advance to the receiver to permit it to carry out the liquidation.

These activities are ancillary to the FB's lending activities outside Canada.

Conclusion: OSFI concluded that the measures taken by the FB to collect on its loan to Canco did not result in the FB engaging in or carrying on business in Canada. These measures are ancillary to a business that the FB is engaging in or carrying on outside Canada.

If the FB had acquired control of, or a substantial investment in, Canco through the realization of its security interests, the FB would also have had to ensure that Division 3 or Divisions 4 and 5 of Part XII of the BA permitted that acquisition. However, this additional requirement would not apply to an FB that is the subject of an exemption order made under subsection 509(1) 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 this Act, 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(2) of the BA provides that, for the purposes of Part XII, 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 foreign bank acting as such.

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

<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>
--