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CONCEPTS OF AGEISM:

ARGUMENTS IN FAVOUR OF THE NEED FOR PROTECTIONS

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INTRODUCTION

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Most will agree that both ageism and age discrimination are harmful to older adults. Not all older adults fit the detrimental and often negative stereotypes of the frail and vulnerable older person. Nevertheless, it is also true that not all older adults are physically or mentally capable, independent, and autonomous. While ageism and age discrimination must be discouraged, conversations about, and the need for protections for older and vulnerable adults cannot be ignored. This paper will discuss arguments in favour of the need for protections for older adults as a component of any discussion on ageism.

Who are the “vulnerable” and in need of protection? We agree that “vulnerability” should not be automatically ascribed to an individual based on their age. There is social vulnerability which reflects an understanding that differing social conditions may make a person more or less vulnerable. Ageism can also make older people *broadly* vulnerable as a class, even while individual older adults may not be, or identify as particularly vulnerable themselves.¹

Statistics show, however, that many older adults face abuse and violence in their own homes, and in institutional and long-term care facilities. Older adults are also sometimes denied the right to make decisions about their personal finances, property and health care. Protection is required to prevent financial, sexual and physical abuse of older adults.

Research demonstrates that abuse or financial exploitation is most often perpetrated by a trusted family member, caregiver, service provider, or other person in a position of power or trust. This makes the job of detecting and preventing issues even more complicated as it is impossible to know who the persons are who may be assisting an older adult or person of compromised capacity.

*Kimberly Whaley’s paper presented by Kimberly Whaley, Andrea McEwan, and Erin Cowling at The IFA 14th Global Conference on Ageing

¹ Vulnerable Adults and Mental Capacity in BC: Provincial Strategy Document, January 2009, BC Adult Abuse and Neglect Preventions Collaborative, online: [http://www.bcli.org/sites/default/files/Vanguard_\(16May09\).pdf](http://www.bcli.org/sites/default/files/Vanguard_(16May09).pdf) accessed on: 03.07.18.

From a Canadian legal perspective, our legislation and court processes are not particularly well equipped to easily and cost effectively remedy these very complicated issues and related disputes for either the abused or the persons trying to help.

From a public policy perspective, the maintenance of an individual's fundamental rights, and freedoms, autonomy, and the presumption of capacity must be delicately balanced alongside societal demands of protecting the vulnerable, meaning: those with diminished capacity; those who are under disability; those who are frail, whether through sheer aging and/or illness; those who are dependant; and those who require some degree of protection from predators. Getting this delicate balance right is not easy on any front.

This paper will identify, using examples through media, employment, gender, cultural and sexual orientation, social themes and theories contributing to ageism.

Next it will identify key challenges in the law, legislation, dissemination of knowledge, and education and awareness, concerning the individual needs of particular persons in society, which include older adults and those suffering from illnesses, abuses, disability or who otherwise may require protection.

The paper will also explore several questions including whether protection is always ageist and address deficiencies internationally in the law, legislation, and public sector that impact society's ability to protect persons who may be vulnerable to abuse and examine remedies, tools and resources to establish a protocol or forum for an approach to the resolution of capacity disputes.

STATISTICS ON AGING AND NEED FOR PROTECTION

As Canada's population ages, we will see a dramatic shift in demographics. In 1976 the average age for Canadians was 31.9, in 2016 it was 41.²

According to Statistics Canada, 2016 represented an important milestone in the history of the Canadian population: for the first time the number of seniors exceeded the number of children – 16.9% (or 5.9 million) vs. 16.6 % (or 5.8 million). It is estimated that by 2031

² Statistics Canada, "Age and Sex Highlight Tables, 2016 Census" Population by Broad Age Groups, online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/as/Table.cfm?T=31> Accessed on 04.07.18.

close to 1 in 4 Canadians will be 65 years of age or older and there will be 12 million seniors by the year 2061. This population has been growing rapidly for many years, mainly due to the gradual increase in life expectancy.³

Similar demographic changes are seen globally. According to the *United Nations World Population Prospects: The 2017 Revision Population Database*, in 2017 there was an estimated 962 million people aged 60 or over in the world, comprising 13% of the global population. The population aged 60 or above is growing at a rate of about 3% per year. Europe has the greatest percentage of population aged 60 or over (25%). The number of older persons in the world is projected to be 1.4 billion in 2030 and 2.1 billion in 2050 and could rise to 3.1 billion in 2100. Further, the number of persons aged 80 or over, globally, is projected to triple by 2050, from 137 million in 2017 to 425 million in 2050.⁴

While it is certainly not the case that all older adults have mental capacity challenges, with longevity comes an increase in medical issues affecting cognition, as well as related diseases and disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. In 2010, an estimated 35.6 million people worldwide were living with dementia, a number that is expected to double in 20 years.⁵ Dementia is a general term used to describe a range of symptoms associated with a decline in mental function severe enough to reduce a person's ability to perform everyday activities. It is caused by a variety of diseases and injuries that affect the brain, with Alzheimer's disease being the most common.⁶

In 2011, 747,000 Canadians were living with general cognitive impairment, including dementia.⁷ Dementia is the most significant cause of disability among Canadians older

³ Statistics Canada, "Canada's Population Estimates: Age and Sex", and "Age and Sex Highlight Tables, 2016 Census" online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/as/Table.cfm?Lang=E&T=21>

⁴ World Population Prospects: The 2017 Revision Population Database, UN Department of Economic and Social Affairs, online: <http://www.un.org/en/sections/issues-depth/ageing/> Accessed on 04.07.18.

⁵ Suzy L. Wong, Heather Gilmour and Pamela L. Ramage-Morin, Alzheimer's Disease and other Dementias in Canada (2016), Health Reports, Statistics Canada, online: <https://www150.statcan.gc.ca/n1/pub/82-003-x/2016005/article/14613-eng.htm> Accessed on 04.07.18.

⁶ *Ibid.*

⁷ Alzheimer's Society of Canada, A New Way of Looking at the Impact of Dementia in Canada. Toronto: Alzheimer's Society of Canada, 2012. Online: <http://alzheimer.ca/en/cornwall/Awareness/A-new-way-of-looking-at-dementia> Accessed on 04.07.18.

than 65, affecting 20 per cent of older adults by age 80, and more than 40 per cent by age 90. Currently, approximately 564,000 Canadians are living with dementia.⁸ The Alzheimer's Society of Canada's recently estimated that the prevalence of dementia will more than double over the next 30 years, up from 1.5 per cent of Canada's population in 2008 to a projected 2.8 per cent of the population in 2038.⁹

Those living with dementia experience far more stigma than those with physical health conditions. In a survey conducted by the Alzheimer's Society of Canada, 57% of the respondents believe that those with dementia may be taken advantage of, 58% believe they may be ignored or dismissed, and 54% believe they may be socially rejected or avoided. Further, 51% of Canadians admit to using some type of stigmatizing language, including telling dementia related jokes, referring to someone as "crazy" or senile or referring to someone as "demented".¹⁰

According to a 2016 Statistics Canada report, nearly 4% of victims of family violence were 65 years or older. Nearly 61% of incidents of elder abuse were physical assaults against older adults and 21% involved threats. 31% of older adults were victimized by a family member. Among women victims, 33% were victimized by their spouse and 31% by their grown children. In comparison, among men, the victim's grown child was the most common perpetrator.¹¹

The World Health Organization defines abuse and neglect of older adults as "a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person."¹²

⁸ Alzheimer's Society of Canada, "Dementia in Numbers in Canada," online: <http://alzheimer.ca/en/Home/About-dementia/What-is-dementia/Dementia-numbers>

⁹ Law Commission of Ontario, Legal Capacity, Decision-Making and Guardianship, Final Report, (Toronto: March 2017) at p.32 ["LCO Capacity Report"]

¹⁰ Alzheimer's Society of Canada, "Dementia in Numbers in Canada," online: <http://alzheimer.ca/en/Home/About-dementia/What-is-dementia/Dementia-numbers> ("Dementia in Numbers")

¹¹ M. Burczycka & S. Conroy, (2018). "Family violence in Canada: A statistical profile, 2016." Juristat, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/problem-canada.html#fn1-0-rf> Accessed on: 03.07.18.

¹² World Health Organization, Elder Abuse Facts, online: http://www.who.int/ageing/projects/elder_abuse/en/ Accessed on: 05.07.18.

Like other forms of abuse in our society, elder abuse comes in many forms: physical, emotional, sexual, or financial abuse. It also includes the restriction or denial of rights, and active or passive neglect. Because of a higher incidence of disabilities, poor health, and financial and emotional dependency, older adults are particularly vulnerable to abuse and exploitation. Elder abuse is a fact of life.¹³

According to another Statistics Canada report the rate of violent victimization among women and men with a cognitive disability or a mental health-related disability was approximately four times higher than among those who did not have a disability. Among women and men with a sensory or physical disability, the rate of violent victimization was roughly twice as high as among those who did not have a disability.¹⁴

The National Council on Aging (the “NCOA”) reports that approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as 5 million older adults who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities.¹⁵ The NCOA also reports that the perpetrator in 60% of elder abuse and neglect incidents is a family member with 2/3 of the perpetrators being adult children or spouses.¹⁶

Older adults who have been abused have a 300% higher risk of death when compared with those who have not been mistreated.¹⁷ Also, while this number is likely low due to under-reporting, estimates of older adult financial abuse and fraud cost to older Americans range from \$2.9 billion to \$36.5 billion annually.¹⁸

Social isolation and mental impairment (such as dementia or Alzheimer’s) are two factors that make an older adult vulnerable to abuse or neglect. Some warning signs of physical abuse, neglect, or mistreatment include bruises, pressure marks, broken bones,

¹³ Beverly McLachlin, *Human Dignity at Any Age: The Law’s Response to an Aging Population*, 6 *Journal of International Aging, Law & Policy* 111 (2013) at p.118 [“McLachlin”]

¹⁴ Adam Cotter, Statistics Canada, *Violent Victimization of Women With Disabilities*, 2014, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54910-eng.htm> Accessed on: 03.07.18

¹⁵ National Council on Aging, *Elder Abuse Facts*, online <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> Accessed on 03.07.18. [“NCOA Elder Abuse Facts”]

¹⁶ NCOA Elder Abuse Facts.

¹⁷ NCOA Elder Abuse Facts.

¹⁸ NCOA Elder Abuse Facts.

abrasions, burns, bedsores, unattended medical needs, poor hygiene, unusual weight loss etc. Signs of verbal or emotional abuse include: unexplained withdrawal from normal activities, a sudden change in alertness, or unusual depression; strained or tense relationships; frequent arguments between the caregiver and older adult; belittling, threats, or other uses of power and control by individuals.¹⁹

As our population continues to age, as the statistics show, the prevalence of individuals with cognitive decline will increase. While we must not discriminate against those who are aging, we must still protect those who are vulnerable from various forms of abuse.

WHAT IS AGEISM?

The term “ageism” was coined in 1969 by Robert N. Butler who headed the District of Columbia Advisory Committee on Aging.²⁰ Butler stated that ageism is a combination of prejudicial attitudes towards older people, old age, and the aging process; discriminatory practices against older people; and institutional practise and policies that perpetuate stereotypes about older people.²¹ A more recent definition of ageism has been used by gerontologist Erdman Palmore, who defines it as “any prejudice or discrimination against or in favour of an age group.”²²

The Ontario Human Rights Commission’s definition of “ageism” refers to two concepts: a socially constructed way of thinking about older persons based on negative attitudes and stereotypes about aging *and* a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.²³

¹⁹ NCOA Elder Abuse Facts.

²⁰ Andrew Achenbaum, *The History of Ageism Since 1969*, Journal of American Society on Aging, October 19, 2015. Accessed online 13.06.18: <http://www.asaging.org/blog/history-ageism-1969>

²¹ Robert N Butler, “Ageism: A Foreword” (1980) 36:2 Journal of Social Issues 8; see also Helene Love, “Ageism, Language and the law” (2011) 31 Windsor Rev. Legal & Soc. Issues 134.

²² Erdman Palmore, *Ageism: Negative & Positive*, 2d ed (New York: Springer 1999) at 89-90, as cited in Helene Love, “Ageism, Language and the Law” (2011) 31 Windsor Rev. Legal & Soc. Issues 133 [“Love”].

²³ Ontario Human Rights Commission, *Ageism and age discrimination fact sheet*, online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet>

One of the common ways that ageism is reflected and reinforced in culture is through the use of ageist language which includes any and all stereotypes or beliefs about aging. These stereotypes can be found in media, healthcare and education systems, workplace, and even regular, everyday conversations i.e. “over the hill” or the “Grey Tsunami”.²⁴

A University of Southern California study²⁵ examined 72 of the highest ranked TV series among U.S. viewers airing from June 2016 through May 2017. Adults 60 and older represented less than 10 per cent of speaking characters on these shows. Older adults accounted for slightly more than 8 per cent of regular characters in a series. Older men were more likely than older women to be series regulars. Of the 39 series with main older adult characters, 41 per cent included at least one ageist comment. Some examples provided: “You like the color? It’s called ‘ancient ivory’, like you,” “Things just sound creepier when you’re older” and “I need to write down all these precious moments before I forget them”.²⁶ Shows without a 60 plus year old writer were more likely to feature an ageist comment than shows with a 60 plus year old writer, suggesting that ageist comments stem from the work of younger writers.²⁷

Other disparities also appeared in the study. None of the 72 shows evaluated depicted a single senior Asian female; only 2 of the 62 shows showed an older Latina character and only 8 out of 72 had a black senior female character on the screen. Further only, 4 of the TV shows depicted an LGBTQ older adult character.²⁸

In her paper *Ageism, Language and the Law*, Helene Love posits that ageist language permeates written judgments from our courts. Love writes that ageism is perpetuated in written judgments by the use of ageist language, such as the word “elderly”. Judgments that employ the term “elderly” reinforce social science research that the term is associated with victimhood, vulnerability, and weakness. Love argues that “[w]hile these negative stereotypes may sometimes result in favourable treatment of older adults by the courts,

²⁴ Love at p.135.

²⁵ Dr. Stacy L. Smith, Dr. Katherine Pieper, Marc Choueiti et al, *Seniors on the Small Screen: Aging in Popular Television Content*, Media Diversity & Social Change Initiative, 2017. Online: http://assets.uscannenberg.org/docs/Seniors_on_the_Small_Screen-Dr_Stacy_L_Smith_9-12-17.pdf [“Smith”]

²⁶ Smith at p.25

²⁷ Smith at p.26.

²⁸ Smith at p.1-2.

ageist language has an overall negative effect on older adults; it reinforces negative social beliefs about older adults as a group”.²⁹

Ageism is not only present in the media and justice system it is also present in healthcare institutions and workplaces. Ageism takes place on both the macro level in anti-aging beauty campaigns but also in the micro level in every day language with derogatory comments about older people.³⁰

So, why do we as a society succumb to these ageist and stereotypical beliefs? Justice L’Heureux-Dube observed in the case of *Dickason v. University of Alberta*:

Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we fear it. We may be more likely to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us.³¹

The impact of ageism on older adults is serious. Older adults presented with negative images of age may display psychological issues such as depression, as well as negative physiological effects such as a decline in memory performance and a heightened cardiovascular response to stress.³² Social sanctions against expressions of negative attitudes and beliefs about older individuals are very rare. In fact, they are socially accepted and rooted in culture and beliefs.³³

Barbara Mikolajczyk in her paper, *International Law and Ageism*, notes:

The demographic trends in the age structure of the current world population are well known. The world’s population is now ageing faster than ever before, especially in the group called the “oldest old” (80+). Individuals in this age group are potentially more vulnerable to poverty, exclusion, violence, neglect, abuse and discrimination. However, younger older persons also suffer unequal treatment.

²⁹ Love at p.136.

³⁰ Barbara Mikolajczyk, “International Law and Ageism” 2014 Polish Yearbook of International Law, Vol. 34 pp.83-107 at p.88 [“Mikolajczyk”]

³¹ *Dickason v University of Alberta*, [1992] 2 SCR 1103 at para 1173, 95 DLR (4th) 439.

³² Love at p.134.

³³ Mikolajczyk at p.89.

They are overlooked for promotion and training, and finally, they are forced to retire against their wishes. Ageing challenges a person's position in society and his/her belonging to family, local community and country. His/her right to choose a place and style of living become increasingly limited. Indeed, it is a widely accepted, or at least tolerated, idea that the elderly are less worthy and their human rights simply shrink.³⁴

LAWS PROHIBITING AGEISM IN CANADA

All ten provinces and three territories in Canada have legislation designed to ensure the equality of its population.

Canada's provisions prohibiting age discrimination are grounded in the *Charter of Rights and Freedoms* (the "Charter"),³⁵ which applies to all jurisdictions and governmental entities. Section 15(1) of the Charter contains an equality clause, which provides as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, **age** or mental or physical disability (emphasis added).

The federal government and all provinces and territories have anti-discriminatory measures against age. Specifically, each jurisdiction has a human rights statute which prohibits discrimination on the basis of age.

Age discrimination is often not taken as seriously as other forms of discrimination. To fight ageism, it is necessary to raise public awareness about its existence and to dispel common stereotypes and misperceptions about ageing.³⁶

³⁴ Mikolajczyk at p. 84, citing Beverly McLachlin, "Human dignity at any age: the law's response to an aging population", 6 *Journal of International Aging, Law & Policy* 111 (2013) at p. 112

³⁵ Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁶ "Ageism and age discrimination (fact sheet)" Ontario Human Rights Commission, online <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet> Accessed on 05.07.18.

Ageism is especially prevalent in the employment setting through age discrimination: fewer training opportunities are available for senior workers; when they are dismissed, senior workers are unemployed for longer periods; and they are often coerced into early retirement.³⁷ Therefore, much of the case law and legislation against age discrimination is often grounded in the employment context. However, all jurisdiction in Canada allow a person to be terminated or refused employment on the basis of age where employers can show a limitation with respect to age that is based on a “bona fide occupational requirement” or known as “BFOR”, i.e., a skill or characteristic essential to a job, without which the job cannot be performed. For example, pilots have to have good eyesight to do their job safely.³⁸

The Supreme Court of Canada decision in *R. v. Kapp*³⁹ sets out the test for age discrimination in Canada and it requires that discrimination be motivated by or perpetuate stereotyping or prejudice. Pnina Alon-Shenker, in her article “*Age is Different*”: *Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting* in the Canadian Labour and Employment Law Journal, argued that this current test has led adjudicators to fail to come to grips with wrongful ageism in the workplace. She proposes that the legal test for age discrimination should focus on wrongs done in the present, and not take account of any past or future wrong, and proposes a broader view of age discrimination based on the “Dignified Lives Approach”, a theoretical framework she developed. The basic premise of this approach is that each individual must be treated with equal concern and respect at any given time, and not just over his or her lifetime as a whole. It requires that each individual be treated in a manner that respects five substantive principles of equality: individual assessment, equal influence, sufficiency, social inclusion, and autonomy.⁴⁰ Alon-Shenker’s view focuses on comparing the treatment of young workers and senior workers, and on treating prejudice and

³⁷ Pnina Alon-Shenker, ““Age is Different”: Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting” (2013) 17:1 Canadian Labour & Employment Law Journal 31 [“Alon-Shenker”].

³⁸ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. (also known as “*Meiorin*”).

³⁹ *R v Kapp* 2008 SCC 41.

⁴⁰ Alon-Shenker at p.44.

stereotyping as the essential indicators of a discrimination, unduly limits the advancement of equality.⁴¹

In Canada, human rights in general are protected by federal, provincial and territorial laws and stem from the *Universal Declaration of Human Rights*.⁴²

Enforcement mechanisms against age discrimination differ depending on the jurisdiction in Canada, as some allow complaints to a Human Rights Commission (for example see Alberta, Manitoba, Nova Scotia) which will investigate the alleged incident and then decide whether to refer the complaint to an adjudicative process. In other jurisdictions (for example, Ontario and British Columbia) an individual can apply directly to the administrative tribunal which will accept, screen, mediate and adjudicate the complaint.⁴³

Anyone who works for, or receives services from a business or organization that is regulated by the *federal* government and is discriminated against can make a formal complaint to the Canadian Human Rights Commission (“CHRC”) which was established pursuant to the *Canadian Human Rights Act*.⁴⁴ The *Canadian Human Rights Act* gives the Commission the authority to research, raise awareness and speak out on any matter related to human rights in Canada. The Commission is also responsible for administering the law which protects people in Canada from discrimination when based on any of the enumerated grounds such as race, sex, disability and age. The CHRC is also empowered under the federal *Employment Equity Act*.⁴⁵

In the province of Ontario, the *Ontario Human Rights Code*⁴⁶ gives all people equal rights and opportunities without discrimination in specific areas such as employment, housing and services. The *Code*’s goal is to prevent discrimination and harassment based on

⁴¹ Alon-Shenker at p.63.

⁴² United Nations, The Universal Declaration of Human Rights, 1948, online: <http://www.un.org/en/universal-declaration-human-rights/>

⁴³ Mathews Dinsdale LLP, “Canada Age Discrimination Info” August 19, 2016, online <http://www.agediscrimination.info/international-age-discrimination/canada> Accessed on 05.07.18.

⁴⁴ *Canadian Human Rights Act*, RSC 1985, c H-6 online: <http://laws-lois.justice.gc.ca/eng/acts/h-6/>

⁴⁵ *Employment Equity Act*, SC 1995, c 44, online: <http://laws-lois.justice.gc.ca/eng/acts/e-5.401/>

⁴⁶ *Human Rights Code*, RSO 1990, c H 19, online: <https://www.ontario.ca/laws/statute/90h19?search=e+laws>

race, colour, gender identity or expression, sex, sexual orientation, creed, age and other grounds.

The Ontario Human Rights Commission (“OHRC”) was established as an arm’s length agency of the government in 1961 to prevent discrimination and to promote and advance human rights in the province of Ontario.⁴⁷ The OHRC is one arm of the human rights system in Ontario, alongside the Human Rights Tribunal of Ontario and the Human Rights Legal Support Centre. Since June 2008, the Tribunal has been tasked with hearing complaints when the *Code* has been violated. This includes complaints based on age discrimination.⁴⁸

One example of case types before the tribunal dealing with age discrimination, are those that deal with mandatory retirement policies. Maximum age limits have been challenged under the *Charter*. Mandatory retirement at age 65 has been found justifiable by the Supreme Court of Canada. In *McKinney v. University of Guelph*,⁴⁹ the Supreme Court of Canada considered the constitutionality of s.10(1) of the Ontario *Code*, which limits protection from age discrimination in employment to persons between 18 and 65 and which permits mandatory retirement policies for those aged 65 and over. The Court found that the maximum age limit of 65 was *prima facie* discrimination based on age but it was a reasonable limit placed on the right and was saved by section 1 of the *Charter*.

Further, there have been long complex proceedings involving the mandatory retirement of Air Canada Pilots at the age of 60 before the Canadian Human Rights Tribunal. The issue has been before the Tribunal for more than a decade.⁵⁰ In the fall of 2017 the Tribunal announced it would hold another hearing to determine whether the airline had the right to force 45 pilots to retire. The new hearing was expected to proceed in early 2018.⁵¹ No decision has been released to date.

⁴⁷ Ontario Human Rights Commission, online: <http://www.ohrc.on.ca/en>

⁴⁸ Human Rights Tribunal of Ontario, online: <http://www.sjto.gov.on.ca/hrto/>

⁴⁹ *McKinney v. University of Guelph*, [1990] 3 SCR 229 (“*McKinney*”).

⁵⁰ The latest decision can be found here: *Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2017 CHRT 22, online: <https://www.canlii.org/en/ca/chrt/doc/2017/2017chrt22/2017chrt22.pdf>

⁵¹ “Canadian Human Rights Tribunal to revisit Air Canada Retirement age issue”, *Financial Post*, September 15, 2017, online: <https://business.financialpost.com/pmnl/business-pmn/canadian-human-rights-tribunal-to-revisit-air-canada-retirement-age-issue>

A person can also allege age discrimination in the context of a civil claim. Often age discrimination is a corollary of other causes of action such as wrongful dismissal, however, the party can be awarded additional damages for age discrimination within the claim.

LAWS PROHIBITING AGEISM INTERNATIONALLY

In her paper, *International Law and Ageism*, Barbara Mikolajczyk writes that “epidemic ageism affects more than 164 million seniors living in Europe. This means that many more Europeans are exposed to ageism than to sexism or racism. Therefore, ageism poses a challenge not only for particular societies and authorities, but also for the international community as a whole.”⁵²

Internationally, there are various documents drafted to protect individuals from, if not all forms of ageism, at least age discrimination. For example, see the International Labour Organisation Convention concerning Discrimination in Respect of Employment and Occupation Discrimination.⁵³

Key documents provide guidelines and recommendations for UN Members States in the area of ageing and older person’s rights.⁵⁴ These documents include the Vienna International Plan on Ageing of 1982, which was endorsed by the UN in its Resolution 37/51;⁵⁵ the United Nations Principles of Older Persons (which include independence, participation, care, self-fulfillment, and dignity);⁵⁶ and the Political Declaration and Madrid International Plan of Action on Ageing adopted in 2002 by the United Nations Second World Assembly on Ageing.⁵⁷

⁵² Mikolajczyk at p.84.

⁵³ See Mikolajczyk at pp. 94-100; Convention concerning Discrimination in Respect of Employment and Occupation Discrimination (No. 111) adopted 4 June 1958, entered into force 15 June 1960), 362 UNTS 31.

⁵⁴ Mikolajczyk at p.85.

⁵⁵ The Vienna International Plan of Action on Ageing, adopted by the World Assembly on Ageing held in Vienna, Austria from 26 July to 6 August 1982, United Nations, 1983. Online: <http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf> Accessed on 04.07.18.

⁵⁶ United Nations General Assembly, Resolution A/RES/46/91: United Nations Principles for Older Persons, 16 December 1991, available at: <http://www.un.org/documents/ga/res/46/a46r091.htm> Accessed on 04.07.18.

⁵⁷ United Nations Political Declaration and the Madrid International Plan of Action on Ageing, Second World Assembly on Ageing, Madrid, Spain 8-12 April 2002, United Nations, New York 2002. Online: <https://social.un.org/ageing-working-group/documents/mipaa-en.pdf> Accessed on 04.07.18.

There are also some new important international acts with varying legal status relating to older adults. One is the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the promotion of human rights of older persons of 2014.⁵⁸ Another is the Inter-American Convention on Protecting the Human Rights of Older Persons which was adopted on June 6, 2015.⁵⁹

Mikolajczyk opines that despite these new acts, “it seems that one of the gaps in the international protection of the elderly concerns the insufficient protection of older persons’ dignity vis-à-vis ageism”.⁶⁰

The United Nations Commission on Human Rights was established in 1946 and was replaced by the UN Human Rights Council in 2006. The Council is composed of 47 United Nations Member States which are elected by the UN General Assembly.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) is a United Nations agency that works to promote and protect the human rights that are guaranteed under international law and are stipulated in the Universal Declaration of Human Rights of 1948. The High Commissioner is the principal human rights official of the United Nations. The OHCHR supervises the Human Rights Council. The OHCHR’s priorities include strengthening international human rights mechanisms, enhancing equality and countering discrimination.⁶¹ The OHCHR’s method of work focuses on three major dimensions: standard-setting, monitoring, and implementation on the ground.⁶²

⁵⁸ Council of Europe, Recommendation CM/Rec (2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons, 19 February 2014. Online:

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c649f Accessed on 04.07.18.

⁵⁹ Inter-American Convention on Protecting Human Rights of Older Persons (adopted 15 June 2015). Online: http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp Accessed on 04.07.18.

⁶⁰ Mikolajczyk at p. 85.

⁶¹ The Office of the High Commissioner for Human Rights, Who We Are, online: <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>

⁶² The Office of the High Commissioner for Human Rights, How We Do It, online: <https://www.ohchr.org/EN/AboutUs/Pages/HowWeDoIt.aspx>

It appears that the proposed UN *Convention on the Rights of Older Persons* will be the next human rights treaty adopted by the United Nations.⁶³ Human rights conventions that already exist include the *Convention on the Rights of People with Disabilities*⁶⁴ and the *Convention on the Rights of the Child*.⁶⁵

It is important that such a treaty with respect to older persons be finalized as it adds an extra layer of rights protections for older adults. States that ratify a treaty are held to account by a dedicated UN treaty body and by the UN Human Rights Council.

At this time, there is no formal draft treaty that has been agreed upon by the United Nations General Assembly, however, there has been established an “Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons”.⁶⁶ The United Nations General Assembly adopted Resolution 65/182 which established the Open-Ended Working Group. The mandate of the Working Group is to consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.⁶⁷

The latest working session of the Working Group was held July 23 to 26, 2018. The session included panel discussions on “Autonomy and Independence” and “Long Term and Palliative Care”.⁶⁸ Several member states provided input to the latest session.⁶⁹ The International Longevity Centre-Canada (an independent think-tank situated at the

⁶³ United Nations Human Rights, Office of the High Commissioner, “UN Human Rights Chief offers her support for a new Convention on the rights of older persons”, online:

<https://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>

⁶⁴ Convention on the Rights of Persons with Disabilities, UN Department of Economic and Social Affairs, Division for Inclusive Social Development, online: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁶⁵ United Nations Human Rights, Office of the High Commissioner, Convention on the Rights of the Child, online: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁶⁶ Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, online: <https://social.un.org/ageing-working-group/index.shtml>

⁶⁷ Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, online: <https://social.un.org/ageing-working-group/>

⁶⁸ Proposed Organization of Work, Open-Ended Working Group on Ageing, Ninth Working Session. Online: https://social.un.org/ageing-working-group/documents/ninth/FINAL_PoW_OEWG9_27June2018.pdf

⁶⁹ Ninth Working Session, Submissions by Member States: <https://social.un.org/ageing-working-group/ninthsession-govts.shtml>

University of Ottawa) hosted a side-event at the Working Group session called “The Right to be My Older Self: A North-South Discussion on Long-Term and Palliative Care, Autonomy and Independence”.⁷⁰

Individual countries also have legislation to prevent ageism and age discrimination as well as elder abuse. For example, in the United States, the *Age Discrimination in Employment Act* is the federal law that prohibits age discrimination against employees 40 years of age or older.

Using “hate crime” legislation is also an option to combat ageism and elder abuse. In Helia Garrido Hull’s article, *The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population* in the Michigan Law Review,⁷¹ she notes that despite a general decline in the overall rate of violent crime in the United States across all age groups, violent crime against the elderly has increased each year since 2003.⁷² Accordingly, severely states elected to prosecute attacks against the elderly as hate crimes.⁷³

KEY CHALLENGES: BALANCING THE PROTECTION OF OLDER ADULTS WHILE PREVENTING AGEIST BELIEFS

In her paper, Helen Love concludes that one common misconception about older adults is that aging “invariably involves physical or mental decline” and that “aging occurs at different rates for different adults, and assuming uniform characteristics, especially sickness or frailty, underestimates the vitality of many older adults”.⁷⁴ Love refers to the case of *Re Culbert Estate*⁷⁵ where despite finding that the 94 year old testator had legal capacity to execute her Will, Ball J., nevertheless made the following statement about older adults in general: “It is not uncommon for an elderly person to lose his or her mental faculties over a period of time, during which intervals of comprehension alternate with

⁷⁰ ILC Canada/LIFE Research Institute hosts a UN Side-Event at the Open-Ended Working Group meeting July 24, 2018, online: <http://www.ilccanada.org/index.php/un>

⁷¹ Helia Garrido Hull, “The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population” 2009 Mich St L Rev 387 [“Hull”],

⁷² Hull at p.390.

⁷³ Hull at p.390.

⁷⁴ Love at p.150.

⁷⁵ 2006 SKQB 454, 28 ETR (3d) 117 [*Re Culbert Estate*].

periods of confusion.”⁷⁶ Love posits that Ball J.’s reference to older people generally losing their mental faculties, which was not the case for Ms. Culbert, reinforces the idea that aging commonly involves a decline in mental acuity and cognitive functions. Love concludes that “[s]ince cognitive decline does not uniformly occur with aging, it should not be attributed to aging adults as a general trait.”⁷⁷

While this may be true, on the other hand, as we suggest in this article, one cannot ignore that the statistics show that some older adults do have a decline in cognitive functions and mental acuity, which makes them vulnerable to potential abuse and undue influence.

Is Protection Always Ageist?

If we attempt to protect vulnerable older adults are we perpetuating ageist beliefs?

In her paper and her speech at the National Academy of Elder Law Attorneys Conference in 2012, titled “Human Dignity at Any Age: The Law’s Response to an Aging Population”, former Supreme Court of Canada Chief Justice Beverly McLachlin observed:

. . .the Law Commission of Canada in 1999 worried that a separate area of law and legal practice for the elderly may inadvertently reinforce the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independent and autonomy. It seems to me that if Elder Law is founded on the inclusionary value of respect for the full humanity of those with special needs, it can have the opposite effect. Elder Law specialization will no more spread the belief that elders are less capable than corporate law specialization has spread the belief that capitalists are less capable. It can help reverse ageist stereotypes rather than perpetuating them, while better meeting the special needs of the aging.⁷⁸

By recognizing that not all older adults are the same and are not a homogenous group, we can hopefully protect the ones that need protection and stop ageist beliefs about those that do not.

⁷⁶ *Re Culbert Estate* at para. 73.

⁷⁷ Love at p.150.

⁷⁸ McLachlin at p.127.

McLachlin also noted that seeking to protect older adults does not necessarily mean we are demeaning older adults or disrespecting their human rights:

. . .several jurisdictions in Canada have already enacted legislation to protect older adults who are victims of physical or sexual abuse, mental cruelty or inadequate care or attention, and to better coordinate legal, health, and social service interventions. Detractors call this a “child welfare model” and complain that it fails to respect the independence of older adults and will inevitably infantilise them. **While this is a danger, again, I am not so pessimistic. We have a strong record of assisting people when they need special assistance, while maintaining their independence and human dignity to the greatest extent possible.**⁷⁹ [emphasis added]

Ageism indeed plays a role in the *lack of protection and perpetuation of elder abuse* as well. Barbara Mikolajczyk in her paper, “International Law and Ageism”, writes that elder abuse is the “worst display of ageism and it manifests itself in (at least) three forms: 1) in neglect, meaning isolation, abandonment and social exclusions; 2) in violation of human, legal and medical rights; 3) in deprivation of choices, decisions, status, finances and respect.”⁸⁰

As noted by Wendy Lacey in her paper, “Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Adults in Australia”:

The abuse, exploitation and neglect of vulnerable older persons involves the serious denial of a person’s basic human rights, however, a lack of community awareness, ageism and the frequent invisibility of our elderly mean that elder abuse remains a hidden problem within society.⁸¹

⁷⁹ McLachlin at p.128.

⁸⁰ Mikolajczyk at p.87, citing World Health Organization, *A Global Response to Elder Abuse and Neglect: Building primary health care capacity*, WHO, Geneva: 2008, available at: http://www.who.int/ageing/publications/elder_abuse2008/en/ (accessed 29 June 2018), p.1.

⁸¹ Wendy Lacey, “Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia” 2014 *Sydney Law Rev* 36: 99 at 100 [“Lacey”].

Despite all these ambiguities and the confusion surrounding the issue, there's a real need to confront the necessity for international protection for the elderly within the fight against ageism at an international level.⁸² As noted by Mikolajczyk:

It is clear that modern, elderly-friendly and skillful interpretations of the discrimination clauses [in the legislation] are required to achieve the fullest protection of older persons' rights and their dignity . . . simply refraining from age discrimination may not be sufficient to combat ageism, especially that which may result in elder abuse.⁸³

All conversation, legislation and initiatives combating ageism must include an element or discussion on the need for protection of older adults as well. Mikolajczyk concludes:

. . . **contemporary binding international law usually does not take into account the vulnerability of older persons.** In addition the ambiguity of the age criterion makes the definition of this category of persons much more subtle than other easily-identified groups, such as those suffering from racism, sexism or homophobia. **Therefore the protection of older persons – if limited only to the prohibition of age discrimination – is incomplete.**⁸⁴ [emphasis added]

ONTARIO LAW: PROTECTIONS, STRENGTHS AND WEAKNESSES

There are several laws in Canada aimed at protecting older adults and preventing elder abuse. Most jurisdictions across Canada have adopted mandatory reporting laws for abuse. For example, if an older adult resides in a Long-Term Care Home or a Retirement Home and elder abuse is suspected or occurred, legislation requires mandatory reporting of any such incidents or suspected incidents.⁸⁵

⁸² Mikolajczyk at p.89.

⁸³ Mikolajczyk at p.102.

⁸⁴ Mikolajczyk at p.106.

⁸⁵ See the *Long-Term Care Homes Act, 2007* SO 2007, c 8 s 24 and the *Retirement Homes Act, 2010*, SO 2010, c 11 s 74.

At the same time, the stereotypes of ageism mean there is often a marked lack of interest in advancing or protecting the rights of the elderly and difficulties or protecting the rights of the elderly and difficulties in reporting and prosecuting abuse.⁸⁶

The Charter provides that every Canadian is entitled to equal protection and equal benefit of the law without discrimination. The federal and provincial statutes in Canada also play a role, directly or indirectly in protecting older adults from age-based discrimination. Many statutes also play a role in preventing the financial abuse and exploitation of older adults.

This next section will explore statutory protections in place for older adults in Canada:

Federal Law: The Canadian Criminal Code⁸⁷

Criminal law in Canada is drafted and enacted by the federal parliament. The Canadian *Criminal Code* creates offences and provides guidance to the courts in respect of sentencing.

The *Criminal Code* does not provide one specific offence in respect of “elder abuse” or “elder financial abuse”. Instead, the police have available to them various sections under which a perpetrator of elder abuse could be charged, depending on the nature of that abuse. Some examples of relevant sections from the *Criminal Code* include: section 331, *Theft by a Person Holding a Power of Attorney*; section 322, *Theft*; section 336, *Criminal Breach of Trust*, section 366, *Forgery*; section 346, *Extortion*; sections 386-388, *Fraud*; section 215, *Neglect, Failure to Provide the Necessaries of Life*; and section 219, *Criminal Negligence*.

In Canada, judges have significant discretion with respect to the sentencing of individuals who are guilty of crime. Judges are guided only by general principles in the *Criminal Code* and high maximum penalties. The fundamental purpose of sentencing is to impose sanctions that meet a number of objectives, including denouncing unlawful conduct and deterring the offender and other persons from committing offences.⁸⁸

⁸⁶ McLachlin at p.119.

⁸⁷ *Criminal Code*, RSC 1985, c C-46 [“*Criminal Code*”], online: <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html?resultIndex=1>

⁸⁸ *Criminal Code*, s. 718.

Courts also consider a wide range of aggravating and mitigating factors in determining the appropriate sentences, and some of the prescribed aggravating factors include evidence that the offence was motivated by age or mental disability, and evidence that the offender abused a position of trust or authority in relation to the victim.⁸⁹ The presence of these factors may result in an increased sentence. The *Protection of Older Adults Act* expanded the *Criminal Code*'s list of aggravating factors considered in sentencing to specifically target offences against victims who are vulnerable due to their age and other personal circumstances.⁹⁰

Many of the criminal cases dealing with older adults have a common fact pattern and involve the criminal misuse of a Power of Attorney for Property (discussed in more detail below). This is a legal substitute decision making mechanism where an Attorney acting under a Continuing Power of Attorney for Property (the "CPOAP") has the legal authority to manage another individual's finances.

For example, while there is a section of the *Criminal Code* specifically related to Theft by a Person Holding a Power of Attorney (s.322) there are in reality, very few reported cases citing this section. In one egregious case, *R. v. Kaziuk*,⁹¹ a son defaulted on the mortgages he placed on all of his older mother's properties without her knowledge, using the Continuing Power of Attorney granted to him by his mother. The mother went from having assets in excess of \$1 million to being penniless and living in a homeless shelter. The son was sentenced to the maximum 10 years in jail, but not under the charge of Theft by a Person Holding a Power of Attorney (as would have been the correct charge as noted by the court) but, rather, under the general theft and fraud provisions of the *Criminal Code*. Unfortunately, his sentence was reduced from 10 years to 8 on appeal. Despite the sentence reduction, this case is precedent for stern sentencing in cases involving theft and fraud perpetrated against an older, vulnerable adult.

⁸⁹ *Criminal Code*, s. 718.2.

⁹⁰ *Protection of Older Adults*, SC 2012 c 19.

⁹¹ *R v Kaziuk* 2011 ONCJ 851.

There are several other cases in Canadian law involving facts and circumstances where vulnerable older adults were the victims of theft by family members or acquaintances;⁹² fraud by trusted financial advisors⁹³ or family members;⁹⁴ failing to provide the necessities of life;⁹⁵ and assault by caregivers.⁹⁶ Many of these cases involve the misuse and abuse of a CPOAP. An unfortunate consequence of this particular substitute decision making mechanism is that, for a number of reasons, financial mismanagement by an attorney under a CPOAP, does not always attract criminal charges. The victim may have knowledge of, or agree to, the inappropriate expenditures of the attorney. The victim may tell investigating police that they knew about and agreed to the expenditures in order to prevent the criminal prosecution of their loved one. In some cases where there is evidence that the older adult is incapable of managing their property, the police often decline to investigate at all on the basis of a misconception that these issues are more appropriately dealt with by the civil courts.

Many of the *Criminal Code* offences are triggered by the abuse and exploitation of older adults. Parliament defines offences broadly to capture behaviour of varying degrees of culpability, and as noted above, wide discretion is afforded to judges in sentencing. The principles of sentencing include deterrence, and sentences may be increased where there is evidence that the offender abused a position of trust, and the victim was older,

⁹² See for example, *R v Webb* 2011 SKPC 181 where a nephew, using a Power of Attorney, sold his uncle's house, removed all his money from his bank accounts (including his pension and monthly government support cheques) and placed his uncle in a nursing home. At the sentencing hearing the nephew professed his love for his uncle and presented a cheque in court for the balance stolen. See also *R v Hooyer* 2016 ONCA 44, where a long-time family friend of an older adult with dementia moved into the older adult's home, used the older adult's money to purchase multiple vehicles and burned through the remainder of the older adult's money. Hooyer was sentenced to 2 years less a day in prison.

⁹³ See *R v Chan* 2012 ABPC where Chan admitted to defrauding multiple elderly clients of over \$1 million.

⁹⁴ See *R v Curreri* 2016 ONSC 3598, where a son fraudulently transferred and mortgaged eight properties owned by his father. The court found that the son "knowingly and deceptively used his name, which was the same as his father's to transfer and mortgage the properties to strangers". The court imposed a conditional sentence of two years less a day.

⁹⁵ See *R v Davy* 2015 CanLII 10885 (ONSC) a particularly heinous case where a daughter and son-in-law neglected and abuse the mother who suffered from severe dementia. The mother was found naked on a bare mattress in a room with blacked out windows covered in her own vomit. The perpetrators were each sentenced to 12 months in jail.

⁹⁶ See the recent case of *R v Llanto* 2018 BCPC 102 where a paid caregiver plead guilty to assaulting (slapping on the head and legs) an older adult who suffered from Alzheimer's disease and was paralyzed due to a stroke. The caregiver was sentenced to 60 days in jail.

vulnerable, or suffered a mental or physical disability. The *Criminal Code* can be an important tool in the protection of vulnerable older adults.

However, as McLachlin noted in her speech:

Even when prosecution is a realistic possibility, some question the utility of criminal law as a response to elder abuse. While the criminal law may be a powerful weapon against abuse, it is often too blunt an instrument to be effective. The criminal law does not always address the complexities of intimate relationships. Given that in ninety percent of elder abuse cases, the perpetrators are spouses or relatives, a victim may avoid initiating the prosecution because of fear of rejection by other family members, loss of care or being left alone . . . Similar problems beset the pursuit of civil remedies. Often, the elderly are hampered in their access to the legal system because they do not recognise their rights, or are unable to navigate the impediments the legal culture has placed between them and justice.⁹⁷

Other statutes, and in particular those that fall within provincial jurisdiction, address issues arising from the legal construct of mental incapacity. In Ontario, adults with compromised mental capacity – regardless of their age – are afforded the protection of the various substitute decision making schemes found in the *Substitute Decisions Act, 1992*⁹⁸ and in the *Health Care Consent Act*⁹⁹ in Ontario. These statutes aim to ensure that older adults enjoy equal protection under the law and will be discussed next.

Capacity and Decision Making Statutory Protection of Older Adults¹⁰⁰

Legal capacity, decision-making and guardianship laws can have a profound influence over some of the most important and intimate legal decisions and choices in a person's life. These decisions involve serious and consequential legal issues that are filled with questions and controversies regarding personal independence, a person's right to make

⁹⁷ McLachlin at p.120.

⁹⁸ *Substitute Decisions Act, 1992*, SO 1992, c 30.

⁹⁹ *Health Care Consent Act, 1996*, SO 1996, c 2 Sched.A.

¹⁰⁰ Portions of this paper were previously published in the paper, *Statutory Protection of Older Adults in Canada: A Difficult Balance*, The Istanbul Initiative on Ageing, October 4, 2013 by Kimberly A. Whaley, Mark Handelman and Heather B. Hogan.

choices and take risks, legal accountability for decision-making, and the balance between a person's autonomy and his or her safety and security.¹⁰¹

Ontario's legislative regime for capacity, decision-making and guardianship is set out in three statutes:

- 1) the *Substitute Decisions Act, 1992* (the "SDA") which addresses decisions related to property management and personal care, and identifies the appointment processes and the duties of guardians and those acting under powers of attorney (POA);
- 2) the *Health Care Consent Act, 1996* (the "HCCA"), which addresses consent to treatment, admission to long-term care homes and personal assistance services of residents of long-term care homes; and,
- 3) to a lesser extent, the *Mental Health Act* (the "MHA").

Similar legislation is found throughout Canada in each province and territory.

The legislation codifies a clear presumption of capacity for the ability to contract, make decisions about personal care, and to make decisions about treatment admission to long-term care and personal assistance services.¹⁰² Legal capacity in these areas can only be removed through specific mechanisms outlined in the legislation.¹⁰³

The education, literacy and familial characteristics of Canada's older adults are relevant factors in our analysis of protective legislation and the ways in which it intersects with the lives of older adults.

Education levels have a close relationship with a number of indicators of well-being in older adults, including health and social isolation.¹⁰⁴ Social isolation is often a contributing factor in the incidents of exploitation and abuse of older adults. Rights and remedies afforded to older adults by statutes, regulations and policies require literacy as a

¹⁰¹ LCO Capacity Report at p.i.

¹⁰² LCO Capacity Report at p.15.

¹⁰³ LCO Capacity Report at p.15.

¹⁰⁴ Law Commission of Ontario, *A Framework for the Law as it Affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice* (Toronto: April 2012) at page 33 ["LCO Older Adult Report"] online at the LCO's website: <http://www.lco-cdo.org/en/older-adults-final-report/>.

prerequisite to the enjoyment of the rights and liberties afforded to them by statute. A study conducted in 2003 found that over 80 percent of Canadians over the age of 65 had prose literacy levels considered to be below the desired threshold for coping well in a “complex knowledge society”, as compared to roughly 40 percent of those aged 16-45, and approximately 45 percent of those aged 46-55.¹⁰⁵ Older women are more likely to have lower levels of educational attainment than their male contemporaries.¹⁰⁶

To the extent that literacy levels may be informed by language, it is important to note that a portion of older Canadian adults speak neither of Canada’s two official languages, English and French, as a second language. In 2001, over one-quarter of persons aged 65-84 were immigrants.¹⁰⁷ It is unclear how many of those older immigrant adults are at a disadvantage in terms of their ability to navigate Canada’s legal system. A study from Ontario acknowledged that older adults who are recent immigrants may be dependent upon their relatives to maintain legal status in the country, may not know an official language, and are less likely to have significant social networks on which they can rely.¹⁰⁸

The notion of “family” in Canada is also a relevant factor in how we protect older adults from abuse and exploitation. As we age, we may become increasingly reliant on family members to assist us in exercising our independence and supporting our ability to make decisions about our lives. This reliance on family members can sometimes create issues, especially when that reliance is concurrent with an absence of connections to the broader community. Older adults may rely on family members to advise them of their rights. Older adults may be reluctant to complain about financial, emotional, physical or sexual abuse by family members on whom they are dependant on maintaining some level of independence and wellbeing.¹⁰⁹ Those social factors and demographic characteristics raise issues that are particular to the effectiveness of some statutes; if a statute or its implementation is premised on the assumption that family members are always able and

¹⁰⁵ LCO Older Adult Report at p. 33.

¹⁰⁶ LCO Older Adult Report at p. 45.

¹⁰⁷ LCO Older Adult Report at p. 46.

¹⁰⁸ LCO Older Adult Report at p. 46.

¹⁰⁹ LCO Older Adult Report at p. 64.

willing to protect their older relatives, it falls short of affording equal protection to older adults, perhaps because, among other factors, this is simply not our social reality.

Substitute Decision Making: A Form of Protection

In Ontario the SDA deals with, among other things, issues arising from compromised mental capacity. It provides a framework for identifying persons who are capable or correspondingly, incapable of making certain kinds of decisions. It provides a process for implementing various forms of substitute decision making on behalf of individuals who meet the statutory criteria for identifying incapacity.

The History and Intentions and Concerns of Drafting Officials

In 1985, the Ontario government established an Advisory Committee to “review all aspects of law governing and related to substitute decision making for persons who are mentally incapacitated and to recommend revision where appropriate”.¹¹⁰ The Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (the “Fram Report”) was completed in December of 1987. It included an early draft of what is now, many revisions later, the *Substitute Decisions Act, 1992*.

Given that the Committee’s recommendations would eventually become legislated substitute decision making, they were sensitive to the potential erosion of the rights of incapable peoples under the auspices of such substitute decision making. They summarized their concern in this way:

Substitute decision making can be viewed either as a positive good. . .or, as a necessary evil. . .This committee has adopted the latter view. . .The history of our choices made on behalf of physically or mentally handicapped people demonstrates the effects of paternalism. The first two values underlying this report, namely no unnecessary intervention and self-determination, are aimed at assuring this history is neither continued nor repeated.¹¹¹

¹¹⁰ Stephen V. Fram, *The Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons*, 1987, at pp.v and vii [“Fram Report”].

¹¹¹ Fram Report at p.42.

Accordingly, the Committee made a number of specific recommendations with the intention of reducing the ways in which substitute decision making powers could be abused and increasing accountability of substitute decision makers. For example, they recommended that attorneys for property and guardians of property be required to account, on an annual basis, to the incapable person whose property they were managing.¹¹² The Committee was of the view that the existing legislation that prescribed an accounting process for estate executors and trustees was unnecessarily onerous, so they recommended a simplified procedure for the annual financial reporting of attorneys and guardians.¹¹³ The Committee was also aware of the potential for privacy violations if the attorney's annual financial report was issued to incapable people living in facilities or to incapable people who were otherwise unable to take steps to protect their own privacy.¹¹⁴ Accordingly, the Committee drafted a proposal that would ensure the availability of a simplified financial report on an annual basis to any incapable person who was able to request it.¹¹⁵

The Committee recommended that the existing Public Trustee's office should be combined with a new Public Guardian's office. The new office would have a mandate to apply to court for guardianship; act as a substitute decision maker of last resort; and have supervisory responsibilities over attorneys for personal care and private guardians.¹¹⁶

The Committee also anticipated that disputes could arise in the course of the exercise of one's duties as an attorney or guardian, so they recommended that the Public Guardian take an active role in mediating "disputes between private parties that arise under the legislation."¹¹⁷ The Committee was of the view that it would not be appropriate in most cases for disputes of this nature to be addressed in the expensive and adversarial court system.¹¹⁸

¹¹² Fram Report at pp.232-234.

¹¹³ Fram Report at pp.232-234.

¹¹⁴ Fram Report at p. 233.

¹¹⁵ Fram Report at pp. 232-234.

¹¹⁶ Fram Report at p. 11.

¹¹⁷ Fram Report at pp.14 &69.

¹¹⁸ Fram Report at p.296.

The *Substitute Decisions Act, 1992* was the Ontario government's response to the Fram Report.¹¹⁹ The SDA was introduced in 1991 as part of a series of statutes that addressed issues of capacity and decision making in the health care context and elsewhere. These Acts were proclaimed on April 3, 1995 with unanimous support of the provincial legislature.¹²⁰ However, in June of 1995, provincial elections saw a shift in political priorities, and the new provincial government introduced a Bill intended to, among other things, simplify the rules for making and using powers of attorney.¹²¹ It did away with the recommended mandatory financial reporting and amended the SDA to simply require attorneys to keep good records. Currently, the regulations require those records to be in the same form as that required by Estate Executors and Trustees. Pursuant to the SDA, if an incapable person wants to assert their right to compel their attorney or guardian to subject their accounts to judicial scrutiny, they must seek that relief by initiating court proceedings.¹²²

With respect to the requirement that the Office of the Public Guardian and Trustee (the "PGT") mediate disputes arising during the course of substitute decision making, that provision was narrowed in scope. The Fram Report recommended that the PGT be mandated to mediate disputes arising between attorneys for personal care and attorneys for property, as well as any other disputes that may arise during the course of their duties.¹²³ The SDA as amended merely states that the PGT can mediate disputes between joint attorneys or between attorneys for personal care and attorneys for property.¹²⁴ Incapable people and their attorneys are otherwise left to initiate court proceedings in the event that a dispute arises in the course of the management of the incapable person's property.

¹¹⁹ Ontario Legislative Assembly, Standing Committee on the Administration of Justice, February 5, 1996 at 1640.

¹²⁰ *Advocacy Act, 1992*, SO 1992, c 26; *Substitute Decisions Act, 1992*, SO 1992 c 30; *Consent to Treatment Act, 1992*, SO 1992, c 32.

¹²¹ Bill 19, *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act, 1st Sess, 36th Leg, 1996* (assented to on March 28, 1996) SO 1996, c 2; Ontario Legislative Assembly, Standing Committee on the Administration of Justice, Submissions of the Attorney General, Honourable Charles Harnick, February 5, 1996.

¹²² SDA, s. 42(3).

¹²³ Fram Report, pp. 14 and 69.

¹²⁴ SDA, s.88.

While one could argue that many of the protective mechanisms were eroded or repealed during the early days of the SDA, and since, it nevertheless still includes numerous measures to protect decision making autonomy and the rights of people who have been declared incapable.

The Current Substitute Decisions Act, 1992

The SDA in its final form, addresses two over-arching areas of incapacity: incapacity in respect of financial decisions (referred to as “property” in the SDA), and incapacity in respect of personal care decisions.

An individual is incapable of managing their property, according to the SDA if he or she is “not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”¹²⁵

The SDA provides a number of mechanisms for determining whether an individual is incapable of managing their property. For example, a capacity assessor – someone who is part of a class of professionals designated by the SDA as being qualified to make determinations of capacity – may issue a certificate of incapacity, which triggers the statutory property guardianship mechanisms, discussed in more detail below.¹²⁶ In the alternative, individuals who meet prescribed criteria are permitted by the SDA to commence court proceedings to obtain a declaration that an individual is incapable of managing his or her property, and to obtain court-appointment as guardian of that person’s property.¹²⁷ In this instance, the applicant or proposed guardian will be required to provide evidence of the individual’s incapacity in order to obtain the necessary declaration of incapacity, and there are rules and case law that set the parameters of the form and content of that evidence.¹²⁸

¹²⁵ SDA, s.6.

¹²⁶ SDA, ss. 16(1),(3).

¹²⁷ SDA, ss. 24(1), 57(3), 69.

¹²⁸ SDA, ss. 25(1), 58(1).

The SDA provides two general mechanisms of substitute decision making on behalf of incapable adults in respect of their property: **attorneyship** and **guardianship**.

Attorneyship under the SDA refers to the appointment by the grantor of a capable adult to make decisions on a grantor's behalf in the event that they become incapable in the future.¹²⁹ This appointment is effected by executing a Continuing Power of Attorney for Property ("CPOAP") document. The SDA specifies the requisite capacity for granting this authority, and it prescribes a number of validity requirements.¹³⁰ The SDA also provides rules for how this decision-making authority is exercised.

The other mechanisms for triggering substitute decision making in respect of property is through **guardianship**. Guardianship of property is established in two ways: by operation of statute (statutory guardianship); or, by court order (court-appointed guardianship). Statutory guardianship is triggered by the issuing of a certificate of incapacity by a capacity assessor, and it results in the appointment of the Public Guardian and Trustee as the guardian of property of the incapable adult. If, after this statutory guardianship has been established, someone comes forward holding a valid CPOAP of the incapable person, the PGT's guardianship is terminated. In the alternative, guardianship may be court-ordered.

In either circumstance, whether attorneyship or guardianship is effected, the SDA provides rules that govern the exercise of that substitute decision making authority.

Protection of Autonomy

The protection of incapable people's autonomy was an overarching concern during the development of the SDA. For example, the SDA starts with the presumption of capacity; it adopts the longstanding common law view that all persons are deemed capable of making decisions at law.¹³¹ In defining incapacity, the SDA is focused solely on decision making capacity, and is not concerned with the content of decisions. Our courts affirmed

¹²⁹ Other statutes permit other forms of attorneyship. See for example, Ontario's *Powers of Attorney Act*, RSO 1990, c P 20.

¹³⁰ SDA, ss. 8(1), 9, 10.

¹³¹ SDA s. 2(1).

this approach in the oft-cited quote from Justice Quinn: “The right to be foolish is an incident of living in a free and democratic society.”¹³² In almost all circumstances, a capacity assessor must explain to the person being assessed, before performing the assessment: the purpose of the assessment, the consequences of a finding of incapacity, the person’s right to refuse the assessment.¹³³ Individuals who have been declared incapable of managing their property under the SDA by a doctor or a capacity assessor may challenge that determination by initiating a hearing before a tribunal, the Consent and Capacity Board (the “CCB”). The CCB is an independent provincial tribunal that adjudicates issues of capacity, consent, civil committal and substitute decision making, most of which arise under other statutes not discussed in this paper.¹³⁴

Once a determination has been made with respect to an individual’s incapacity, that individual is nevertheless entitled to continue to be involved in the decisions made on their behalf. The substitute decision maker’s role is not to usurp total control and authority, but rather to foster autonomy. For example, attorneys for property are required to include the incapable person in decisions about their property and are required to consult from time to time with the incapable person’s supportive family members and friends.¹³⁵ The powers and duties of attorneys for property must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.¹³⁶ This concept of good faith is an important one. Attorneys who are liable for their breach of duty, for example, may be saved from that liability if the breach arose while the attorney or guardian was acting with honest, diligence and good faith.¹³⁷ Attorneys must keep accounts of all transaction involving the incapable person’s property.¹³⁸

There is an important distinction between the reporting requirements for guardians of property who are appointed by the court, and attorneys for property, who are appointed by capable adults in advance of incapacity. Upon the appointment of a guardian of

¹³² Quinn J. in *R v Koch* (1997), 33 OR (3d) 485 (Gen Div).

¹³³ SDA, s. 78.

¹³⁴ See the CCB’s website: <http://www.ccboard.on.ca/scripts/english/index.asp> Accessed on 04.07.18.

¹³⁵ SDA, ss 32(3), (5), 66(5)-(7).

¹³⁶ SDA, s. 32(1)

¹³⁷ SDA, ss. 32 and 38.

¹³⁸ SDA, s 32(6)

property, courts usually order the guardian to pass his or her accounts every few years. There is no such protection afforded to incapable people who have their property managed by attorneys under the SDA.

Finally, the SDA provides some mechanisms for addressing issues that arise in the course of the management of the individual's property. For example, the attorney may apply to the court for advice and directions.¹³⁹ In addition, the court may, on an application brought by the incapable person or other prescribed individuals, order the attorney for property to pass their accounts before a court.¹⁴⁰

The SDA sets out the criteria for determining whether an individual lacks capacity in either of the separate and exclusive realms of property or personal care. It provides a number of different substitute decision making mechanisms in circumstances where an individual is identified as incapable of managing their property or person care, and it governs the exercise of that decision making authority.

Protection: Summary of Strengths

In summary, the strengths of Ontario's laws on legal capacity, decision-making and guardianship are a result of an extensive and thoughtful law reform process spanning a number of years during the late 1980s and early 1990s. The resultant legislation, progressive and innovative in its approach to complex issues. In its final report on Legal Capacity, Decision Making and Guardianship (which was the result of an extensive consultation process on legal reform in this area of law) the Law Commission of Ontario ("LCO") noted that there "[t]here are a number of aspects of Ontario's current law which were far-sighted at the time, continue to be valuable, and should be preserved in any reform."¹⁴¹ The LCO went on to list the following strengths of the laws in this area, including:

- Emphasis on the importance of self-determination: Charter and human rights values of self-determination and freedom from unwarranted

¹³⁹ SDA, s. 39(1).

¹⁴⁰ SDA, s. 42(1)-(4).

¹⁴¹ LCO Capacity Report at p. 23.

intervention underlie many aspects of the current legislative framework, resulting in an emphasis on respecting where possible the right of individuals to make choices that others disagree with or that may be risky or unwise.

- Nuanced approaches to legal capacity: presumption of capacity, domain and time-specific approach;
- Accessible powers of attorney: simple and low-cost to create;
- Clear and appropriate duties for substitute decision makers;
- Enabling families: accessibility of POAs under the SDA make it easy for families to be appointed to act for their loved ones;
- Balanced approach to advance care planning; and
- Protection of procedural rights for persons lacking or perceived to be lacking legal capacity.

Deficiencies in Protection: Summary of Weaknesses

Laws related to the protection of older adults from abuse are not free from criticism.

Unfortunately, there can be a disconnect between the protective mechanisms in the legislations and real-world outcomes, including a disconnect between the SDA's protective measures and the actions of some people who are appointed as attorneys for property. While it may be true that people will prefer, if given a choice, to appoint family members as their attorneys for property, it seems that this approach is not always wise or beneficial to the incapable person. The SDA's rules governing the exercise of attorneyship powers do not always appear to be effective in the absence of regular reporting.

The SDA was drafted to protect people who meet the SDA's guidelines for incapacity with respect to particular kinds of decisions, and to permit people to effect advance planning by appointing attorneys under CPOAP's. To the extent statutory mechanisms exist in the SDA to ensure that incapable people may benefit from the assistance of substitute decision makers, and to the extent that those powers of substitute decision are subject to

rules and regulations, the SDA plays a role in the protection of vulnerable older adults from financial abuse and exploitation.

However, there appear to be limits to the protections afforded to incapable people via the attorney for property model of substitute decision making.¹⁴²

For example, the absence of mandatory financial reporting on the part of attorney may play a role in the financial abuse perpetrated by attorneys. This issue is not particular to Ontario; the Alberta Law Reform Institute recommends strengthening the transparency and accountability of attorneys for property in part by mandating additional safeguards.¹⁴³ It is not clear if mandatory provision of financial statements by attorneys would serve as a deterrent to perpetrators, but at the very least such reports, if provided, could shed light on problems earlier and could possibly expedite the evidentiary process in subsequent court proceedings. The problem thereafter is who would review these accounts?

POA's are important as they are very common forms of substitute decision-making, however, they are also the most "private" in that POAs in practice are rarely subject to outside scrutiny. There is widespread concern about misuse and outright abuse of POAs and particular concern about financial abuse of older adults through POAs.¹⁴⁴

There is also an implementation gap between the protections afforded to people by the SDA and the ability of some older adults to access and understand their rights. We know that many older adults rely on their family members to provide them with assistance as attorneys for property. We also know that many older adults in Canada have a lower than average literacy rate and may not read or write in English or French. Language barriers and dependence on family members create risks that may be heightened by the attorneyship mechanisms in the SDA.

The SDA was ground breaking in its accomplishments with respect to protecting the interests of vulnerable adults and it goes a fair distance in protecting older adults from

¹⁴² LCO Older Adult Report, at p. 236.

¹⁴³ Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (2003) as cited in the LCO Older Adult Report at p. 236.

¹⁴⁴ LCO Capacity Report at p. vii.

financial abuse and exploitation. However, twenty years after the SDA was enacted, there is evidence that suggest that some models of substitute decision making may be more vulnerable to misuse than others.

After conducting an extensive consultation on the capacity, decision-making and guardianship legal regime in Ontario, the LCO published its findings and recommendations in a Final Report in 2017.¹⁴⁵

The LCO's analysis of the impact of the law and of its effectiveness focused on the experiences of persons with disabilities and older adults who are affected by these laws, and that the ultimate intent of their recommendations is to advance the substantive equality of these individuals.¹⁴⁶

According to the LCO, “[c]onsultations for the LCO Capacity Report widely emphasized the social isolation and marginalization often affecting those most deeply affected by this area of law, and the significant implications of this, for any approach to law reform. Broader societal challenges related to the principle of promoting social inclusion and participation for persons with disabilities and older adults are an important context for this project and a challenge for law reform.”¹⁴⁷

The laws in this area are implicitly premised on the ability and willingness of family members to provide supports and assistance as necessary. However, it is important to acknowledge that family members may not always be well-equipped to take on this role.¹⁴⁸ There are situations where family members have clearly exploited a vulnerable individual for their own benefit, but there are also situations where meeting the needs of the individual will create considerable hardship for other family members.¹⁴⁹

Cultural diversity, economic disparities, and gender roles and assumptions must also be taken into account. Gender and culture may affect the personal supports available, who

¹⁴⁵ LCO Final Capacity Report: <http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf>

¹⁴⁶ LCO Capacity Report at p.29.

¹⁴⁷ LCO Capacity Report at p. 31.

¹⁴⁸ LCO Capacity Report at p. 33.

¹⁴⁹ LCO Capacity Report at p.33.

will provide them, and how they are provided. For example, a hierarchical list of substitute decision makers in the *Health Care Consent Act* may conflict with cultural expectations that the eldest son make decisions, causing practical difficulties for healthcare staff.¹⁵⁰

Safeguards must be created to ensure protection from abuse, with a primary focus on ensuring the rights, will and preference of the person. Safeguards must include protection against undue influence, but must also respect the right to take risks and make mistakes.¹⁵¹ Legal structures should promote and protect decision-making practices that enhance autonomy.¹⁵²

Acknowledging the importance of fostering autonomy is only one aspect of a consideration of the appropriate approach to legal capacity, while our society places a high value on autonomy and self-determination, we are all subject to a wide range of legal restrictions aimed at protecting the rights and needs of others or of the collective, or at preventing unconscionable risk. That is, as important as autonomy is, it is always subject to limits, whether practical, social or legal.¹⁵³

The LCO's Final Report noted several areas of concern in the legal capacity, decision-making and guardianship regime in Ontario, including that:

- the system is confusing and complex;
- the system lacks coordination;
- there is a lack of clarity and consistency for capacity assessments;
- there is a need for legal tools that are less binary and more responsive to the range of needs of those directly affected;
- guardianships are insufficiently limited, tailored and flexible;
- individuals, families and service providers need more supports;
- oversight and monitoring mechanisms for substitute decision-makers need to be improved;

¹⁵⁰ LCO Capacity Report at p.36.

¹⁵¹ LCO Capacity Report at p.67.

¹⁵² LCO Capacity Report at p.69.

¹⁵³ LCO Capacity Report at p.76.

- there are significant barriers to capacity assessments under the *Substitute Decisions Act, 1992*;
- there is a lack of meaningful procedural protections under the *Health Care Consent Act, 1996*;
- the rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992* are inaccessible to many Ontarians;
- there is a need for statutory provisions regarding detention of person lacking capacity; and
- the system needs to promote pilots, monitoring, research and evaluation.¹⁵⁴

The LCO recommended “considering whether those charged with implementing the law have been provided with adequate ongoing training and education to enable them to perform their duties in a way that respects the principles, including training and education on the Charter, Human Rights Code and the Accessibility for Ontarians with Disability Act, anti-ageism and anti-ableism. It was the strong view of the vast majority of stakeholders consulted during this project that Ontario’s system falls significantly short in this respect.
.”¹⁵⁵

There is a deficiency in educating the public and the elderly population itself, on the rights of older adults and the appropriateness of seeking legal redress for the wrongs that have been done to them.¹⁵⁶ One of the reasons older adults do not seek justice for wrongs is that they see the law as inaccessible and not something there to assist them. Beverley McLachlin suggests that the answer to this problem “lies in public information and education – information that sends the message that the law is there to assist and protect our society’s senior citizens, information that fosters self-determination and autonomous decision-making, and helps with the ability to resist coercion.”¹⁵⁷

¹⁵⁴ LCO Capacity Report at pp. iv-v.

¹⁵⁵ Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship, Final Report*, (Toronto: March 2017) at pp. 327-328 [“LCO Capacity Report”]

¹⁵⁶ McLachlin at p.128.

¹⁵⁷ McLachlin at p.129. In Canada there are a number of education initiatives that can assist, including the Advocacy Centre for the Elderly, the Canadian Centre for Elder Law Studies, and the Canadian Bar Association Elder Law Section, to name a few.

IMPROVEMENT IN REMEDIES FOR PROTECTION

Beverly McLachlin proposed in her speech that we should think of elder law as a problem of access to justice and that without access to justice, the dignity that is the right of every person will be denied to the older people in our society. McLachlin posited three ways we can promote access to justice for the elderly: 1) specialization to improve legal services to the elderly; 2) legal reform through protective legislation and impact litigation; and 3) education and social sensitization.¹⁵⁸

In particular to Ontario, the LCO Capacity Report also concluded that access to justice and rights enforcement underpin the entire capacity, decision-making and guardianship system. In its consultation research, the LCO repeatedly heard that the current court based system for resolving issues under the SDA was inaccessible to all but a few, and as a result, the rights under the law are frequently not enforced and the promise of the legislation is unfulfilled.

One of the LCO's several recommendations included a recommendation that the Government of Ontario work towards the creation of a specialized, expert tribunal with broad jurisdiction in this area of law, and the ability to provide flexible and holistic approaches to capacity and substitute decision making disputes.¹⁵⁹

Another recommendation was for a mandatory, standard-form Statement of Commitment to be signed by persons accepting an appointment as an attorney, prior to acting for the first time under the appointment.¹⁶⁰

Further, in the LCO report there was an agreement that improved education and access to information about rights and responsibilities was central to effective implementation of the law in this area. The LCO recommended partnership and collaboration between the many institutions that interact with this area of law, with government providing a focal point for co-ordination and strategic development.¹⁶¹

¹⁵⁸ McLachlin at p. 123.

¹⁵⁹ LCO Capacity Report, p.ix.

¹⁶⁰ LCO Capacity Report, p.vii.

¹⁶¹ LCO Capacity Report, p.x.

CONCLUSION

Ageism is not just about age discrimination – ageism must also be about dignity – an aspect of dignity is security. Elder abuse, often stemming from discriminatory attitudes, denies the elderly the security they are entitled to as human beings.¹⁶²

How can the law protect older adults and minimize abuse while still maintaining the human rights of older adults and avoid ageist actions?

Beverly McLachlin made several suggestions, including minimizing the barriers to criminal and civil prosecutions. Changes in the law and education may alleviate some of those barriers. McLachlin also suggested that lawyers and jurists work together to inform the public about the prevalence and illegality of elder abuse: “Our society once swept child abuse under the rug. It must not permit the same thing to happen in the case of elder abuse. The abuse of a vulnerable person is a moral and legal wrong, whatever the age of the victim”.¹⁶³

Older adults not only should be free from ageism and ageist stereotypes, they should be free from financial, emotional, physical and sexual abuse. The law and society need to be vigilant in protecting those that may be vulnerable and susceptible to abuse and undue influence due to mental or physical incapacity. Beverly McLachlin observed that:

Different stages of life are characterized by different needs. The last stage of life is no exception. Among the needs that are critical at this stage are the need to be protected from discrimination, the need for security and protection from abuse, and the need for appropriate care and the need for autonomy. These are critical aspects of an elderly person’s ability to maintain his or her dignity. The law plays a vital role in meeting these needs.¹⁶⁴

Beverly McLachlin concluded her speech by stating:

¹⁶² McLachlin at p.118.

¹⁶³ McLachlin at p.120.

¹⁶⁴ McLachlin at p.122.

What should remain steadfast, however, is our commitment to the principle that every person, regardless of age, is entitled to live in dignity. This means being able to live in security, to be free from discrimination and abuse, and to be entitled to make one's own choices to the maximum degree possible. In achieving these goals, we will need the expertise of economists, social workers, health care professionals, and many others, but the law, and the legal profession, also have an important role to play.

We can build a profession that is sensitive to needs of older people. We can pursue legal reform through legislation and litigation. And we can educate and sensitize the public and seniors themselves in the rights and needs of older demographic.¹⁶⁵

¹⁶⁵ McLachlin at p.131.