

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**BANK OF AMERICA, NATIONAL ASSOCIATION**

Appellant,

and

**ATTORNEY GENERAL OF CANADA**

Respondent.

**NOTICE OF APPEAL**

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 Ottawa, 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 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 order 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: December 7, 2023

Issued by:

\_\_\_\_\_  
(Registry Officer)

Address of local office:

Thomas D'Arcy McGee Building  
90 Sparks Street, 5<sup>th</sup> Floor  
Ottawa, ON K1A 0H9

TO: HIS MAJESTY THE KING  
Department of Justice (Canada)  
Tax Law Services Section  
99 Bank Street, Suite 1100  
Ottawa, ON K1A 0H8

Shalene Curtis-Miscallef  
Deputy Attorney General of Canada

Attention: Dan Daniels and Mitchell Meraw  
Counsel for the Respondent

**APPEAL**

THE APPELLANT APPEALS to the Federal Court of Appeal the judgment of the Honourable Madam Justice Elliott of the Federal Court of Canada (the “**Federal Court**”) dated November 9, 2023 by which the Appellant’s application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 (the “**Federal Court Rules**”) in the Federal Court application *Bank of America, National Association v Attorney General of Canada* (Federal Court Docket Nos. T-116-21 and T-1082-21) was dismissed with costs. The Appellant hereby appeals the Federal Court’s decision.

THE APPELLANT ASKS that this Honourable Court to:

1. to allow this appeal and give the decision that should have been given by the Federal Court which is:
  - a. to allow the Appellant’s application before the Federal Court,
  - b. to set aside the decisions made by the Canada Revenue Agency (“**CRA**”), on behalf of the Minister to deny the filed applications for authorization to use a particular input tax credit (“**ITC**”) allocation method (the “**Decisions**”) as provided by subparagraph 141.02(19)(b)(ii) of the *Excise Tax Act*, RSC 1985, c E-15, as amended (the “**ETA**”),
  - c. to refer the matter back to the Minister for redetermination on the basis that the Decisions were unreasonable, and
  - d. to order the Respondent to pay the Appellant’s costs before the Federal Court;
2. in referring the Decisions back to the Minister for redetermination, to provide such directions to the Minister as this Honourable Court considers appropriate;
3. to order the Respondent to pay the Appellant its costs of this appeal; and

4. to make such further and other orders as this Honourable Court concludes are just in the circumstances.

THE GROUNDS OF APPEAL are as follows.

The Federal Court erred in concluding that the Decisions by the CRA on behalf of the Minister were reasonable and reached this erroneous conclusion by, *inter alia*, the following:

1. failing to observe the legislative object and purpose of s. 141.02 of the ETA and, in particular, ss. 141.02(18) to (21) thereof, namely, to provide equity between and certainty to financial institutions which may have the status of “qualifying institution” as defined in that legislation. Such purpose must inform an exercise of discretion by the Minister to permit an application for pre-approved method pursuant to s. 141.02(19)(b);
2. erring in its over-reliance upon internal, unpublished criteria in respect of the Minister’s exercise of discretion at large having regard to an applicant taxpayer’s due diligence in the circumstances, including its over-reliance upon the timing of the discretionary application for pre-approved method;
3. erring in concluding the Appellant had been careless and/or negligent in the circumstances having regard to the recognized descriptions of negligence and carelessness in the jurisprudence.
4. basing its decision on erroneous findings of fact that were made in a perverse or capricious manner or without regard for the material before it, including, *inter alia*, at paragraph 40 of its Judgment and Reasons that the Appellant “failed to point to any evidence to support their accusation of bias” on the part of the Minister notwithstanding clear and repeated evidence in the Application Record before her supporting an apprehension of bias on the part of the Appellant. Such evidence included allegations that the Appellant had engaged in retroactive tax planning, which allegations were plainly mistaken, and that to

allow the application for pre-approved method would result in a loss of tax revenue for the fisc.

5. making an error of law in requiring evidence that established proof of bias on the part of the decision-maker, as opposed to the correct legal test of reasonable apprehension of bias.
6. making an error of law, or at least mixed fact and law, in failing to properly consider the inability of the Appellant to know the case it needed to meet and to have a full and fair chance to respond. Specifically,
  - a. at the time when the Appellant submitted the applications to file the applications for pre-approval method in respect of the 2019 and 2020 taxation years in June of 2020, the internal guidelines setting out the criteria relied upon to make the Decisions had not been published nor had they been provided to it; and
  - b. at the time when the Appellant submitted the applications to file the applications for pre-approval method in respect of the 2017 and 2018 taxation years in December of 2020, the exercise of discretion had already been made based on the considerations endorsed by the CRA Head Office in October of 2020

The Appellant requests the Federal Court to send a certified copy of the following material that is not in the possession of the Appellant but is in the possession of the Federal Court to the Appellant and to the Registry:

- A. The Judgement and Reasons the Honourable Madam Justice Elliott dated 9 November 2023;
- B. The Applicant/Appellant's original Notices of Application for court file numbers:
  - a. T-116-21 (T-117-21);
  - b. T-118-21 (T-119-21);

- c. T-1081-21 (T-1083-21); and
  - d. T-1082-21 (T-1085-21).
- C. The Applicant/Appellant's and Respondent's Records in support of the applications.
- D. The Confidentiality Order of Madam Prothonotary Mireille Tabib dated April 16, 2021.
- E. The transcripts of the hearing of the application before the Federal Court held on July 19, 2022.
- F. The Applicant/Appellant's and the Respondent's Written Submission in support of the applications.

The Appellant proposes that the hearing of this appeal take place in any of the following centres (in order of preference):

- 1. Ottawa, Ontario
- 2. Toronto, Ontario
- 3. Calgary, Alberta

DATED in the City of Calgary, the Province of Alberta this 7<sup>th</sup> day of December, 2023.



David Douglas Robertson  
Thomas Brook

EY Law LLP  
Calgary City Centre  
Suite 2250, 215 2<sup>nd</sup> Street SW  
Calgary, Alberta T2P 1M4

Tel.: 403.206.5474 / David.D.Robertson@ca.ey.com  
416.943.2117 / Thomas.Brook@ca.ey.com

Fax: 403.440.3810  
Counsel for the Appellant,  
Bank of America, National  
Association

Court File No.:

**FEDERAL COURT OF APPEAL**

BETWEEN:

**BANK OF AMERICA, NATIONAL  
ASSOCIATION,**

Appellant,

and

**ATTORNEY GENERAL OF CANADA,**

Respondent.

---

**NOTICE OF APPEAL**

---

EY Law LLP  
Ernst & Young Tower  
Suite 2250, 215 2nd Street SW  
Calgary, AB T2P 1M4

David Douglas Robertson  
Thomas Brook

Tel.: 403.206.5474 /  
David.D.Robertson@ca.ey.com  
Fax: 403.440.3810

Counsel for the Appellant