

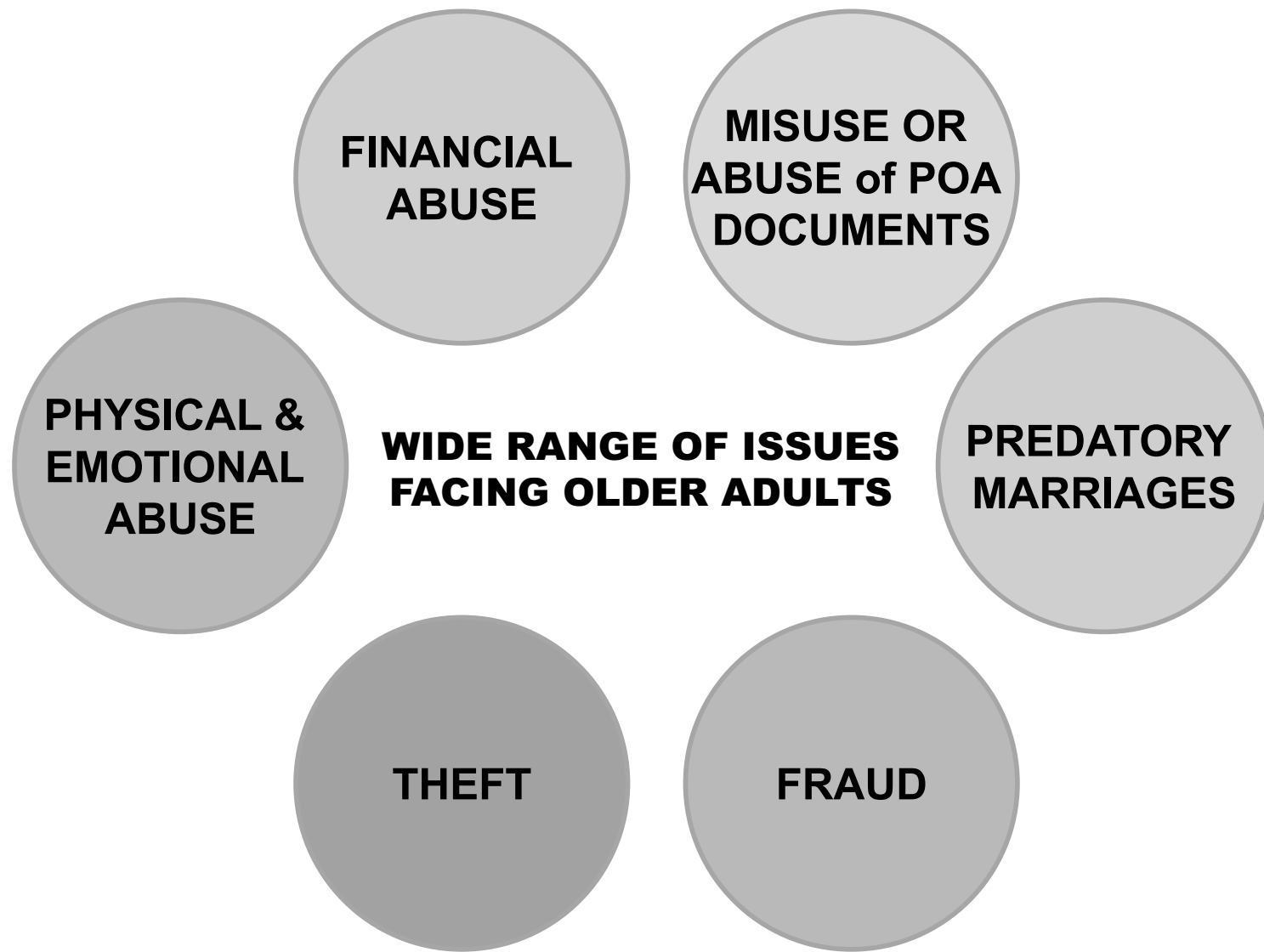
THE IFA 14TH GLOBAL CONFERENCE ON AGEING
AUGUST 7, 2018
CONCEPTS OF AGEISM: ARGUMENTS IN FAVOUR OF
THE NEED FOR PROTECTIONS
MASTER CLASS



DISCUSSION TOPICS

1. When does protectionism become ageism?
2. How can we better protect adults globally from an international human rights and legal perspective?; and
3. What are the appropriate tests for ageism when considering the safety of the older adult versus the protection of autonomy and the rights of the older adult?
 - a) How do we balance societal needs and autonomy?
 - b) Should there be mandatory assessments and if so;
 - c) under what terms, conditions, restrictions, and governance?

Introduction



Introduction

RAPIDLY AGING SOCIETY

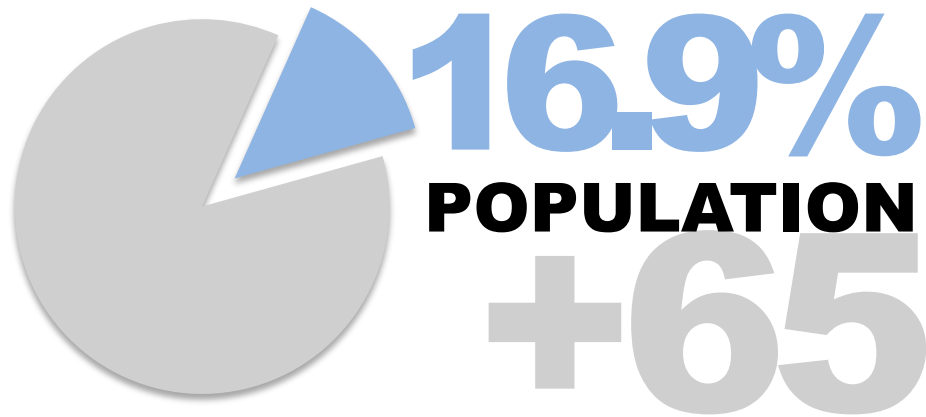


**INCREASE IN MEDICAL ISSUES AFFECTING
COGNITION AND CAPACITY**



**HYPER GROWTH IN SUSCEPTABILITY TO
BECOMING VULNERABLE AND DEPENDENT**

Statistics



12 million
SENIORS
BY 2061

AVERAGE LIFE EXPECTANCY



3/4 
million
LIVING WITH
COGNITIVE
IMPAREMENT

1 in **11**  **>65**
CURRENTLY HAS ALZHEIMER'S
OR RELATED DEMENTIA



Internationally:

2017: 962 million aged 60+

80+ is expected to triple by 2050 –
from 137 million in 2017 to 425 million in 2050

Shift in Family Dynamic

- Family and Societal relationships are changing
- Second , third, or more marriages are increasing
- Growth in later in life common law partnerships (60-64 years old)

COMMON-LAW COUPLES

+14%
2006-2011



13% **FAMILIES WITH CHILDREN ARE**
STEP-FAMILIES
1 or MORE CHILDREN NOT BIOLOGICALLY RELATED

41% **STEP-FAMILIES ARE**
“COMPLEX” FAMILIES
1 CHILD of BOTH PARENTS & 1 CHILD of ONLY ONE PARENT



- Exploitation, financial abuse and undue influence of older adults can occur in the context of:
 - marriage,
 - co-habitation,
 - separation, and
 - divorce
- When does an older adult have the requisite capacity to make these life decisions for themselves?

WHAT IS AGEISM?

LAWS PROHIBITING AGEISM

CANADA

LAWS PROHIBITING AGEISM

INTERNATIONAL

KEY CHALLENGES

Balance protection vs. ageist beliefs

CAPACITY CONCEPTS

An Overview

Capacity Concepts

- What is Capacity?
- Legally everyone is presumed 'capable'
- No single definition



- Capacity is **decision** specific



- Capacity is **time** specific



- Capacity is **situation** specific



- Capacity in general:
 - Ability to understand all the information that is relevant to the decision being made and the ability to understand the possible implications
- Mental disorders not equated with incapacity
- Unwise decision not equated with incapacity

Case Scenario

“Machiavellian Plotting”

- Rift between older adult parents and adult children
- Parents choose to side with one daughter
- Son argues Mother lacked capacity to grant a Continuing Power of Attorney for Property (“CPOAP”) to her husband

- Mother was not capable of ‘sophisticated reasoning’ and unable to manage her financial affairs
- Mother was capable of:
 - taking a taxi,
 - making and keeping medical appointments,
 - buying groceries,
 - managing basic household affairs.
 - understood nature and purpose of POA and had complete confidence in her husband to look after her finances

- Mother was not capable of managing her own money, BUT was capable of granting a CPOAP

Capacity Assessments:

- Balancing of fundamental rights & freedoms with the protection of the vulnerable
- Rights' Advice
- Will not be court ordered lightly
- Law prioritizes the dignity, privacy and autonomy of older adults

CAPACITY ISSUES

With respect to Marriage/Separation/Divorce



Capacity Issues

- Incapacity or diminished capacity may make older adults dependant and vulnerable leading to abuse in their personal relationships
- Capacity plays a key role in decisions re marriage, co-habitation, separation and divorce

Predatory Marriages

- Where unscrupulous opportunists prey on older adults with diminished reasoning ability purely for financial profit



Predatory Marriages

- Traditionally challenged at Common Law by arguing lack of requisite decisional capacity
- Capacity to marry criteria (easily met):
 - Older adult must appreciate the nature and effect of marriage including responsibilities, state of previous marriages and the effect on one's children
 - Yet, may have to have requisite capacity to make personal care and property decisions

Predatory Marriages

- **Characteristics/Hallmarks:**
 - One spouse significantly advanced in age and older than the predator spouse
 - Susceptible to exploitation/influence because of loneliness loss of spouse, illness, physical disability, incapacity etc.
 - No children of the union
 - One spouse finances the relationship
 - Alienation, secrecy, sequestering etc... from family/friends

Case Scenario

“84 Year Widower and 31 Year old Waitress”

- Terminally ill with prostate cancer, castrated, depressed, living in a retirement home
- Marries waitress and signs new Will and CPOAP
- Court: Had requisite decisional capacity to marry, but not to execute Will
- “willing victim”?
- Wife inherited through intestacy legislation since marriage revokes a Will in Ontario

Case Scenario

“The Caregiver Who Just Wanted To Take”

- Elderly widower and younger caregiver
- Married under pretense he would not be put in a home
- New Will benefiting caregiver
- Transfer of house to caregiver's son
- The Outcome: With help of neighbour obtained a divorce and house transfer and others were set aside
- Severely affected by predatory actions
- “lovely and cheerful” to “downcast and downtrodden”

Predatory Marriages

- Watch for red flags of a predatory marriage/relationship but all situations need to be examined on own unique facts



Separation

- When does an older adult not have decisional capacity to form the intention to separate from his or her spouse?

Case Scenario

“The Abusive Husband”

- Older adult admitted to hospital with injuries to her body
- Medically certified incompetent
- Abused by husband, wants to remain in care home and not live with husband
- BUT could not name the care home or address, forgot most things, could not file a tax return etc.

Separation

- Decision to separate is the simplest act requiring the lowest level of understanding: A person must know with whom he or she does not want to live
- Wife wanted to live separate and apart from her husband

Divorce

- **Capacity to divorce?**
- Still simple, but requires a bit more understanding than the decision to separate
- Desire to *remain* separate and to no longer be married to one's spouse
- Understand nature and consequences
- An undoing of the contract of marriage

Case Scenario

“Younger 2nd Wife vs. Adult Children”

- 85 year old man wanted to divorce his 55 year old second wife
- Wife: Husband still loves me, being pressured by his greedy children
- Court: Husband had an independent intention to divorce his wife, severed joint ownership of house etc.



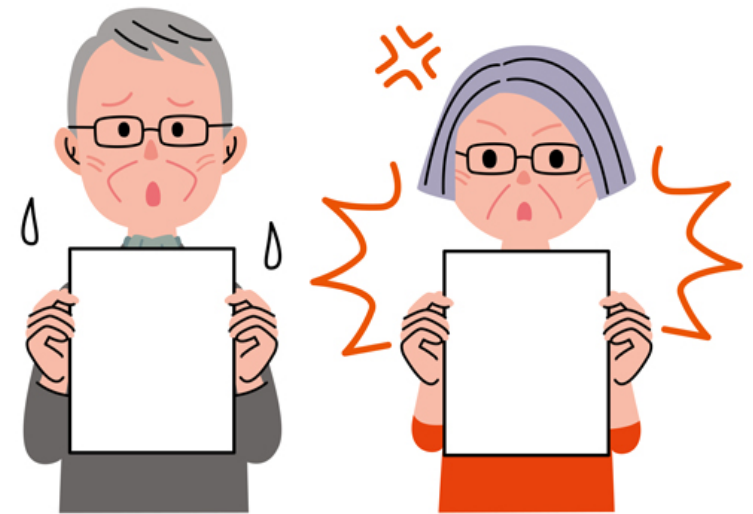
FINANCIAL ABUSE

Of Older Adults

- **Financial Abuse** – most commonly reported type of abuse:
 - Procuring and use of joint accounts
 - Fraud/Forgery
 - Abuse and Misuse of CPOAP
 - Sharing home without payment
 - Stealing/transferring assets & property etc.
 - Transfer of Real Property without Consideration

POA Abuse and Misuse:

- Used to protect vulnerable and minimize conflict
- However, also may cause rather than prevent conflict
- Used abusively to cause harm through fraud, neglect and depletion of wealth



Continuing Power of Attorney for Property (“CPOAP”):

- Effective immediately
- Extensive powers-very POWERFUL tool!
- Must choose attorney(s) wisely
- Trust, Honesty, Integrity-most important consideration
- Fairness to children – ill founded consideration

Case Scenario

“Go-Karts for Mother”

- Mother neglects to tell one son he is her joint attorney with his brother
- Brother invests \$2 million of mother's money into dubious business ventures – go-kart businesses
- Loses money
- Court removes brother as attorney and orders him to pay back \$

Jointly Held Assets

- Transfer of real property into joint names to avoid probate
- Pay the probate!
- Joint bank accounts to assist with banking or also to avoid executing a Will
- “Rights of Survivorship”? Or Presumption of Resulting Trust?

- Presumed to be held in trust by adult child for parent or parent's estate
- UNLESS evidence of intention that it was a gift

Case Scenario

“Of Course Mom Wanted Me to Have Her House”

- Older adult transfers house into joint names with daughter
- Daughter sells house and keeps all proceeds when mother dies – Will says grandchildren were to receive money
- Court: Mother did not gift house to daughter



CIVIL AND CRIMINAL REMEDIES

Case Examples

- Do not always attract criminal charges-due to nature of relationship and issues of capacity
- Victim may be unwilling to report a loved one
- Act may not be criminal in nature, rather civil in nature
- Civil prosecutions are expensive and time consuming
- Incarceration v. restitution?

Case Scenario

“The Son Who Tried to Steal his Mom’s House”

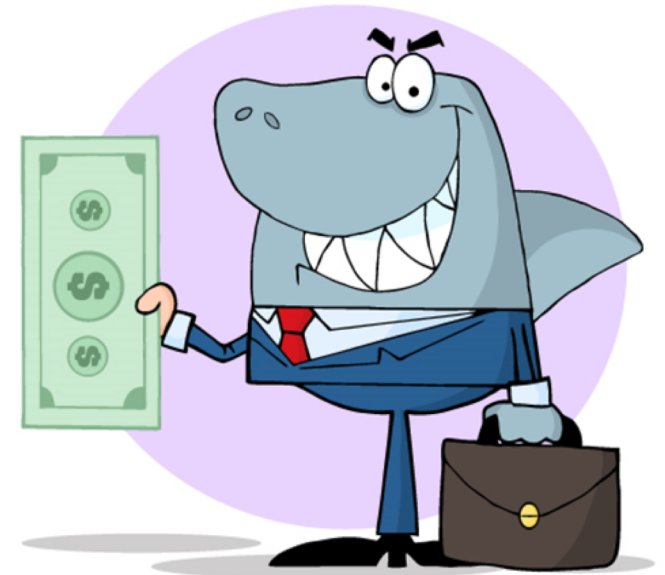
- After father died, took mother to registry office
- Transferred title into joint names
- Mother thought she was signing a CPOAP
- Mother’s English was limited
- Son refused to transfer house back
- No ILA

- Court:
 - Transfer set aside
 - A “textbook example” of child unduly influencing parent
 - Mother required independent legal advice

Case Scenario

“The Crooked Lawyer”

- McMichael Art Collection
- Night her husband died – consoled her and had her sign a CPOAP, he was attorney for property
- Used her assets as his own while she was still alive- depleted estate
- Did not notify charity after death/executor



- Expensive dinners
- New clothing
- Limousines
- Sailing trips to Bermuda
- Used her BMW
- Put her valuable art collection on his own walls
- Lost art etc.

- Paid himself over \$350,000 CAD and \$85,000 USD
- Court ordered money to be paid back
- Incarcerated-failed to account-contempt of court
- Died shortly after case (in a Hot Tub!?)



Criminal Proceedings:

- Theft by power of attorney (s.331)
- Theft (s.322)
- Criminal Breach of Trust (s.336)
- Forgery (s.366)
- Extortion (s.346)
- Fraud (s.386-388)
- Failure to provide the necessaries of life (s.215)
- Criminal negligence (s.219) etc.

Sentencing Principals:

- S.718
- Age and / or disability
- Abusing position of trust
- Lengthier sentence

Case Scenario

R v Bernard 2015 (Surrey, BC)

- Window washer weaseled his way into widower's home
- Withdrew \$500/day from Visa
- Left victim in deplorable state, malnourished and needed hospitalization
- Sentence: 4 years for fraud

Case Scenario

R v Kaziuk 2011 (Oakville, ON)

- Used a CPOAP granted by mother to take out mortgages on her properties
- Defaulted and left her penniless and homeless
- Sentenced to 10 years but reduced on appeal to 8 years



“he would rip off the wings of angels in heaven and sell them to the devil for his own gain”

Case Scenario

***R v Taylor* 2012 (Burlington, ON)**

- Elderly frail woman executed CPOAP in favour of her caregiver
- Caregiver obtained a bank card and withdrew \$126,000.00
- Sentenced to 21 months in prison

Case Scenario

***R v Owen* 2014 (Ottawa, ON)**

- Forged a deed and transferred parking space into his own name
- Thought he was transferring entire condo
- Financial abuse of elderly a factor in his sentence
- 18 months

Case Scenario

***R v Davy* 2015 (Orillia, ON)**

- Daughter and son-in-law attorneys for personal care of elderly mother
- Charged with failing to provide the necessities of life
- Cat urine, filth & feces, squalor, deplorable conditions
- Clear case of elder abuse
- Sentenced to 12 months each

Case Scenario

***R v. Hooyer* 2016 (Simcoe, ON)**

- Theft by a person holding a power of attorney & fraud
- Over \$300,000 stolen – bought himself a Hummer, a friend a Mustang, etc.
- Claimed he was “told he could use the money as his own”
- Fiduciary duties & Obligations
- 2 years less a day & 6 months concurrently (plus restitution)



Case Scenario

***R v Curreri* 2016 (Toronto, ON)**

- Son charged with committing fraud over \$5,000
- Transferred title of 8 properties from his 96 year old father's name to others and mortgaged all 8 properties
- Accomplice: Legal assistant at law firm
- Both convicted
- LSUC found lawyer involved was deceived, he admitted to professional misconduct – fined \$25,000.00

Case Scenario

R v. Reynolds 2016 (Victoria BC)

- Daughter stole \$300,000 from elderly mother's bank account
- Cocaine addiction, lavish trips and expensive lingerie
- Mother trusted her completely
- 30 months incarceration

Case Scenario

R v. Bruyns 2016 (Oakville, ON)

- Daughter “loaned” herself \$\$ under POA
- Caused father to default on payments
- “honest but mistaken belief?": No
- 18 months probation, removal as attorney



UNDUE INFLUENCE

An Overview

Undue Influence

- Equitable principal used by courts to set aside or invalidate transactions that have been obtained by undue influence or coercion
- Ability of one person to dominate the free will of another
- Donor's mind falls short of being wholly independent

- **Actual Undue Influence:** force, cheats, manipulates
- **Presumed Undue Influence-by relationship:** where potential for domination inheres in relationship itself
- Examples – solicitor and client, parent and child, guardian and ward etc.
- BUT each relationship needs to be examined

Case Scenario

“The Domineering Daughter”

- Daughter influenced her mother to transfer all of her assets (house and investments) into joint names
- Other two children inherited nothing
- Court found relationship between older mother and daughter had a potential for domination – gave rise to presumption of undue influence

- Mother relied on daughter's judgment
- Daughter had dominant personality
- Husband had looked after finances – now relied on daughter
- Always took daughter's advice
- Daughter wrote letters on her behalf
- Would never contradict daughter



RED FLAGS

A Summary

Case Scenario

“The Sketchy Son”

- Older adult named one of her sons as attorney
- Son transferred mother's house into his name using CPOAP for \$2
- Transferred \$175,000 into his own name
- Brothers asked Court to remove him as attorney and set aside transfers
- Court agreed

- Court's indicators of potential for undue influence:
 - Dependent
 - Vulnerable
 - Socially isolated
 - Recent family conflict
 - Recent bereavement
 - A new Will inconsistent with prior Will

Case Scenario

“The Bullying Beneficiary”

- Another undue influence case – pressure to change a Will
- Older adult executed new Will benefiting only one family member, excluding others

■ **Court's indicators of Undue Influence:**

- Increasing isolation
- Dependence
- Pre-death transfers
- No reason or explanation
- Beneficiary chose lawyer
- Beneficiary conveyed instructions
- Afraid

- **Summary of Other Red Flags and Indicators:**
 - Hesitation or confusion
 - Difficulty remembering details
 - Cognitive difficulties
 - Recent / Significant medical events
 - Physical impairments
 - Changes in living arrangements
 - Unexplained or sudden inability to pay bills

- Unexplained or sudden withdrawals of money
- Poor living conditions in comparison with assets
- Changes in banking patterns
- Changes in appearance
- Confusion or lack of knowledge about financial situation
- Unexplained disappearance of possessions (jewellery, silverware)

- Necessaries of life being denied by attorney (food, medication, assistive devices)
- Being overcharged for services
- Denying an older adult's right to make financial decisions
- Dependent upon beneficiary
- Socially isolated
- Recent family conflict or bereavement
- Move to a new city

- Substantial pre-death transfers
- Use of a lawyer previously unknown to and not chosen by older adult
- Any evidence of fearfulness or reluctance to be around a certain person

Capacity and Decision Making Statutory Protection of Older Adults

- Substitute Decision Making: A Form of Protection
- Protection: Summary of Strengths
- Deficiencies: Summary of Weaknesses
- Improvement in Remedies for Protection

- 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

- 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”)

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

- Education levels have a close relationship with a number of indicators of well-being in older adults, including health and social isolation. 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 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. Older women are more likely to have lower levels of educational attainment than their male contemporaries

- 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

- 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”
- 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 concerns as follows:

- 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

- The SDA in its final form, addresses two overarching areas of incapacity: (1) incapacity in respect of financial decisions (referred to as “property” in the SDA); and (2) incapacity in respect of personal care decisions
- 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.
- 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. 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 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 March 2017, 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

- 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 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

- 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
- 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

- 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

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

CONCLUDING COMMENTS



- Theme: Balancing older adult's autonomy & privacy with need to protect society's vulnerable
- Not an easy balancing act
- Knowledge, Information & Education are key

- 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

- 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

- 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:

- Beverly McLachlin concluded her speech by stating:

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