

# Scams and Frauds Targeting Older Adults

Canadian Bar Association – Elder Law Section

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# Overview

Today we will discuss:

- The law of equity and it's evolution in Canada;
- The use of equitable remedies as an effective response to frauds and scams targeting older adults; and
- Relevant equitable doctrines, maxims, and other forms of relief that may be applicable.

# The History of the Law of Equity

- Body of law developed by Court of Chancery in England before 1873
- Born out of need to rectify deficiencies in common law
- Equity is based on the premise of **fairness** – what is fair is guided by equitable maxims:
  - Equity will not suffer a wrong to be without a remedy;
  - He who seeks equity must do equity;
  - He who comes into equity must come with clean hands; and
  - No one shall be permitted to profit by his own fraud.

# The Law of Equity in Canada

- Most provinces did not have separate jurisdictions for law & equity
  - Quebec (the exception) relies on a civil law system
- Enactment of the *Charter of Rights and Freedoms* has led to interpretative jurisprudence
  - Clarified limits put upon the declaration of rights as between individuals and government and individuals
  - Courts often deliver remedies in view of what is “just and convenient”

# Equitable Doctrines

- **Unjust enrichment**
  - One party enriched at expense of another without juristic reason for enrichment.
- **Breach of trust**
  - To remedy misappropriation or improper dealing with trust property.
- **Undue influence**
  - One party through coercion or abuse of power, dominates the will of another.
- **Unconscionability**
  - Concerning improvident contracts or transfers of assets.
- **Doctrine of equitable fraud**
  - Due to dependency, declining mental and physical health, vulnerability, coercion, or other, an individual is taken advantage of by a self-interested individual.

# Forms of Equitable Relief

- Declaratory orders (binding declarations of rights);
- Relief against penalties;
- Granting injunctions or specific performance;
- Restitution;
- Constructive trust;
- Damages in equity;
- Recission;
- Equitable Accounting;
- Equitable Liens;
- Rectification; and
- Awards of financial compensation for breach of confidence.

# Doctrine of Unconscionability

- Used to set aside a contract that offends the conscience of a court of equity
- Arises when **unfair advantage** is gained by an unconscientious use of power by a stronger party against a weaker party
- A successful claim requires:
  1. **Proof of inequality**
  2. **Proof of substantial unfairness of the bargain.**

# Criteria for a claim of Unconscionability

## ***Uber Technologies Inc. v. Heller*, [2020 SCC 16](#)**

- SCC established 2-step test when deciding whether a contract or bargain should be set aside:
  1. **Inequality of bargaining position;** and
  2. **Proof of an improvident bargain.**
- Court requires there are circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from the inequality of bargaining power

# Predatory Mortgage Lending Scam

- Elaborate scam – left seniors with high-interest mortgages they didn't want or understand
- Pattern: door-to-door rental contracts; mortgages with usually one-year terms with 25% interest
- Canada's Choice Investments (“**CCI**”) frequently involved
  - June 2023 – lawyer acting for CCI received interlocutory suspension for participation in scam
  - November 2023 – OPP execute search warrant at home of CCI's Director

# Case Example: Injunction/Unconscionability

## ***Sanders v. Canada's Choice Investments Inc.***, [2023 ONSC 195](#)

- 78-year-old woman with Alzheimer's pressured into taking out \$500k one-year loan secured by 1<sup>st</sup> mortgage on her home
- Through her litigation guardian, brought motion for an injunction to prevent lenders from enforcing mortgage
- Court granted equitable relief of an injunction on grounds she had a strong *prima facie* case that mortgage was unconscionable

# Case example - Unconscionability

## ***Smith v. Croft*, [2015 CanLII 3837](#) (ON SCSM)**

- Daughter brought claim on behalf of mother – alleging a neighbour took advantage of her mother with Alzheimer to purchase her antique truck for undervalue
- Court relied on 2-part test enunciated by SCC in *Norberg v. Wynrib*, [1992 CanLII 65](#) (SCC)
- Court declared the transaction to be unconscionable: not credible that someone would gift a stranger such a valuable gift:
  - The actions of the older adult could not be viewed as the act of a ‘normal’ person

## Case examples – Application of Unconscionability

### ***Juzumas v. Baron*, [2012 ONSC 7220](#)**

- Unconscionability used to set aside transactions in a predatory marriage respecting transfer of property

### ***Ip v. Chiang*, [2021] NSWSC 822**

- Gambling addict tricked elderly cognitively impaired widower into transferring his property into joint tenancy for no consideration

# Other Applicable Doctrines

- 2010 New York Case of *Campbell v. Thomas* – Appellate Division: **equity will intervene to prevent the unjust enrichment of a wrongdoer**
- State of New York in *Matter of Berk* – **no one shall profit from wrongdoing**
- ***Non est factum*** and **clean hands doctrine** in *Servello v. Servello*

# Conclusions

- The Court of Equity has developed several doctrines and remedies that can potentially assist in rectifying fraud/scams
- All too often: abuse is carried out by those on whom an older adult is reliant or trusts for whatever reason
  - The law must make ongoing efforts to protect the interests of older adults, especially with technological and societal changes leaving them vulnerable to predators

THANK YOU!  
Questions?

