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Re Sandhu and the Role of Capacity Assessments in Court

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Assessments of mental capacity are important tools in matters where there is a dispute as to capacity, whether that is the central issue in the litigation or a side issue that arises and interrupts the next steps. For example, in an estate litigation practice, we often see the challenge of gifts or testamentary documents made at a time when someone's mental capacity may have been diminished. A capacity assessment, typically by a designated capacity assessor, is also often the key piece of evidence in an application to appoint a guardian of property and/or personal care as a substitute decision maker for someone who is alleged to be incapable of making their own decisions.

In the context of an aging population where medical conditions tied to declines in mental capacity are on the rise as Canadians are living longer, yet there is a presumption that all adults are capable of managing their own property, we can only expect the tool of capacity assessments to become increasingly important. Case law provides us with some guidance as to best practices when relying on this important type of evidence.

A Recent Example in *Re Sandhu*

A recent decision of the British Columbia Supreme Court revisits the principles to be considered by a court when determining whether or not to direct the assessment of a person's capacity in the context of a guardianship proceeding.

In *Re Sandhu*,[1] an adult son and only child of the respondent sought to have his father declared incapable of managing his property and his corresponding appointment as guardian of his father's property (under British Columbia's *Patients Property Act*,[2] a "committee" of the person's "estate"). The father and mother jointly responded, opposing their son's application. The British Columbia Public Guardian and Trustee took no position.

Under the *Patients Property Act*, two opinions of medical doctors are required in support of a declaration of incapacity to manage property.[3] While the materials before the court in this matter did include multiple medical opinions, the doctors' views as to whether the father was capable of managing his own property differed.

The father had previously been assessed while at hospital by a geriatric physician, who had expressed concern regarding the father's medical condition and its impact on his capacity. The physician did not directly opine on whether the man remained capable of managing his

[1] 2022 BCSC 2027.
[2] R.S.B.C. 1996, c. 349.
[3] *Ibid.*, s. 3.

property. Another assessment of the father's capacity to manage property was organized by the son and conducted with the son's involvement and the assistance of an interpreter after the father's release from the hospital. The assessment arranged by the son supported that the father was incapable of managing his own property. The father's own lawyer subsequently arranged a further capacity assessment, to which Justice Shergill referred as a "comprehensive independent medical examination"[4], conducted in the father's native language of Punjabi.

Notwithstanding the concerns expressed by the son regarding some of his father's recent behaviour, which were echoed and supported by the physicians who conducted the first two capacity assessments, Justice Shergill favoured the more recent capacity assessment, in which the assessor concluded that the father was capable of managing his own affairs without assistance, and did not consider there to be any serious question regarding the father's capacity warranting a further assessment.

Not only was the son's application for appointment as guardian of his father's property dismissed, but the father was not ordered to submit for a further assessment of his capacity to manage property.

This case is a recent example of the court's efforts to preserve autonomy and independence, and its respect for the presumption of mental capacity,[5] where there is insufficient evidence in support of allegations of mental incapacity or that evidence is rebutted by evidence of capacity that the court finds more reliable. This decision also features an important review of (1) reasons why a capacity assessment may be viewed as less reliable than others, and (2) principles relevant to compelling an individual to submit for a capacity assessment, which we review in further detail below.

Guidance for Requesting and/or Conducting Effective Capacity Assessments

From the decision of the British Columbia Supreme Court in *Re Sandhu* and, specifically, its comments regarding the three capacity assessments, one can glean elements of a capacity assessment that may more likely be accepted as reliable by a court, regardless of jurisdiction, in the context of a guardianship application or other dispute involving allegations of mental incapacity.

As reviewed above, there were three capacity assessments considered by the Court in reviewing whether there was a serious concern as to the father's mental capacity to manage his own property, which can be very briefly summarized and contrasted as follows:

1. The first assessment performed at the hospital by a geriatric physician:

[4] *Re Sandhu*, *supra* note 1 at para. 28.
[5] In Ontario, a statutory presumption of mental capacity is set out under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 2 [*Substitute Decisions Act* or SDA].

   a. General concerns expressed regarding physical health and possible impact on mental capacity;
   b. No clear opinion as to capacity to manage property was provided;
   c. Assessment conducted over a year before the hearing;

2. The second assessment organized by the applicant son:
   a. Conducted with the assistance of an interpreter;
   b. The assessor relied on background information provided by the applicant son and drew certain inferences from the father's disagreement with that version of events;
   c. The son was in a different room in the father's home, but within earshot;

3. The third assessment preferred by the Court:
   a. Organized by the father's lawyer;
   b. Viewed by the Court as being "comprehensive" and "independent";
   c. No involvement of the son;
   d. Some responses were considered relative to the education of the father, without the assumption that they were linked to any decline in capacity;
   e. Conducted in the father's native language of Punjabi and in the comfort of his home.

Mental capacity is time, task, and situation-specific. It follows that the manner in which a capacity assessment is conducted can directly impact an assessor's opinion and render that opinion of lesser assistance to the court.

The qualifications of none of the assessors were questioned, with the primary differences in their value resulting from the different ways in which the assessments were conducted. Specifically, the passage of time and absence of a clear opinion in the first assessment, and the reliance of the second assessor on controversial background information provided by the son, resulted in the weight of those assessments being discounted, with a clear preference for the third capacity assessment. The Court's comments serve as a reminder that an assessment of capacity should:

- Be current;
- Take into account the patient's background, including education;
- Be conducted in a language that the patient is comfortable with;
- Be conducted in a location comfortable to the patient, such as their home or another familiar setting;
- In the event that background information is provided to the assessor, it should be neutral to avoid any tainting of the assessor's opinion;

- Provide a clear opinion regarding the patient's capacity to make a certain (type of) decision.

Capacity assessors and the lawyers working with them may wish to consider these factors when making arrangements for a formal capacity assessment. It may be wise to consider these issues (regions served, languages spoken, etc.) when assisting clients in selecting an appropriate capacity assessor.

When lawyers are retaining a capacity assessor on a client's behalf, it is best to clearly indicate and explain the legal capacity standard in question in respect of which the assessor's opinion is sought. This will assist in ensuring that the assessor's report available to the court applies the same mental capacity standard that the court is being asked to consider.

Court-Ordered Assessments of Mental Capacity

As mentioned above, the relief sought by the son in *Re Sandhu* included an order requiring the respondent father to submit for a further capacity assessment. With the presumption that an individual is capable of managing their own property, it is important to remember that there is no automatic right to have an individual submit for a capacity assessment and, in fact, it can be very difficult to obtain a court order compelling them to do so, as this recent British Columbia decision demonstrates.

As reviewed in *Re Sandhu*, when considering applications under the *Patients Property Act*, in which declarations of incapacity may be sought, courts in British Columbia may order a medical examination using their inherent jurisdiction, albeit only in exceptional circumstances.

Generally, in British Columbia, the evidence must establish: (1) that there are serious questions to be tried as to the person's capacity, and (2) that there are serious questions to be tried as to the person's need for protection.[6]

In Ontario, the *Substitute Decisions Act* addresses the ability of the court to order that a person submit for a capacity assessment *"If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable…"*[7] The related case law makes clear that the existence of both of these conditions does not necessarily mean that a capacity assessment will be ordered, with courts reviewing matters on a case-by-case basis and considering their merits. Given the intrusive nature of a capacity assessment, courts tend to exercise their discretion to order that a person submit for an assessment of their capacity with caution.

As we saw in *Re Sandhu*, even where there is evidence suggestive of at least some degree of capacity issues, a court may not be satisfied that what the judge referred to as "the

[6] *Re Sandhu*, *supra* note 1 at para. 46.
[7] SDA, *supra* note 5, s. 79.

extraordinarily intrusive remedy"[8] of a capacity assessment is warranted absent clear and compelling grounds to believe that the person is incapable. When assisting clients with matters where orders compelling capacity assessments are being requested, it would be prudent to consider Justice Shergill's words in *Re Sandhu*: *"…it is imperative that the court take care to exercise its power of inherent jurisdiction under proper circumstances, as compelling a person to submit to a medical examination intrudes on their personal autonomy, and implicates several Charter values."*[9]

Conclusion

The *Re Sandhu* decision is a recent example of the respect that the courts have for the personal autonomy of older adults and the presumption of mental capacity, even where there may be legitimate concerns as to a person's mental capacity raised by supportive family members. It is consistent with the courts' preference for the least intrusive option.

There is no automatic right to have someone submit for a capacity assessment. If concerns have been raised and addressed in some satisfactory way, the court may decline to compel someone to undergo a capacity assessment and to appoint a guardian of property and/or personal care. At the same time, a report from a designated capacity assessor is typically required if a guardianship appointment is being requested because the evidence needs to be clear before someone is deprived of their independence in decision making.

It will be interesting to see how courts in Ontario and other Canadian provinces continue to balance the interests of preserving the autonomy of older adults with signs of some decline in mental capacity with the reality that many older Canadians may eventually lose the mental capacity to manage their own property, and to see developments in the use of capacity assessments in estate and capacity litigation, as well as other areas of law.

[8] *Supra* note 1 at para. 76.
[9] *Ibid.* at para. 49.