



**CONCEPTS OF AGEISM:  
ARGUMENTS IN FAVOUR OF THE NEED FOR PROTECTIONS**

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## INTRODUCTION\*

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

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

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

Research demonstrates that abuse or financial exploitation is most often perpetrated by a trusted family member, caregiver, service provider, or other person in a position of power or trust.<sup>2</sup> This makes detecting and preventing issues even more complicated since

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

<sup>2</sup> See Vancity, “Suffering in Silence: The financial abuse of seniors in British Columbia” (2017), accessed online: <https://www.vancity.com/SharedContent/documents/pdfs/News/Vancity-Report-Seniors-Financial-Abuse-2017.pdf>; See also Government of Canada, “Crime and Abuse Against Seniors: A Review of the Research Literature with Special Reference to the Canadian Situation” (2019), accessed online:

it is impossible to know who the persons are who may be assisting a vulnerable, or older adult or person of compromised capacity.

From a Canadian legal perspective, our legislation and court processes are not particularly well equipped to easily and cost effectively remedy these very complicated issues and related disputes.

From a public policy perspective, the maintenance of an individual's fundamental rights, freedoms, autonomy, and the presumption of capacity must be delicately balanced alongside societal demands of protecting the vulnerable, meaning: those with diminished capacity; those who are under disability; those who are frail, whether through sheer aging and/or illness; those who are dependent or dependant; and those who require some degree of protection from predators. Getting this delicate balance right is not easy. This paper identifies, using examples through media, employment, gender, cultural and sexual orientation, social themes and theories contributing to ageism. Key challenges arising in the law, legislation, dissemination of knowledge, education, and, awareness, concerning the individual needs of particular persons in society, which include older adults and those suffering from illnesses, abuses, disability or who otherwise may require protection will also be addressed. Part and parcel to this investigation will be an exploration of existing remedies to explore in both civil and criminal forums.

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

## **STATISTICS ON AGING AND NEED FOR PROTECTION**

### *Population*

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<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/crim/p52.html>; See also, Canadian Centre for Elder Law, "Report on Vulnerable Investors Elder Abuse, Financial Exploitation, Undue Influence and Diminished Mental Capacity" (November 2017), accessed online: <https://www.bcli.org/wp-content/uploads/2017/11/171115-Vulnerable-Investor-Paper-FINAL.pdf>.

As Canada's population ages, we will see a dramatic shift in demographics. In 1976 the average age for Canadians was 31.9, in 2016 it was 41.<sup>3</sup> That average has risen slightly to 41.7 years in 2022.

According to Statistics Canada, 2016 represented an important milestone in the history of the Canadian population: for the first time, the number of seniors exceeded the number of children with 16.9% (or 5.9 million) seniors vs. 16.6 % (or 5.8 million) children. It is estimated that by 2031, close to 1 in 4 Canadians will be 65 years of age or older and there will be 12 million seniors in Canada by the year 2061. Our ageing population has been growing rapidly for many years, mainly due to the gradual increase in life expectancy.<sup>4</sup>

The proportion of older adults compared to other demographics has continued to rise since 2016. As of July 1, 2022, Statistics Canada reports that the number of persons aged 65 years and older in Canada was 7,330,605. Of this figure, there are approximately 13,485 centenarians (individuals aged 100 years and older). The number of adults aged 65 years and older now represents 18.8 % of Canada's population while the number of Canadians aged 14 years and under has dropped to 15.6 % of Canada's population.<sup>5</sup>

Similar demographic changes are seen globally. According to the *United Nations World Population Prospects: The 2022 Revision Population Database*, in 2022, there were an estimated 8 billion people in the world, of which adults aged 65 and older comprised 10% of the global population. By 2050, the number of adults over the age of 65 is expected to increase to 16 % of the global population. The World Health Organization (the "WHO") also estimates that between 2015 and 2050, the proportion of the world's population over 60 will nearly double from 12 % to 22 %.<sup>6</sup> Between 2022 and 2050, the population of older

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<sup>3</sup> Statistics Canada, "Age and Sex Highlight Tables, 2016 Census" Population by Broad Age Groups, online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/as/Table.cfm?T=31> Accessed on 04.07.18.

<sup>4</sup> Statistics Canada, "Canada's Population Estimates: Age and Sex", and "Age and Sex Highlight Tables, 2016 Census" online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/as/Table.cfm?Lang=E&T=21>.

<sup>5</sup> Statistics Canada, "Older Adults and Population Aging: Statistics" online: [https://www.statcan.gc.ca/en/subjects-start/older\\_adults\\_and\\_population\\_aging](https://www.statcan.gc.ca/en/subjects-start/older_adults_and_population_aging)

<sup>6</sup> World Health Organization, "Ageing and health" (October 1, 2022), accessed online: <http://who.int/news-room/fact-sheets/detail/ageing-and-health>.

adults is projected to grow at rates above 3 per cent per year. According to the WHO, by 2050, approximately two-thirds of the world's population over 60 will live in low-and middle-income countries.<sup>7</sup>

The global life expectancy at birth, however, fell to 71 years in 2021, a figure which is down from 72.8 in 2019. The United Nations reports that this is due mostly to the impact of the COVID-19 pandemic.<sup>8</sup>

The number of older persons in the world is projected to reach 1.4 billion in 2030, and 2.1 billion in 2050, and, could rise to as high as 3.1 billion in 2100. Furthermore, the number of persons aged 80 or over, globally, is projected to triple by 2050, from 137 million in 2017 to 425 million in 2050.<sup>9</sup>

### *Rates of Cognitive Impairment*

While it is certainly not the case that all older adults have mental capacity challenges, with longevity can come an increase in medical issues affecting cognitive ability, as well as related diseases and disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependent.

It is estimated that approximately 55 million people across the globe right now have dementia,<sup>10</sup> making it the seventh (7<sup>th</sup>) leading cause of death among all diseases.<sup>11</sup> Dementia is a general term used to describe a range of symptoms associated with a decline in mental function severe enough to reduce a person's ability to perform everyday activities. It is caused by a variety of diseases and injuries that affect the brain, with Alzheimer's disease being the most common.<sup>12</sup> Independent surveys conducted in both

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<sup>7</sup> *Ibid.*

<sup>8</sup> World Population Prospects: The 2022 Revision Population Database, UN Department of Economic and Social Affairs, online: <https://www.un.org/development/desa/pd/content/World-Population-Prospects-2022>

<sup>9</sup> World Population Prospects: The 2017 Revision Population Database, UN Department of Economic and Social Affairs, online: <http://www.un.org/en/sections/issues-depth/ageing/> Accessed on 04.07.18.

<sup>10</sup> CanAge, "Dementia in Canada: Cross-Country Report 2022" (Fall 2022), accessed online: <https://www.canage.ca/wp-content/uploads/2022/10/CanAge-Dementia-Report-2022-EN-OCT-18-2022-compressed.pdf> [CanAge] citing United Nations, "World Population Ageing 2020 Highlights", (2020), accessed online: [https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesapd-2020\\_world\\_population\\_ageing\\_highlights.pdf](https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesapd-2020_world_population_ageing_highlights.pdf).

<sup>11</sup> World Health Organization, "Dementia", n.d., accessed online: <https://www.who.int/news-room/fact-sheets/detail/dementia>.

<sup>12</sup> *Ibid.*

the United States and Canada show that more than half of those over the age of 60 fear a dementia diagnosis more than any other diagnosis, including cancer and heart disease.<sup>13</sup>

In May of 2017, the WHO released its Global action plan on the public health response to dementia 2017-2025. The action plan features seven target areas to increase in relation to dementia: policy, awareness, prevention, diagnosis, research, care, and treatment. The first target (policy), urges that 75 per cent of Member States (146 countries) must develop a tailored response to dementia by 2025.<sup>14</sup>

In 2020, it was estimated that 597,300 Canadians were living with general cognitive impairment, including dementia.<sup>15</sup> By 2030, the Alzheimer's Society of Canada expects this number will reach close to 1 million. Dementia is the most significant cause of disability among Canadians older than 65, affecting 20 per cent of older adults by age 80, and more than 40 per cent by age 90. The Alzheimer's Society of Canada reports that in 2020, there were 124,000 new cases of dementia diagnosed (10,333 per month; 348 per day; 15 every hour). By 2030, they expect the annual incidence to increase to 187,000 new cases a year (15,583 per month; 512 per day; 21 every hour). This translates to an expected increase of 51 per cent in terms of the number of new cases per year and an overall increase of 65 per cent in the number of Canadians living with dementia.<sup>16</sup> Using the latest demographic trends from Statistics Canada combined with the Alzheimer's Society of Canada's Landmark Study model, it is predicted that by 2040 over 250,000 individuals will develop dementia each year and that by 2050, over 1.7 million Canadians will be living with dementia.<sup>17</sup>

Those living with dementia experience far more stigma than those with physical health conditions. In a survey conducted by the Alzheimer's Society of Canada, 57% of the

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<sup>13</sup> SAGA, "Dementia more feared than Cancer Saga Survey reveals" (2016), accessed online: <https://newsroom.saga.co.uk/news/dementia-more-feared-than-cancer-new-saga-survey-reveals>.

<sup>14</sup> CanAge, *supra* at note 10.

<sup>15</sup> Alzheimer's Society of Canada, "Navigating the Path Forward for Dementia in Canada" (2022), accessed online: <https://alzheimer.ca/sites/default/files/documents/Landmark-Study-1-Path-Forward-Alzheimer-Society-of-Canada-2022-wb.pdf>

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

respondents believe that those with dementia may be taken advantage of, 58% believe they may be ignored or dismissed, and 54% believe they may be socially rejected or avoided. Further, 51% of Canadians admit to using some type of stigmatizing language, including telling dementia related jokes, referring to someone as “crazy” or senile or referring to someone as “demented”.<sup>18</sup>

In response to the growing threat of dementia, on June 17, 2019, the Government of Canada released Canada’s first national dementia strategy entitled, *A Dementia Strategy for Canada: Together We Aspire*. The strategy features three key objectives:

1. Prevent dementia;
2. Advance therapies and find a cure; and
3. Improve the quality of life of people living with dementia and caregivers.

To support the national strategy, the federal budget in 2022 proposed to provide \$20 million over five years starting in 2022-23, for Canadian Institutes of Health Research towards learning more about prevention and treatment. The budget also provided \$30 million over the course of three years to the Public Health Agency of Canada and the Centre for Aging and Brain Health Innovation to help accelerate innovations in brain health and aging. Finally, the budget announced that the 2022-23, Canada Health Transfer would provide provinces and territories with \$45.2 billion in support – a 4.8 per cent increase since the 2021 budget.

During the last election, the Alzheimer’s Society of Canada reports that almost 4,000 letters were sent by Canadian voters to candidates for Member of Parliament (MPs) asking them to commit to a fully-funded strategy.<sup>19</sup> According to CanAge’s 2022 dementia report, “[t]he strategy is undeniably an effective vehicle for funding to advance Canada’s approach to dementia. However, provinces and territories are signalling that the money

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<sup>18</sup> Alzheimer’s Society of Canada, “Dementia in Numbers in Canada,” accessed online: <http://alzheimer.ca/en/Home/About-dementia/What-is-dementia/Dementia-numbers>.

<sup>19</sup> Alzheimer’s Society of Canada, “Canada’s National Dementia Strategy,” (2022), accessed online: <http://alzheimer.ca/en/take-action/change-minds/canadas-national-dementia-strategy>.

is either moving too slowly, or the ongoing challenges with the healthcare system capacities and labour shortages are crippling many regional healthcare systems.”<sup>20</sup>

### *Rates of Abuse Against Older Adults*

The World Health Organization defines abuse and neglect of older adults as “a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”<sup>21</sup>

Like other forms of abuse in our society, elder abuse comes in many forms: physical, emotional, sexual, or financial abuse. It also includes the restriction or denial of rights, and active or passive neglect. Because of a higher incidence of disabilities, poor health, and financial and emotional dependency, older adults are particularly vulnerable to abuse and exploitation. Elder abuse is a fact of life.<sup>22</sup>

Financial abuse comes in many different forms. For example, the financial abuse of an older adult can occur in scenarios involving the improper use of a joint bank account, forgery or abuse involving a power of attorney document, sharing a home with an older adult without sharing or paying for expenses, misappropriation or theft of an older adult’s assets, the unauthorized or improper transfer of real property, ATM fraud, undocumented loans, withholding of an older adult’s pension or social assistance cheques, predatory marriages, or even pressuring the older adult into signing documents they do not understand.<sup>23</sup> Financial abuse can also include more subtle scenarios such as circumstances where an older adult is financially supporting family members due to coercion or pressure.

According to a 2022 Statistics Canada report, in 2021, 5% of victims of family violence were 65 years or older. Senior women had a higher rate of family violence than senior

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<sup>20</sup> CanAge, *supra* note 10.

<sup>21</sup> World Health Organization, Elder Abuse Facts, accessed online: [http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/).

<sup>22</sup> Beverly McLachlin, *Human Dignity at Any Age: The Law’s Response to an Aging Population*, 6 *Journal of International Aging, Law & Policy* 111 (2013) at p.118 [McLachlin].

<sup>23</sup> M. Jasmine Sweatman and Kimberly A. Whaley, “Incapable and Capable Rights: The Rights of Adults in Vulnerable Circumstances – Sledgehammer v. Swiss Army Knife” (2022) 1:4 *ETPJ* 385 [Sweatman & Whaley].

men (88 versus 76 victims per 100,000 population). Women accounted for nearly 6 in 10 (57%) of senior victims. Incidence of reported family violence against older adults is steadily rising. Statistics Canada reports that in 2021, family violence against older adults was 8 per cent higher than in 2020 and 14 per cent higher than pre-pandemic levels in 2019. Compared with 2009 statistics, the rate of family violence against older adults increased by 37 per cent over the longer-term.<sup>24</sup> In 2022, the Canadian Resource Centre for Victims of Crime (the “CRCVC”) found that family violence is more prevalent in rural areas, sharing that, “it was highest in Nunavut with a rate of 1,970 victims per 100,000 population and was lowest in Nova Scotia with a rate of 61 per 100,000.”<sup>25</sup>

In 2019, three-quarters (76%) of older adults who reported experiencing violent victimization were physically assaulted. An additional 19 per cent of cases involved the presence of a weapon, and, about one-third (35%) of older adult victims suffered a physical injury as a result of the violence they experienced. Between 2000 and 2020, 944 seniors were the victims of homicide in Canada. This figure accounted for 7 per cent of all homicide victims during this time. Statistics Canada reports that the homicide rate among seniors increased 9 per cent in this period and was primarily driven by the homicides of senior men. Within this figure, two-thirds (67%) of senior men were killed by a non-family member, most commonly a friend (30%) followed by a stranger (20%) or an acquaintance (17%). Among senior women victims of homicide, two-thirds (67%) were killed by an intimate partner (32%) or, family member (35%), while one-in-eight (13%) were killed by a stranger.<sup>26</sup>

In 2018, nearly 61% of incidents of elder abuse were physical assaults against older adults and 21% involved threats, while 31% of older adults were victimized by a family member. Among women victims, 33% were victimized by their spouse, and, 31% by their grown children. In comparison, among men, the victim’s grown child was the most

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<sup>24</sup> Statistics Canada, “Victims of police-reported family and intimate partner violence in Canada, 2021” (October 19, 2022), accessed online: <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>

<sup>25</sup> Canadian Resource Centre for Victims of Crime, “Elder Abuse” (May 2022), accessed online: [http://crcvc.ca/wp-content/uploads/2021/09/Elder-Abuse\\_-DISCLAIMER\\_-Revised-April-2022\\_-Final-1.pdf](http://crcvc.ca/wp-content/uploads/2021/09/Elder-Abuse_-DISCLAIMER_-Revised-April-2022_-Final-1.pdf) at para. 5 [CRCVC].

<sup>26</sup> *Ibid.*

common perpetrator.<sup>27</sup> In 2020, nearly two-thirds (64%) of senior victims of police-reported violence were victimized by someone other than a family member or intimate partner.<sup>28</sup>

According to the latest Statistics Canada report on the rate of violent victimization among women and men with cognitive disability, or, a mental health-related disability, this demographic was three times more likely to report that they had been physically or sexually assaulted in the previous 12 months. Persons with mental health-related disabilities were also more likely than those with disabilities not related to mental health and those without disabilities to report that they had spoken to someone other than the police, or that they utilized or contacted victim services for help following a violent victimization in the past 12 months.<sup>29</sup>

The CRCVC reports that the impacts of crime for older adults includes physical and emotional impacts, the inability to recover financially, a loss of independence, diminished quality of life, and vicarious victimization.<sup>30</sup>

The Parliament of Canada through a Justice Committee has recently investigated elder abuse in Canada. In its report entitled *Elder Abuse: Identifying the Issue and Combatting all Types of Abuse*, the Committee discussed not only federal government policy initiatives,<sup>31</sup> but, also reasons why data collection on elder abuse is difficult, including:

- A lack of a clear definition of elder abuse;

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<sup>27</sup> M. Burczycka & S. Conroy, (2018). "Family violence in Canada: A statistical profile, 2016." Juristat, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/problem-canada.html#fn1-0-rf> Accessed on: 03.07.18.

<sup>28</sup> Canadian Centre for Justice and Community Safety Statistics, "Violence against seniors and their perceptions of safety in Canada" (July 7, 2022) accessed online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00011-eng.htm>

<sup>29</sup> Statistics Canada, "Experiences of violent victimization among persons with mental health-related disabilities in Canada" (2018), accessed online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220126/dq220126b-eng.htm>.

<sup>30</sup> CRCVC, *supra* note 25 at para. 4.

<sup>31</sup> Including the New Horizons for Seniors Program which provides \$70 million per year to senior-serving organizations in Canada (part of which is designed to raise awareness of elder abuse and to increase the social inclusion of seniors, which can decrease the risk of abuse), \$50 million provided to the Public Health Agency of Canada in 2021 to promote safe relationships and prevent family violence, including elder abuse, and Justice Canada's Victims Fund which provides funding to provincial, territorial, and non-governmental organizations for senior victims and other victims of crime.

- Lack of clear benchmarks for different forms of abuse;
- Disparities in reporting requirements and data collection practices and the provincial, territories, and local level, including among police services;
- Difficulty of capturing information about elder abuse in institutional contexts and among seniors suffering cognitive impairments; and,
- The tendency to under-report.<sup>32</sup>

### *America's Experience with Elder Abuse*

The National Council on Aging (the “NCOA”) reports that approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as 5 million older adults who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities.<sup>33</sup> The NCOA also reports that the perpetrator in 60% of elder abuse and neglect incidents, is a family member with 2/3 of the perpetrators being adult children or spouses.<sup>34</sup> Older adults who have been abused have a 300% higher risk of death when compared with those who have not been mistreated.<sup>35</sup>

In a recent research study, the American Association of Retired Persons (“AARP”) collaborated with the National Opinion Resource Center (“NORC”) at the University of Chicago to provide a comprehensive, accurate, and up-to-date analysis of elder financial exploitation losses experienced by adults over the age of 60. The study found that annually, in America, adults over the age of 60 experience \$28.3 billion in losses. It was also estimated that an additional \$20.5 billion in losses go unreported. Where it concerns understanding the scope of the problem, AARP shared that “the lion’s share of total losses – about 72% (20.3 billion) – arises from fraud by people the victim knows, compared with losses from stranger-perpetrated incidents (\$8 billion in losses representing 28%).<sup>36</sup>

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<sup>32</sup> Parliament of Canada, House of Commons, “Elder Abuse: Identifying the Issue and Combatting all Types of Abuse” (2022), *JUST Committee Report*, accessed online: <http://www.ourcommons.ca/DocumentViewer/en/43-2/JUST/report-10/page-63> [JUST].

<sup>33</sup> National Council on Aging, *Elder Abuse Facts*, online <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> Accessed on 03.07.18. [NCOA Elder Abuse Facts”]

<sup>34</sup> NCOA Elder Abuse Facts, *supra* note 33.

<sup>35</sup> *Ibid.*

<sup>36</sup> Jilene Gunther, AARP BankSafe Initiative, “The Scope of Elder Financial Exploitation: What It Costs Victims” (2023) accessed online: <http://aarp.org/content/dam/aarp/money/scams-and-fraud/2023/true-cost-elder-financial-exploitation.doi.10.26419-2Fppi.00194.001.pdf>.

Recently, the Federal Bureau of Investigation’s (“FBI”) Internet Crime Complaint Center (“IC3”) released its Elder Fraud Report 2022. The report indicated that the total losses reported to the IC3 by elderly victims increased 84 per cent from 2021, monetary losses due to Investment Fraud reported by victims over 60 increased over 300 per cent, and cryptocurrency-related losses reported by the elderly increased by a staggering 350 per cent.<sup>37</sup> Overall, the report indicated that in 2022, there were 88,262 victims over 60 who experienced \$3.1 billion in losses for an average loss of \$35,101 per victim (5,456 victims, however, experienced losses over \$100,000).<sup>38</sup> Investment fraud, which involves complex financial crimes often characterized as low-risk investments with guaranteed returns, have risen significantly in their prevalence. This is largely due to the rise in cryptocurrency scams directed at older adults.<sup>39</sup> In 2022, the IC3 reported over 4,500 cryptocurrency investment scam victims, over 60 reporting just under \$1 billion in losses.<sup>40</sup> Some of the other commonly reported frauds affecting victims over 60 include call center frauds (with fraudsters impersonating tech, customer support, and government agents), lottery or sweepstakes frauds, and confidence or romance scams.

### *Vulnerability Factors*

Social isolation and mental impairment (such as dementia or Alzheimer’s) are two factors that make an older adult vulnerable to abuse or neglect. Some warning signs of physical abuse, neglect, or mistreatment include bruises, pressure marks, broken bones, abrasions, burns, bedsores, unattended medical needs, poor hygiene, unusual weight loss etc. Signs of verbal or emotional abuse include: unexplained withdrawal from normal activities, a sudden change in alertness, or unusual depression; strained or tense relationships; frequent arguments between the caregiver and older adult; belittling, threats, or other uses of power and control by individuals.<sup>41</sup>

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<sup>37</sup> Federal Bureau of Investigation Internet Crime Complaint Center, “Elder Fraud Report 2022” (2023), accessed online: <http://www.ic3.gov/Media/PDF/AnnualReport/2022-IC3ElderFraudReport.pdf>.

<sup>38</sup> *Ibid.*, at page 4.

<sup>39</sup> In 2022, IC3 received almost 10,000 complaints from victims over 60 involving the use of some type of crypto such as Bitcoin, Ethereum, Litecoin, and Ripple. Adults over 60 experienced over \$1 billion in losses with investment scams accounting for approximately 66 per cent of all losses regarding cryptocurrency.

<sup>40</sup> *Ibid.*, at page 13.

<sup>41</sup> NCOA Elder Abuse Facts, *supra* note 33.

As our population continues to age, and the statistics support, the prevalence of individuals with cognitive decline will increase. While discrimination against those who are aging ought not to be tolerated in a democratic society, we must still however ensure protections for those who are vulnerable.

## WHAT IS AGEISM?

The term “ageism” was coined in 1969 by Robert N. Butler who headed the District of Columbia Advisory Committee on Aging.<sup>42</sup> Butler stated that ageism is a combination of prejudicial attitudes towards older people, old age, and the aging process; discriminatory practices against older people; and institutional practices and policies that perpetuate stereotypes about older people.<sup>43</sup> A more recent definition of ageism has been used by gerontologist Erdman Palmore, who defines ageism as, “any prejudice or discrimination against or in favour of an age group.”<sup>44</sup>

The Ontario Human Rights Commission’s definition of “ageism” refers to two concepts: a socially constructed way of thinking about older persons based on negative attitudes and stereotypes about aging *and* a tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons.<sup>45</sup>

One of the most common ways that ageism is reflected and reinforced in various cultures is through the use of ageist language which includes any and all stereotypes or beliefs about aging. These stereotypes can be found in media, healthcare and education systems, workplace, and even regular, everyday conversations i.e. “over the hill” or the “Grey Tsunami”.<sup>46</sup>

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<sup>42</sup> Andrew Achenbaum, *The History of Ageism Since 1969*, Journal of American Society on Aging, October 19, 2015. Accessed online 13.06.18: <http://www.asaging.org/blog/history-ageism-1969>

<sup>43</sup> Robert N Butler, “Ageism: A Foreword” (1980) 36:2 Journal of Social Issues 8; see also Helene Love, “Ageism, Language and the law” (2011) 31 Windsor Rev. Legal & Soc. Issues 134 [Love].

<sup>44</sup> Erdman Palmore, *Ageism: Negative & Positive*, 2d ed (New York: Springer 1999) at 89-90, as cited in Helene Love, “Ageism, Language and the Law” (2011) 31 Windsor Rev. Legal & Soc. Issues 133.

<sup>45</sup> Ontario Human Rights Commission, “Ageism and age discrimination fact sheet” (2022), accessed online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet>.

<sup>46</sup> Love, *supra* note 43 at p.135.

A University of Southern California study<sup>47</sup> examined 72 of the highest ranked TV series among U.S. viewers airing from June 2016 through May 2017, and found that adults 60 and older represented less than 10 per cent of speaking characters on these shows. Older adults accounted for slightly more than 8 per cent of regular characters in a series. Older men were more likely than older women to be series regulars. Of the 39 series with main older adult characters, 41 per cent included at least one ageist comment. Some examples provided: “You like the color? It’s called ‘ancient ivory’, like you,” “Things just sound creepier when you’re older” and “I need to write down all these precious moments before I forget them”.<sup>48</sup> Shows without a 60 plus year-old writer were more likely to feature an ageist comment than shows with a 60 plus year-old writer, suggesting that ageist comments stem from the work of younger writers.<sup>49</sup>

Other disparities also appeared in the study. None of the 72 shows evaluated depicted a single senior Asian female; only 2 of the 62 shows showed an older Latina character and only 8 out of 72 had a black senior female character on the screen. Further only, 4 of the TV shows depicted an LGBTQ older adult character.<sup>50</sup>

In her paper, *Ageism, Language and the Law*, Helene Love posits that ageist language also permeates written judgments from our courts. Love writes that ageism is perpetuated in written judgments by the use of ageist language, such as the word “elderly”. Judgments that employ the term “elderly” reinforce social science research that the term is associated with victimhood, vulnerability, and weakness. Love argues that “[w]hile these negative stereotypes may sometimes result in favourable treatment of older adults by the courts, ageist language has an overall negative effect on older adults; it reinforces negative social beliefs about older adults as a group”.<sup>51</sup>

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<sup>47</sup> Dr. Stacy L. Smith, Dr. Katherine Pieper, Marc Choueiti et al, *Seniors on the Small Screen: Aging in Popular Television Content*, Media Diversity & Social Change Initiative, (2017), accessed online: [http://assets.uscannenberg.org/docs/Seniors\\_on\\_the\\_Small\\_Screen-Dr\\_Stacy\\_L\\_Smith\\_9-12-17.pdf](http://assets.uscannenberg.org/docs/Seniors_on_the_Small_Screen-Dr_Stacy_L_Smith_9-12-17.pdf) [Smith].

<sup>48</sup> Smith, *supra* note 47 at p.25

<sup>49</sup> *Ibid.*, at p.26.

<sup>50</sup> *Ibid.*, at p.1-2.

<sup>51</sup> Love, *supra* note 43 at p.136.

Ageism is not only present in the media and justice system, it is also present in healthcare institutions and workplaces. Ageism takes place on both the macro level in anti-aging beauty campaigns, but, also in the micro level in every day language with derogatory comments about older people.<sup>52</sup>

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

Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we fear it. We may be more likely to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us.<sup>53</sup>

The impact of ageism on older adults is serious. Older adults presented with negative images of age may display psychological issues such as depression, as well as negative physiological effects such as a decline in memory performance and a heightened cardiovascular response to stress.<sup>54</sup> Social sanctions against expressions of negative attitudes and beliefs about older individuals are very rare. In fact, they are socially accepted and rooted in culture and beliefs.<sup>55</sup>

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

The demographic trends in the age structure of the current world population are well known. The world's population is now ageing faster than ever before, especially in the group called the "oldest old" (80+). Individuals in this age group are potentially more vulnerable to poverty, exclusion, violence, neglect, abuse and discrimination. However, younger older persons also suffer unequal treatment. They are overlooked for promotion and training, and finally, they are forced to retire against their wishes. Ageing challenges a person's position in society and his/her belonging to family, local community and country. His/her right to choose a place and style of living become increasingly limited. Indeed, it is a widely accepted, or at least tolerated, idea that the elderly are less worthy and their human rights simply shrink.<sup>56</sup>

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<sup>52</sup> Barbara Mikolajczyk, "International Law and Ageism" 2014 Polish Yearbook of International Law, Vol. 34 pp.83-107 at p.88 ["Mikolajczyk"].

<sup>53</sup> *Dickason v University of Alberta*, [1992] 2 SCR 1103 at para 1173, 95 DLR (4<sup>th</sup>) 439.

<sup>54</sup> Love, *supra* note 43 at p.134.

<sup>55</sup> Mikolajczyk, *supra* note 52 at p.89.

<sup>56</sup> *Ibid.*, at p. 84, citing Beverly McLachlin, "Human dignity at any age: the law's response to an aging population", 6 Journal of International Aging, Law & Policy 111 (2013) at p. 112.

## LAWS PROHIBITING AGEISM IN CANADA

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

Canada's provisions prohibiting age discrimination are grounded in the *Charter of Rights and Freedoms* (the "Charter"),<sup>57</sup> which applies to all jurisdictions and governmental entities. Section 15(1) of the Charter contains an equality clause, which provides as follows:

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

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

Age discrimination is often not taken as seriously as other forms of discrimination. To fight ageism, it is necessary to raise public awareness about its existence and to dispel common stereotypes and misperceptions about ageing.<sup>58</sup>

Ageism is especially prevalent in the employment setting through age discrimination: fewer training opportunities are available for senior workers; when they are dismissed, senior workers are unemployed for longer periods; and they are often coerced into early retirement.<sup>59</sup> Therefore, much of the case law and legislation against age discrimination is often grounded in the employment context. However, all jurisdictions in Canada allow a person to be terminated or refused employment on the basis of age where employers can show a limitation with respect to age that is based on a "bona fide occupational requirement" or known as "BFOR", i.e., a skill or characteristic essential to a job, without

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<sup>57</sup> Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>58</sup> Ontario Human Rights Commission, "Ageism and age discrimination (fact sheet)", (2022), accessed online: <http://www.ohrc.on.ca/en/ageism-and-age-discrimination-fact-sheet>.

<sup>59</sup> Pnina Alon-Shenker, "'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" (2013) 17:1 *Canadian Labour & Employment Law Journal* 31 [Alon-Shenker].

which the job cannot be performed. For example, pilots have to have good eyesight to do their job safely.<sup>60</sup>

The Supreme Court of Canada decision in *R. v. Kapp*,<sup>61</sup> sets out the test for age discrimination in Canada and it requires that discrimination be motivated by or perpetuate stereotyping or prejudice. Pnina Alon-Shenker, in her article “*Age is Different*”: *Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting* in the Canadian Labour and Employment Law Journal, argued that this test has led adjudicators to fail to come to grips with wrongful ageism in the workplace. She proposes that the legal test for age discrimination should focus on wrongs done in the present, and not take account of any past or future wrong, and proposes a broader view of age discrimination based on the, “Dignified Lives Approach”, a theoretical framework she developed. The basic premise of this approach is that each individual must be treated with equal concern and respect at any given time, and not just over one’s lifetime as a whole. It requires that each individual be treated in a manner that respects five substantive principles of equality: individual assessment, equal influence, sufficiency, social inclusion, and autonomy.<sup>62</sup> Alon-Shenker’s view, focuses on comparing the treatment of young workers and senior workers, and on treating prejudice and stereotyping as the essential indicators of a discrimination, unduly limits the advancement of equality.<sup>63</sup>

In Canada, human rights in general, are protected by federal, provincial and territorial laws and stem from the *Universal Declaration of Human Rights*.<sup>64</sup>

Enforcement mechanisms against age discrimination differ depending on the jurisdiction in Canada since some allow complaints to a Human Rights Commission (for example see Alberta, Manitoba, Nova Scotia) which will investigate the alleged incident and then decide whether to refer the complaint to an adjudicative process. In other jurisdictions (for

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<sup>60</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. (also known as “*Meiorin*”).

<sup>61</sup> *R v Kapp* 2008 SCC 41.

<sup>62</sup> Alon-Shenker, *supra* note 59 at p.44.

<sup>63</sup> *Ibid.*, at p.63.

<sup>64</sup> United Nations, The Universal Declaration of Human Rights, 1948, accessed online: <http://www.un.org/en/universal-declaration-human-rights/>.

example, Ontario and British Columbia) an individual can apply directly to the administrative tribunal which will accept, screen, mediate and adjudicate the complaint.<sup>65</sup>

Anyone who works for, or receives services from a business or organization that is regulated by the *federal* government and is discriminated against can make a formal complaint to the Canadian Human Rights Commission (“CHRC”) which was established pursuant to the *Canadian Human Rights Act*.<sup>66</sup> The *Canadian Human Rights Act* gives the Commission the authority to research, raise awareness and speak out on any matter related to human rights in Canada. The Commission is also responsible for administering the law which protects people in Canada from discrimination when based on any of the enumerated grounds such as race, sex, disability and age. The CHRC is also empowered under the federal *Employment Equity Act*.<sup>67</sup>

In the province of Ontario, the Ontario *Human Rights Code*<sup>68</sup> gives all people equal rights and opportunities without discrimination in specific areas such as employment, housing and services. The *Code*’s goal is to prevent discrimination and harassment based on race, colour, gender identity, or expression, sex, sexual orientation, creed, age and other grounds.

The Ontario Human Rights Commission (“OHRC”) was established as an arm’s length agency of the government in 1961 to prevent discrimination and to promote and advance human rights in the province of Ontario.<sup>69</sup> The OHRC is one arm of the human rights system in Ontario, alongside the Human Rights Tribunal of Ontario and the Human Rights Legal Support Centre. Since June 2008, the Tribunal has been tasked with hearing complaints when the *Code* has been violated. This includes complaints based on age discrimination.<sup>70</sup>

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<sup>65</sup> Mathews Dinsdale LLP, “Canada Age Discrimination Info” August 19, 2016, accessed online: <http://www.agediscrimination.info/international-age-discrimination/canada>.

<sup>66</sup> *Canadian Human Rights Act*, RSC 1985, c H-6 accessed online: <http://laws-lois.justice.gc.ca/eng/acts/h-6/>.

<sup>67</sup> *Employment Equity Act*, SC 1995, c 44, accessed online: <http://laws-lois.justice.gc.ca/eng/acts/e-5.401/>

<sup>68</sup> *Human Rights Code*, RSO 1990, c H 19, accessed online: <https://www.ontario.ca/laws/statute/90h19?search=e+laws>

<sup>69</sup> Ontario Human Rights Commission, accessed online: <http://www.ohrc.on.ca/en>.

<sup>70</sup> Human Rights Tribunal of Ontario, accessed online: <http://www.sjto.gov.on.ca/hrto/>

The Ontario Human Rights Code guarantees to every person having legal capacity, a right to contract on equal terms without discrimination and states at Part I that services are to be provided without discrimination because of race, ancestry, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. There must always be a connection between the adverse treatment and the ground of discrimination.<sup>71</sup>

One example of case types before the tribunal dealing with age discrimination, are those that deal with mandatory retirement policies. Maximum age limits have been challenged under the *Charter*. Mandatory retirement at age 65 has been found justifiable by the Supreme Court of Canada. In *McKinney v. University of Guelph*,<sup>72</sup> the Supreme Court of Canada considered the constitutionality of s.10(1) of the Ontario *Code*, which limits protection from age discrimination in employment to persons between 18 and 65 and which permits mandatory retirement policies for those aged 65 and over. The Court found that the maximum age limit of 65 was *prima facie* discrimination based on age but it was a reasonable limit placed on the right and was saved by section 1 of the *Charter*.

Further, there have been long complex proceedings involving the mandatory retirement of Air Canada Pilots at the age of 60 before the Canadian Human Rights Tribunal. The issue has been before the Tribunal for more than a decade.<sup>73</sup> In the fall of 2017 the Tribunal announced it would hold another hearing to determine whether the airline had the right to force 45 pilots to retire. The new hearing was expected to proceed in early 2018.<sup>74</sup> No decision has been released to date, however, a similar claim is working its way through the Canadian Human Rights Tribunal in the case of, *Nedelec et al v. Air Canada and Air Canada Pilots Association*.<sup>75</sup>

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<sup>71</sup> Sweatman & Whaley, *supra* note 23 at page 402.

<sup>72</sup> *McKinney v. University of Guelph*, [1990] 3 SCR 229 [*McKinney*].

<sup>73</sup> The latest decision can be found here: *Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2017 CHRT 22, online: <https://www.canlii.org/en/ca/chrt/doc/2017/2017chrt22/2017chrt22.pdf>.

<sup>74</sup> "Canadian Human Rights Tribunal to revisit Air Canada Retirement age issue", September 15, 2017, *Financial Post*, accessed online: <https://business.financialpost.com/pmn/business-pmn/canadian-human-rights-tribunal-to-revisit-air-canada-retirement-age-issue>.

<sup>75</sup> 2022 CHRT 40.

In *Talos v. Grand Erie District School Board*,<sup>76</sup> the Ontario Human Rights Tribunal held that an employer's ability to terminate group benefits for employees once they reach the age of 65 is illegal discrimination. The case itself dealt with group health, dental and life insurance benefits. The Ontario Human Rights Tribunal held that Ontario's legislation, which allows for age discrimination in benefit plans by simply carving out employees over the age of 65, was unconstitutional and a violation of section 15 equality rights under the *Canadian Charter of Rights and Freedoms*.

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

## **LAWS PROHIBITING AGEISM INTERNATIONALLY**

In her paper, *International Law and Ageism*, Barbara Mikolajczyk writes that, "epidemic ageism affects more than 164 million seniors living in Europe. This means that many more Europeans are exposed to ageism than to sexism or racism. Therefore, ageism poses a challenge not only for particular societies and authorities, but also for the international community as a whole."<sup>77</sup>

Internationally, there are various documents drafted to protect individuals from, if not all forms of ageism, at least age discrimination. For example, see the International Labour Organisation Convention concerning Discrimination in Respect of Employment and Occupation Discrimination.<sup>78</sup>

Key documents provide guidelines and recommendations for UN Members States in the area of ageing and older person's rights.<sup>79</sup> These documents include the Vienna International Plan on Ageing of 1982, which was endorsed by the UN in its Resolution

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<sup>76</sup> [2018] O.H.R.T.D. No. 525 [*Talos*].

<sup>77</sup> Mikolajczyk, *supra* note 52 at p.84.

<sup>78</sup> *Ibid.*, at pp. 94-100; Convention concerning Discrimination in Respect of Employment and Occupation Discrimination (No. 111) adopted 4 June 1958, entered into force 15 June 1960), 362 UNTS 31.

<sup>79</sup> *Ibid.*, at p.85.

37/51;<sup>80</sup> the United Nations Principles of Older Persons (which include independence, participation, care, self-fulfillment, and dignity);<sup>81</sup> and the Political Declaration and Madrid International Plan of Action on Ageing adopted in 2002 by the United Nations Second World Assembly on Ageing.<sup>82</sup>

There are also some important international acts with varying legal status relating to older adults. One is the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the promotion of human rights of older persons of 2014.<sup>83</sup> Another is the Inter-American Convention on Protecting the Human Rights of Older Persons which was adopted on June 6, 2015.<sup>84</sup>

Mikolajczyk opines that despite this legislation that, “it seems that one of the gaps in the international protection of the elderly concerns the insufficient protection of older persons’ dignity vis-à-vis ageism”.<sup>85</sup>

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

The Office of the United Nations High Commission for Human Rights (OHCHR) is a United Nations agency that works to promote and protect the human rights that are guaranteed under international law and are stipulated in the Universal Declaration of Human Rights of 1948. The High Commissioner is the principal human rights official of the United Nations. The OHCHR supervises the Human Rights Council. The OHCHR’s

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<sup>80</sup> The Vienna International Plan of Action on Ageing, adopted by the World Assembly on Ageing held in Vienna, Austria from 26 July to 6 August 1982, United Nations, 1983, accessed online: <http://www.un.org/es/globalissues/ageing/docs/vipaa.pdf>.

<sup>81</sup> United Nations General Assembly, Resolution A/RES/46/91: United Nations Principles for Older Persons, 16 December 1991, accessed online: <http://www.un.org/documents/ga/res/46/a46r091.htm>.

<sup>82</sup> United Nations Political Declaration and the Madrid International Plan of Action on Ageing, Second World Assembly on Ageing, Madrid, Spain 8-12 April 2002, United Nations, New York 2002, accessed online: <https://social.un.org/ageing-working-group/documents/mipaa-en.pdf>.

<sup>83</sup> Council of Europe, Recommendation CM/Rec (2014)2 of the Committee of Ministers to Member States on the promotion of human rights of older persons, 19 February 2014, accessed online: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c649f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c649f).

<sup>84</sup> Inter-American Convention on Protecting Human Rights of Older Persons (adopted 15 June 2015), accessed online: [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp).

<sup>85</sup> Mikolajczyk, *supra* note 52 at p. 85.

priorities include strengthening international human rights mechanisms, enhancing equality and countering discrimination.<sup>86</sup> The OHCHR's method of work focuses on three major dimensions: standard-setting, monitoring, and implementation on the ground.<sup>87</sup>

Notably, the United Nations Human Rights Council in Geneva has made advancements for the human rights of older adults. In its 48<sup>th</sup> session in October 2021, the Human Rights Council adopted its first substantive resolution to advance the human rights of older adults and fight ageism and age discrimination. At this session, the Human Rights Council also requested that the UN High Commissioner for Human Rights present a report on international legal standards and obligations.<sup>88</sup>

In response, on January 28, 2022, the High Commissioner released a report which detailed that:

The current international framework provides fragmented and inconsistent coverage of the human rights of older persons in law and practice and that there is a need to move expeditiously towards developing and adopting a coherent, comprehensive and integrated human rights framework on older persons, while further integrating older persons' concerns into the work of existing mechanisms.<sup>89</sup>

Related human rights conventions that exist include, the *Convention on the Rights of People with Disabilities*<sup>90</sup> ("CRPD") and the *Convention on the Rights of the Child*.<sup>91</sup> It

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<sup>86</sup> The Office of the High Commissioner for Human Rights, Who We Are, accessed online: <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>.

<sup>87</sup> The Office of the High Commissioner for Human Rights, How We Do It, accessed online: <https://www.ohchr.org/EN/AboutUs/Pages/HowWeDoIt.aspx>.

<sup>88</sup> Age Platform Europe, "Rights of older persons: substantive resolution adopted by UN Council" (November 9, 2021), accessed online: <https://age-platform.eu/policy-work/news/rights-older-persons-substantive-resolution-adopted-un-council>.

<sup>89</sup> United Nations General Assembly Human Rights Council, 49<sup>th</sup> Session Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General, "Normative standards and obligations under international law in relation to the promotion and protection of the human rights of older persons" (January 28, 2022), accessed online: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/238/86/PDF/G2223886.pdf?OpenElement>.

<sup>90</sup> Convention on the Rights of Persons with Disabilities, UN Department of Economic and Social Affairs, Division for Inclusive Social Development, accessed online: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>.

<sup>91</sup> United Nations Human Rights, Office of the High Commissioner, Convention on the Rights of the Child, accessed online: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

appears that the proposed UN *Convention on the Rights of Older Persons* will be the next human rights treaty adopted by the United Nations.<sup>92</sup>

The CRPD, which was adopted on December 13, 2006 and entered into force on May 3, 2008, was the first comprehensive human rights treaty of the 21<sup>st</sup> century. As explained in *Incapable and Capable Rights*, the CRPD was and still is intended as a human rights instrument and re-affirms the notion that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>93</sup> In the CRPD, persons with disabilities are defined as those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>94</sup>

The CRPD also clarified and qualified how all categories of rights apply to persons with disabilities and identified areas where adaptations are required in order to allow persons with disabilities to effectively exercise their rights in the face of violation, but also, areas where the protection of rights must be reinforced.<sup>95</sup> The CRPD has important implications for older adults with physical or cognitive disabilities.

The CRPD, through Article 12 of the Convention, has implications for the protection of the right to legal capacity and persons with disabilities. The Article, which deals with equal recognition before the law requires signatory states to:

- reaffirm that persons with disabilities have the right to recognition everyone as persons before the law;
- recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity;

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<sup>92</sup> United Nations Human Rights, Office of the High Commissioner, “UN Human Rights Chief offers her support for a new Convention on the rights of older persons”, accessed online: <https://www.ohchr.org/EN/NewsEvents/Pages/RightsOfOlderPersons.aspx>.

<sup>93</sup> Sweatman & Whaley, *supra* note 23 at page 406.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, at page 405.

- ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law; and,
- take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs, and to have equal access to bank loans, mortgages and other forms of financial create, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.<sup>96</sup>

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

At this time, there is no formal draft treaty that has been agreed upon by the United Nations General Assembly, however, an “Open-Ended Working Group on Ageing for the Purpose of Strengthening the Protection of the Human Rights of Older Persons” has been established.<sup>97</sup> The United Nations General Assembly adopted Resolution 65/182 which established the Open-Ended Working Group. The mandate of the Working Group is to consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.<sup>98</sup>

The twelfth and latest working session of the Working Group was held on April 11 to 14, 2022. The session included panel discussions on, “Measures to enhance the promotion and protection of the human rights and dignity of older persons” and, “The contribution of older persons to sustainable development” and an interactive panel discussion on “strengthening the promotion and protection of the human rights of older persons in the context of COVID-19 pandemic and beyond”.<sup>99</sup> Several member states provided input to the latest session.<sup>100</sup> The thirteenth session of the Working Group was held from April 3 to 6, 2023 in Conference Room 2 at the United Nations Headquarters in New York. The

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<sup>96</sup> *Ibid.*, at pages 406-407.

<sup>97</sup> Open-ended Working Group on Ageing for the purpose of strengthening the protection of the human rights of older persons, accessed online: <https://social.un.org/ageing-working-group/index.shtml>

<sup>98</sup> *Ibid.*

<sup>99</sup> United Nations General Assembly, “Report of the Open-Ended Working Group on Ageing on its twelfth session” (April 2022), accessed online: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/350/17/PDF/N2235017.pdf?OpenElement>.

<sup>100</sup> *Ibid.*

panel discussions included a focus area on the, “Right to health and access to health services”, “Social inclusion,” and an interactive discussion on “strengthening the promotion and protection of the human rights of older persons.” Ovide Mercredi, the Ambassador for the International Longevity Centre of Canada and Former National Chief of the Assembly of First Nations presented a statement at the session during the panel on social inclusion.<sup>101</sup>

Recently, there has been a renewed focus on the adoption of a Convention for the Rights of Older Persons. On June 14, 2022, six leading national organizations on ageing from the United States of America jointly signed a letter asking U.S. Ambassador Linda Thomas-Greenfield to take steps for drafting a Convention.<sup>102</sup> The letter was sent to coincide with the Ministerial Conference on Ageing, part of the United Nations Economic Commission for Europe, who met in Rome to mark the 20<sup>th</sup> anniversary of the adoption of the Madrid International Plan of Action on Ageing and its Regional Implementation Strategy (MIPAA/RIS).<sup>103</sup>

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

Using “hate crime” legislation is also an option to combat ageism and abuse. In Helia Garrido Hull’s article, *The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population* in the Michigan Law Review,<sup>104</sup> she notes that despite a general decline in the overall rate of violent crime in the United States across all age

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<sup>101</sup> United Nations Human Rights Office of the High Commissioner, “13<sup>th</sup> Session: Open-Ended Working Group on Ageing for the purpose of strengthening the protection of human rights of older persons” (April 2023), accessed online: <https://social.un.org/ageing-working-group/thirteenthsession.shtml>.

<sup>102</sup> Including Ramsey Alwin (President and CEO of the National Council on Aging), Bob Blancato (Executive Director of the National Association of Nutrition and Ageing Services Programs), Cindy Cox-Roman (CEO of HelpAge USA), Lindsay Goldman (President of Grantmakers in Ageing), Peter Kaldes (President and CEO of the American Society on Ageing) and, Katie Smith Sloan (President and CEO of Leading Age and the Executive Director of the Global Ageing Network.)

<sup>103</sup> National Council on Aging, “Protecting the Rights of Older Adults: The Time to Act is Now” (June 14, 2022), accessed online: <http://ncoa.org/article/protecting-the-rights-of-older-adults-the-time-to-act-is-now>.

<sup>104</sup> Helia Garrido Hull, “The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population” 2009 Mich St L Rev 387 [Hull].

groups, violent crime against the elderly has increased each year since 2003.<sup>105</sup> Accordingly, several states elected to prosecute attacks against the elderly as hate crimes.<sup>106</sup>

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

In her paper, Helene Love concludes that one common misconception about older adults is that ageing, “invariably involves physical or mental decline” and that “ageing occurs at different rates for different adults, and assuming uniform characteristics, especially sickness or frailty, underestimates the vitality of many older adults”.<sup>107</sup> Love refers to the case of *Re Culbert Estate*,<sup>108</sup> where despite finding that the 94 year old testator had legal capacity to execute her Will, Ball J., nevertheless made the following statement about older adults in general: “It is not uncommon for an elderly person to lose his or her mental faculties over a period of time, during which intervals of comprehension alternate with periods of confusion.”<sup>109</sup> Love posits that Ball J.’s reference to older people generally losing their mental faculties, which was not the case for Ms. Culbert, reinforces the idea that aging commonly involves a decline in mental acuity and cognitive functions. Love concludes that “[s]ince cognitive decline does not uniformly occur with aging, it should not be attributed to aging adults as a general trait.”<sup>110</sup>

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

### ***Is Protection Always Ageist?***

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

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<sup>105</sup> Hull, *supra* note 104 at p.390.

<sup>106</sup> *Ibid.*, at p.390.

<sup>107</sup> Love, *supra* note 43 at p.150.

<sup>108</sup> 2006 SKQB 454, 28 ETR (3d) 117 [*Re Culbert Estate*].

<sup>109</sup> *Re Culbert Estate* at para. 73.

<sup>110</sup> Love, *supra* note 43 at p.150.

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

. . .the Law Commission of Canada in 1999 worried that a separate area of law and legal practice for the elderly may inadvertently reinforce the pernicious belief that older persons are less capable, less deserving of respect, and less needful of independent and autonomy. It seems to me that if Elder Law is founded on the inclusionary value of respect for the full humanity of those with special needs, it can have the opposite effect. Elder Law specialization will no more spread the belief that elders are less capable than corporate law specialization has spread the belief that capitalists are less capable. It can help reverse ageist stereotypes rather than perpetuating them, while better meeting the special needs of the aging.<sup>111</sup>

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

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

. . .several jurisdictions in Canada have already enacted legislation to protect older adults who are victims of physical or sexual abuse, mental cruelty or inadequate care or attention, and to better coordinate legal, health, and social service interventions. Detractors call this a “child welfare model” and complain that it fails to respect the independence of older adults and will inevitably infantilise them. **While this is a danger, again, I am not so pessimistic. We have a strong record of assisting people when they need special assistance, while maintaining their independence and human dignity to the greatest extent possible.**<sup>112</sup> [emphasis added]

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

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<sup>111</sup> McLachlin, *supra* note 22 at p.127.

<sup>112</sup> *Ibid.*, at p.128.

legal and medical rights; 3) in deprivation of choices, decisions, status, finances and respect.”<sup>113</sup>

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

The abuse, exploitation and neglect of vulnerable older persons involves the serious denial of a person’s basic human rights, however, a lack of community awareness, ageism and the frequent invisibility of our elderly mean that elder abuse remains a hidden problem within society.<sup>114</sup>

Despite all these ambiguities and the confusion surrounding the issue, there’s a real need to confront the necessity for international protection for the elderly within the fight against ageism at an international level.<sup>115</sup> As noted by Mikolajczyk:

It is clear that modern, elderly-friendly and skillful interpretations of the discrimination clauses [in the legislation] are required to achieve the fullest protection of older persons’ rights and their dignity . . . simply refraining from age discrimination may not be sufficient to combat ageism, especially that which may result in elder abuse.<sup>116</sup>

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

**. . . contemporary binding international law usually does not take into account, the vulnerability of older persons.** In addition, the ambiguity of the age criterion makes the definition of this category of persons much more subtle than other easily-identified groups, such as those suffering from racism, sexism or homophobia. **Therefore, the protection of older persons – if limited only to the prohibition of age discrimination – is incomplete.**<sup>117</sup> [emphasis added]

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<sup>113</sup> Mikolajczyk, *supra* note 52 at p.87, citing World Health Organization, A Global Response to Elder Abuse and Neglect: Building primary health care capacity, WHO, Geneva: 2008, accessed online: [http://www.who.int/ageing/publications/elder\\_abuse2008/en/](http://www.who.int/ageing/publications/elder_abuse2008/en/) at p.1.

<sup>114</sup> Wendy Lacey, “Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia” 2014 Sydney Law Rev 36: 99 at 100 [Lacey].

<sup>115</sup> Mikolajczyk, *supra* note 52 at p.89.

<sup>116</sup> *Ibid.*, at p.102.

<sup>117</sup> *Ibid.*, at p.106.

## CIVIL AND CRIMINAL REMEDIES

When faced with the abuse of an older adult, there are at least two avenues that can be followed in pursuit of a remedy: a civil proceeding in a court (i.e., lawsuits between private individuals) or a criminal proceeding (i.e., where an individual is charged under the *Criminal Code* by the Crown).

While criminal prosecution is a possibility in the context of older adult abuse, it is not always an ideal response for a variety of reasons. Criminal 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 too much time, such 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 under-utilized due to this apparent misperception that such matters are best suited to civil recourse rather than criminal.

In a recent Parliamentary Committee studying elder abuse, it was discovered that the nature of the legal system itself can discourage seniors from pursuing criminal charges. The JUST Committee was told that most jurisdictions in Canada do not have Crown counsel policies to guide prosecutors working with victims and witnesses who may have mental capacity issues such as dementia. What's more, the Canadian Centre for Elder Law testified that "Canada lacks a robust infrastructure to support charging and

conviction,” and that, there is a lack of policy direction and professional development for police, Crown counsel, and the judiciary about elder abuse.”<sup>118</sup>

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 in civil courts. Often, civil remedies are only available to those who can afford such a 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.<sup>119</sup>

## **CIVIL REMEDIES**

Civil remedies are mainly about restitution, meaning placing the victim back into the place one would have been, had the wrongful act never occurred. In other words, to have the perpetrator pay back the money appropriated and face imposed punitive cost consequences (this is also known as “damages”). While there may well be some element of restitution in criminal cases, the guilty perpetrator is often sentenced to jail, probation, or some other punitive outcome that may not include a return of the taken money or property. Moreover, in some civil decisions, courts have signaled their willingness to order custodial sentences where necessary, especially in breach of trust cases. Another remedy available in civil proceedings 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.

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<sup>118</sup> JUST, *supra* note 32.

<sup>119</sup> See Appendix “A” to this paper for a list of provincial/territorial legislation.

In a civil court proceeding, the plaintiff (i.e., the older adult/victim) must use evidence to prove on a “balance of probabilities” 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 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 an arguably lower standard, being “on a balance of probabilities”, may well be more suitable.

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

- (1) **Breach of fiduciary duty** by a substitute decision maker. Where an individual has been duly appointed to act on behalf of a grantor to make financial or property decisions, they enter into a fiduciary relationship. A fiduciary is held to certain ethical, moral, and legal duties. In Ontario for example, the actions of an attorney acting under a valid Continuing Power of Attorney for Property (“CPOA”) are governed by the *Substitute Decisions Act, 1992* at section 32(1).<sup>120</sup>

In Ontario, the terminology surrounding Power of Attorney documents differs slightly from other jurisdictions like British Columbia. For example, the person appointing the attorney under a Power of Attorney document is called a “grantor” rather than a “donor”. While Ontario also has General and Limited Power of Attorney documents, it is a 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.

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<sup>120</sup> See *Substitute Decisions Act, 1992*, SO 1992 c 30 at s 32(1) [SDA] which holds that “A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.”

In British Columbia, the fiduciary standard applies to anyone acting as an attorney under a Power of Attorney (“POA”) or Enduring Power of Attorney document. The duties relating to Powers of Attorney in British Columbia are codified in the *Power of Attorney Act*<sup>121</sup>. Additionally, a representative<sup>122</sup> acting under a Representation Agreement, made pursuant to the *Representation Agreement Act*<sup>123</sup> must also fulfill certain ethical, moral and legal duties/obligations.<sup>124</sup> These statutory provisions exist alongside parameters established in the common law that govern a fiduciary’s actions.<sup>125</sup>

The nature of a fiduciary relationship was addressed in the 1987 Supreme Court of Canada decision in *Frame v. Smith* where Wilson J. held that relationships in which a fiduciary obligation have been imposed possess three general characteristics:

- a. The fiduciary has the scope for the existence of some discretion or power;
- b. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and
- c. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>126</sup>

(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

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<sup>121</sup> *Power of Attorney Act*, RSBC 1996, c 370, s 19.

<sup>122</sup> Meaning an individual who makes health care and personal care decisions or provides routine management of the adult’s financial affairs.

<sup>123</sup> *Representation Agreement Act*, RSBC 1996, c 405.

<sup>124</sup> 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.

<sup>125</sup> See for example, *Andreasen v Daniels-Ferrie*, 2001 BCSC 1503, at para 27 [*Andreasen*].

<sup>126</sup> (1987), 42 D.L.R. (4<sup>th</sup>) 81, at pp. 98-99 [*Frame v Smith*].

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.

### *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 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.<sup>127</sup>

#### *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 affairs, in making decisions that are not contrary to the interests of the donor/grantor.<sup>128</sup> 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

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<sup>127</sup> See generally, *supra* note 120 SDA.

<sup>128</sup> *Andreasen*, *supra* note 125 at para 27.

*Power of Attorney Regulations*<sup>129</sup>, that provide robust record keeping obligations on those acting under an EPOA. Additionally, the duty to account can also be found in case law.<sup>130</sup>

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”.<sup>131</sup>

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.<sup>132</sup>

In Ontario, at a hearing of an accounting application under the *Substitute Decisions Act, 1992*, a 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.

In 2022, the Ontario Superior Court released its decision in *Moore v. McLean*.<sup>133</sup> In *Moore*, an attorney for property was removed after the court took the view that he was not following through on clear direction from the court and as a result, his conduct fell below what is required of a fiduciary. Despite receiving direction from the court in the spring of 2021, the attorney had failed to provide his accounting in an easily and conventionally understood format. The attorney also took a ‘just in time’ approach to serving and filing documents to both the court and to other interested parties. In removing the attorney, the court re-iterated the general principles applicable to removing an attorney and in doing so, relied on the decision in *Bellefeuille v. Bellefeuille*.<sup>134</sup> In *Bellefeuille*, it was held that to terminate a power of attorney, there must be strong and compelling evidence of

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<sup>129</sup> *Power of Attorney Regulations*, BC Reg 20/2011.

<sup>130</sup> See *McEwen v Jenkins and Bradley*, 1958 CanLII 69 (SCC); *Brown v Brown*, 2011 BCSC 649; *Sull v Pengelly*, 2019 BCSC 575 [*Sull*].

<sup>131</sup> *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).

<sup>132</sup> *Sull*, *supra* note 130 at para 116.

<sup>133</sup> 2022 ONSC 295 [*Moore*].

<sup>134</sup> 2018 ONSC 6802 [*Bellefeuille*].

misconduct or neglect on the part of the attorney<sup>135</sup> but also, that the attorney has a duty at all times to be in the position to prove the legitimacy of disbursements made on behalf of the estate of the incapable person.<sup>136</sup>

The court removed the Attorney in breach of his fiduciary duties and ordered that he provide an accounting for the money he had taken and/or used.

### *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 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.

In the 2010 decision of *Zimmerman v. McMichael Estate*,<sup>137</sup> a lawyer and family friend took a widow and had himself appointed as her sole Attorney for Property. The widow was frail and required constant nursing assistance. The lawyer, Mr. Zimmerman, had complete control of her assets. He proceeded to misappropriate her assets to pay for such things as expensive dinners, new clothing, limousines, sailing trips to Bermuda, and trips to New York. The court found that he had also used the widow’s BMW, charging all expenses to her, and had taken her expensive art collection to adorn the walls of his own home (he had even “lost” one piece of art). The court found that Mr. Zimmerman’s conduct fell well below the standards expected of an Attorney. He was required to repay the amounts that he had taken, together with interest from the date of each misappropriation. Mr. Zimmerman died shortly after the decision, so it is unknown if the money was ever recovered.

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

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<sup>135</sup> See *Teffer v. Schaefers*, 2008 CarswellOnt 5447 at para. 21 quoting *Re Hammond Estate* (1998), 1999 CanLII 19754 (NL SC), 25 E.T.R. (2d) 188 at para. 31.

<sup>136</sup> See *Aragona v. Aragona (Guardian of)*, 2012 ONCA 639 at para. 21, citing Carmen S. Thériault, Widdifield on Executors and Trustees, 6<sup>th</sup> ed (Toronto: Thompson Reuters Canada, 2002, loose-leaf), ch 13 at s 13-1.

<sup>137</sup> 2010 ONSC 2947 [*McMichael Estate*].

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. 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.

In the recent decision of *Marttunen v. McDevitt*,<sup>138</sup> an attorney for property was found to have held the sum of \$443,974.04 on a resulting trust for his mother. In that case, the Attorney admitted that he took the funds from the grantor by way of cash withdrawals and internet banking transfers from the joint account he held with her.

#### *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.

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<sup>138</sup> 2023 ONSC 208 [*Marttunen*].

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.<sup>139</sup> 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.<sup>140</sup> 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.

In the 2021 decision of *Public Guardian and Trustee v. Cherneyko et al.*,<sup>141</sup> a neighbour who took advantage of a vulnerable older adult failed to rebut the presumption of a resulting trust with respect to an alleged gift to her of \$250,000. The neighbour, who was found to have breached her fiduciary duties as an attorney for property, was caught misappropriating the funds of an older adult with dementia after the Office of the Public Guardian and Trustee investigated her conduct.

### *Setting Aside or Declaring a Predatory Marriage as “Void”*

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<sup>139</sup> See *Garland v Consumers’ Gas Co*, 2004 SCC 25, at para 50 and *Kerr v Baranow*, 2011 SCC 10.

<sup>140</sup> *Pecore v Pecore*, [2007] 1 SCR 795.

<sup>141</sup> 2021 ONSC 107 [*Cherneyko*].

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.

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.<sup>142</sup>

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<sup>142</sup> 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.

## CRIMINAL REMEDIES

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

In Canada, judges have significant discretion with respect to the sentencing of individuals who are guilty of crime. Judges are guided only by general principles in the *Criminal Code* and high maximum penalties. The fundamental purpose of sentencing is to impose sanctions that meet a number of objectives, including denouncing unlawful conduct and deterring the offender and other persons from committing offences.<sup>143</sup>

The *Criminal Code* plays a role in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse. The *Criminal Code* does not provide one specific offence in respect of “elder abuse” or “elder financial abuse”. Instead, the police have available to them various sections under which a perpetrator of elder abuse could be charged, depending on the nature of that abuse.

Parliament defines offences broadly to capture behaviour of varying degrees of culpability. Some examples of relevant sections from the *Criminal Code* include: section 331, *Theft by a Person Holding a Power of Attorney*; section 322, *Theft*; section 336, *Criminal Breach of Trust*, section 366, *Forgery*; section 346, *Extortion*; sections 386-388, *Fraud*; section 215, *Neglect, Failure to Provide the Necessaries of Life*; and section 219, *Criminal Negligence*.

Courts also consider a wide range of aggravating and mitigating factors in determining the appropriate sentences, and some of the prescribed aggravating factors include evidence that the offence was motivated by age or mental disability, and evidence that the offender abused a position of trust or authority in relation to the victim.<sup>144</sup> The presence of these factors may result in an increased sentence. Notably, the *Protection of Older Adults Act* expanded the *Criminal Code*'s list of aggravating factors found in section

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<sup>143</sup> *Criminal Code*, s. 718.

<sup>144</sup> *Criminal Code*, s. 718.2.

718. These factors are considered in sentencing to specifically target offences against victims who are vulnerable due to their age and other personal circumstances.<sup>145</sup>

Cases which deal with the aggravating factor of age are rarely seen, however, in 2022, a decision out of Quebec was rendered which demonstrated the use of the sentencing provision found in 718 in the context of violence against older and vulnerable victims. In *R. c. D'Onofrio*,<sup>146</sup> two elderly victims were kidnapped inside their home in New York State and taken to Canada under the cover of night. The couple was held for ransom due to a major drug debt incurred by their grandson, with whom they had little connection.<sup>147</sup> In *D'Onofrio*, the court held that the fact the couple was elderly and vulnerable constituted an aggravating factor, recognizing that “[the couple] were 70 and 76 at the time of their abduction and each had pre-existing health conditions.”<sup>148</sup> The offender in that case received a 17-year prison sentence.

Where there is suspected abuse, a family member or the victim can make a police report. According to the CRCVC, “reporting to the police might involve making a detailed verbal statement about the nature of abuse, having the police interview family members, caregivers, and neighbours who may have evidence, taking photographs of evidence, physical examination if a sexual or physical assault occurred, and identifying the abuser and testifying against him or her in court.”<sup>149</sup> Criminal charges may be filed by police or Crown prosecutors. The case is then heard in either criminal court or a special set court for domestic violence cases. A peace bond may be issued when personal injury or damage to property is feared. A peace bond, however, cannot be used to protect a victim from emotional or financial abuse. According to the CRCVC, “a court can grant a peace bond that requires the abuser to have no contact with the older adult and to stay away from specific locations.”<sup>150</sup> Peace bonds last up to 12 months, don’t require a lawyer for

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<sup>145</sup> *Protection of Older Adults*, SC 2012 c 19.

<sup>146</sup> 2022 QCCQ 7241 [*D'Onofrio*].

<sup>147</sup> *D'Onofrio*, *supra* note 147 at para. 4.

<sup>148</sup> *Ibid.*, at para. 117.

<sup>149</sup> CRCVC, *supra* note 25 at para. 11.

<sup>150</sup> *Ibid.*, at para. 12.

an application, and can generally be accessed at a local Provincial court through its criminal division.

In 2015, the *Canadian Victims Bill of Rights*<sup>151</sup> came into force. While the Bill does not provide remedies per se, it does provide 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.

In cases of financial abuse, courts can make orders for restitution (or compensation) which relates to losses suffered as a result of the crime. It can include such losses as stolen property, lost wages, and moving costs."<sup>152</sup> The difficulty with restitution orders is that they are difficult to enforce – victims likely have to initiate their own court proceedings as restitution orders are not paid voluntarily in Canada.

While there is a section of the *Criminal Code* specifically related to, Theft by a Person Holding a Power of Attorney (s.322) there are in reality, very few reported cases citing this section. In one egregious case, *R. v. Kaziuk*,<sup>153</sup> a son defaulted on the mortgages he placed on all of his older mother's properties without her knowledge, using the Continuing Power of Attorney granted to him by his mother. The mother went from having assets in excess of \$1 million to being penniless and living in a homeless shelter. The son was sentenced to the maximum 10 years in jail, but not under the charge of Theft by a Person Holding a Power of Attorney (as would have been the correct charge as noted by the court) but, rather, under the general theft and fraud provisions of the *Criminal Code*. Unfortunately, his sentence was reduced from 10 years to 8 on appeal. Despite the sentence reduction, this case is precedent for stern sentencing in cases involving theft and fraud perpetrated against an older, vulnerable adult.

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<sup>151</sup> *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

<sup>152</sup> *Ibid.*

<sup>153</sup> *R v Kaziuk* 2011 ONCJ 851.

A recent example of the financial exploitation of an older adult leading to a criminal sentence was seen in *R v Cvetas*.<sup>154</sup> In that case, a banking executive (“Mr. Cvetas”) entered a guilty plea for the charge of theft over \$5,000. Mr. Cvetas admitted to taking \$317,000 over the course of a year from the account of his 81-year-old godmother, (“Ms. Cemas”).<sup>155</sup>

Mr. Cvetas befriended and grew close to Ms. Cemas, who had lost her entire family. In 2014, he was added as a joint account holder on one of her bank accounts, appointed Executor and Trustee of her estate, and was named a beneficiary to the Estate as well. In early 2015, he was appointed as Attorney under a Power of Attorney for Property and Personal Care for Ms. Cemas.

On December 1, 2015, he withdrew \$35,000 from Ms. Cemas’ account and deposited the funds into his own. On February 5, 2016, he withdrew another \$260,000 from her account. When a bank employee inquired, he responded that “he was moving the money to BMO Nesbitt Burns to get a higher interest rate deposited on account.” On August 11, 2016, he withdrew \$15,000, and on October 26, 2016, \$7,000 for a total of \$317,000. During this same period, Ms. Cemas only made three withdrawals for a total of \$2,000.00.

When Ms. Cemas discovered there were insufficient funds in her account she contacted Mr. Cvetas. When he failed to return the money, she contacted a lawyer. On October 11, 2017, Mr. Cvetas was arrested and charged after turning himself in to police. Prior to sentencing, he made restitution of \$317,000 to Ms. Cemas through his lawyer. Mr. Cvetas was sentenced to 12 months imprisonment followed by two years of probation.

There are several other cases in Canadian law involving facts and circumstances where vulnerable older adults were the victims of theft by family members or acquaintances;<sup>156</sup>

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<sup>154</sup> 2022 ONSC 1640 [*Cvetas*].

<sup>155</sup> *Ibid*, at para 1.

<sup>156</sup> See for example, *R v Webb* 2011 SKPC 181 where a nephew, using a Power of Attorney, sold his uncle’s house, removed all his money from his bank accounts (including his pension and monthly government support cheques) and placed his uncle in a nursing home. At the sentencing hearing the nephew professed his love for his uncle and presented a cheque in court for the balance stolen. See also *R v Hooyer* 2016 ONCA 44, where a long-time family friend of an older adult with dementia moved into the older adult’s home, used the older adult’s money to purchase multiple vehicles and burned through the remainder of the older adult’s money. Hooyer was sentenced to 2 years less a day in prison.

fraud by trusted financial advisors<sup>157</sup> or family members;<sup>158</sup> failing to provide the necessities of life;<sup>159</sup> and assault by caregivers.<sup>160</sup> Many of these cases involve the misuse and abuse of a CPOAP. An unfortunate consequence of this particular substitute decision making mechanism is that, for a number of reasons, financial mismanagement by an attorney under a CPOAP does not always attract criminal charges. The victim may have knowledge of, or agree to, the inappropriate expenditures of the attorney. The victim may tell investigating police that they knew about and agreed to the expenditures in order to prevent the criminal prosecution of their loved one. In some cases where there is evidence that the older adult is incapable of managing their property, the police often decline to investigate at all on the basis of a misconception that these issues are more appropriately dealt with by the civil courts.

In light of this, McLachlin noted in her speech:

Even when prosecution is a realistic possibility, some question the utility of criminal law as a response to elder abuse. While the criminal law may be a powerful weapon against abuse, it is often too blunt an instrument to be effective. The criminal law does not always address the complexities of intimate relationships. Given that in ninety percent of elder abuse cases, the perpetrators are spouses or relatives, a victim may avoid initiating the prosecution because of fear of rejection by other family members, loss of care or being left alone . . . Similar problems beset the pursuit of civil remedies. Often, the elderly are hampered in their access to the legal system because they do not recognise their rights, or are unable to navigate the impediments the legal culture has placed between them and justice.<sup>161</sup>

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<sup>157</sup> See *R v Chan* 2012 ABPC where Chan admitted to defrauding multiple elderly clients of over \$1 million.

<sup>158</sup> See *R v Curreri* 2016 ONSC 3598, where a son fraudulently transferred and mortgaged eight properties owned by his father. The court found that the son “knowingly and deceptively used his name, which was the same as his father’s to transfer and mortgage the properties to strangers”. The court imposed a conditional sentence of two years less a day.

<sup>159</sup> See *R v Davy* 2015 CanLII 10885 (ONSC) a particularly heinous case where a daughter and son-in-law neglected and abuse the mother who suffered from severe dementia. The mother was found naked on a bare mattress in a room with blacked out windows covered in her own vomit. The perpetrators were each sentenced to 12 months in jail.

<sup>160</sup> See the recent case of *R v Llanto* 2018 BCPC 102 where a paid caregiver plead guilty to assaulting (slapping on the head and legs) an older adult who suffered from Alzheimer’s disease and was paralyzed due to a stroke. The caregiver was sentenced to 60 days in jail.

<sup>161</sup> McLachlin, *supra* note 22 at p.120.

## ONTARIO LAW: PROTECTIONS, STRENGTHS AND WEAKNESSES

There are several laws in Canada aimed at protecting older adults and preventing elder abuse. Most jurisdictions across Canada have adopted mandatory reporting laws for abuse.<sup>162</sup> For example, if an older adult resides in a Long-Term Care Home or a Retirement Home and elder abuse is suspected or occurred, legislation requires mandatory reporting of any such incidents or suspected incidents.<sup>163</sup> Each Act provides that where there are reasonable grounds to suspect abuse, it must be reported. The *Long-Term Care Homes Act, 2021*, which was proclaimed into force on April 11, 2022, not only provides that consent is not required to report information that would otherwise be considered confidential but also includes a Residents Bill of Rights featuring 29 rights divided into 5 sections.

In June of 2017, a nurse in Ontario (Elizabeth Wettlaufer) was convicted of eight counts of first-degree murder, four counts of attempted murder, and two counts of aggravated assault. Between 2007 and 2016, while working as a Registered Nurse in long-term care homes, she intentionally injected residents with an overdose of insulin. Wettlaufer, Canada's first known healthcare serial killer, received a sentence of life in prison with no chance of parole for 25 years.<sup>164</sup>

On August 1, 2017, a public inquiry was launched to investigate how such a heinous crime could have occurred. The two-year inquiry concluded with three principal findings and several recommendations. The Honourable Eileen E. Gillese, Commissioner of the Long-Term Care Homes Public Inquiry, released her report on July 31, 2019 in Woodstock, Ontario. The report made three principal findings:

1. If Wettlaufer had not confessed, the offences would not have been discovered;
2. Offences were the result of systemic vulnerabilities, and, therefore, no findings of individual misconduct are warranted; and

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<sup>162</sup> See Appendix A for a cross-provincial list of protection and reporting legislation.

<sup>163</sup> See the *Long-Term Care Homes Act, 2021* SO 2021, c 39 s 28 (which repealed the *Long-Term Care Homes Act, 2007*) and the *Retirement Homes Act, 2010*, SO 2010, c 11 s 74.

<sup>164</sup> Government of Ontario, "Public Inquiry into the Safety and Security of Residents in the Long-Term Care Homes System" (February 25, 2022), accessed online: <https://www.ontario.ca/page/public-inquiry-safety-and-security-residents-long-term-care-homes-system>.

### 3. The long-term care home system is strained but not broken.

The report makes a total of 91 recommendations, including that system issues require a systemic response. The report identifies four of these systemic responses, including prevention, awareness, deterrence, and detection. According to the Commissioner, “human and financial resources are stretched thin in the long-term care system, so it is important to use those resources wisely, making changes that will improve not only the safety and security of those in the long-term care system but also the quality of their daily lives.”<sup>165</sup>

At the same time, the stereotypes of ageism mean there is often a marked lack of interest in advancing or protecting the rights of the elderly and difficulties or protecting the rights of the elderly and difficulties in reporting and prosecuting abuse.<sup>166</sup>

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

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

Statutes, and in particular those that fall within provincial jurisdiction, address issues arising from the legal construct of mental incapacity. In Ontario, adults with compromised mental capacity – regardless of their age – are afforded the protection of the various substitute decision making schemes found in the *Substitute Decisions Act, 1992*<sup>167</sup> and in the *Health Care Consent Act*<sup>168</sup> in Ontario. These statutes aim to ensure that older adults enjoy equal protection under the law and will be discussed next.

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<sup>165</sup> Government of Ontario, “Public Inquiry into the Safety and Security of Residents in the Long-Term Care Homes System – Report of the Honourable Eileen E. Gillese, Commissioner of the Long-Term Care Homes Public Inquiry” (July 31, 2019), accessed online: [http://longtermcareinquiry.ca/wp-content/uploads/LTCI\\_Final\\_Report\\_Volume1\\_e.pdf](http://longtermcareinquiry.ca/wp-content/uploads/LTCI_Final_Report_Volume1_e.pdf).

<sup>166</sup> McLachlin, *supra* note 22 at p.119.

<sup>167</sup> *Substitute Decisions Act, 1992*, SO 1992, c 30.

<sup>168</sup> *Health Care Consent Act, 1996*, SO 1996, c 2 Sched. A.

## ***Capacity and Decision-Making Statutory Protection of Older Adults***

Legal capacity, decision-making and guardianship laws can have a profound influence over some of the most important and intimate legal decisions and choices in a person's life. These decisions involve serious and consequential legal issues that are filled with questions and controversies regarding personal independence, a person's right to make choices and take risks, legal accountability for decision-making, and the balance between a person's autonomy and his or her safety and security.<sup>169</sup>

In an ETPJ article, *Incapable and Capable Rights: The Rights of Adults in Vulnerable Circumstances – Sledgehammer v. Swiss Army Knife*,<sup>170</sup> the authors identify how older adults often face ageist presumptions including the fallacious notion that they have cognitive impairments and require someone else to make their financial decisions. Capacity, consent, and the ability to make a choice as well as any limitation on this ability has a long-standing social and legal history. The conception of capacity and the laws surrounding it underwent a significant paradigm shift beginning in the 1970's. In response, by the beginning of the 1990s, Ontario had created a new legislative structure. After the inception of this legislative structure, Ontario saw the development and interpretation of various tools developed by courts using the new legislative structures in place. The "passage of time has not been kind," and that while these tools are merely "satisfying" the fundamental principles of "making choice" with less and less practical success. As indicated in the article, "courts, clients, and practitioners alike are frustrated," and as such, "change in the form of coordination and refocus is needed by all communities affected in capacity planning as we look towards the next 30 years."<sup>171</sup>

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

- 1) the *Substitute Decisions Act, 1992* (the "SDA") which addresses decisions related to property management and personal care, and identifies the appointment

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<sup>169</sup> Law Commission of Ontario, "Final Capacity Report" (2017), accessed online: <http://www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf> at p.i [LCO Capacity Report].

<sup>170</sup> M. Jasmine Sweatman and Kimberly A. Whaley, "Incapable and Capable Rights: The Rights of Adults in Vulnerable Circumstances – Sledgehammer v Swiss Army Knife" (2022), *ETPJ* 1:14, 385.

<sup>171</sup> *Ibid.*

processes and the duties of guardians and those acting under powers of attorney (POA);

- 2) the *Health Care Consent Act, 1996* (the “HCCA”), which addresses consent to treatment, admission to long-term care homes and personal assistance services of residents of long-term care homes; and,
- 3) to a lesser extent, the *Mental Health Act* (the “MHA”).

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

The legislation codifies a clear presumption of capacity for the ability to contract, make decisions about personal care, and to make decisions about treatment admission to long-term care and personal assistance services.<sup>172</sup> Legal capacity in these areas can only be removed through specific mechanisms outlined in the legislation.<sup>173</sup>

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

Education levels have a close relationship with a number of indicators of well-being in older adults, including health and social isolation.<sup>174</sup> Social isolation is often a contributing factor in the incidents of exploitation and abuse of older adults. Rights and remedies afforded to older adults by statutes, regulations and policies require literacy as a prerequisite to the enjoyment of the rights and liberties afforded to them by statute. In 2013, Canada was ranked 11<sup>th</sup> out of 18 countries of the Organization for Economic Cooperation and Development in an International Assessment of Adult Competencies test on the percentage of adults with suitable literacy skills. In that survey, only 48 per cent of Canadian adults demonstrated suitable literacy skills. In fact, seventeen (17) per cent of Canadians surveyed functioned at a level so low that, for example, they were not able to understand instructions in a cookbook. According to the Public Health Agency of

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<sup>172</sup> *Ibid.*, at p.15.

<sup>173</sup> *Ibid.*

<sup>174</sup> 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* (April 2012) accessed online: <http://www.lco-cdo.org/en/older-adults-final-report/> at page 33 [LCO Older Adult Report].

Canada, sixty (60) per cent of Canadian adults and eighty-eight (88) per cent of older adults are not health literate. Simply put, a significant proportion of older adults cannot follow instructions on a medicine bottle.<sup>175</sup>

Compounding the issue of literacy even further, is the fact that internet access and usage among older adults is measured at much lower levels than other demographics. In fact, Statistics Canada reports that since 2016, while internet use rates among Canadians aged 15 to 64 have reached near-saturation (97.2%) levels, the diffusion of information and communications technology (including the internet) has proceeded at a much slower pace among Canadians aged 65 and older. Statistics Canada found that by 2016, 85 per cent of seniors aged 65 to 69 were Internet users, compared with 62 per cent of seniors aged 75 to 79 and 40.8 per cent of seniors aged 80 or older.

The Statistics Canada research found that the youngest seniors in their study were born in 1951 and would have all been over the age of 50 when the Internet became mainstream. As a result, many of these seniors can be described as ‘digital immigrants’ due to the fact that they were socialized in a pre-digital era and may have outdated skills and attitudes that affect their openness to using the Internet.<sup>176</sup>

Another factor that could be suppressing Internet use among older adults in Canada is ageism. A (2015) study conducted by Lagacé et al., found that age-related stereotypes influence seniors’ Internet use because they affect how seniors perceive themselves and their capabilities. As an example, the study found that ageist stereotypes about seniors’ competence and their learning abilities can diminish their self-efficacy, which tends to make them more hesitant and more anxious to adopt new technologies.<sup>177</sup>

To the extent that literacy levels may be informed by language, it is important to note that a portion of older Canadian adults speak neither of Canada’s two official languages. In

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<sup>175</sup> George Szasz, “Basic health literacy: Canada is doing poorly” (January 12, 2023), *BC Medical Journal*, accessed online: <https://bcmj.org/blog/basic-health-literacy-canada-doing-poorly>.

<sup>176</sup> Statistics Canada, “Analytical Studies Branch Research Paper Series: Evolving Internet Use Among Canadian Seniors” (July 10, 2019), accessed online: <https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019015-eng.htm>.

<sup>177</sup> Lagacé, M., H. Houssein, J. Laplante, and A. Tanguay. 2015. “How ageism contributes to the second-level digital divide: The case of Canadian seniors.” *Journal of Technologies and Human Usability* 11 (4): 1–13.

fact, Employment and Social Development Canada (“ESDC”) found that approximately 63 per cent of immigrant seniors aged 65 and older who arrived in Canada over the past five years (between 2012 to 2016) reported that they were unable to speak either official language. Women across all age groups are more likely than men to speak neither official language. This lack of proficiency has been associated with older and married immigrant women and those lower levels of formal education. Additionally, among all seniors in the Canadian population, 30 per cent were foreign-born, compared with 21 per cent of the total population. Having said that, most new immigrants and refugees are relatively young – seniors actually represent a relatively small proportion (3.3 %) of new immigrants and refugees.<sup>178</sup> A study from Ontario acknowledged that older adults who are recent immigrants may be dependent upon their relatives to maintain legal status in the country, may not know an official language, and are less likely to have significant social networks on which they can rely.<sup>179</sup>

The notion of “family” in Canada is also a relevant factor in how we protect older adults from abuse and exploitation. As we age, we may become increasingly reliant on family members to assist us in exercising our independence and supporting our ability to make decisions about our lives. This reliance on family members can sometimes create issues, especially when that reliance is concurrent with an absence of connections to the broader community. Older adults may rely on family members to advise them of their rights. Older adults may be reluctant to complain about financial, emotional, physical or sexual abuse by family members on whom they are dependant on maintaining some level of independence and wellbeing.<sup>180</sup> Those social factors and demographic characteristics raise issues that are particular to the effectiveness of some statutes; if a statute or its implementation is premised on the assumption that family members are always able and willing to protect their older relatives, it falls short of affording equal protection to older adults, perhaps because, among other factors, this is simply not our social reality.

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<sup>178</sup> Employment and Social Development Canada, “Social isolation of seniors: A focus on new immigrant and refugee seniors in Canada”, accessed online: <https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/social-isolation-immigrant-refugee.html>.

<sup>179</sup> LCO Older Adult Report, *supra* note 183 at p. 46.

<sup>180</sup> *Ibid.*, at p. 64.

## Substitute Decision Making: A Form of Protection

Substitute decision-making law in Ontario is based on two guiding principles:

1. The promotion of respect for the rights, autonomy, and dignity of all persons; and,
2. The protection of the most vulnerable from abuse, neglect, and exploitation.<sup>181</sup>

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

### *The History and Intentions and Concerns of Drafting Officials*

In 1985, the Ontario government established an Advisory Committee to “review all aspects of law governing and related to substitute decision making for persons who are mentally incapacitated and to recommend revision where appropriate”.<sup>182</sup> The Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons (the “Fram Report”) was completed in December of 1987. It included an early draft of what is now, many revisions later, the *Substitute Decisions Act, 1992*.

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

Substitute decision making can be viewed either as a positive good. . .or, as a necessary evil. . .This committee has adopted the latter view. . .The history of our choices made on behalf of physically or mentally handicapped people demonstrates the effects of paternalism. The first two values underlying this report, namely no unnecessary intervention and self-determination, are aimed at assuring this history is neither continued nor repeated.<sup>183</sup>

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<sup>181</sup> Sweatman & Whaley, *supra* note 23 at p. 403.

<sup>182</sup> Stephen V. Fram, *The Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons*, 1987, at pp.v and vii [Fram Report].

<sup>183</sup> Fram Report, *supra* note 191 at p.42.

Accordingly, the Committee made a number of specific recommendations with the intention of reducing the ways in which substitute decision making powers could be abused and increasing accountability of substitute decision makers. For example, they recommended that attorneys for property and guardians of property be required to account, on an annual basis, to the incapable person whose property they were managing.<sup>184</sup> The Committee was of the view that the existing legislation that prescribed an accounting process for estate executors and trustees was unnecessarily onerous, so they recommended a simplified procedure for the annual financial reporting of attorneys and guardians.<sup>185</sup> The Committee was also aware of the potential for privacy violations if the attorney's annual financial report was issued to incapable people living in facilities or to incapable people who were otherwise unable to take steps to protect their own privacy.<sup>186</sup> Accordingly, the Committee drafted a proposal that would ensure the availability of a simplified financial report on an annual basis to any incapable person who was able to request it.<sup>187</sup>

The Committee recommended that the existing Public Trustee's office should be combined with a new Public Guardian's office. The new office would have a mandate to apply to court for guardianship; act as a substitute decision maker of last resort; and have supervisory responsibilities over attorneys for personal care and private guardians.<sup>188</sup>

The Committee also anticipated that disputes could arise in the course of the exercise of one's duties as an attorney or guardian, so they recommended that the Public Guardian take an active role in mediating "disputes between private parties that arise under the legislation."<sup>189</sup> The Committee was of the view that it would not be appropriate in most cases for disputes of this nature to be addressed in the expensive and adversarial court system.<sup>190</sup>

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<sup>184</sup> *Ibid.*, at pp.232-234.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*, at p. 233.

<sup>187</sup> *Ibid.*, at pp. 232-234.

<sup>188</sup> *Ibid.*, at p. 11.

<sup>189</sup> *Ibid.*, at pp.14 &69.

<sup>190</sup> *Ibid.*, at p.296.

The *Substitute Decisions Act, 1992* was the Ontario government's response to the Fram Report.<sup>191</sup> The SDA was introduced in 1991 as part of a series of statutes that addressed issues of capacity and decision making in the health care context and elsewhere. These Acts were proclaimed on April 3, 1995 with unanimous support of the provincial legislature.<sup>192</sup> However, in June of 1995, provincial elections saw a shift in political priorities, and the new provincial government introduced a Bill intended to, among other things, simplify the rules for making and using powers of attorney.<sup>193</sup> It did away with the recommended mandatory financial reporting and amended the SDA to simply require attorneys to keep good records. Currently, the regulations require those records to be in the same form as that required by Estate Executors and Trustees. Pursuant to the SDA, if an incapable person wants to assert their right to compel their attorney or guardian to subject their accounts to judicial scrutiny, they must seek that relief by initiating court proceedings.<sup>194</sup>

With respect to the requirement that the Office of the Public Guardian and Trustee (the "PGT") mediate disputes arising during the course of substitute decision making, that provision was narrowed in scope. The Fram Report recommended that the PGT be mandated to mediate disputes arising between attorneys for personal care and attorneys for property, as well as any other disputes that may arise during the course of their duties.<sup>195</sup> The SDA as amended merely states that the PGT can mediate disputes between joint attorneys or between attorneys for personal care and attorneys for property.<sup>196</sup> Incapable people and their attorneys are otherwise left to initiate court proceedings in the event that a dispute arises in the course of the management of the incapable person's property.

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<sup>191</sup> Ontario Legislative Assembly, Standing Committee on the Administration of Justice, February 5, 1996 at 1640.

<sup>192</sup> *Advocacy Act, 1992*, SO 1992, c 26; *Substitute Decisions Act, 1992*, SO 1992 c 30; *Consent to Treatment Act, 1992*, SO 1992, c 32.

<sup>193</sup> Bill 19, *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, 1<sup>st</sup> Sess, 36<sup>th</sup> Leg, 1996 (assented to on March 28, 1996) SO 1996, c 2; Ontario Legislative Assembly, Standing Committee on the Administration of Justice, Submissions of the Attorney General, Honourable Charles Harnick, February 5, 1996.

<sup>194</sup> SDA, *supra* note 120 s. 42(3).

<sup>195</sup> Fram Report, *supra* note 191 pp. 14 and 69.

<sup>196</sup> SDA, *supra* note 120 s.88.

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

*The Current Substitute Decisions Act, 1992*

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

An individual is incapable of managing their property, according to the SDA if he or she is “not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”<sup>197</sup>

The SDA provides a number of mechanisms for determining whether an individual is incapable of managing their property. For example, a capacity assessor – someone who is part of a class of professionals designated by the SDA as being qualified to make determinations of capacity – may issue a certificate of incapacity, which triggers the statutory property guardianship mechanisms, discussed in more detail below.<sup>198</sup> In the alternative, individuals who meet prescribed criteria are permitted by the SDA to commence court proceedings to obtain a declaration that an individual is incapable of managing his or her property, and to obtain court-appointment as guardian of that person’s property.<sup>199</sup> In this instance, the applicant or proposed guardian will be required to provide evidence of the individual’s incapacity in order to obtain the necessary declaration of incapacity, and there are rules and case law that set the parameters of the form and content of that evidence.<sup>200</sup>

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<sup>197</sup> *Ibid.*, s.6.

<sup>198</sup> *Ibid.*, ss. 16(1)(3).

<sup>199</sup> *Ibid.*, ss. 24(1), 57(3), 69.

<sup>200</sup> *Ibid.*, ss. 25(1), 58(1).

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

Attorneyship, under the SDA refers to the appointment by the grantor of a capable adult to make decisions on a grantor's behalf in the event that they become incapable in the future.<sup>201</sup> This appointment is effective by executing a CPOAP document. SDA specifies the requisite capacity for granting this authority, and it prescribes a number of validity requirements.<sup>202</sup> The SDA also provides rules for how this decision-making authority is exercised.

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

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

### ***Protection of Autonomy***

Fundamental rights and freedoms made it obvious that certain tools needed to be created to support and provide guidance and the framework to ensure the protection of persons under a disability, including the vulnerable and incapable and those who become substitute decision-makers. Some of these protections include the presumption of

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<sup>201</sup> Other statutes permit other forms of attorneyship. See for example, Ontario's *Powers of Attorney Act*, RSO 1990, c P 20.

<sup>202</sup> SDA, *supra* note 120 at ss. 8(1), 9, 10.

capacity; the use and application of a litigation guardian; section 3 counsel;<sup>203</sup> the Consent and Capacity Board (the “CCB”); Privacy tools (such as sealing orders, privacy tort laws, and rules on confidentiality); and, capacity assessments.<sup>204</sup>

The protection of incapable people’s autonomy was an overarching concern during the development of the SDA. The SDA is approached from a presumption of capacity; it adopts the longstanding common law view that all persons are deemed capable of making decisions at law.<sup>205</sup> In defining incapacity, the SDA is focused solely on decision making capacity, and is not concerned with the content of decisions. Our courts affirmed this approach in the oft-cited quote from Justice Quinn: “The right to be foolish is an incident of living in a free and democratic society.”<sup>206</sup> In almost all circumstances, a capacity assessor must explain to the person being assessed, before performing the assessment: the purpose of the assessment, the consequences of a finding of incapacity, the person’s right to refuse the assessment.<sup>207</sup> Individuals who have been declared incapable of managing their property under the SDA by a doctor or a capacity assessor may challenge that determination by initiating a hearing before a tribunal at the CCB. The CCB is an independent provincial tribunal that adjudicates issues of capacity, consent, civil committal and substitute decision making, most of which arise under other statutes not discussed in this paper.<sup>208</sup>

A recent example of a successful CCB challenge was seen in the 2022 decision of *DM (Re)*,<sup>209</sup> where DM was found incapable and requested a CCB review of the finding of incapacity to manage his property. DM was previously a skilled millwright who worked fulltime in construction and mechanics. Five years before the hearing, he sustained a serious back injury on the job and began receiving Ontario Works and Ontario Disability Support Program payments. DM was brought to an assessment by a Case manager with

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<sup>203</sup> The purpose of section 3 of the SDA is to ensure an allegedly incapable person in proceedings under the SDA is treated like any other party litigant and given an opportunity for legal representation balancing the autonomy of the client and the public interest in protecting the vulnerable.

<sup>204</sup> *Sweatman & Whaley*, *supra* note 23 at page 420.

<sup>205</sup> SDA, *supra* note 120 at s. 2(1).

<sup>206</sup> Quinn J. in *R v Koch* (1997), 33 OR (3d) 485 (Gen Div).

<sup>207</sup> SDA, *supra* note 120 at s. 78.

<sup>208</sup> See the CCB’s website: <http://www.ccboard.on.ca/scripts/english/index.asp>.

<sup>209</sup> 2022 CanLII 116965 (ON CCB).

Developmental Services for Adults after seeking help to manage his finances. While there was evidence of late payments, impulsive spending, and a declaration of bankruptcy (stemming from DM co-signing a car loan with his ex-wife who never made a payment towards the loan), the CCB review panel held that the test of capacity is not one of best interests, and the capacity assessor must not apply his or her own personal beliefs about the wisdom of the subject's actions.<sup>210</sup> The panel found that the evidence of DM's financial matters did not rise to a sufficient body of evidence to conclude at the date of the hearing, he was incapable of managing his property. The presumption of capacity was restored to DM.

Once a determination has been made with respect to an individual's incapacity, that individual is nevertheless entitled to continue to be involved in the decisions made on their behalf. The substitute decision maker's role is not to usurp total control and authority, but, rather to foster autonomy. For example, attorneys for property are required to include the person whose capacity is at issue in decisions about their property and are required to consult from time to time with the incapable person's supportive family members and friends.<sup>211</sup> The powers and duties of attorneys for property must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.<sup>212</sup> This concept of good faith is an important one. Attorneys who are liable for their breach of duty, for example, may be saved from that liability if the breach arose while the attorney or guardian was acting with honest, diligence and good faith.<sup>213</sup> Attorneys must keep accounts of all transaction involving the incapable person's property.<sup>214</sup>

There is an important distinction between the reporting requirements for guardians of property who are appointed by the court, and attorneys for property, who are appointed by capable adults in advance of incapacity. Upon the appointment of a guardian of property, courts usually order the guardian to pass his or her accounts every few years.

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<sup>210</sup> See Justice Quinn's commentary in *Re Koch*, 1997 CanLII 12138 (ON SC) at para. 17.

<sup>211</sup> SDA, *supra* note 120 at ss. 32(3), (5), 66(5)-(7).

<sup>212</sup> *Ibid.*, s. 32(1).

<sup>213</sup> *Ibid.*, ss. 32 and 38.

<sup>214</sup> *Ibid.*, s 32(6).

There is no such protection afforded to incapable people who have their property managed by attorneys under the SDA.

Finally, the SDA provides some mechanisms for addressing issues that arise in the course of the management of the individual's property. For example, the attorney may apply to the court for advice and directions.<sup>215</sup> In addition, the court may, on an application brought by the incapable person or other prescribed individuals, order the attorney for property to pass their accounts before a court.<sup>216</sup>

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

### **Protection: Summary of Strengths**

In summary, the strengths of Ontario's laws on legal capacity, decision-making and guardianship are a result of an extensive and thoughtful law reform process spanning a number of years during the late 1980s and early 1990s. The resultant legislation, progressive and innovative in its approach to complex issues. In its final report on Legal Capacity, Decision Making and Guardianship (which was the result of an extensive consultation process on legal reform in this area of law) the Law Commission of Ontario ("LCO") noted that there "[t]here are a number of aspects of Ontario's current law which were far-sighted at the time, continue to be valuable, and should be preserved in any reform."<sup>217</sup> The LCO went on to list the following strengths of the laws in this area, including:

- Emphasis on the importance of self-determination: Charter and human rights values of self-determination and freedom from unwarranted intervention underlie many aspects of the current legislative framework, resulting in an emphasis on respecting where possible the right of individuals to make choices that others disagree with or that may be risky or unwise;

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<sup>215</sup> *Ibid.*, s. 39(1).

<sup>216</sup> *Ibid.*, s. 42(1)-(4).

<sup>217</sup> LCO Capacity Report, *supra* note 159 at p. 23.

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

As discussed in, *Incapable and Capable Rights*,<sup>218</sup> the SDA is still considered “a very important legislative policy,” in fact, as stated by Justice Kitley in *Phelan (Re)*<sup>219</sup>:

It recognizes that persons may become temporarily or permanently incapable of managing their personal or financial affairs. It anticipates that family members or others will identify when an individual has lost such capacity. It includes significant evidentiary protections to ensure that declarations of incapacity are made after notice is given to all those affected or potentially affected by the declaration and after proof on a balance of probabilities has been advanced by professionals who attest to their incapacity. It requires that a plan of management be submitted to explain the expectations. It specifies ongoing accountability to the court of the implementation of the plan and the costs of so doing.<sup>220</sup>

### **Deficiencies in Protection: Summary of Weaknesses**

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

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

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<sup>218</sup> Sweatman & Whaley, *supra* note 23 at page 393.

<sup>219</sup> 1999 CarswellOnt 2039, [1999] O.J. No. 2465 (Ont. S.C.J.). See also *Stickells Estate v. Fuller*, 1998 CarswellOnt 2880, [1998] O.J. No. 2940 (Ont. Gen. Div.) [*Phelan*]

<sup>220</sup> *Phelan*, *supra* note 219 at paras. 22-23.

attorneyship powers do not always appear to be effective in the absence of regular reporting.

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

However, there appear to be limits to the protections afforded to incapable people via the attorney for property model of substitute decision making.<sup>221</sup>

For example, the absence of mandatory financial reporting on the part of attorney may play a role in the financial abuse perpetrated by attorneys. This issue is not particular to Ontario; the Alberta Law Reform Institute recommends strengthening the transparency and accountability of attorneys for property in part by mandating additional safeguards.<sup>222</sup> It is not clear if mandatory provision of financial statements by attorneys would serve as a deterrent to perpetrators, but at the very least such reports, if provided, could shed light on problems earlier and could possibly expedite the evidentiary process in subsequent court proceedings. The problem thereafter is who would review these accounts?

POA's are important since they are very common forms of substitute decision-making, however, they are also the most "private" in that POAs in practice are rarely subject to outside scrutiny. There is widespread concern about misuse and outright abuse of POAs and particular concern about financial abuse of older adults through POAs.<sup>223</sup>

There is also an implementation gap between the protections afforded to people by the SDA and the ability of some older adults to access and understand their rights. We know that many older adults rely on their family members to provide them with assistance as

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<sup>221</sup> LCO Older Adult Report, *supra* note 183 at p. 236.

<sup>222</sup> Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (2003) as cited in the LCO Older Adult Report at p. 236.

<sup>223</sup> LCO Capacity Report, *supra* note 178 at p. vii.

attorneys for property. We also know that many older adults in Canada have a lower than average literacy rate and may not read or write in English or French. Language barriers and dependence on family members create risks that may be heightened by the attorneyship mechanisms in the SDA.

The SDA was ground breaking in its accomplishments with respect to protecting the interests of vulnerable adults and it goes a fair distance in protecting older adults from financial abuse and exploitation. However, twenty years after the SDA was enacted, there is evidence that suggest that some models of substitute decision making may be more vulnerable to misuse than others.

After conducting an extensive consultation on the capacity, decision-making and guardianship legal regime in Ontario, the LCO published its findings and recommendations in a Final Report in 2017.<sup>224</sup>

The LCO's analysis of the impact of the law and of its effectiveness focused on the experiences of persons with disabilities and older adults who are affected by these laws, and that the ultimate intent of their recommendations is to advance the substantive equality of these individuals.<sup>225</sup>

According to the LCO, “[c]onsultations for the LCO Capacity Report widely emphasized the social isolation and marginalization often affecting those most deeply affected by this area of law, and the significant implications of this, for any approach to law reform. Broader societal challenges related to the principle of promoting social inclusion and participation for persons with disabilities and older adults are an important context for this project and a challenge for law reform.”<sup>226</sup>

The laws in this area are implicitly premised on the ability and willingness of family members to provide supports and assistance as necessary. However, it is important to acknowledge that family members may not always be well-equipped to take on this role.<sup>227</sup> There are situations where family members have clearly exploited a vulnerable

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<sup>224</sup> *Ibid.*, *supra* note 159.

<sup>225</sup> *Ibid.*, at p.29.

<sup>226</sup> *Ibid.*, at p. 31.

<sup>227</sup> *Ibid.*, at p. 33.

individual for their own benefit, but there are also situations where meeting the needs of the individual will create considerable hardship for other family members.<sup>228</sup>

Cultural diversity, economic disparities, and gender roles and assumptions must also be considered. Gender and culture may affect the personal supports available, who will provide them, and how they are provided. For example, a hierarchical list of substitute decision makers in the *Health Care Consent Act* may conflict with cultural expectations that the eldest son makes decisions, causing practical difficulties for healthcare staff.<sup>229</sup>

Safeguards must be created to ensure protection from abuse, with a primary focus on ensuring the rights, will and preference of the person. Safeguards must include protection against undue influence, but must also respect the right to take risks and make mistakes.<sup>230</sup> Legal structures should promote and protect decision-making practices that enhance autonomy.<sup>231</sup>

Acknowledging the importance of fostering autonomy is only one aspect of a consideration of the appropriate approach to legal capacity, while our society places a high value on autonomy and self-determination, we are all subject to a wide range of legal restrictions aimed at protecting the rights and needs of others or of the collective, or at preventing unconscionable risk. That is, as important as autonomy is, it is always subject to limits, whether practical, social or legal.<sup>232</sup>

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

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

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<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*, at p.36.

<sup>230</sup> *Ibid.*, at p.67.

<sup>231</sup> *Ibid.*, at p.69.

<sup>232</sup> *Ibid.*, at p.76.

- oversight and monitoring mechanisms for substitute decision-makers need to be improved;
- there are significant barriers to capacity assessments under the *Substitute Decisions Act, 1992*;
- there is a lack of meaningful procedural protections under the *Health Care Consent Act, 1996*;
- the rights enforcement and dispute resolution mechanisms under the *Substitute Decisions Act, 1992* are inaccessible to many Ontarians;
- there is a need for statutory provisions regarding detention of person lacking capacity; and,
- the system needs to promote pilots, monitoring, research and evaluation.<sup>233</sup>

The LCO recommended “considering whether those charged with implementing the law have been provided with adequate ongoing training and education to enable them to perform their duties in a way that respects the principles, including training and education on the Charter, Human Rights Code and the Accessibility for Ontarians with Disability Act, anti-ageism and anti-ableism. It was the strong view of the vast majority of stakeholders consulted during this project that Ontario’s system falls significantly short in this respect.”<sup>234</sup>

There is a deficiency in educating the public and the elderly population itself, on the rights of older adults and the appropriateness of seeking legal redress for the wrongs that have been done to them.<sup>235</sup> One of the reasons older adults do not seek justice for wrongs is that they see the law as inaccessible and not something there to assist them. Beverley McLachlin, suggests that the answer to this problem “lies in public information and education – information that sends the message that the law is there to assist and protect our society’s senior citizens, information that fosters self-determination and autonomous decision-making, and helps with the ability to resist coercion.”<sup>236</sup>

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<sup>233</sup> *Ibid.*, at pp. iv-v.

<sup>234</sup> *Ibid.*, at pp. 327-328.

<sup>235</sup> McLachlin, *supra* note 22 at p.128.

<sup>236</sup> *Ibid.*, at p.129. In Canada there are a number of education initiatives that can assist, including the Advocacy Centre for the Elderly, the Canadian Centre for Elder Law Studies, and the Canadian Bar Association Elder Law Section, to name a few.

## Supported Decision-Making: Moving Towards a New Model?

The CRPD, arguably increased the focus on legal models of supported decision-making. Advocates have long held that supported decision-making processes enhance the self-determination and dignity of individuals with compromised mental capacity. To ‘support’ means to understand the issues involved and their consequences, access appropriate information and assistance, and express the views of the supported person, even acting as an interpreter where needed. A supportive decision-maker can assist a person with cognitive disabilities to exercise legal capacity and determine matters in their own lives.

Supported decision-making legislations create a legal framework for supported decision-making and can address anything from the types of decisions that can be covered by supported decision-making relationships to the eligibility criteria, duties and responsibilities and legal rights and powers of a supported decision-maker.

As early as 2010, Bach and Kerzner suggested three main types of support required by the CRPD and Article 12:

1. Assist in formulating one’s purpose, to explore the range of choices and to make a decision;
2. Engage in the decision-making process with other parties to make agreements that give effect to one’s decision (when the decision requires this); and,
3. Act on the decisions that one has made, and to meet one’s obligations under any agreements made for that purpose.

Research indicates that the concept of supported decision-making in Canada developed as early as the late 1980s and early 1990s. According to Arstein-Kerslake et al., The first articulated principles of supported decision-making were written by the Canadian Association for Community Living (CACL) Taskforce in their August 1992 report on Alternatives to Guardianship.

Examples of supported decision-making in Canada include British Columbia’s *Representation Agreement Act*,<sup>237</sup> one of the first self-contained supported decision-making legal regimes in the world. This *legislation* allows adults to enter into an

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<sup>237</sup> RSBC 1996, c 405.

agreement to appoint a supported or substitute decision-maker.<sup>238</sup> Through *this legislation*, supported decision-making in British Columbia is potentially available to other populations of older adults with cognitive impairments or compromised capacity, including survivors of a traumatic brain injury, people with conditions such as Parkinson's Disease, and older adults with Alzheimer's and other forms of dementia.

The province of New Brunswick has recently drafted a Supported Decision-Making and Representation Act.<sup>239</sup> It was first read on November 18, 2022 and, received Royal Assent on December 16, 2022 and will come into force and effect on a day to be fixed by proclamation. The legislation aims to provide adults living with a disability, the ability to make decisions about their lives with the support they require to do so. The legislation replaces New Brunswick's outdated *Infirm Persons Act*,<sup>240</sup> and, features a three-level framework which provides legal recognition and outlines the rights and responsibilities of:

1. Decision-making assistants for assisted persons;
2. Decision-making supporters for supported persons; and
3. Representatives for represented persons.

## **IMPROVEMENT IN REMEDIES FOR PROTECTION**

McLachlin proposed that we should think of elder law as a problem of access to justice and that without access to justice, the dignity that is the right of every person will be denied to the older people in our society. McLachlin also posited three ways we can promote access to justice for the elderly: 1) specialization to improve legal services to the elderly; 2) legal reform through protective legislation and impact litigation; and 3) education and social sensitization.<sup>241</sup>

In particular to Ontario, the LCO Capacity Report also concluded that access to justice and rights enforcement underpin the entire capacity, decision-making and guardianship

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<sup>238</sup> Section 7 of the *RAA* grants legal recognition to the family and community members providing supported and assisted decision-making for adults with capacity issues while section 7 and 9 also allow an adult to appoint substitute decision-makers if they meet the capacity standards set out in the legislation.

<sup>239</sup> SNB 2022, c 60.

<sup>240</sup> RSNB 1973, c I-8.

<sup>241</sup> McLachlin, *supra* note 22 at p. 123.

system. In its consultation research, the LCO repeatedly heard that the current court based system for resolving issues under the SDA was inaccessible to all but a few, and as a result, the rights under the law are frequently not enforced and the promise of the legislation is unfulfilled.

One of the LCO's several recommendations included a recommendation that the Government of Ontario work towards the creation of a specialized, expert tribunal with broad jurisdiction in this area of law, and the ability to provide flexible and holistic approaches to capacity and substitute decision making disputes.<sup>242</sup>

Another recommendation was for a mandatory, standard-form Statement of Commitment to be signed by persons accepting an appointment as an attorney, prior to acting for the first time under the appointment.<sup>243</sup>

Further, in the LCO report there was an agreement that improved education and access to information about rights and responsibilities was central to effective implementation of the law in this area. The LCO recommended partnership and collaboration between the many institutions that interact with this area of law, with government providing a focal point for co-ordination and strategic development.<sup>244</sup>

As our processes and models continue to evolve, we must also be mindful that the LCO report at recommendation number seven calls on the Government of Ontario to enact supported decision-making legislation. The goal is to allow people in Ontario to receive assistance with their day-to-day, routine decisions related to personal care and property while retaining their decision-making power.<sup>245</sup> There of course continues to be much debate over the potential for abuse of a supported decision-making regime including respecting accountability which ought not to be overlooked in any consideration for change and development of such a regime.

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<sup>242</sup> LCO Capacity Report, *supra* note 178 at p. ix.

<sup>243</sup> *Ibid.*, at p.vii.

<sup>244</sup> *Ibid.*, at p.x.

<sup>245</sup> The background research for this recommendation came from the LCO's study paper entitled *Understanding the Lived Experiences of Supported Decision-making in Canada* (2014), accessed online: <https://www.lco-cdo.org/wp-content/uploads/2014/03/capacity-guardianship-commissioned-paper-ccl.pdf>.

## CONCLUSION

Ageism is not just about age discrimination – ageism must also be about dignity – an aspect of dignity is security. Older adult abuse, often stemming from discriminatory attitudes, denies the elderly the security they are entitled to as human beings.<sup>246</sup>

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

Again, McLachlin made several suggestions, including minimizing the barriers to criminal and civil prosecutions. Changes in the law and education may alleviate some of those barriers, as well as the suggestion that lawyers and jurists work together to inform the public about the prevalence and illegality of elder abuse. McLachlin states, “Our society once swept child abuse under the rug. It must not permit the same thing to happen in the case of elder abuse. The abuse of a vulnerable person is a moral and legal wrong, whatever the age of the victim”.<sup>247</sup>

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

Different stages of life are characterized by different needs. The last stage of life is no exception. Among the needs that are critical at this stage are the need to be protected from discrimination, the need for security and protection from abuse, and the need for appropriate care and the need for autonomy. These are critical aspects of an elderly person’s ability to maintain his or her dignity. The law plays a vital role in meeting these needs.<sup>248</sup>

McLachlin also noted:

What should remain steadfast, however, is our commitment to the principle that every person, regardless of age, is entitled to live in dignity. This means being able to live in security, to be free from discrimination and abuse, and to be entitled to make one’s own choices to the maximum degree possible. In achieving these goals, we will need the expertise of economists, social workers, health care

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<sup>246</sup> McLachlin, *supra* note 22 at p.118.

<sup>247</sup> *Ibid.*, at p.120.

<sup>248</sup> McLachlin, *supra* note 22 at p.122.

professionals, and many others, but the law, and the legal profession, also have an important role to play.

We can build a profession that is sensitive to needs of older people. We can pursue legal reform through legislation and litigation. And we can educate and sensitize the public and seniors themselves in the rights and needs of older demographic.<sup>249</sup>

*This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

*Kimberly A. Whaley, Whaley Estate Litigation Partners*

*July 2023*

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<sup>249</sup> *Ibid.*, at p.131.

## **APPENDIX “A” Provincial / Territorial Protection 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