



ONTARIO POLICE SEMINAR

ELDER ABUSE: CIVIL AND CRIMINAL REMEDIES

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1. INTRODUCTION

When abuse of older adults is suspected, remedies (to correct the wrong or punish the perpetrator) can be sought under provincial laws (such as legislation governing property, guardianship, capacity, health, and social services), as well as under federal laws, including under the *Criminal Code* of Canada. Civil proceedings can be commenced in addition to criminal proceedings and the two sets of proceedings can continue at the same time, or, civil remedies can be pursued alone as a means of recovering property, seeking restitution and obtaining damages.

Available civil and criminal remedies are not well understood. The differences between the two procedural avenues, and when one type of remedy may be more suitable than another will be explored as well as contextually why we need these remedies.

2. ELDER ABUSE: OVERVIEW

Elder abuse can take many forms, including financial, physical, psychological (mental or emotional) and sexual abuse. Neglect can also be an overlooked form of abuse.

Elder abuse often occurs at the hands of someone familiar: a family member, friend, or caretaker. In fact, in 2019, Statistics Canada reported that approximately one third of reported cases of physical violence against older adults were perpetrated by a family member.¹ Other perpetrators can include other seniors who reside with the older adult victim in a nursing or retirement home.

Elder abuse is also often unreported for a variety of reasons which will be explored shortly, including stigmatization, embarrassment, or lack of awareness or ability to vocalize concerns. As elder abuse is often propagated by familiar persons, there is often the added concern that reporting abuse will cause trouble or eliminate the support which the older adult is reliant on. In 2019, Statistics Canada reported that the rate of police-reported

¹ Shana Conroy, "Family violence in Canada; A statistical profile, 2019" (2 March 2021), online: *Juristat* <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00001-eng.pdf?st=cUAIJLLU>>.

violence against seniors aged 65 to 89 in Canada was 227 per 100,000 people, and 55% of victims were men.²

Older adults have been particularly vulnerable during the COVID-19 pandemic, which has exacerbated an already upward trend of elder abuse.³ As a result of the global crisis, restrictions were imposed throughout the country which led to increased isolation of senior populations, and decreased access to medical and caregiving services. Given the confluence of factors caused by the pandemic, there was a noticeable shift in the social proclivity of all populations, but especially the older adult population which is often reliant on social services and social programs. While comprehensive data about elder abuse during the pandemic is still being studied, it seems that COVID-19 created the perfect breeding ground for abusive relationships to thrive. One organization noted that calls to their 24-hour seniors safety line rose by 250%, while two other organizations noted a ten-fold increase in calls since the outset of the pandemic.⁴

According to the Canadian Department of Justice, financial abuse is the most commonly *reported* type of abuse against older adults.⁵ However, the Department of Justice also commented on the difficulty in estimating the accurate prevalence and incidence of elder abuse in Canada due to obvious factors associated with under-reporting.⁶ Financial abuse can look like anything including improper use of bank accounts and/or joint bank accounts, forgery or abuse involving a Power of Attorney document, sharing an older adult's home without payment of, or sharing in, expenses, misuse, appropriation, or theft of an older adult's assets, transfer of real property, ATM fraud and other.⁷ Often financial

² *Ibid*, Shana Conroy, "Family violence in Canada; A statistical profile, 2019".

³ Isobel Mackenzie, "*Hidden and Invisible: Seniors Abuse and Neglect in British Columbia*" Office of the Seniors Advocate British Columbia, December 2021, online: <<https://www.seniorsadvocatebc.ca/app/uploads/sites/4/2021/12/Hidden-and-Invisible-Report.pdf>>.

⁴ House of Commons, "*Elder Abuse: Identifying the Issue and Combatting All Types of Abuse: Report of the Standing Committee on Justice and Human Rights* (June 2021) (Chair: Iqra Khalid), online: <<https://www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11454619/justrp10/justrp10-e.pdf>>.

⁵ Government of Canada, "Backgrounder Elder Abuse Legislation" (15 March 2012), online: <<https://www.canada.ca/en/news/archive/2012/03/elder-abuse-legislation.html>>.

⁶ *Ibid*, Government of Canada, "Backgrounder Elder Abuse Legislation".

⁷ Public Health Agency of Canada, "Facts on Financial Abuse of Seniors" (2009); see also, Government of Canada, "Elder Abuse: It's Time to Face the Reality" (July 26, 2012), online: <[2](https://www.canada.ca/en/public-</p></div><div data-bbox=)

abuse is conducted by a family member upon whom the older adult is dependent and who is potentially influenced by or controlled and victimized.⁸ Financial abuse can also be inflicted by a caregiver, service provider, or other person in a position of power or trust (where there is a power imbalance).⁹ Financial abuse often occurs in connection with other types of abuse. For example, an attorney under a power of attorney document may refuse to provide an older adult with funds to pay for groceries or provide for other necessities of life.

According to the World Health Organization, “elder abuse” is:

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.¹⁰

The United States’ Centers for Disease Control and Prevention (the “CDC”) defines elder abuse as:

An intentional act or failure to act that causes or creates a risk of harm to an older adult.¹¹

The CDC defines an “older adult” as “someone age 60 or older” and notes that the older adult population is growing faster in the United States than are younger populations. Accordingly, the CDC advocates for more research in order to uncover the causes for, and solutions to, violence against older adults.¹²

health/services/health-promotion/stop-family-violence/prevention-resource-centre/prevention-resources-older-adults/elder-abuses-time-face-reality.html>.

⁸ Ontario Provincial Police, *Tip Sheet on Abuse of Older Adults*; see also, Elder Abuse Prevention Ontario, *Reporting*, online: <<https://eapon.ca/reporting/>>.

⁹ Advocacy Centre for the Elderly, “Community Training Manual”, Third Ed., December 2002, online: <[http://www.advocacycentreelderly.org/appimages/file/eamanualsec1\(2\).pdf](http://www.advocacycentreelderly.org/appimages/file/eamanualsec1(2).pdf)>.

¹⁰ World Health Organization, “Elder Abuse” (June 13, 2022), online: <<https://www.who.int/news-room/fact-sheets/detail/elder-abuse>>.

¹¹ Centers for Disease Control and Prevention, “What is Elder Abuse” (June 2, 2021), online: <<https://www.cdc.gov/violenceprevention/elderabuse/definitions.html>>.

¹² *Ibid*, Centers for Disease Control and Prevention, “What is Elder Abuse”.

Furthermore, a consistent definition for elder abuse would also be helpful in combatting violence against older adults. Unfortunately, elder abuse has been (1) poorly or imprecisely defined, (2) defined specifically to reflect the unique statutes or conditions present in specific locations (e.g. states, counties or cities), or (3) defined specifically for research purposes. As a result, a set of universally accepted definitions does not exist.¹³

Elder Abuse includes:

- **Misuse of a Power of Attorney Document:** Misusing a Power of Attorney for Property document, which is a legal document where a person (the “grantor”) gives another (the “attorney”) the legal authority to make financial decisions on the grantor’s behalf;
- **Theft and Fraud:** Stealing an older adult’s money, pension cheques, or possessions, and/or committing fraud, forgery or extortion;
- **Shared Residence:** Sharing an older adult’s home without paying rent, or a fair share of the expenses;
- **Undue Influence:** Unduly exerting pressure on an older adult in order to:
 - sell personal property;
 - invest or take out money;
 - buy alcohol or drugs;
 - make or change a testamentary document;
 - begin legal documents that are not understood;
 - gift money to relatives, caregivers or friends; and/or
 - engage in paid work to bring in extra money;
- **Psychological Abuse:** Isolating an older adult, or threatening of isolation and withholding of social and familial relationships in order to gain control or leverage a benefit (e.g., an adult child who threatens their older adult parent that he or she

¹³ Ontario Human Rights Commission, “Elder abuse & neglect”, online: < <https://www.ohrc.on.ca/en/time-action-advancing-human-rights-older-ontarians/elder-abuse-neglect>>.

cannot see their grandchildren unless they guarantee a loan or give the adult child money;

- **Failure to Provide the Necessaries of Life:** An attorney under a Power of Attorney document is a fiduciary who is obligated to provide the grantor with the necessaries of life, that include for example, shelter, food, medication, and assistive devices;
- **Predatory Marriages:** A predatory marriage is where a person marries an older adult in order to gain access to their money and assets; and/or
- **Violence and/or Abuse:** Domestic violence, physical or sexual abuse.¹⁴

SOME INDICATORS OF ABUSE ON AN OLDER ADULT INCLUDE...

- ❖ Physical signs of abuse and/or unusual/unexplained accidents or injuries
- ❖ Changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without permission or consent
- ❖ Unexplained or sudden inability to pay bills
- ❖ Unexplained or sudden withdrawal of money from accounts
- ❖ Poor living conditions in comparison to the value of the assets
- ❖ Changes in banking patterns
- ❖ Changes in appearance or social behaviours
- ❖ Controlling spending
- ❖ Confusion or lack of knowledge about a financial situation and execution of legal documents
- ❖ Being forced to sign multiple documents at once, or successively

¹⁴ Generally, for more information on the particulars of Elder Abuse, see the resources available from the Advocacy Centre for the Elderly ("ACE"), online: <http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php>.

- ❖ Being coerced into a situation of overwork and underpay
- ❖ Unexplained disappearance of possessions (e.g., lost jewelry or silverware)
- ❖ Changes in Power of Attorney documents
- ❖ Being overcharged for services or products by providers
- ❖ Being denied the right to make independent financial decisions¹⁵

The most frequent perpetrators of abuse on older adults are their adult children, their service providers, strangers, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability purely for financial gain).

Frequently, adult children who harm their parents have various health concerns themselves, including issues related to mental health, substance abuse, social isolation, and employment and financial dependency on the older person.¹⁶ The abuser may rationalize the abuse thinking that they deserve the benefit of the victim's money as they are the older adult's child.

As mentioned, older adult abuse is under-reported for several reasons and often because the older adult:

- feels guilt, blameworthiness, shame, or embarrassment for having been victimized;
- is fearful of the perpetrator, or has a fear of the police or other authorities;
- is dependent upon the perpetrator for physical well-being;

¹⁵ For more information on the indicators of elder abuse, see generally, Elder Abuse Prevention Ontario, "Learn the Facts", online: < <https://eapon.ca/learn-the-facts/>>.

¹⁶ Laura Tambyln Watts, "Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" Canadian Centre for Elder Law (March 2013), online: CanLII <<https://canlii.ca/t/27wk>>.

- wants to protect the abuser, especially if they are a family member;
- feels that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is family or is a friend;
- can minimize, rationalize or deny the abuse altogether;
- may not even recognize the abuse;
- may not be able to report the abuse, physically or otherwise, even if they have a desire to (e.g., the victim may be suffering from dementia or lack the requisite mental capacity to report the abuse);
- is worried about stigma on the family; and/or
- is resistant to having strangers in their home to provide services that are otherwise provided for by the abuser.

Notwithstanding the above, the Office of the Seniors Advocate in British Columbia recently released a paper detailing the results of a systemic review of seniors' abuse and neglect in British Columbia.¹⁷ This paper highlights that previously made reports of abuse and neglect by people 65 and over have increased significantly in the past six years and showed increasing reporting numbers with respect to various types of abuse. The paper described a 49% increase in reports of abuse, neglect and self-neglect to health authorities (Designated Agencies), a 69% increase in reports of victims of violent crime to the RCMP, an 87% increase in reports of physical abuse to the Vancouver Police, a 49% increase of financial abuse to the Vancouver Police, a 30% increase in reports of abuse to bc211, and a 5% increase in reports to the Seniors Abuse and Information Line.

Furthermore, the paper noted concerns regarding the lack of public awareness, a fragmented reporting and response system, gaps in service, and the need for training for those working with seniors in the community, and made five recommendations to

¹⁷ *Supra*, note 3, "Hidden and Invisible: Seniors Abuse and Neglect in British Columbia".

undertake to remedy these concerns and attenuate the rise and consequences of elder abuse. This is a chief concern currently in British Columbia given the increasing aging population.

3. CIVIL & CRIMINAL REMEDIES

Once elder abuse is reported or discovered, there are at least two avenues that can be followed in pursuit of a remedy: a civil proceeding in court (i.e., lawsuits between private parties) or a criminal proceeding (i.e., where an individual is charged under the *Criminal Code*¹⁸ by the Crown).

While criminal prosecution is a possibility in the context of elder abuse, it is not always an ideal response for a variety of reasons: prosecutions are often difficult since the victim may be reluctant to cooperate in a prosecution of a loved one; the older adult victim may be in poor health; the prosecution takes so long that the victim dies before the case goes to trial; or, the abuser may be the only significant person in the victim's life, and as such, to report them or testify against them would result in loneliness and pain from the perceived consequences.

For a number of reasons, financial abuse of older adults does not always attract criminal charges. A victim may be unable or unwilling to extricate themselves from the presence of undue influence and may refuse ultimately to report a loved one, or care provider to the police. This is especially true in circumstances where the older adult relies on the perpetrator for care and needed assistance.

In some cases, the police may even decline to investigate at all on the basis that such issues may *appear* not to be criminal in nature, but rather thought to be *civil*. We seek to demonstrate there are several sections of the *Criminal Code* that may well be underutilized due to this apparent misperception that such matters are best suited to civil recourse rather than criminal.

While anyone can commence a civil action (as opposed to relying on the Crown to pursue charges), there are still many barriers to overcome in order to achieve justice for victims

¹⁸ *Criminal Code*, RSC 1985, c.C-46.

in civil courts. Often, civil remedies are only available to those who can afford this costly process. Hiring a lawyer is expensive. Civil litigation can also potentially take many years, which poses a practical problem for an older adult plaintiff who may not have the luxury of time. In certain situations, if the elements can be met under an applicable section of the *Criminal Code*, it may well be more appropriate for criminal remedies to be explored and pursued.

There are a number of federal and provincial/territorial laws that may also apply to abuse of seniors. Federally, besides the *Criminal Code*, privacy legislation is also relevant. Additionally, older adult abuse has been addressed provincially through adult protection and guardianship legislation, legislated protection for adults living in residential care, domestic violence legislation, and human rights legislation.¹⁹

CIVIL REMEDIES

Civil remedies are mainly about restitution, meaning placing the victim back into the place he or she would have been had the wrongful act never occurred. In other words, to have the perpetrator pay back the money they took and face an imposed punitive cost consequence (this is also known as “damages”). While there may well be some element of restitution in criminal cases, the guilty perpetrator would likely be sentenced to jail, probation, or some other punitive outcome that may not include a return of the taken money. Furthermore, in some civil decisions, courts have signaled their willingness to order custodial sentences where necessary, especially in breach of trust cases. Another remedy available to a civil court is to make a “declaration” that real property, or a bank account, for example, beneficially belongs to the older adult, where the perpetrator wrongfully assumed control of it.

In a civil court proceeding, the plaintiff (i.e., the older adult/victim) must use evidence to prove on a “balance of probabilities” (i.e. more likely than not) that the perpetrator caused the harm, as opposed to the criminal standard of proof, being “beyond a reasonable doubt”. This difference in evidentiary requirement is one way to determine which remedial

¹⁹ See Appendix “A” to this paper for a list of provincial/territorial legislation.

route would be more appropriate: if the evidence is not available to prove a crime occurred on the higher criminal standard, being “beyond a reasonable doubt”, then the civil route with the lower standard, being “on a balance of probabilities”, may well be more suitable.

Lawyers practicing civil litigation often see two types of financial elder abuse that can be remedied in the civil courts:

- (1) **Breach of fiduciary duty** by a substitute decision maker. For example, in British Columbia, someone who is acting as an attorney under a Power of Attorney document, or under an Enduring Power of Attorney document, and making financial or property decisions on behalf of the grantor, is a fiduciary²⁰ and must fulfill certain ethical, moral and legal duties/obligations. For reference, the duties of an attorney are codified in the *Power of Attorney Act*²¹. Also, a representative under a Representation Agreement, made pursuant to the *Representation Agreement Act*²², who makes health care and personal care decisions, or “provides routine management of the adult’s financial affairs” must also fulfill certain ethical, moral and legal duties/obligations.²³ These statutory provisions exist alongside parameters established in the common law that govern a fiduciary’s actions.²⁴ In Ontario, someone who is acting as an attorney under a Power of Attorney for Property, or under a Continuing Power of Attorney for Property must also fulfill certain ethical, moral and legal duties/obligations. That attorney’s actions are fiduciary in nature and are governed legislatively by the *Substitute Decisions Act, 1992*²⁵.

²⁰ See *Lau v Lee* (1994) 49 ACWS (3d) 647 (BCSC), aff’d [1996] BCJ No 1667 (CA); *McMullen v Webber et al*, 2006 BCSC 1656 at para 51.

²¹ *Power of Attorney Act*, RSBC 1996, c 370, s 19.

²² *Representation Agreement Act*, RSBC 1996, c 405.

²³ See Part 3 of the *Representation Agreement Act*, RSBC 1996, c 405, “Duties, Powers and Liability of Representatives and Monitors”, sections 16 – 26, and the *Representation Agreement Regulation*, BC Reg 199/2001.

²⁴ See for example, *Andreasen v Daniels-Ferrie*, 2001 BCSC 1503, at para 27.

²⁵ *Substitute Decisions Act, 1992*, SO 1992 c 30.

- (2) **An “inadvertent” transfer of assets**, meaning, the transfer of money, real property (e.g., houses, land, condos, cottages), property rights, or beneficial rights, by a vulnerable adult to another person. Some ways this happens is through an outright transfer to another, the transfer of property into joint names, or a “miscommunication” over a “loan vs. gift”. The perpetrator, for example, argues the loan was a gift, yet, the victim insists it was a loan. Or an abuser obtains rights to a vulnerable adult’s property through a predatory marriage. The abuser, for example, preys on someone who lacks capacity, or unduly influences them into marriage, so they can appropriate all the property rights of their older adult spouse.

The Power of Attorney Document

Power of Attorney documents differ as between jurisdiction. For example, the below canvasses the differences and similarities as between Power of Attorney documents in British Columbia and Ontario.

POWER OF ATTORNEY DOCUMENTS IN BRITISH COLUMBIA

❖ General Power of Attorney

becomes effective once signed by the person giving the power of attorney (the “donor”) but ends on incapacity, revocation or death of the grantor

❖ Limited Power of Attorney

is similar to the General Power of Attorney but it is used for a specific purpose and/or limited periods of time

❖ Enduring Power of Attorney

the most common form of Power of Attorney document, where it is active once signed and continues to be effective if the donor becomes incapable but ends on revocation or death

❖ **Springing Power of Attorney**

does not become effective until the donor is incapable (or another specified trigger) but ends if the donor regains capacity or dies

In British Columbia, Enduring Power of Attorney documents (“**EPOAs**”) are the more popular document for advance planning.

In Ontario the terminology surrounding Power of Attorney documents differs slightly. For example, the person appointing the attorney under a Power of Attorney document is called a “grantor” rather than a “donor”. And, while Ontario also has General and Limited Power of Attorney documents, it is a *Continuing* Power of Attorney for Property (“**CPOAP**”) that Ontarians use to make sure that their financial affairs are looked after at a time when they (being the grantor) can no longer look after their affairs alone, either temporarily, as agent, and/or permanently when incapable. Much to the surprise of many, the CPOAP is effective immediately upon execution unless there is a provision or “triggering” mechanism in the document itself which says that it is only to come into effect on a certain date or upon a certain event, such as the incapacity of the grantor.

The powers granted to an attorney acting on behalf of an incapable person are extensive. An attorney operating under an EPOA in British Columbia or a CPOAP in Ontario has the power to do anything on behalf of the donor/grantor that the grantor could do themselves if capable, except make a Will. These powers are subject to legislative governance and various conditions imposed by the common law.

In British Columbia, the *Power of Attorney Act*²⁶ governs, setting out the powers conferred on attorney by way of an EPOA,²⁷ and particularizes the obligations and duties of an attorney under an EPOA.²⁸

Civil Remedies Regarding Power of Attorney Documents

When there is an abuse of the powers granted under a Power of Attorney document, there are several legal remedies available in the civil litigation system, including removal of the attorney, requesting that the attorney account, setting aside impugned transactions, and/or repayment or restitution of money taken from the donor.

Removal of Attorney

In British Columbia, if an attorney under a Power of Attorney document abuses his or her power and the donor is incapacitated, one remedy is to ask the civil court to declare the donor to be incapacitated and appoint a committee of estate, under the *Patients Property Act*²⁹, to make financial and legal decisions for the incapable donor, or a monitor to oversee the attorney's actions on behalf of the donor. The appointment of a committee, whether it is a family member or the Public Guardian and Trustee, cancels the Power of Attorney document.

Under section 34 of the *Power of Attorney Act*, a concerned person may make a report to the Public Guardian and Trustee regarding any abuse or undue influence by an attorney. The Public Guardian and Trustee must then review the report and decide upon next steps, which could include conducting an investigation or applying for a court order to terminate all or part of an EPOA, etc.³⁰

²⁶ *Power of Attorney Act*, RSBC 1996 c 370.

²⁷ *Ibid*, *Power of Attorney Act*, ss. 20-21.

²⁸ *Ibid*, *Power of Attorney Act*, s. 19.

²⁹ *Patients Property Act*, RSBC 1996, c 349.

³⁰ See *British Columbia (Public Guardian and Trustee) v Ferrier*, 2017 BCSC 2142.

Further, any person who makes a report to the Public Guardian and Trustee, may also apply to the court for various remedies, including an order terminating the EPOA or a declaration that the EPOA and all actions done under it are void.³¹

Removal of an attorney, however, is often a more extraordinary remedy. Not every mistake or error by an attorney should result their removal. Borrowed from the law of trusteeship, the Supreme Court of British Columbia has held that there is a certain degree of mistake or neglect of duty that must be met in order to remove a fiduciary, which is tantamount to actions or omissions by the fiduciary which endanger the subject (here the donor), or which show a lack of honesty, reasonable fidelity, or proper capacity to execute the fiduciary's duties.³² In its analysis, the Court will focus on the best interests of the donor.

In Ontario, the *Substitute Decisions Act, 1992* prescribes the court procedure for holding an attorney accountable for its actions, and allows for a court to order that an attorney be removed and, further, can prohibit them from acting as an attorney under a Power of Attorney document.³³

Order to “Account” (i.e., Produce Evidence of How the Money was Spent)

One civil remedy to address any money wrongfully taken by an attorney under a Power of Attorney document is to ask the civil court to order an accounting of how the donor/grantor's money was spent. The attorney would need to provide a tracking of all transactions undertaken for the donor/grantor (i.e., to provide financial documents and back-up to show how he or she was spending the money). This process is called an “accounting”.

The duty to account arises out of an attorney's *fiduciary* obligation to the donor/grantor, as their agent, to exercise reasonable care, as would a typical person managing their own

³¹ *Supra*, note 26, *Power of Attorney Act*, s 36(5).

³² *Putman v Putman*, 2021 BCSC 1700, at paras 105-6.

³³ See generally, *supra* note 25, *Substitute Decisions Act, 1992*.

affairs, in making decisions that are not contrary to the interests of the donor/grantor.³⁴ This long-standing standard of care for an attorney has now been codified in section 19 (1)(d) of the *Power of Attorney Act*, and in greater detail in sections 2(1) and (2) of the *Power of Attorney Regulations*³⁵, that provide robust record keeping obligations on those acting under an EPOA. Additionally, the duty to account can also be found in case law.³⁶

Not every breach of duty, generally, equates to a breach of fiduciary duty. A breach of fiduciary duty is a specific type breach of loyalty to the donor/grantor, including for instance, where the fiduciary is “acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith”.³⁷

In British Columbia only the donor of the authority, or their estate, may apply to have the attorney provide a full accounting of the attorney’s activities.³⁸

In Ontario, at the hearing of an accounting application under the *Substitute Decisions Act, 1992*, the civil court will consider the evidence and look at the accounts and the conduct of the attorney. Judges have a broad discretion in an accounting application – they can make all manner of inquiry into the conduct of the attorney. If it is found that the attorney failed to meet the obligations under the *Substitute Decisions Act, 1992*, it is open to the court to make a finding that there has been a breach of fiduciary duty.

Repay Money Improperly Taken

If the civil court finds that an attorney under a Power of Attorney document improperly took money from the donor/grantor or did not pursue another who, for example, did not

³⁴ *Supra* note 24, *Andreasen v Daniels-Ferrie*, at para 27.

³⁵ *Power of Attorney Regulations*, BC Reg 20/2011.

³⁶ See *McEwen v Jenkins and Bradley*, 1958 CanLII 69 (SCC); *Brown v Brown*, 2011 BCSC 649; *Sull v Pengelly*, 2019 BCSC 575.

³⁷ *Meng Estate v Liem*, 2019 BCCA 127, at para 25; see also *Girardet v Crease & Co* (1987) 11 BCLR (2d) 261 (BCSC) at para 263 (SC).

³⁸ *Supra* note 36, *Sull v Pengelly*, at para 116.

repay a “loan” from the older adult, or committed civil fraud on the older adult, etc., the court can order the repayment of those amounts, plus interest, and legal costs incurred.

“Set Aside” a Transfer of Title or Bank Account into Joint Names

Older adults may transfer real property into a joint tenancy with one or more of their adult children. Sometimes, this is a planning technique used to avoid estate administration tax on the theory that title to the parent’s property, once the parent has died, will automatically transfer to the adult child.

Older adults may also add their adult children jointly to their bank accounts to permit their children to assist them with bill payments and other financial matters. Joint bank accounts with “rights of survivorship” are also used as an estate planning tool by individuals who wish to avoid paying probate taxes and/or fees of professionals who draft Wills. “Rights of survivorship” simply means that when one joint owner dies the entire asset is now owned by the survivor of them.

Obtaining “rights of survivorship” on a joint bank account can be as simple as checking off a box on the application form. This is where the trouble arises. An older adult may open a joint account with one of their adult children. Then the older adult dies. The adult child who is jointly named on the bank account says all of the money is now theirs because *“That’s what Mother wanted”*. The other children cry foul and say *“No, mother wanted the money to be split between all her children”*, which is where the lawyers come in. A civil court can make a declaration that the money or property belonged solely to mother and order that title be returned and/or that any money taken be returned as well.

Restitution (Unjust Enrichment/Constructive Trust/Resulting Trust)

A court can declare that although the abuser may have “legal” title to property, the “beneficial” title belongs to the older adult. In other words, while the name on the property is that of the abuser, the property *really* belongs to the older adult.

This may occur where an abuser has been “unjustly enriched”. An abuser has been unjustly enriched where a benefit has been given to them (e.g., the older adult made payments on the abuser’s mortgage, or made the abuser a joint tenant on title), to the

detriment of the older adult and there is no lawful reason for it to have happened.³⁹ If the court finds that the abuser has been unjustly enriched, then the court can order that money be paid back to the older adult, or order that the property the abuser holds is being held “in trust” for the older adult.

Another type of trust which can be ordered in favour of older adult victims is a “resulting trust”. Often, property or bank accounts will be transferred gratuitously from an older adult to an adult child so that the child may assist them with the management of property and/or banking. In 2007, the Supreme Court of Canada held that when a gratuitous transfer of this nature is made to an adult child, there will be a presumption that the child holds the property/money in trust for the parent.⁴⁰ This is because equity presumes bargains, not gifts. In other words, while title to a property/asset is given to a fiduciary/child gratuitously, the law presumes that the intention of the transfer was not to provide the recipient a gift but, rather, to have the recipient hold the property/asset for some time and eventually return it to the original title owner. This presumption is rebuttable if the transfer can be shown to have been intended to be a gift.

Setting Aside or Declaring a Predatory Marriage as “Void”

Another form of financial abuse is where an older adult inadvertently transfers property or beneficial rights through a predatory marriage.

A predatory marriage is one where unscrupulous opportunists prey upon, in particular, older adults with diminished reasoning ability purely for financial gain through the contract of marriage (as marriage brings with it a wide range of property and financial entitlements). For example, while no longer the case in Ontario or British Columbia, in other provinces marriage still revokes a Will. Therefore, if the victim of such a marriage had a Will in place, it would be revoked and the perpetrator, as a spouse, would stand to inherit under intestacy legislation.

³⁹ See *Garland v Consumers’ Gas Co*, 2004 SCC 25, at para 50 and *Kerr v Baranow*, 2011 SCC 10.

⁴⁰ *Pecore v Pecore*, [2007] 1 SCR 795.

The overriding problem with predatory marriages is that they are not easily challenged at common law. Recent cases indicate that success in righting this type of wrong depends on the existence of sufficient, compelling medical evidence of incapacity.

Traditionally, one might argue that the older adult did not have the requisite capacity to enter into the marriage. However, the older adult will likely be considered capable of marriage if they can appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children. Also, they might be required to have the requisite capacity to manage property and make person care decisions.

Historically, case law developing the understanding that marriage is a simple task not requiring a high degree of intelligence is the criterion upon which one can conclude that it is increasingly easy to have the capacity to marry, and therefore courts often find that the older adult was capable even in the most obvious cases of exploitation.⁴¹

BC & ON COURT DECISIONS HIGHLIGHTING CIVIL REMEDIES

British Columbia Cases

Sangha (Re): Repayment of Money Improperly Taken

In this case, an older adult father of three adult children, having been diagnosed with a degenerative disease involving the gradual deterioration of the brain that leads to both serious physical and cognitive decline, attempted to plan for his incapacity.⁴² He did this by naming his three children as representatives under a Representation Agreement (although only his daughter was aware that she was a representative), and his daughter and two close friends/advisors as his attorneys under an EPOA.

⁴¹ For more information on predatory marriages see: Kimberly A. Whaley and Albert H Oosterhoff, "Predatory Marriages", Law Society of Ontario, Six-Minute Lawyer, 2018, online: *WEL Partners* <<http://welpartners.com/resources/WEL-six-minute-estates-lawyer-predatory-marriages-2018.pdf>>; Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, (Aurora: Canada Law Book, 2010); Albert H. Oosterhoff, "Predatory Marriages" (2013) 33 ETPJ 24, Kimberly Whaley and Albert H Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

⁴² *Sangha (Re)*, 2013 BCSC 1965.

However, the father was not happy with his daughter's actions in those roles. For example, she was very controlling, restricted his visitors (including visits by his lawyer and doctor), and dictated his diet against his wishes. When the father wanted to make a phone call she instructed the staff at his care home to call her instead (rather than the person her father sought to contact) and then if she did not answer, the staff were to leave a message *as if* they were leaving a message for the requested contact.⁴³

Ultimately, the father revoked the Representation Agreement and executed a nomination of committee to appoint all three of his children, and a direction authorizing all three of his children (or two acting together) to apply to the court to be appointed as his committees. He made no changes to the EPOA.

The following day, the daughter filed a petition to have her father declared incapable and to be named as his *sole* committee. The siblings and friends opposed the petition. The daughter incurred over \$100,000 in legal fees for her committee petition and charged those fees to her father's credit cards.

Upon review of all the evidence, the court was satisfied that the daughter was not suitable as a sole committee of either the person or her father's estate. Accordingly, the other two siblings were appointed committee of the person and a long-time trusted friend and advisor, his committee of estate. Of "particular concern" to the court was the daughter's "inability to consult with her fellow co-attorneys" and the fact that she was incurring charges on her father's credit card without consulting them.⁴⁴

In acting unilaterally to pay her legal fees with her father's credit card, contrary to the terms of the EPOA, the daughter was in breach of her fiduciary obligation to her father. This breach was "further compounded by the fact that she knew that her father opposed both unilateral action and the commencement of any contested legal proceedings." Her actions went against her father's wishes and as such were in contravention of her duties under the *Power of Attorney Act*.

⁴³ *Ibid, Sangha (Re)*, at para 61.

⁴⁴ *Ibid, Sangha (Re)*, at para 58.

Ultimately, the court ordered the daughter to “forthwith return to her father the funds she improperly used, being the sum of \$105,474.05, with interest at the rate (if any) such funds were earning in the [father’s] account.”⁴⁵

Galloway v Barksj: Return of Property Improperly Transferred

In this case, an adult daughter used power of attorney documents to transfer property owned by her older adult parents to her son, arguing that she did this to protect her parents from her brother, who lived with them and whom she believed had abused and manipulated them.⁴⁶ A “Declaration of Bare Trust and Agency Agreement” was executed with the grandson as “Nominee” and the daughter as “Attorney” and owner of the property. Neither of the parents were consulted or agreed to the transfer of the property. Additionally, the father’s multiple demands for the return of the property were ignored.

In the proceeding, the father argued (the mother having passed away before the hearing) that he was legally competent and wanted title to the property to be put back into his name. He relied on section 27 of the *Property Law Act*⁴⁷, which prohibits an attorney from transferring property to himself or herself unless expressly authorized in the power of attorney document. Further, the father noted that the transfer took place after the daughter learned that he had changed his Will to benefit his son more than his daughter.

The daughter and grandson argued that, on the basis of the trust agreement, they could not be compelled to transfer title to the property back to the father notwithstanding his expressed direction to do so.

The court concluded that the transfer of the property and the trust were null and void, and that title to the property must be returned to the father. Notwithstanding the daughter’s claims concerning her brother’s behaviour, the court found that the daughter “breached her duties as an attorney in using the power of attorney to transfer title to her son. . .in trust for herself without consulting [her father] and obtaining his consent.” The held that

⁴⁵ *Ibid, Sangha (Re)*, at para 107.

⁴⁶ *Galloway v Barski*, 2016 BCSC 1588.

⁴⁷ *Property Law Act*, RSBC 1996 c 377.

in circumstances where an attorney has used a power of attorney document to confer a benefit on themselves or a family member, section 27 of the *Property Law Act* will operate to void that transfer.⁴⁸

The court also noted that if the daughter continued to have concerns about her brother's relationship with her father, the *Adult Guardianship Act*⁴⁹ provides options for reporting instances of abuse.⁵⁰

British Columbia (PGT) v Ferrier: Removal of Attorneys

In this case, two adult children (who were attorneys under Power of Attorney document) thought it was okay to attempt to use their elderly mother's money to pay off \$451,000 on their mortgage, \$20,000 on a line of credit, and to make purchases at boat and kayak stores.⁵¹ \$10,000 was also transferred out of the mother's bank account, with \$6,000 going directly to the son personally and the remainder to third parties for unspecified reasons.

An investigation was commenced by the Public Guardian and Trustee under section 7 of the *Power of Attorney Act*. In response to their legitimate concerns, the son called the Public Guardian and Trustee staff members "douchebags", "losers", "assholes" and "shitheads". He also threatened to "begin criminal charges" against the Public Guardian and Trustee for various crimes, including torture and fraud, and during his oral argument "for some reason, he added the charge of culpable homicide".⁵²

The mother lived with the adult children, and the court observed that she was happy, comfortable, and well looked after, and that the issue of the case was not her "physical

⁴⁸ See *Egli v Egli*, 2004 BCSC 529, at para 82, aff'd 2005 BCCA 627.

⁴⁹ *Adult Guardianship Act*, RSBC 1996 c-6

⁵⁰ See also the costs decision *Galloway v Barski*, *supra* note 46, and the assessment of special costs decision, *Galloway v Barski*, 2019 BCSC 335.

⁵¹ *Supra* note 30, *British Columbia (Public Guardian and Trustee) v Ferrier*.

⁵² *Ibid*, *British Columbia (Public Guardian and Trustee) v Ferrier* at para 8.

well-being or safety but rather the respondents' approach to managing her money and property."⁵³

The court found that it was clear from the respondents' evidence that "they consider their mother's estate not as her personal property that they are under a legal duty to protect, preserve and use for her care, maintenance and benefit, but common property which they may access at their discretion for their own purposes as well as her."⁵⁴

Based on the medical evidence presented, the court declared the mother incapable of managing her affairs and her person, and that the power of attorney document in favour of the respondents be terminated. The Public Guardian and Trustee was appointed as the mother's committee of the person and estate.

***Sull v Pengelly*: Resulting Trust (Not a Valid Gift)**

In this case, the British Columbia Supreme Court found that an elderly mother's "gift" of a one-half joint interest in her house was not valid, and that the presumption of resulting trust applied.⁵⁵ In other words, while legal title to the house belonged to the adult daughter as a result of the "gift", she was *really* holding it in trust for her mother and, upon her mother's death, for her mother's estate.

In order to determine if the gratuitous transfer by the elderly mother to the daughter was a valid gift, in reliance on the Supreme Court of Canada decision *Pecore v Pecore*⁵⁶, the court reviewed evidence of the mother's intention vis-à-vis the gift. Various witnesses provided evidence that the mother intended to leave equal shares of the property to all three of her children and that her Will contemplated her estate being divided equally as between her three children. Furthermore, there was no evidence that the daughter incurred expenses of any sort related to the property prior to her mother's death, indicating that the mother still treated the property as her own. The court was satisfied on the

⁵³ *Ibid*, *British Columbia (Public Guardian and Trustee) v Ferrier* at para 9.

⁵⁴ *Ibid*, *British Columbia (Public Guardian and Trustee) v Ferrier* at para 11.

⁵⁵ *Supra* note 36, *Sull v Pengelly*.

⁵⁶ *Supra*, note 40, *Pecore v Pecore*.

evidence that the mother “did not intend to gift either the right of survivorship or any other interest in the property” to her daughter.

Additionally, using an EPOA, the daughter misappropriated over \$325,000 belonging to her mother. In August of 2008, the elderly mother was generally debt-free, however, by January of 2012 there was a balance of \$300,910 owing on a mortgage on the property and an outstanding balance of \$19,000 on a credit card. On the evidence provided, the court was satisfied that the daughter was responsible for the misappropriation, however, the court concluded that, based on the length of time that had passed, it would not serve any useful purpose to send the matter to the Registrar for an accounting.

As the daughter had already sold the property shortly after her mother’s death, the daughter was ordered to pay her siblings their share of the proceeds as set out in the Will and their share of the misappropriated funds.

Sarzynick v Skwarchuk: Repayment of Funds and Constructive Trusts

In this case, the court considered a dispute between two adult children over their mother’s estate.⁵⁷ The two children, a son and a daughter, were the only beneficiaries under their mother’s Will. At the time the mother made her Will in 2007, she also executed an EPOA authorizing the son to act over her assets. By the time the mother had died, her assets had been significantly depleted.

The daughter and the estate asserted that the son misappropriated large sums of money for his exclusive benefit, which rightfully belonged to their mother, and now the estate. It was asserted that the son misappropriated his mother’s money to purchase and renovate several properties, and that he had a pattern of withdrawing his mother’s funds from accounts on which he was joint owner, for his own benefit.

On examination, the son admitted he did not keep records of the various transactions he performed with respect to his mother’s assets while he was acting as her attorney. The son also acknowledged that the purpose of the joint accounts was to facilitate the payment of expenses and bills on his parents’ behalf. Accordingly, the daughter and the estate

⁵⁷ *Sarzynick v Skwarchuk*, 2021 BCSC 443.

sued the son, claiming, among other things, breach of fiduciary obligations to his mother, and that he held various assets, including the sale of proceeds of others, for their mother in trust.

As his mother’s attorney, the court found that the son had an obligation to act with utmost loyalty, good faith, and in the best interests of his mother for whom he exercised discretion or control.⁵⁸ As a result of these obligations, he was precluded from acting in a way which benefitted him personally, and was responsible for accounting for assets under his power and all proceeds generated from those assets—two obligations that he did not fulfill.

The son failed to keep, or at the very least disclose, the necessary financial records for his mother’s bank accounts and the proceeds from the sales of her assets. This breach went to the “core” of the fiduciary relationship created by the Power of Attorney document.⁵⁹ He also benefitted personally from the misappropriation of his mother’s assets thereby breaching his duty of utmost loyalty.

In considering the appropriate remedies, the court granted a constructive trust over the proceeds of sale of several of the properties and accounts, which could be traced back to the mother. The Court also ordered special costs for the son’s behaviour during the litigation. Ultimately, the estate was entitled to recover over \$440,000 from the son.

Ontario Cases

Carey v Carey: Removal of Attorneys

This decision opens with the words of Abraham Lincoln: “*A house divided against itself cannot stand*”.

In this case, the older adult mother suffered from dementia and had two capacity assessors agree in their findings that she was incapable of managing both her property

⁵⁸ *Ibid*, at para 179.

⁵⁹ *Ibid*.

and person⁶⁰ Additionally, the mother's lawyer also concluded that she was incapable of providing instructing.

The mother had seven adult children, all of whom were over their mother's care and what was to be in her "best interests", including questions surrounding where she should live. There were also allegations of elder and financial abuse. The mother was being shuttled between the two homes of her attorneys under a Power of Attorney document, that of her son, Arthur, and her other son, Douglas.

There were disputes on when the mother could have contact with her other five children. The other siblings made allegations of elder abuse and called the police to pay a number of "wellness" visits on their mother. The police visited the mother multiple times and confirmed her well-being. At no time did the police officers report any concerns. Neither did the mother's treating doctor or dentist.

One of the main questions for the court to consider was whether the two attorney sons should be removed as attorneys. The court concluded that there was strong and compelling evidence of misconduct and/or neglect by Arthur (who worked in concert with Douglas), that included:

- Arthur having failed to adequately explain how he spent all of his mother's \$42,000 per year pension income when she had no independent expenses such as housing costs, car, etc.;
- Arthur having failed to adequately account for how increased mortgage funds were utilized;
- Arthur and Douglas having failed to obey a number of court orders requiring disclosure;

⁶⁰ *Carey v Carey*, 2018 ONSC 4564. Appeal to Court of Appeal for Ontario quashed on the basis that the order appealed from was interlocutory: *Carey v Carey* 2019 ONCA 144. Further and final reasons for judgment made in *Carey v Carey*, 2019 ONSC 2616.

- there being credible evidence regarding the mother’s missing jewelry and that Arthur pawned it;
- at the very least, that the attorneys had “shown little skill in using [the mother’s] funds in a responsible manner to secure her financial best interests”;
- whatever Arthur may have done or neglected to have done, and that Douglas had failed to step in; and
- Arthur and Douglas having failed in their duties to foster regular contact between the mother and her other children.

Ultimately, the court found that the two-part test as set out in the case of *Schaefer’s Estate*⁶¹, that (1) there must be strong and compelling evidence of misconduct or neglect and (2) that the court must consider whether the best interests of an incapable person are being served, had been met and accordingly removed the Arthur from his role as attorney and Douglas from his role as alternate.

McMaster v McMaster: Accounting Ordered and Removal of Attorney

In one rather sad case, a mother appointed her two adult sons as joint attorneys under a CPOAP.⁶² However, she either decided not to inform one of them, or forgot to tell him, that he was appointed as her attorney.

The son who knew he was an attorney, and had access to all of his mother’s assets, used her life savings to invest in rather dubious business ventures, including a go-kart business. By the time the other son figured it out what had happened, the mother’s assets were depleted by almost \$2,000,000.

The court removed the “knowing son” as attorney and ordered that he provide an accounting for the money he had taken and/or used. The court also had this to say:

⁶¹ *Teffer v Schaefer’s*, (2008) 93 OR (3d) 447 (ONSC)

⁶² *McMaster v McMaster*, 2013 ONSC 1115, Costs Decision 2014 ONSC 2545.

[The mother] is the embodiment of an individual who needs protection of the court otherwise she is a pawn in the investment schemes of her son. . . The fiscal stewardship of [the son] has been a disaster for his mother. He has literally blown through at least \$2,000,000. If there was ever a case for removal of an attorney this is it. It will prevent the further haemorrhaging of his mother's assets.

Servello v Servello: Return of Property Improperly Taken

In this case, shortly after his father's death, a son took his mother to a registry office and, with the assistance of a conveyancer, transferred the title to his mother's house to himself and his mother as joint tenants.⁶³

The mother thought that she was attending the courthouse so that her son could sign a document which would give him the power to look after her as she grew older (or in other words a Power of Attorney document). Also, the son was living with the mother at this time, and she was relying more-and-more on him after her husband's death. To add insult to injury, not only was the mother grieving the loss of her husband, but her first language was Italian and her comprehension and reading in English was limited, thus ensuring that she did not understand the documents she was signing.

Three years later, the mother attended the registry office with one of her daughters and had a title search completed on her house. This was the first time that she became aware that her son had acquired a right of survivorship in her home. The son refused to restore title to the property to his mother. Accordingly, the mother sought an order from the court restoring her as the property's sole owner.

The court held that the transfer of the property into joint tenancy should be set aside and that the mother should be restored as sole owner, finding that:

"... the natural influence as between a mother and son exerted by those who possess it to obtain a benefit for themselves, is undue influence."

"This is a textbook example of a case in which the presence of undue influence by a child over a parent requires that the parent have independent legal advice. [The mother] did not receive independent legal advice, and

⁶³ *Servello v Servello*, 2015 ONCA 434

accordingly the two deeds which gave [the son] an interest in the land should be set aside on this basis as well.”

The transfer was set aside as the mother was vulnerable to the influences of her adult son and she did not receive the required independent legal advice before the transfer took place.

Zimmerman v McMichael Estate: Repayment of Money Improperly Taken

In this case, a deceased husband and his surviving wife were founders of an extensive Canadian art collection, the McMichael Collection, donated to the province of Ontario.⁶⁴ Both husband and wife had Wills that left their entire estate to the surviving spouse and, should there be no surviving spouse, the residue of the estate was to go to the McMichael Collection.

The very night her husband died, Mr. Zimmerman, a friend of the couple who was a lawyer and former crown prosecutor, took the widow, Mrs. McMichael, who was 81 years old at the time, to his parents’ house to console her and have her sign power of attorney documents appointing himself as her sole attorney for property.

Mrs. McMichael was frail and required constant nursing assistance. She had no immediate family and her health had deteriorated to the point that she could no longer remain in her home and was moved to a seniors’ residence, where she remained until her death. Up until her death, as her attorney for property, Mr. Zimmerman had full control over all of her assets.

After Mrs. McMichael’s death, her niece and niece’s husband went to court for a declaration that the Power of Attorney document was void, and an order that Mr. Zimmerman be required to explain or “account” for his financial dealings with Mrs. McMichael’s property. They were successful.

During the hearing, the court found that the financial accounts presented by Mr. Zimmerman were inadequate, incomplete and in many respects false.

⁶⁴ *Zimmerman v McMichael Estate*, 2010 ONSC 2947.

It was found that Mr. Zimmerman had taken money to cover such things as expensive dinners, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging all expenses to her, and had taken her expensive art collection to adorn the walls of his own home, even "losing" one piece of art.

The court found that Mr. Zimmerman's conduct fell well below the standards expected of an attorney. He had paid himself over \$350,000 CDN and over \$85,000 USD from Mrs. McMichael's assets.

The court concluded that he was required to repay the amounts that he had taken, together with interest from the date of each taking. However, Mr. Zimmerman died shortly after this court case, and so it is unknown if the money was ever recovered.

Provincial/Territorial Legislation

Besides the remedies provided for by the *Criminal Code*, each province and territory has created their own legislation in response to elder abuse and neglect. Generally, the following different types of provincial legislation may apply to the abuse of older adults:

- Adult protection laws
- Protection for persons in care legislation
- Neglect legislation
- Domestic violence legislation
- The Quebec Charter of Human Rights and Freedoms
- Public Guardian and Trustee Legislation

A small number of jurisdictions have adult protection laws that apply to adults who meet the definition of an "adult in need of protection". These include British Columbia,⁶⁵ the

⁶⁵ *Adult Guardianship Act*, RSBC 1996, c. 6.

Yukon,⁶⁶ Prince Edward Island,⁶⁷ and New Brunswick.⁶⁸ With British Columbia, the Yukon and Prince Edward Island having established by regulation designated agencies that investigate and respond to situations of an adult needing protection, although there is no duty to report.

In British Columbia, the *Adult Guardianship Act*, provides protection to vulnerable older adults who experience abuse and neglect in the province. Particularly, Part 3 of the *Adult Guardianship Act* provides provisions with respect to support and assistance for abused and neglected adults. Among other things, the *Adult Guardianship Act* establishes a legal framework for reporting abuse or neglect to a designated agency in the province, and gives those agencies the powers to respond to reports of abuse, as necessary, including authority to investigate and take steps to protect the individual. There are also other Acts available in the province to assist designated agencies in fulfilling their mandate through various other mechanisms, see: the *Mental Health Act*⁶⁹, the *Representation Agreement Act*, the *Health Care (Consent) and Care Facility (Admission) Act*⁷⁰, the *Patients Property Act*, and the *Enduring Power of Attorney Act*⁷¹.

Nova Scotia is the only jurisdiction in Canada that has a mandatory reporting regime for the abuse of older adults with this duty applying in limited circumstances under the *Adult Protection Act*⁷². In Newfoundland and Labrador, there is a general duty on everyone to report neglect. However, the duties under both of these Acts does not apply to financial abuse per se, as they focus on physical, sexual, or mental abuse, or “neglect” in general.

⁶⁶ *Adult Protection and Decision-Making Act*, SY 2003, c 21, Sch A.

⁶⁷ *Adult Protection Act*, RSPEI 1988, c A-5.

⁶⁸ *Family Services Act*, SNB 1908, c F-2.2.

⁶⁹ *Mental Health Act*, RSBC 1996, Chapter 288.

⁷⁰ *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, Chapter 181.

⁷¹ *Enduring Power of Attorney Act*, RSBC 1996, Chapter 370.

⁷² *Adult Protection Act*, RSNS 1989, c.2.

In British Columbia,⁷³ Alberta,⁷⁴ Manitoba,⁷⁵ Ontario,⁷⁶ and Nova Scotia⁷⁷ employees or operators of care facilities have a statutory duty to report and investigate abuse.

In some provinces and territories, the Public Guardian and Trustee has some power to intervene in circumstances of financial abuse or abuse by an attorney under a Power of Attorney document, guardian, trustee, or other substitute decision maker, but no corresponding duty to report. Note that in the Yukon,⁷⁸ British Columbia,⁷⁹ Alberta,⁸⁰ Saskatchewan,⁸¹ Ontario,⁸² and Quebec⁸³ the Public Guardian and Trustee has the power to investigate abuse.

Like the *Criminal Code*, provincial and territorial legislation are essentially age neutral, meaning there are no laws that apply exclusively to older people, and that the laws were made to protect people at risk, generally. For a full list of related provincial or territorial legislation see Appendix “A” attached to this paper.

4. CRIMINAL REMEDIES

The *Criminal Code* plays a role directly and indirectly in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

⁷³ *Community Care and Assisted Living Residential Care Regulation*, BC Reg 96/2009 Sched. D.

⁷⁴ *Protection for Persons in Care Act*, SA, 2009 C.P-29.1.

⁷⁵ *The Protection for Persons in Care Act*, CCSM, c P144.

⁷⁶ *Long-Term Care Homes Act*, SO 2007, c 8.

⁷⁷ *Protection for Persons in Care Act*, SNS 2004 c 33.

⁷⁸ *Public Guardian and Trustee Act*, SY 2003, c 21, Sch C, Part 2, s. 9(1)

⁷⁹ *Public Guardian and Trustee Act*, RSBC 1996, c 383, s.17

⁸⁰ *Adult Guardianship and Trusteeship Act*, SA 2008, cA-4.2, ss. 75 – 77.

⁸¹ *The Public Guardian and Trustee Act*, SS 1983, c P-36.3, s. 40.7.

⁸² *Supra*, note 25 *Substitute Decisions Act*, 1992, s. 27.

⁸³ *Public Curator Act*, RSQ, c C-81.

While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are certain offences under which such a perpetrator could be charged.

CRIMINAL CODE OFFENCES AND THE “CRIME” OF ELDER ABUSE

- ❖ Section 215: failing to provide the necessaries of life (i.e., criminal neglect)
- ❖ Section 220: causing death by criminal negligence (i.e., where neglect leads to death of older adult)
- ❖ Section 264.1: uttering threats
- ❖ Sections 265 and 266: physical assault
- ❖ section 271: sexual assault
- ❖ Section 279: unlawful confinement
- ❖ Section 322: theft
- ❖ Section 331: theft by a person holding a power of attorney
- ❖ Section 336: criminal breach of trust (i.e., conversion by trustee)
- ❖ Section 342: theft or forgery of a credit card
- ❖ Section 346: extortion
- ❖ Section 366: forgery
- ❖ Sections 386 – 388: fraud
- ❖ Section 423: intimidation

Notably, section 718 of the *Criminal Code*, being a sentencing provision introduced in 2013, now provides our courts with additional factors that can be considered to increase the severity of sentencing, such as where the victims of these crimes are older and vulnerable. Furthermore, section 718 references a wide range of aggravating factors that can be considered by the court in determining appropriate sentencing principles. For example, longer sentences are warranted if the crime was motivated by age or disability and evidence exists that the offender abused a position of trust or authority in relation to the victim.

In 2015, the *Canadian Victims Bill of Rights*⁸⁴ came into force. This Bill provides clear rights for victims of crime, including the right to information, participation, protection, and restitution. Some examples of victim's rights include receiving information about the review of an offender's conditional release, timing and conditions of that release, and providing a current photo of the offender prior to release.

Court Decisions Highlighting Criminal Remedies: 2011 – 2022

***R v Kaziuk* (2011, Oakville, ON)**

s. 334 (Theft), s. 380 (Fraud), s. 331 (Theft by Person Holding a Power of Attorney)

This case is interesting because although section 331 of the *Criminal Code*, theft by a person holding a power of attorney document, was enacted back in 1984, this case is one of only a few reported decisions in Canada citing section 331 in the context of abuse of older adults. Notably, in this case,⁸⁵ the accused was not even charged under section 331, rather, he was charged under the regular theft and fraud provisions. That being said, Justice Baldwin did find "*that the s.331 offence had been proven by the Crown beyond a reasonable doubt*" and that even though the accused was not charged with this offence, it was an "*aggravating sentencing factor pursuant to s.725(1)(c) of the Criminal Code*".

⁸⁴ *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

⁸⁵ *R v Kaizuk*, 2011 ONCJ 851.

The facts of this case are unfortunately becoming more commonplace, and therefore of an increasing societal concern. The accused, was the adult son, and only child of, the victim, his mother, a widow who was 88 years old at the time of trial. When her husband died a few years earlier, the mother held assets and property well in excess of \$1,000,000, yet at trial she was penniless and living in a homeless shelter. Her son had mortgaged her various properties under a Power of Attorney for Property and, subsequently, defaulted on those mortgages. The victim lost everything.

The Crown sought a total sentence of only 3 – 4 years' incarceration. However, Justice Baldwin sentenced the son to the maximum 10-year sentence for theft over \$5,000, and ordered a concurrent 10-year sentence for fraud. Justice Baldwin made the following further comments in the sentencing decision:

This was a despicable breach of trust fraud as the offender was, at the time, the Power of Attorney to the victim....The victim was his elderly Mother who was extremely vulnerable to him as her only child. ...[the son] would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could ... In jail, this offender will be better off physically than his own Mother. He will be sheltered, fed regularly and kept warm.

The son appealed, and on appeal the Court of Appeal upheld the conviction, but determined that the sentence “was excessive” having regard to the fact that the trial judge referenced in the sentencing considerations another offence that was not proven at trial, and “having regard to sentences imposed in similar cases, and the fact that the appellant had some 39 months left to serve on a prior offence.”⁸⁶ Accordingly, the Court of Appeal reduced the 10-year sentence to 8-years, but in doing so, observed, “[w]e agree with the trial judge’s observations about the offender.” The son sought leave to appeal to the Supreme Court of Canada but was denied.⁸⁷

⁸⁶ *R v Kaziuk*, 2013 ONCA 217.

⁸⁷ *R v Kaziuk*, 2013 CanLII 64666 (SCC).

R v Taylor (2012 - Burlington, ON)
s. 380 (1) (Fraud)

This case is another notable example of an abuse of trust and an aggravating factor considered in sentencing. In this case,⁸⁸ the victim, now deceased, was a frail, elderly woman who suffered a number of physical challenges that limited her mobility and left her vulnerable. She employed a caregiver upon whom she relied for her daily needs. At the caregiver's suggestion, the victim executed a Power of Attorney for Property in the caregiver's favour. The victim also executed a new Will that appointed the caregiver as executor. One year later, the caregiver used the Power of Attorney for Property document to obtain a bank card for the victim's savings account. The caregiver then drained the bank account of \$126,000, leaving only \$17,000 remaining. Note that the caregiver used that money for her own benefit.

The caregiver subsequently left the victim's employ, and when the victim's new caregiver read her bank statements, the new caregiver informed the victim of the discovered suspicious transactions and called the police. The police charged the attorney caregiver with fraud and obtained expert reports confirming that the victim was capable of managing her property throughout the period in question, that included the period of her discussions with police. Unfortunately, the victim died before the trial took place. In her absence, the Crown relied on the victim's witness statements that had been recorded by the police. The judge accepted the Crown's evidence and expert's evidence, and sentenced the accused to 21-months in prison.

The attorney caregiver appealed her conviction on the grounds that the victim's recorded statements were hearsay and therefore inadmissible, and that on the basis of mitigating factors the judge should have reduced the severity of the sentence. In dismissing the appeal, Justice Rosenberg wrote:

...this was a serious offence. The appellant voluntarily placed herself in a position of trust in relation to the complainant. She became her attorney and the executor of her estate. The frail, elderly complainant was completely

⁸⁸ *R v Taylor*, 2012 ONCA 809

reliant on the appellant. This was not a one-time act but a planned and deliberate fraud committed over many months by someone whom the complainant looked upon as a friend. The appellant stole and then spent over \$126,000, almost the complainant's entire life savings. In such a case, the paramount objectives of sentencing must be deterrence and denunciation, and they cannot be adequately met by a conditional sentence.

***R v Cousineau* (2013 – Vancouver, BC)**

s. 380(1) (Fraud)

In this case, the offender was employed by a seniors' facility to market the residence.⁸⁹ On three occasions he met with potential residents and pocketed their rent deposits. The offender was convicted of three counts of fraud under section 380(1) of the *Criminal Code*, and was sentenced to 18-months in jail and two years probation. The offender sought leave to appeal his sentence. On appeal, the British Columbia Court of Appeal found that the advanced age and vulnerability of his victims was considered an aggravating factor in the court's sentencing.⁹⁰ And so, in addition to the penal sentence, the court ordered the offender repay \$7,357 plus payment to the victims in the amount of \$300.⁹¹

***R v Bernard* (2015 - Surrey, BC)**

s. 380(1)(a) (Fraud over \$5,000)

In this case, the offender was convicted of defrauding a 79-year-old man of over \$10,000 by making unauthorized withdrawals of \$500 a day from a VISA card.⁹² The older adult victim had no surviving children and his wife had just been moved into a care home the previous year. He also suffered from the early stages of dementia and other forms of "degenerative mental conditions" at the time of the offence. The offender came to the victim's house offering to wash his windows and eavestroughs. Afterwards, the victim

⁸⁹ *R v Cousineau*, 2013 BCSC 947.

⁹⁰ *R v Cousineau*, 2013 BCCA 289, at paras 11 and 25.

⁹¹ See *R v Cousineau*, 2013 BCCA 289 where Mr. Cousineau sought to appeal the monetary components of his sentence. However, he was late in filing his application for leave to appeal and brought a written motion to extend the time to file. While the court considered refusing leave to appeal on this motion, the court decided not to as the Crown neglected to request such an order. An extension was provided to Mr. Cousineau; however, no further court decision has been reported.

⁹² *R v Bernard*, 2015 BCPC 107.

offered for the offender to live in his house in exchange for assistance around the house, among other tasks. The offender accepted this offer and took on the role of “caregiver” for the victim. It was in his role as caregiver that the offender defrauded his victim. Not only did the offender steal from the older adult, but at the time the fraud was discovered by the older adult’s sister-in-law, the house was in a “deplorable state”, there was no food in the refrigerator, and the older adult was malnourished and had to be taken to the hospital.

The Crown sought a jail sentence of four-and-half years. In determining the appropriate sentence, the Court noted:

[32] Section 718.2(a)(iii) and (iii.1) provide that a sentencing court consider evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, and evidence that the offence had a significant impact on the victim, considering their age or other personal circumstances, including their health and financial situation, to be aggravating factors. . .

[. . .]

[47] The present case involves a breach of trust of certainly a very high nature. Mr. Crouter [the older adult] had confidence in Mr. Bernard [the offender], not only to live in his house and share living space without defrauding him, but to assist him in the necessary tasks which were difficult or impossible for Mr. Crouter to do himself. When he was "befriended" by Mr. Bernard, Mr. Crouter was living alone after his wife had recently moved into a care home. His only family support was from the family in Calgary. His physical and mental health were failing, and it appears from Mr. Bernard's own evidence that Mr. Crouter was not able to properly physically care for himself. Mr. Bernard purported to be Mr. Crouter's friend and caregiver at a time when Mr. Crouter desperately needed both. Mr. Crouter invited Mr. Bernard into his home in shared quarters and Mr. Bernard assisted Mr. Crouter to drive him to various visits to his wife and run other errands. He was to make sure that Mr. Bernard was taking his insulin. Mr. Bernard convinced Ms. Etchison [the sister-in-law] that he was a benevolent caregiver and that he had had prior experience with assisting other elderly persons in need.

Upon consideration of the principles of sentencing, the court concluded that the primary factors involved in this case were the “denunciation” of the conduct and “general deterrence so that others do not participate in similar activities”. The Court noted that the offender “preyed upon a vulnerable, isolated, elderly victim and a significant sentence [was] required to reflect society’s abhorrence for such conduct”.⁹³ The offender was sentenced to 4 years in custody.⁹⁴

R v Davy (2015 - Orillia, ON)
s. 215 (Failure to Provide Necessaries of Life)

There have been an increasing number of cases dealing with convictions under section 215 of the *Criminal Code*, being the provision for criminal neglect (i.e., failure to provide the necessaries of life). These cases show how neglect and financial abuse can go hand-in-hand, as the abuser(s) often have their own mental health or substance abuse problems.

Section 215 is a complex provision as there is a legal duty to provide the necessaries of life to someone under a person’s “charge” if that person is: (a) unable to withdraw themselves from the other person’s charge for reasons of “detention, age, illness, mental disorder or other cause”; and (b) is “unable to provide themselves with necessaries of life”.⁹⁵ As highlighted below, the courts have interpreted this description to impose, under certain circumstances, a duty on an adult child to provide adequate care for an aged parent, or on a paid caregiver to provide adequate care to a client.

In this case, the court was faced with a particularly heinous crime.⁹⁶ In 2015, a daughter and son-in-law were convicted of failing to provide the necessaries of life to the elderly and vulnerable victim, the daughter’s mother. The mother lived with her daughter and son-in-law and suffered from, among other serious medical conditions, severe dementia

⁹³ *Ibid*, at para 65.

⁹⁴ *Ibid*, at para 66.

⁹⁵ *Supra*, note 18, *Criminal Code*, s. 215(1)(c).

⁹⁶ *R v Davy*, 2015 CanLII 10885 (ON SC).

and was incapable of making decisions for herself, including decisions regarding her personal care.

In response to a call, the police arrived at the offenders' home where they were met with an overpowering smell of cat urine, the presence of filth and feces, and, generally, a home in complete squalor. The police discovered the mother naked on a bare mattress in a room with blacked out windows, covered in her own vomit. It as noted that she looked like a skeleton covered with skin. When examined by health care professionals she was found to be dehydrated, emaciated, anemic, and suffering from internal bleeding and a fractured right hip. She died shortly thereafter at the age of 77.

The daughter and son-in-law had looked after their mother for 8 years and were her attorneys under a Power of Attorney for Personal Care. In their roles, they had refused all help to care for their mother, kept their mother isolated and denied access to those who offered assistance (e.g., community care personnel).

Because of the mother's ill health, she could not provide for herself. She was unable, by reason of her severe dementia and physical ailments, to withdraw herself from the offenders' charge. Her daughter and son-in-law were responsible to provide the necessities of life, being food, water, shelter, adequate care, medical treatment of health conditions and protection from harm. It was clear that they failed to provide these necessities and were each sentenced to 12 months in jail.

In rendering their decision, the Court had this to say:

This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the mother] suffered from severe dementia and was vulnerable.

R v Hooyer (2016 - Simcoe, ON)

s. 331 (Theft by Person Holding a Power of Attorney) and s. 380 (Fraud)

In this case, a long-time family friend of an older adult couple was charged and convicted of theft and fraud contrary to sections 331 and 380, being theft by person holding a power of attorney and fraud, respectively.⁹⁷

The offender had helped the couple with, among other things, chores around the house and driving them to appointments. Ultimately, the husband developed dementia and was moved into long term care facility with his wife as his attorney for property until she died. The offender was the alternate attorney for property and named residual beneficiary in the couple's Wills.

After the wife died, the offender assumed control over the husband's property under the Power of Attorney document. Over the course of 7 years, he moved into their home, purchased a \$37,000 Hummer for himself, spent \$15,000 on a Mustang for a friend and spent the rest of the husband's money on various daily expenses totalling thousands of dollars.

By the time the husband's long-term care facility and bank called the police, the husband was left with \$18 in his bank account, \$13,000 in back taxes on his home and \$16,000 owing to the facility. In total, the offender stole \$378,552.67 of the husband's assets and investments. He also defrauded Veteran's Affairs Canada (VAC) of over \$2,000 as he submitted invoices from the facility to VAC claiming partial reimbursement and then kept the money himself.

At trial, the offender argued that no laws were broken because there were no limitations listed on the Power of Attorney document and that the husband told him he could use the money as if it were his own. Therefore, he did not have the requisite mental intent to commit the offence as he honestly believed he was entitled to do what he did. The court disagreed, explaining that an attorney is a fiduciary with fiduciary duties and obligations, and as such, the offender should have known of his responsibilities. The court found that

⁹⁷ *R v Hooyer*, 2016 ONCA 44.

the offender knew the assets belonged to the husband when he used them for his own benefit.

On the theft charge, the offender was sentenced to 2 years less a day and ordered to pay \$378,552.67 in restitution to the husband's estate, as the husband predeceased the outcome of the trial. On the fraud charge, the offender was sentenced to 6 months in prison to be served concurrently with the theft charge and ordered to pay full restitution to VAC. His appeal of his conviction and sentences was dismissed.⁹⁸

***R v Reynolds* (2016 - Victoria, BC)
s. 322 (Theft)**

In this case, a daughter stole over \$300,000 from her elderly mother's bank account between 2009 and 2013.⁹⁹ She did this after her mother gave her access to her bank account to pay some of her bills. From here, the daughter took over all of her mother's finances. The mother trusted her completely. As the daughter took the money out in cash—up to \$10,000 a month—there was no way to trace how the money was spent. The daughter had various explanations, including that she spent it on her cocaine addiction, trips, and shopping for lingerie. Shortly after being informed of the theft the mother was admitted to the hospital for heart problems attributed to stress. She died before sentencing was completed. The daughter pled guilty to one count of theft of monies and was sentence to 30 months incarceration.

***R v Bruyns* (2016 - Oakville, ON)
s. 322 (Theft), s. 380(1) (a) (Fraud over \$5,000), and s. 336 (Criminal Breach of Trust)**

In this case, a daughter was charged with three offences.¹⁰⁰ The first two charges alleged that, being entrusted with her father's Power of Attorney for Property, she (1) stole money exceeding \$5,000, and (2) defrauded him of money exceeding \$5,000. The third charge alleged that, being the trustee of money for her father's benefit, she converted money to

⁹⁸ *R v Hooyer*, 2016 ONCA 44.

⁹⁹ *R v Reynolds*, 2016 BCPC 69.

¹⁰⁰ *R v Bruyns*, 2016 ONCJ 207.

a use not authorized by the trust, contrary to section 336 of the *Criminal Code*. It should be noted that it is not clear from the caselaw as to why she was not charged under section 331, being Theft by a Person Holding a Power of Attorney.

The daughter had used her father's money to pay her own personal bills that caused him to default on payments to his long-term care facility where he was residing. That facility took no steps against him as the daughter repaid the entire amount after the charges were laid. The question before the court was whether the daughter took the money with an "honest but mistaken belief" that she was entitled to loan his money to herself in these particular circumstances. The Power of Attorney document had a clause that stated:

My attorneys shall also be authorized to make expenditures on my behalf for the purpose of making gifts or loans to my friends and relatives . . . if, in the absolute discretion of my attorneys, they have reason to believe that I would have made such gifts or loans if I were capable of doing so personally.

The daughter believed her father would have loaned her the money if he was mentally capable.

The court disagreed. When the father had loaned her money in the past it had not caused him to go into debt or to default on his other financial obligations, unlike the current "loan" to the daughter. Additionally, past loans did not put him at risk of being denied any services, such as those that the long-term care facility provided. There was no reason to believe that the father would have made the loan if he were capable of doing so.

Furthermore, the court agreed with the Crown's argument that the daughter had breached her fiduciary and statutory duties under sections 32 and 66 of the *Substitute Decisions Act, 1992*. The court found that the Crown had proven beyond a reasonable doubt all of the essential elements of the charged offences. Accordingly, the daughter was found guilty of theft and fraud *under* \$5,000,¹⁰¹ and guilty of criminal breach of trust.

¹⁰¹ Note that the Crown was unable to prove the stolen quantum as being *over* \$5,000, resulting in an adjustment to the offences being those *under* \$5,000.

She was sentenced to a suspended sentence with probation for 18 months, and the terms of her probation required that she could no longer act as her father's attorney.

***R v Curreri* (2016 - Toronto, ON)
s. 380(1)(a) (Fraud over \$5,000)**

In this case, an adult son was charged under section 380(1)(a) of the *Criminal Code* for committing fraud over \$5,000 against his 96-year-old father.¹⁰² The son fraudulently transferred and mortgaged 8 properties in Toronto and Ajax owned by his father. The fraud came to light when the father mentioned to his daughter that he was considering selling one of his properties to cover his funeral expenses and any estate taxes and asked his daughter to check to see if the property was in his name alone or was it held jointly with his deceased wife. The daughter and father were shocked to learn that all of his properties were in strangers' names and mortgaged to persons unknown. They went straight to the police.

The son was assisted in his fraud by a legal assistant at a real estate law firm. Both were found guilty and both were sentenced to two years less a day to be served in the community (i.e., house arrest). The son was also ordered to pay restitution.¹⁰³ The Law Society of Ontario also disciplined the lawyer acting on the transaction for being duped by the son and the assistant. The lawyer admitted to professional misconduct and was fined \$25,000.

***R v Llanto* (2018, Port Coquitlam, BC)
s. 266 (Assault)**

In this case, the offender, charged with assault, was a paid caregiver for an 88-year-old elderly woman suffering from Alzheimer's.¹⁰⁴ Video surveillance showed the offender slapping the top of the elderly woman's head repeatedly without reason. The Court compared the vulnerability of elderly persons to that of children, holding that, while the

¹⁰² *R v Curreri*, 2016 ONSC 3598.

¹⁰³ *R v Curreri*, 2017 ONSC 5652.

¹⁰⁴ *R v Llanto*, 2018 BCPC 102 (BC Prov Ct).

assaults in this instance were not particularly forceful, to an elderly and fragile woman, they would no doubt be traumatic to her and potentially dangerous.

The offender ultimately pled guilty to assault, leaving the court to resolve what the appropriate sentencing would be. Although this case considered abuse in its physical nature, the court provided particularly salient commentary with respect to power imbalances present in elder abuse cases, and discussed why it was important to deter and denounce this behaviour when considering sentencing.

Adopting the language from an older case out of Ontario,¹⁰⁵ the court stated:

Cases involving elder abuse are deserving of a strong denunciatory aspect in sentencing. While sentences involving the abuse of children are required to give primacy to denunciation and deterrence given the vulnerability of children, similar considerations should apply to cases involving abuse of the elderly...there is little to distinguish individuals suffering from Alzheimer's disease or severe dementia from children. Both are among the most vulnerable members of our society. Just as one is forbidden to strike a baby, one is forbidden to strike a vulnerable, elderly person.... Caregivers of the elderly, particularly those suffering from Alzheimer's disease and dementia, hold tremendous power. That power cannot be abused. Caregivers must know that if they abuse their position of trust and authority over vulnerable individuals, the court shall deal with them harshly. Caregivers often work in environments where witnesses are not present. As such, they must deal with those entrusted to their care in the utmost good faith. Families who entrust their aged parents to institutions often do so with a sense of overwhelming guilt and desperate resignation. They have the absolute right to expect that those entrusted with the care of their aged parents will at all times act professionally, and within the bounds of the law.¹⁰⁶

In weighing all of the circumstances, including the aggravating factors of the offender abusing a position of trust and the complainant being unable to protect herself or report the abuse, the judge sentenced the offender to the payment of a fine, and 60 days imprisonment, to be served intermittently, followed by 12 months probation.

¹⁰⁵ *R v Foubert*, 2009 OJ No 5024 (Ont SCJ).

¹⁰⁶ *Supra*, note 104, *R v Llanto*, at para 26, citing *R v Foubert*, at paras 30-1.

***R v Siwicki* (2018 – Winnipeg, MB)**

s. 220 (causing death by criminal negligence) and s. 215 (failure to provide the necessities of life)

In this case, the offender lived with his 89-year-old mother and was her sole caregiver.¹⁰⁷ He pled guilty to criminal negligence causing her death, leaving the court to deal with his sentencing.

After the offender called 911, the first responders found his mother’s body on the floor in the hallway. She was on a plastic sheet with a blanket over her, covered in feces and urine, her hair was matted and dirty and she had several gaping and infected bedsores on her leg and hip. The house was in an “appalling state: cluttered, dirty and smelling of urine and feces”.

The son told police that his mother had fallen out of bed several weeks earlier and he was unable to lift her to get her back into bed. He said he didn’t call an ambulance because his mother didn’t want to go to the hospital, but he gave her water and a food supplement every day. After she died, he alleged he pulled the blanket off her and was shocked at what he saw, moved her from the bedroom to the hall and tried to wash her so she would not be seen that way. He waited several weeks before calling 911 to report her death.

An autopsy revealed she died from sepsis, a complication from the bedsores which would have caused her significant pain and which could have been successfully treated. Her brain also showed signs of dementia.

The offender testified that he had tried to get help for his mother as she got older and her ailments made her more immobile. He suggested, among other things, to take her to the hospital or elder care centres, or seek home care help, but the mother always refused and wanted to remain at home. He testified that he tried to care for her himself. He also accepted full responsibility for causing his mother’s death and was traumatized by her passing.

¹⁰⁷ *R v Siwicki*, 2018 MBQB 115.

By pleading guilty the court noted that the offender acknowledged his failure to provide assistance to his mother. The Crown sought three years imprisonment. The defence argued that the offender's actions were "borne of ignorance and a lifetime of wanting to please" and asked for a suspended sentence and probation. After reviewing the aggravating factors (i.e. that he was in a position of trust with his mother) and the many mitigating factors, the court sentenced the offender to three months' imprisonment (and credited time in custody of one month).

R v Fernandez (2018 – Brampton, ON)
s. 267 (b) (Assault causing bodily harm)

In this case, the offender was a personal support worker at a long-term care facility who punched a 97-year-old woman causing severe bruising.¹⁰⁸ He was found guilty of assault causing bodily harm. Initially, the offender denied, but later admitted to, committing the offence. In his presentence report he stated that: "*My initial dishonesty turned to a ball of lies that snowballed out of control, and I was too scared and embarrassed to turn things back.*" He apologized to the victim and her family.

The court noted that "*this is a case of what is sometimes referred to as 'elder abuse', that is, abuse of an elderly person by his or her caregiver. I agree with Crown counsel that the principles of deterrence and denunciation are of particular importance in such cases.*" Fernandez was sentenced to a term of imprisonment for six months, to be served in the community (i.e., with conditions, remain in his house, not be in contact with anyone over 65, etc.) and probation.

R v Saucier (2019 – Cornwall, ON)
s. 380(1) (Fraud over \$5,000), ss. 368(1) and 366(1) (Forgery, use, trafficking or possession of forged document)

In this case, a financial advisor stole (i.e., defrauded and misused funds) from his elderly retired clients over a period of three years.¹⁰⁹ In doing so he forged and used forged

¹⁰⁸ *R v Fernandez*, 2018 ONSC 272.

¹⁰⁹ *R v Saucier*, 2019 ONSC 3611.

documents. His clients paid him money expecting that it would be used for their life insurance premiums. Instead, he deposited the stolen money into two bank accounts that he controlled. Ultimately, however, when his clients asked for their money back, all of the money was repaid to the clients.

The offender was found guilty of 10 counts of fraud over \$5,000, 4 counts of use, trafficking or possession of forged documents and 1 count of forgery.

In the sentencing decision, the court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The court also noted that:

many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. ...some also needed the accused to translate documents and make out their cheques because of language and literacy issues...¹¹⁰

The offender was sentenced to 15 months in jail.

***R v Barker* (2019 – Pictou, NS)
s. 380(1)(a) (Fraud over \$5,000)**

This decision opens with the words: “*This is a case of elder abuse.*”

In this case, a married couple forced the wife’s 83-year-old mother, who had dementia, dysphasia, and needed around-the-clock care to sign a number of lending and financing documents.¹¹¹ The mother lacked the requisite capacity to enter into the aforementioned financial services contracts, but she gave in to the pressure that the offenders placed on her. It is important to note that the mother was living with the offenders and dependent upon them for her care.

¹¹⁰ *Ibid*, at para 15.

¹¹¹ *R v Barker*, 2019 NSPC 24.

The offenders made off with over \$50,000 of the mother's money and left her on the hook for repayment of the loans.

The court noted that it is not always the case that a non-violent crime, like theft or fraud, will be regarded as less serious than a violent one:

Violence or threats of violence are not needed when one seeks to exploit someone who is elderly and infirm or incapacitated. Breach of trust which enables elder abuse may be as serious as employing violence against someone capable of putting up a fight.¹¹²

After looking at both the aggravating and mitigating factors, the court ultimately decided to suspend the passing of sentence on the offenders and placed them on probation for terms of three years each, starting with 6 months of house arrest and restitution of amounts taken.

Furthermore, the offenders were to cooperate with any lawyer representing the mother to have the fraudulent loan documents set aside or voided and to assume responsibility for any obligations arising from the documents. They were also not allowed to contact the mother without the mother's prior approval and the approval of her guardian.

***R v Banoub* (2019 – Halton, ON)
s. 322 (Theft), s. 334 (Punishment for Theft over \$5,000)**

In this case, a daughter pled guilty to theft over \$5,000 for depleting her mother's bank accounts and investments by approximately \$161,000 in four years.¹¹³ While her mother was in a long-term care home, the daughter, who was appointed as her mother's attorney pursuant to a Power of Attorney document, used her position of power to make consistent withdrawals and advances from her mother's accounts for her own personal benefit. She spent the money on things such as gambling, living expenses, and an overseas trip. What's worse was that, in doing so, she ceased paying her mother's long-term care home

¹¹² *Ibid*, *R v Barker* at para 13.

¹¹³ *R v Banoub*, 2019 ONCJ 681.

costs. Exacerbating these actions was the fact that the daughter offered “no reason” as to why she did these things.

In sentencing the offender to six months imprisonment, followed by three years probation, the Court held:

The most aggravating factor is that instead of taking care of her mother, she took advantage of her. She treated her mother's money, which was entrusted to her on a fiduciary basis, as if it were her own... She took this money despite having been gifted \$288,000 following the sale of her mother's house...It is... an aggravating factor that this gift was not enough to satisfy her greed. Instead she stole the rest of her mother's assets. In the process she put her mother at risk of being denied the same level of services which she had been receiving at the long-term care facility.¹¹⁴

The Court was satisfied that the offence was of such gravity that no sentence other than imprisonment of at least six months would be appropriate in this case.

R v Duffenais (2021 – Corner Brook, NL)
s. 266 (Assault)

In this case, the offender was a caregiver at the elderly victim’s nursing home.¹¹⁵ One day, while helping the elderly woman change, the accused picked her up from behind, placed his hands near her breasts and shook her. While doing so, he made a crude reference. The victim was 84-years-old. The offender was charged with the offence of assault, contrary to section 255 of the *Criminal Code*.

The court held that while the assault itself was not of significant force, it was committed by a person in a significant position of trust and involved the commission of a degrading act against a vulnerable victim, constituting a serious violation of her personal integrity.

As such, the accused was sentenced to a period of three months incarceration, followed by one year of probation.

¹¹⁴ *Ibid*, *R v Banoub* at paras 87-92.

¹¹⁵ *R v Duffenais*, 2021 NLPC 1320A00344.

5. POLICY CONSIDERATIONS

As Canada's population continues to age, it is incumbent upon the legislators that policies are put into place to protect the integrity, interests and well-being of its elderly people.

Currently, there is no criminal offence of elder abuse, however, in the last years, sentencing provisions have been aptly used by courts with respect to crimes targeted at vulnerable people in order to bridge any policy gaps. While it remains to be seen how provincial and federal governments will continue to respond legislatively to the growing prevalence of abuse toward elderly populations, in the interim, many institutions are playing their part in spreading awareness to the general public in a bid to prevent elder abuse.

Recently, the Canadian Network for the Prevention of Elder Abuse launched *Future Us*, a pan-Canadian engagement website developed for people of all ages, designed to explore our country's collective goal in uphold the rights of seniors in Canada.¹¹⁶ This website provides information to assist in the recognition of, and safe and effective response to, elder abuse and neglect at the individual, community, and government levels, and provides recommendations to create an integrated approach for elder abuse prevention in communities across Canada.

Additionally, some regulatory leaders have begun implementing elder protections from a financial perspective. Recently, the Canadian Securities Administrators has taken steps to implement the "Trusted Contact Person" (TCP) strategy, designed in part to protect older and vulnerable investors from financial exploitation.¹¹⁷ In some provinces, securities dealers and their advisors must now take reasonable steps to obtain from their elderly client(s) the name and contact information of a TCP that the dealers and advisors can contact should they suspect potential financial exploitation or have concerns about a client's mental capacity to make financial decisions. Of course, in these cases, it will be

¹¹⁶ Canadian Network for the Prevention of Elder Abuse, "Future Us: Roadmap to Abuse Prevention" (24 March 2022), online: <https://futureus.cnpea.ca/roadmap/en/introduction>

¹¹⁷ For more information, visit the Canadian Securities Administrators' website, online: <https://www.securities-administrators.ca/news/canadian-securities-regulators-publish-final-amendments-to-enhance-protection-of-older-and-vulnerable-clients/>.

important for elderly individuals to be careful about the person who they name as their TCP, so as to not provide their abuser further control over their finances. While a TCP does not have the authority to make transactions on the account, they will be given a certain level of control over an elderly individual's financial interests.

These are just a few of the initiatives started by non-governmental institutions.

6. CONCLUSION

As long as elder abuse continues to exist, the public, the police, the community, and those involved with older adults must be aware of its devastating effects and how important it is to keep a watchful eye out for older family members, neighbours, and acquaintances. Several remedies exist to address elder financial abuse once it is detected or reported, but many may be under-utilized, unknown or simply unavailable. In certain instances, civil remedies will be more appropriate, especially where the evidence cannot prove all the elements of a criminal charge beyond a reasonable doubt. The lesser civil burden of proving the wrong on a balance of probabilities will be more easily reached. However, where the elements of a criminal charge can be met by the evidence, criminal courts may be better equipped to deal with the abuse, especially when the victim may lack the resources or ability to advance a claim in civil court.

7. RESOURCES

WEL Partners Resource Centre: <http://welpartners.com/resources/>

CBA Elder Law Section Website: http://www.cba.org/cba/sections_Elder/main/

OBA Elder Section Website: <https://www.oba.org/Sections/Elder-Law>

Advocacy Centre for the Elderly: www.advocacycentreelderly.org

British Columbia Law Institute's Canadian Centre for Elder Law: www.bcli.org (A Practical Guide to Elder Abuse and Neglect Law in Canada (2011), Report on the Common-Law Tests of Capacity (2013) Background Paper: Financial Abuse of Seniors – An Overview of Key Legal Issues and Concepts (2013))

Western Canada Law Reform Agencies: “Enduring Powers of Attorney: Areas for Reform” (2008) online at www.law.ualberta.ca

Alberta Law Reform Institute, “Enduring Powers of Attorney: Safeguards Against Abuse” (Edmonton: February 2003), online at www.law.ualberta.ca

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) <http://www.lco-cdo.org/en/older-adults-final-report>

Canadian Network for the Prevention of Elder Abuse (CNPEA): www.cnpea.ca

This paper is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice, nor is it exhaustive.

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APPENDIX “A” Provincial / Territorial Legislation

Alberta

The Adult Guardianship and Trusteeship Act, SA 2008 c A-4.2

Protection Against Family Violence Act, RSA 2000, c P-27

Protection for Persons in Care Act, SA 2009 c P-29.1

British Columbia

Adult Guardianship Act, RSBC 1996, c 6

Adult Guardianship Act, Designated Agencies Regulation, BC Reg 19/2002

Community Care and Assisted Living Act, Residential Care Regulation, BC Reg 96/2009,
Schedule D

Adult Guardianship (Abuse and Neglect) Regulation, BC Reg 13/2000

Public Guardian and Trustee Act, RSBC 1996, c 383

Health Professions Act, RSBC 1996, c 183

Personal Information Protection Act, RSBC 2003, c 63

Freedom of Information and Protection of Privacy Act, RSBC 2003 c 165

Manitoba

Protection for Persons in Care Act, CCSM, c P144

Vulnerable Persons Living with a Mental Disability Act, CCSM c V90

The Domestic Violence and Stalking Act, CCSM c D 93

New Brunswick

Family Services Act, SNB 1980, c F-2.2

Personal Health Information Privacy and Access Act, SNB 2009, c P-7.05

Public Trustee Act, SNB 2005 c P-26.5

Newfoundland

Adult Protection Act, SNL 2001, c A-4.01

Family Violence Protection Act, SNL 2005, c.F-31

Personal Health Information Act, SNL 2008 c P-7.01

Access to Information and Protection of Privacy Act, SNL 2002, c A-1.1

Nova Scotia

Adult Protection Act, RSNS 1989, c 2

Protection for Persons in Care Act, SNS 2004 c 33

Domestic Violence Intervention Act, SNS 2001, c 29

Ontario

Long-Term Care Homes Act, SO 2007, c8

Substitute Decisions Act, 1992, SO 1992, c 30

Health Care Consent Act, 1996, SO 1996, c 30 Sch A

Mental Health Act, 1990, RSO 1990 c M7

Residential Tenancies Act, SO 2006 c 17

Consumer Protection Act, 2002 SO 2002 c 30, SchA

Freedom of Information and Protection of Privacy Act, RSO 1990, c F 31

Prince Edward Island

Adult Protection Act, RSPEI 1988, c A-5

Victims of Family Violence Act, RSPEI 1998, c V-3.2

Quebec

The Charter of Human Rights and Freedoms, RSQ c C-12, art 48

Public Curator Act, RSQ c. C-81

An Act respecting access to documents held by public bodies and the protection of personal information, RSQ c A-2.1

Professional Code, RSQ c C-26

Code of Ethics of Advocates, RRQ 1981 c B-1 r.1

Saskatchewan

Victims of Domestic Violence Act, SS 1994, c V-6.02

The Public Guardian and Trustee Act, SS 1983, c P-36.3

Yukon

Adult Protection and Decision Making Act, SY 2003, c 21 Sch A

Family Violence Prevention Act, RSY 2002, c 84

Public Guardian and Trustee Act, SY 2003, c 21 Sch. C, Part 2

Nunavut

Family Abuse Intervention Act, SNU 2006, c 18

Northwest Territories

Protection Against Family Violence Act, SNWT 2003, c 24