

## Non-Resident Speculation Tax: Ontario's 25% Land Transfer Tax Applies More Broadly Than You May Think

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Ontario's Non-Resident Speculation Tax (NRST) is a 25% tax on real property transactions across Ontario. In this article, we discuss two matters that together illustrate the complexity of this tax, being technical NRST rules that capture a broad range of transactions, and notable takeaways from the first reported NRST decision, *Yavari v Ontario (Minister of Finance)* (*Yavari*).<sup>1</sup>

### Key Takeaways

- *NRST is more than a tax on land.* Partnership or trust unit transactions (unit issuance, redemption, sale, etc.) can trigger NRST where a partnership or trust structure holds land.
- *NRST applies to Canadian entities.* NRST can apply to Canadian corporations controlled by non-Canadians and to trusts having at least one trustee or beneficiary that is a "foreign" national or corporation.
- *NRST is more than a tax on single family homes.* Small apartment buildings, farmland containing a farmhouse, homes converted to commercial use, and condominiums are just some examples of properties that can potentially trigger NRST.
- *NRST concepts are not harmonized with other taxes.* The NRST adopts the "foreign national" concept from immigration law instead of the "non-resident" concept from tax law.

### Background: The Broad NRST Tax Base

The NRST was introduced to address concerns around non-resident investors purchasing Ontario homes primarily for speculative purposes.<sup>2</sup> Originally imposed in 2017 as a 15% tax on transactions occurring within the Greater Golden Horseshoe Region, the NRST is now a province-wide 25% tax.<sup>3</sup> The NRST is imposed under the Ontario *Land Transfer Tax Act* (the LTTA) as an additional land transfer tax payable when certain types of land are conveyed to a "foreign entity" or "taxable trustee."<sup>4</sup>

The NRST applies where the following requirements are met:

1. The transaction involves "designated land," defined in part as land containing six or less "single family residences";

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2. There is a change in beneficial or legal ownership of that designated land; and
3. The land is conveyed to a “foreign entity” or a “taxable trustee.”<sup>5</sup>

## Requirement 1: “Designated Land”

“Designated land” generally means land containing six or less “single family residences.”<sup>6</sup> “Single family residence” captures *any* structure *designed* as a family residence.<sup>7</sup> Accordingly, it is possible that agricultural lands containing a farmhouse, residential buildings converted to commercial use, or apartment buildings with six or less units may be treated as “designated land.”

## Requirement 2: Change in Beneficial or Legal Ownership in Land

NRST may be triggered wherever there is a transfer of a legal or beneficial interest in land.<sup>8</sup> Generally, any transaction resulting in an individual or corporation acquiring or increasing their interest in land may trigger NRST.

This rule is unexpectedly broad. The NRST does not treat partnerships and trusts as “persons” that can own land and, as such, the Ministry of Finance considers any change to a partnership or trust interest as possibly constituting a change to a partner’s or beneficiary’s co-ownership interest in any partnership- or trust-held land. NRST may therefore apply where there is a redemption, issuance, or transfer of partnership or trust units.

## Requirement 3: Land Conveyed to a “Foreign Entity” or a “Taxable Trustee.”

A person is a “foreign entity” if it is a foreign national or a foreign corporation.<sup>9</sup> A person can be a “foreign national” for NRST purposes if they satisfy the corresponding definition under the *Immigration and Refugee Protection Act* (Canada), which generally means a person who is not a Canadian citizen or a permanent resident.<sup>10</sup>

A person can be a “foreign corporation” if they are a private corporation controlled by a foreign national, a corporation not incorporated in Canada, or a combination thereof.<sup>11</sup>

A trust is a “taxable trustee” if at least one trustee or beneficiary is a foreign national or a foreign corporation.<sup>12</sup> For example, a transfer of land involving a family trust may be considered a transfer to a taxable trustee that triggers NRST if one family member of that trust is a foreign national.

There are exceptions to these requirements. For example, the definition of “taxable trustee” excludes a trustee acting on behalf of a mutual fund trust or real estate trust (as those terms are defined in subsections 132(6) and 122.1(1), respectively of the *Income Tax Act* (Canada).

## Other Key NRST Concepts

The NRST legislation defines “land” and “convey” broadly which can potentially impose NRST on matters such as a charge registered on land that merely recognizes an option to purchase that land.<sup>13</sup>

“Consideration” is also broadly defined and sometimes capture benefits granted to or liabilities assumed by third parties as part of an arrangement related to the conveyance of land.<sup>14</sup>

Considering tax law, the NRST rules do not consistently or harmoniously reflect corresponding and well-established rules existing in other Canadian tax statutes. For example, the NRST incorporates the immigration law concept of “foreign national” instead of using the concept of “non-resident” prevalent in tax law.<sup>15</sup>

## Yavari v Ontario: The First Reported NRST Decision

*Yavari* involved a dispute between a taxpayer and the Ontario Minister of Finance over an NRST rebate. The taxpayer was a foreign national and international student at the time she bought a home and paid the NRST. The taxpayer later applied for a rebate of the NRST which is available to a foreign national that becomes a permanent resident of Canada within four years after purchasing their home (the NRST Rebate).<sup>16</sup> The taxpayer eventually obtained permanent resident status four years and ten days after her home purchase.

Unfortunately, the taxpayer’s rebate application was denied. The taxpayer missed the four-year NRST Rebate application deadline by only ten days due to COVID-19 related delays in their permanent resident application process. The taxpayer responded by both challenging that rebate denial and requesting administrative relief – section 20 of the LTTA grants the Minister the power to waive NRST liability where “special circumstances” (here, an unprecedented global pandemic) deem the payment of NRST “inequitable” (Section 20 Relief).<sup>17</sup>

The Minister denied the request for Section 20 Relief, relying almost exclusively on its own general policy documents, leading the taxpayer to apply for judicial review of that decision. The Court allowed the taxpayer’s judicial review application, quashing the Minister’s decision for unreasonableness. The Court identified several reasons why the Minister’s decision was unreasonable, including the Minister not considering the taxpayer’s particular circumstances,<sup>18</sup> not considering the COVID-19 pandemic to be “special circumstances,”<sup>19</sup> and applying an inappropriately high threshold to the concept of “special circumstances.”<sup>20</sup> The Court also rejected the Minister’s technical argument that the judicial review application was premature, recognizing that the LTTA provides two separate avenues for taxpayer redress (a statutory appeal mechanism and the discretionary Section 20 Relief mechanism), each with separate judicial remedies.<sup>21</sup>

## Concluding Remarks

*Yavari* is ultimately a good news story for the taxpayer, who successfully obtained substantive Section 20 Relief. *Yavari* is also a good news story more generally, confirming the viability of Section 20 Relief requests for other taxpayers with extraordinary circumstances that cause them to apply for relief under section 20 outside the four-year limitation period. This decision, when considered together with the technical NRST nuances outlined above, illustrates the complexities involved in navigating the NRST rules.

*Yavari* is an apt reminder that the 25% NRST can be a significant tax and should not be overlooked when undertaking transactions involving Ontario land or involving businesses or entities holding Ontario land. Those considering such transactions should carefully address Non-Resident Speculation Tax and other related sales and commodity tax risks (provincial and municipal land transfer tax, harmonized sales tax, etc.) where such a transaction will involve ownership directly or indirectly by foreign nationals, foreign corporations, or trusts with at least one foreign national trustee or beneficiary.

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<sup>1</sup> 2024 ONSC 5296 (*Yavari*).

<sup>2</sup> Legislative Assembly of Ontario, *2017 Ontario Budget: A Stronger, Healthier Ontario* (April 2017).

<sup>3</sup> *Land Transfer Tax Act*, RSO 1990, c L.6, s. 2(2.1) (LTTA), s. 2(2.1), *Tax Payable Under Subsection 2(2.1) of the Act by Foreign Entities and Taxable Trustees*, O Reg 182/17, s. 1.3(1).

<sup>4</sup> LTTA, s. 2(2.1).

<sup>5</sup> LTTA, s. 2(2.1), 2.1(2), & 3(2).

<sup>6</sup> “Designated land” also captures certain storage and parking units associated with residential condominiums: see *Tax Payable Under Subsection 2 (2.1) of the Act by Foreign Entities and Taxable Trustees*, O Reg 182/17, s. 1.1.1.

<sup>7</sup> LTTA, s. 1(1) “single family residence.”

<sup>8</sup> LTTA, s. 2.1(2) & 3(2).

<sup>9</sup> LTTA, s. 1(1) “foreign entity.”

<sup>10</sup> LTTA, s. 1(1) “foreign national.”

<sup>11</sup> LTTA, s. 1(1) “foreign corporation.”

<sup>12</sup> LTTA, s. 1(1) “taxable trustee.”

<sup>13</sup> LTTA, s. 1(1) “land” & “convey.”

<sup>14</sup> LTTA, s. 1(1) “value of the consideration.”

<sup>15</sup> LTTA, s. 1(1) “foreign national.”

<sup>16</sup> The NRST Rebate has other criteria that are not discussed herein.

<sup>17</sup> LTTA, s. 20.

<sup>18</sup> *Yavari* at para 44.

<sup>19</sup> *Yavari* at para 42.

<sup>20</sup> *Yavari* at para 37.

<sup>21</sup> *Yavari* at para 21.

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