Toronto Law Journal

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.

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Mortgagee's Self-Help Remedies: An Analysis on Peaceable Possession

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As a general rule, a mortgagee must obtain a Writ of Possession prior to taking possession of a residential property upon default of a mortgagor. In limited and exceptional circumstances, a mortgagee may take possession without obtaining a Court-issued Writ of Possession.

The rising interest rates (among other things) have caused, and continue to cause, mortgagors to go into default. It is likely that there will be a rise in mortgagees using the self-help remedy of possession without the general practice of obtaining a Writ of Possession. This self-help remedy should be used with caution as it has the effect of ousting people from their homes without a Court Order.[1]

The purpose of a possession remedy is linked with the proper exercise of the power of sale conferred by the mortgage. A mortgagee will rarely take possession upon default for as long as the mortgagor has a right to redeem.[2]

The right of a mortgagee to take possession of a property upon default is circumscribed by the mortgage agreement, the *Mortgages Act*, R.S.O. 1990, c. M40 ("***Mortgages Act***"), and the common law. The common law imposes an umbrella requirement that possession must be taken "peaceably".

In August 2022, the Ontario Court of Appeal provided the latest word on the definition of the term "peaceable". In *Hume v. 11534599 Canada Corp.*, 2022 ONCA 575 (CanLII) ("***Hume***"), the appellant mortgagee held a second mortgage over a residential property owned by the respondent mortgagors. The mortgage was in default, and the property suffered a fire and was consequently uninhabitable. The appellant mortgagee, without a Court-issued Writ of Possession, changed the locks and took possession of the residential property. The respondent mortgagors commenced an application to regain possession.

The application judge correctly noted that the appellant mortgagee is able to take possession of the property, in light of the respondent mortgagors' default, but only insofar as possession is taken "peaceably". In defining the term, the application judge relied on the criminal standard, specifically stating that "peaceable possession" means possession that is "not seriously challenged by others" and that is "unlikely to lead to violence". Armed with this definition, the application judge found that the appellant mortgagee did not take peaceable possession of the property because the respondent mortgagors did not acquiesce to the appellant taking possession and had not vacated the property. The mortgagee appealed.

[1] A mortgagor is a borrower; a mortgagee is a lender.
[2] Joseph Roach, The Canadian Law of Mortgages (3 rd.) (2018, Lexis Nexis).

The Ontario Court of Appeal determined that the application judge erred in law by relying on the definition of "peaceable possession" in the criminal law context. Peaceable possession in the criminal law context is materially different to the mortgage enforcement context, especially in dealing with residential properties: the Court noted:

> Words must be interpreted in their proper context. The requirement for "peaceable possession" under s.41(1) of the Criminal Code as a precondition to the use of reasonable force is a **very different inquiry than the issue of whether a mortgagee has taken "peaceable possession" of the property of a defaulting mortgagor.** […] In the mortgage enforcement context, "peaceable possession" does not refer to a mortgagee's entitlement to possession, but rather to the manner in which a mortgagee who has a legal entitlement to possession of a property actually takes possession of that property. **There may be some overlap in the meaning of "peaceable possession" in both contexts, but the interpretation of "peaceable possession" in the criminal law context cannot properly inform what "peaceable possession" means in the context of mortgage enforcement. [emphasis added]**

The Appeal Court made reference to, *inter alia*, the following cases in its analysis of "peaceable possession".

In *Lusk v. Perrin* (1920), 19 O.W.N. 58 (H.C.), the mortgagor defaulted on the mortgage and left the premises. Months later, the mortgagor returned and found the mortgagee to be in possession. It was held that the mortgagee was permitted to enter peaceably into the home without a Writ of Possession where lands were vacant.

The Court also found possession to be "peaceable" in *Toronto Dominion Bank v. Clarry*, 2019 ONSC 5076. Here, the property was unoccupied; the heating, electricity and water were disconnected; the property was deconstructed to the wood studs; and, the property was uninhabited, uninhabitable and had been in that state for seven months. This was clear evidence for the Court to be satisfied that the general process of obtaining a Writ of Possession was unnecessary and the mortgagee may exercise the exceptional self-help remedy of taking possession.

Reference was also made by the Appeal Court to Walter Traub in *Falconbridge on Mortgages*:

> **Where the property is occupied by the borrower, the mortgagee cannot oust the borrower from the property or use physical force to obtain possession of the property**. Where, however, the mortgagor has abandoned the property, the mortgagee may merely move in and change the locks. The mortgagee is permitted by law to use a moderate amount of force to take possession, such as breaking locks or breaking doors or windows where the property is vacant. **[emphasis added]**

The key terms are "occupied", "vacant" and "abandoned". Hume seems to say that a mortgagee cannot dispossess a mortgagor from their property when it is not abandoned and when it is occupied.

Following its review of the jurisprudence and reference to texts, the Court of Appeal noted the following:

> A review of the limited authorities on the issue suggests that what "peaceable" means depends on the circumstances of the case. At **minimum**, taking peaceable possession means taking possession of a property without violence or the threat of violence; in other words, without engaging in behaviour that is contrary to the Criminal Code. Such conduct is self-evidently not peaceable. **The meaning of peaceable possession may also depend on whether the property is occupied for residential purposes. In the case of residential properties that are occupied, the requirement that possession be taken peaceable may require something more than possession being taken without violence or the threat of violence. Otherwise, mortgagees could change locks on a residence while the occupants are temporarily away which, while not involving the actual use or threat of violence, dispossesses the owners or occupants of their habitation and personal possessions without giving them an opportunity to make arrangements to move to another location. While such actions may not be violent, they are likely not peaceable. [emphasis added]**

The Appeal Court ultimately found that the mortgagee did take peaceable possession. In coming to this conclusion, it relied on the following evidence:

a. the property was uninhabitable after a fire;
b. on inspection, there was no evidence that anyone was living at the property;
c. there was no evidence that the occupants notified the mortgagee of the fire; and
d. the mortgagee was faced with the prospect that their investment was at risk.

Hume's conclusion was founded on exceptional facts; this is emphasized as the Court of Appeal went on to say that it is generally preferable that a mortgagee obtain a Writ of Possession before taking possession, especially in the case of residential properties. Apparently, unless exceptional circumstances exists that, *prima facie*, evidence abandonment of a residential property, the mortgagee must obtain a Writ of Possession.

A review of *Hume*, as well as the cases it cites, allows us to extract the following questions, which, we think, must be considered by mortgagees prior to using the exceptional self-help possession remedy:

a. Was the property vacant and/or abandoned, and for how long?
b. Was the property unoccupied, and for how long?
c. Was the property uninhabitable, and for how long?
d. Are the utilities, such as water, heat and electricity, turned on?
e. Is the lawn, if any, maintained (i.e., is the grass overgrown)?
f. Was possession taken with violence, or threat of violence?

g. Was notice or warning of the lender's want to proceed with possession delivered to the borrowers?
h. Is the lender's investment at immediate risk?[3]

The analysis relates to the circumstances of the property, and the manner in which a mortgagee takes possession.

In November 2022, the Court, in *Vault Capital Inc. v. Jiaxiang Huang and Yong Shi*, 2022 ONSC 6595, applied, perhaps for the first time, the law as outlined in *Hume*. The facts are as follows: the defendant mortgagors owned a luxury residential home and borrowed $2,860,000 from the plaintiff mortgagee. Although, at one point, the defendants lived in the home with their children, as of about May 2021, it was only Jiaxiang Huang that occupied the property. The mortgage went into default in August 2022. About three months after the default, Vault, the mortgagee, without warning, notice, or a Court-issued Writ of Possession, took possession of the residential home.

The defendants brought an urgent motion to regain possession: the only question before the Court was whether Vault, the mortgagee, took peaceable possession of the property.

The Court relied on *Hume* and noted that the analysis depends on the evidence and facts. Following its review, the Court made the following findings:

a. Vault's property manager conducted a number of inspections of the home and preliminary concluded that the property was unoccupied;
b. upon taking possession, Vault's property manager noted that they were wrong, and the property was, in fact, occupied;
c. Mr. Huang uses the property for himself, but not as a full-time residence;
d. the property is sparsely furnished;
e. there was some food in the refrigerator;
f. there was some male clothing in the closet and a single jacket on the back of a chair;
g. the bedroom has a bed; and
h. the house is not abandoned and is used by a single man, but not as a full-time residence.

The Court concluded that the house is occupied, but not as a full-time residence. The Court, in its legal analysis, stated that a mortgagor has a right not to be confronted or threatened with violence, and not to be put out of his or her home in an aggressive way; in addition, the Court quoted *Hume*, noting that in the case of residential properties that are occupied, the

[3] There is jurisprudence which defines the terms "vacant" and "unoccupied". Briefly, the term "vacant" and "abandoned" are synonymous and mean that the property is totally deprived of its contents and entirely abandoned. The term "unoccupied" means that the person(s) living at the property have permanently (not temporarily) stopped living at the property. See *Shaeen v Meidian Insurance Group Inc.*, 2011 ONSC 1578, *Lambert v Wawanesa Mutual Ins. Co.*, 1945 CanLII 99 (ON CA).

requirement that possession be taken peaceable may require something more than possession being taken without violence or threat of violence. The Court also found the following:

> [22] Having discovered that the Property, while not exactly fully resided in, **was not abandoned**, **the Plaintiff should have given the Defendants (or, more precisely, Mr. Huang) some time to remove their possessions in an orderly way**. They were not dispossessing a family of its habitations as the Court of Appeal described, but they were removing Mr. Huang from some of his possessions and a premises that he uses at least sometimes and for some purposes.
>
> [25] While Mr. Huang himself does not suffer negative consequences as a result of his own default and of the Plaintiff's remedy, no other individuals are directly effected. **There is no irreparable harm to Mr. Huang (or to the other Defendant), and there is no basis to enjoin the Plaintiff from exercising its rights altogether**. [**emphasis added**]

Vault raises a number of questions and concerns in its application of *Hume*.

One: if Vault had done what the Court says it should have done (i.e., gave the Defendants, or Mr. Huang, notice of its intention to take possession), could Mr. Huang have refused to give up possession of his home? Arguably, yes. If Mr. Huang refused to give possession, Vault would then not be able to take possession in a non-peaceable manner because it would include the physical removal of Mr. Huang from his property (unless it takes possession while Mr. Huang is temporarily away, like at the grocery store). In that regard, it appears that Vault, by failing to give notice of its intention to possess the property, has benefited from the use of the exceptional self-help possession remedy.

Two: does "peaceable possession" depend on the irreparable harm caused to the mortgagors? In *Vault*, the Court found that there is no irreparable harm to Mr. Huang by Vault's taking of possession. This weighed in favour of the conclusion that possession was "peaceable". This raises a question: if Mr. Huang was of modest means and had no where to relocate, would possession then not be peaceable?

Three: what role, if any, does the "risk" factor have in the "peaceable possession" analysis? In *Hume*, the Court of Appeal noted that the mortgagee's investment was at "risk" – this, in turn, weighed in favour of the mortgagee obtaining possession with a Writ of Possession. It does not appear that the Court, in *Vault*, undertook an analysis of whether the mortgagee's investment was at risk.

Four: The Court's emphasis, in *Vault*, was on "violence" and "threat of violence". Indeed, the Court appears to have heavily relied on *Royal Trust v. 880185 Ontario Ltd.*, 2005 (CanLII 13910 (Ont. C.A.) where the Court noted that a mortgagor has a right not to be confronted or threatened with violence, and not to be put out of his or her home in an aggressive or oppressive way that leaves families homeless. Violence and/or threat of violence is the criminal standard – the Court in *Hume* held that "[a]t the minimum, taking peaceable possession means taking

possession of a property without violence or the threat of violence". In the context of mortgage enforcement, a higher standard must be used – indeed, the Appeal Court in *Hume* stated that the application judge "erred" in relying on the meaning of peaceable possession in the criminal law context.

Hume appears to say that peaceable possession can be taken when the property is vacant/abandoned, and unoccupied for a significant amount of time, and when the lender's investment is at risk. The examples used by *Hume* deal with properties that are completely bare, abandoned, damaged by fire, and relate to situations in which mortgagors have been absent for months at a time.

Vault is different; the Court in Vault says that even with temporary occupancy and without complete vacancy/abandonment and without (it appears) any risk to the mortgagee on its investment, the mortgagee can still, without a Court-issued Writ of Possession, take possession of the property.

Vault appears to open the door (wider) for mortgagees to exercise their self-help remedy of taking possession of a property even in circumstances in which the property is not vacant, not abandoned, and is temporarily occupied.

Suffice to say, there will likely be further opportunity for the Court to apply *Hume*, and now, *Vault*, in the future.

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Non-Resident Speculation Tax in Real Estate Transactions

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For those who practice real estate law in Toronto, we are all too familiar with the thankless task of explaining the Land Transfer Taxes that are imposed on (almost) all purchases in the City of Toronto. In 2022, the Government of Ontario introduced an additional tax on real estate conveyances, this time extending the reach to all of the Greater Golden Horseshoe area, and later all of Ontario.[1] The Non-Resident Speculation Tax (**"NRST"**) is paid in addition to the Provincial Land Transfer Tax,[2] and the Municipal Land Transfer Tax.[3] The taxable rate currently is twenty-five percent (25%) of the consideration for the transfer of the property, the consideration generally being the purchase price under the agreement of purchase and sale.

Legislative Background

The NRST was originally passed as Schedule 1 to the *Budget Measures Act* and received assent on June 1, 2017.[4] The regulations initially set the taxable rate for the NRST at 15% and agreements that were entered into at that time that have not yet closed also continue to have this rate.[5] This 15% NRST was also only applicable to properties located within the Greater Golden Horseshoe Region, which included much of southern Ontario. At the time of assent, the regulations already included an embedded ability for a revision of the applicable NRST taxable rate, at the discretion of the Minister.[6]

On March 30, 2022, amendments came into force that increased the rate to 20% by way of Ontario Regulation 240/22.[7] These changes also expanded the scope to include all municipalities outside of the Greater Golden Horseshoe Region in Ontario, making the tax applicable everywhere in the province.[8] These changes did not apply to any agreement of purchase and sale that was entered into prior to March 29, 2022.

As of October 25, 2022, the rate has increased to the 25%, which is the rate that is currently in effect. In addition to the rate increase, this amendment also added transitional provisions to

[1] A full overview of the NRST can be found here: https://www.ontario.ca/document/land-transfer-tax/non-resident-speculation-tax#section-8.
[2] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, ss. 2-3.
[3] City of Toronto, By-Law No. 1423-2007 *To adopt a new Municipal Code Chapter 760, Taxation, Municipal Land Transfer Tax, to make minor consequential amendments to Municipal Code Chapter 27, Council Procedures, and to Chapter 767, Taxation* (13 December 2007) [***Bylaw***].
[4] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, as amended by *Budget Measures Act (Housing Price Stability and Ontario Seniors' Public Transit Tax Act Credit), 2017*, S.O., c 17 - Bill 134.
[5] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 2(2.1)(a).
[6] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 22(1.1)(d).
[7] O. Reg. 240/22, s. 1.3(1).
[8] *Land Transfer Tax Act*, R.S.O. 1990, c. L 6, s. 2(2.1)(a).

allow for the differing tax during the time period between March 30, 2022, until October 25, 2022.[9]

Application of the NRST

The following circumstances must be in place, in order for the NRST to apply:

1. The property must meet the definition of "**designated land**", being at least one and not more than six family residences. The definition also provides some exclusions for properties located on agricultural land.[10]
2. Be in Ontario (or located in the Greater Golden Horseshoe Region if the transitional rules apply).[11]
3. Be a Foreign Entity, which includes a foreign corporation or foreign national, or Taxable Trustee.[12] The definition of foreign entity is distinct from the treatment of residency under the *Income Tax Act*.[13] A Taxable trustee includes trusts with at least one foreign national as trustee, or if a beneficiary of the trust who holds a beneficial interest in the trust is a foreign entity. The definition specifically excludes those trustees that fall into the categories of real estate investment trusts ("REIT"), mutual fund trusts, and specified investment flow-through ("SIFT") trusts.[14]

Exemptions and Rebate Criteria

There are rebates and exemptions available to persons who may meet the requirements for applicability. Differing circumstances, such as education or employment criteria, that may modify individuals' foreign status may impact the amount of NRST which applies to their transaction.[15]

Practical Considerations

As of April 25, 2023, six months have elapsed since the most recent amendment, and a full year since the incremental increase in the rate and applicability to all regions. Teraview, the Ontario electronic land registration system, has been updated with the appropriate law statements to accommodate declarations in respect of the applicability and submission of the NRST at the time of transfer. Given the lock-step increases in the applicable NRST rates, the law statements required by real estate counsel need to be navigated with care, to ensure the applicable rate is afforded to the transaction. Many pre-construction agreements of purchase and sale for condominiums would have been entered into potentially within the period of applicability to only the Greater Golden Horseshoe Region or be at the reduced rate of fifteen or twenty-

[9] O. Reg. 182/17 as amended by O. Reg. 506/22, s. 1(1)(a).
[10] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).
[11] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).
[12] *Immigration and Refugee Protection Act*, S.C. 2001, c. 17, s. 2(1).
[13] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).
[14] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 1(1).
[15] *Land Transfer Tax Act*, R.S.O. 1990, c. L. 6, s. 2.1(5).

percent, rather than the currently applicable twenty-five percent rate. Careful consideration of the criteria should be provided to ensure that the applicable rate is used.

Previously, Teraview did not have the ability to accept payment of the NRST directly until December 2017. This meant that for this transitional period, between June and December 2017, payment of the NRST had to be made in advance of closing by way of submission of funds to the Ministry of Finance.[16] For paper registrations, which is much rarer, payment of the NRST is also required to be made in advance of closing in much the same way.

Transfers of beneficial interests in land, where no change in registered owner is taking place (i.e. no transfer will be registered on title), payment of the NRST is still required to be made, via paper filing. Paper filing of a return, together with the payment, must be submitted to the Ministry. [17]

These legislative updates, together with changes to corporate record keeping requirements, such as the Real Property Register[18] in respect to corporate owned properties, and the Significant Control Register[19] in respect of individuals in control of a given corporate entity, are requiring corporate owners of land to consolidate information in respect of the residency status, legal and beneficial ownership, and controlling parties for any given property. Lawyers and clients should ensure that all records of land ownership are in sync and ensure proper recording of beneficial ownership if trusts are involved at the time of registration so that the applicability of the NRST is accurately determined.

[16] Submission of payment, along with supporting documents is made to: Ministry of Finance Compliance Branch Land Taxes Section Third Floor, 33 King Street West PO Box 625 Oshawa ON L1H 8H9.
[17] Returns can be made at https://forms.mgcs.gov.on.ca/en/dataset/013-0775.
[18] *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 140.1(1)-(3).
[19] *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 140.2(1)-(8).

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Why Businesses of All Sizes in Canada Should Have Privacy Management Programs … If Not Now, Sooner Than Later

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Since November 2020 and despite consensus that reform is necessary, Canada's federal government has struggled to find broad support for its proposed modernization of the country's 20-year old federal private sector privacy law — namely, the *Personal Information Protection and Electronic Documents Act* (**PIPEDA**). The government's current attempt (Bill C-27, the *Digital Charter Implementation Act, 2022*), introduced in June 2022, languished in Second Reading until April 24th, 2023, when it was referred to the House of Commons Standing Committee on Industry, Science and Technology (also known as INDU). Earlier this month, Parliament continued to debate many foundational aspects of Bill C-27 including whether it should treat privacy as a fundamental or human right, include more enhanced protections for minors, and eliminate implied consent, to name a few.

That said, there seems to be a consensus amongst Canadian politicians and stakeholders (from industry to civil society) that every business subject to PIPEDA (and any modernized privacy law that replaces it) should have a comprehensive privacy management program (**PMP**) scaled to a number of factors including the size of the business and the volume and sensitivity of the personal information under its control. Perhaps this consensus is to be expected because PIPEDA's accountability principle (which obliges businesses to accept responsibility for personal information protection) has long required in Principle 4.1.4 that every business design and implement policies, procedures and practices to give effect to its obligations under PIPEDA.

PMPs under PIPEDA

In 2012, the Office of the Privacy Commissioner of Canada (**OPC**), and the Offices of the Information and Privacy Commissioners of Alberta and British Columbia issued a seminal guidance document (that has stood the test of time) outlining their expectations for a comprehensive, robust, and effective PMP - *Getting Accountability Right with a Privacy Management Program* (**Guideline**). The Guideline describes in considerable detail what a business must do to implement and maintain a demonstrably credible PMP. The Guideline identifies many expectations of Canada's privacy commissioners but underscores that these expectations are not meant to provide businesses with a simple "one-size-fits-all" solution. Instead, when considering these expectations each business must take into account its particular situation and tailor its PMP to best operationalize its compliance with PIPEDA.

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To this end, the Guideline recommends two building blocks for businesses to use when developing a compliant and effective PMP: specifically, each business should (1) take actions to develop an internal governance structure that cultivates a privacy-respectful culture and (2) create program controls to protect personal information under its control.

Regarding the first block, the Guideline states that a business should incorporate privacy protection into their internal data governance by taking at least the following actions:

- getting buy-in from senior management to champion the PMP;
- appointing someone (usually called the privacy officer) who is qualified and responsible for the PMP and giving them the powers and resources to implement the PMP;
- if necessary (e.g., in larger businesses), setting up a privacy office with staff to assist the privacy officer with their mandate; and
- establishing internal reporting mechanisms to help ensure that the PMP functions as expected.

Regarding the second block, the Guideline states that a business should implement at least the following PMP controls:

- establishing and maintaining a personal information inventory to determine all the personal information held by the business and to document why the business collects, uses or discloses that personal information, and how sensitive that personal information is;
- having internal privacy protection policies for employees to follow that help ensure the business meets its obligations under PIPEDA including policies regarding (a) the collection, use and disclosure of personal information, (b) access to and correction of personal information, (c) retention and disposal of personal information, (d) responsible use of information and information technology (including appropriate security and access controls), and (e) challenging compliance;
- establishing identification and mitigation processes and documents (including risk assessments) for privacy impacts and security threats;
- providing ongoing training on privacy protection policies and obligations to persons involved in handling personal information tailored to specific needs;
- creating protocols for privacy breach and incident management response that, among other things, assign responsibilities for privacy breach reporting;
- managing third party service providers to whom the business transfers personal information for processing by putting in place contractual or other means to protect that personal information (such as including specific provisions in a contract binding the service provider to the policies and protocols of the

business and requiring the service provider to notify the business in the event of a breach); and

- developing a procedure and approach to external communication for informing individuals of their privacy rights and the business's program controls in clear and understandable language.

The Guideline also outlines the following critical tasks involved in the ongoing assessment and revision of a business's PMP to ensure it remains relevant and effective including:

- developing an annual oversight and review plan with key performance measures and a schedule for review; and
- assessing (through regular monitoring and periodic audit) and where necessary revising program controls which requires the privacy officer to undertake at least the following actions:
    - monitor and update the personal information inventory;
    - review and revise privacy protection policies as needed to ensure they remain relevant and effective;
    - treat privacy impact assessments and security threat and risk assessments as evergreen documents;
    - review and modify training and education of employees;
    - review and adapt breach and incident management response protocols;
    - review and where necessary refine requirements in contracts with service providers; and
    - update and clarify external communication explaining privacy policies.

PMPs under Bill C-27

It seems reasonable to conclude that the PMP provisions in Bill C-27 are mainly a statutory codification of the Guideline. Notably, however, the Canadian privacy commissioners' expectations in the Guideline for all businesses in Canada to have a tailored PMP will be legally binding on businesses if the PMP requirements in sections 9 and 10 of the CPPA become law. Specifically, these provisions will:

- again, make it mandatory for businesses of all sizes in Canada to implement and maintain an appropriately scaled PMP;
- require the PMP to include the policies, practices, and procedures for the business to fulfill its privacy obligations; and
- in developing the PMP, require each business to take into account the volume and sensitivity of personal information under its control.

Moreover, the OPC will have the right, on request, to access the policies, practices and procedures of the business's PMP. While the OPC can provide guidance and corrective measures with regards to that PMP, the OPC cannot use the policies, practices and procedures it obtains through such access to initiate a complaint or carry out an audit.

More Guidance on PMPs

In addition to the Guideline, businesses can draw inspiration in establishing or updating their PMPs through the general guidance in the following recent publications:

- British Columbia's 2023 *Accountable Privacy Management in BC's Public Sector*;
- the International Organization for Standardization (**ISO**)'s 2023 *ISO/DIS 31700 Consumer protection — Privacy by design for consumer goods and services*; and
- the European Data Protection Board's 2020 *Guidelines 4/2019 on Article 25, Data Protection by Design and by Default*.

Why businesses should be proactive with their PMPs

For any business, compliant and effective privacy and data governance involves understanding its personal information flows, practices, risks, safeguards, procedures, and legal requirements. Having a comprehensive PMP is one of the best ways for a business to achieve and demonstrate accountability. It provides assurance to the business that it is both aware of its privacy obligations, as well as what personal information practices occur within its operations.

While the passage of Bill C-27 in its current form is not guaranteed, there has been little controversy about the PMP requirements proposed in the CPPA and likely for good reason. For the most part, these sections are a codification and evolution of the Guideline with which most businesses responsibly discharging their accountability obligations under PIPEDA have been familiar for many years.

Lastly, with the number and severity of cyber incidents on the rise and with Canada's federal private sector privacy law most likely soon moving from an ombuds model to an enforcement model with significant penalties and fines for non-compliance, prudence dictates that all Canadian businesses (whether large, medium or small) be proactive and, if they haven't already, now start the process of putting in place comprehensive, robust and effective PMPs appropriately tailored to their operations. Simply put, if a Canadian business takes the lead with a demonstrably credible PMP, it will be good for that business's customers, employees, service providers, relationship with Canadian privacy commissioners and, in turn, the business's bottom line and reputation.