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**The Intersection of Estates, Criminal & Elder Law**

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## Introduction

Certain federal *Criminal Code* provisions are increasingly applied to elder abuses and as such, intersect with the function and operation of estates laws. This may occur as a result of many circumstances, however, the most prevalent reason for the intervention of the criminal law is often the suspected abuse of an older adult.

When this occurs, there are remedies available (to correct the wrong or punish the perpetrator) which can be sought under provincial laws,<sup>1</sup> as well as under federal laws, including under the *Criminal Code* of Canada.

The purpose of this paper will be to discuss the application of such federal laws in the purview of the physical, emotional, or financial abuse of an older adult. Other criminal applications that impact estates law including the forfeiture or ‘slayer’ rule and the equitable doctrine of *ex turpi causa* will also be examined

Contextual considerations, including societal demographics concerning rates of population, disability, and cognitive impairment, and community are relevant and bear mention. Scams targeting older adults, the United States of America’s experience with the creation of criminal offences for elder abuse, Canada’s relevant criminal laws, and a selection of illustrative cases from across the country will also be addressed

## 1. Demographics

### 1.1 - Population

The population in Canada is constantly growing. Within this growth exists the reality that the population is also rapidly aging. As evidence of this, Statistics Canada estimates that by 2031, close to 1 in 4 Canadians will be 65 years of age or older. It is also estimated that by the year 2061, there will be 12 million seniors in Canada.<sup>2</sup>

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<sup>1</sup> Provincial laws can include legislation governing property, guardianship, capacity, health, and social services.

<sup>2</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/hltfst/as/Table.cfm?Lang=E&T=21>.

Recent data from Statistics Canada indicates that as of July 2022, the number of persons aged 65 years and older in Canada was 7,330,605. Of this figure, there were 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.<sup>3</sup>

Across the globe, similar population trends are seen. In 2022, the United Nations ("UN") estimated there were 8 billion people on the planet, 10 per cent of which were adults over the age of 65. By 2050, the UN estimates that the number of adults over the age of 65 will increase to 16 per cent of the global population. The World Health Organization ("WHO") also estimates that between 2015 and 2050, the proportion of the world's population over 60 will nearly double from 12 per cent to 22 per cent.<sup>4</sup> According to WHO, by 2030, there will be 1.4 billion persons alive over the age of 60. This figure is expected to rise to 2.1 billion in 2050, and as high as 3.1 billion in the year 2100.<sup>5</sup>

Within this growing population, there is a significant rise in the number of older adults living with a physical or mental disability or experiencing cognitive impairment.

## 1.2 - Cognitive Impairment

Rising levels of cognitive impairment are an important factor to consider when evaluating the need to protect vulnerable older adults. Often, it is older adults who are frail or unable to voice their concerns due to cognitive impairment or incapacity who fall victim to abuse.

Globally, dementia in its various forms<sup>6</sup> is the seventh leading cause of death among all diseases. In 2022, the UN estimated that approximately 55 million people across the world were living with the disease.<sup>7</sup>

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<sup>3</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>4</sup> World Health Organization, "Ageing and health" (October 1, 2022), accessed online: <http://who.int/news-room/fact-sheets/detail/ageing-and-health>.

<sup>5</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>6</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>7</sup> World Health Organization, "Dementia", n.d., accessed online: <https://www.who.int/news-room/fact-sheets/detail/dementia>.

Here in Canada, the Alzheimer Society reports that over 600,000 Canadians are currently living with dementia. By 2030, this figure is expected to rise to close to 1 million Canadians and by 2050, well over 1.7 million Canadians.<sup>8</sup> Statistics Canada estimates that by 2050, the percentage of Canadians over the age of 65 living with dementia will increase to 13.2 per cent.<sup>9</sup>

According to the Canadian Institute for Health Information (“CIHI”), approximately one-third or 33.3 per cent of seniors under the age of 80 with a diagnosis of dementia are living in long-term care homes. This proportion increases to 42 per cent for adults over the age of 80.<sup>10</sup> As rates of dementia increase in Canada, older adults who cannot be properly supported at home will need to move into long-term care facilities.

### 1.3 - Rates of Disability

The Canadian Survey on Disability (“CSD”) revealed that in 2017, approximately 6.2 million or 22 per cent of Canadians over the age of 15 were living with a disability. Of this figure, 38 per cent were adults over the age of 65. The majority of these individuals also have two or more types of disabilities (71 per cent).<sup>11</sup> The CSD also revealed that approximately 315,000 (5.1 per cent) of Canadians over the age of 15 and living with a disability report having a developmental disability or disorder.<sup>12</sup>

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<sup>8</sup> Alzheimer Society of Canada, “The Landmark Study: Path” (2022), accessed online: [http://www.alzheimer.ca/sites/default/files/documents/Landmark-Study-Report-1-Path\\_Alzheimer-Society-Canada.pdf](http://www.alzheimer.ca/sites/default/files/documents/Landmark-Study-Report-1-Path_Alzheimer-Society-Canada.pdf)

<sup>9</sup> *Ibid.*

<sup>10</sup> Canadian Institute for Health Information, “Dementia in long-term care” (2023), accessed online: [https://www.cihi.ca/en/dementia-in-canada/dementia-care-across-the-health-system/dementia-in-long-term-care#:~:text=Challenges%20of%20caring%20for%20seniors,or%20trauma\)%20was%2087%25](https://www.cihi.ca/en/dementia-in-canada/dementia-care-across-the-health-system/dementia-in-long-term-care#:~:text=Challenges%20of%20caring%20for%20seniors,or%20trauma)%20was%2087%25).

<sup>11</sup> Statistics Canada, “Measuring Disability in Canada” (December 2, 2022), accessed online: [http://www.150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2022062\\_eng.htm](http://www.150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2022062_eng.htm)

<sup>12</sup> Government of Canada, “Infographic: Developmental Disabilities or Disorders in Canada – Highlights from the 2017 Canadian Survey on Disability” (March 29, 2021), accessed online: <http://www.canada.ca/en/public-health/services/publications/diseases-conditions/infographic-developmental-disabilities-disorder-highlights-canadian-survey-2017.html>

## 2. Elder Abuse

### 2.1 - Understanding and Defining Elder Abuse

Elder abuse appears in many forms and includes financial, physical, psychological (mental or emotional), and sexual abuse. An often-overlooked form of abuse also includes neglect. There is a wide-range of definitions which describe what elder abuse entails.

The WHO uses the following definition from the 2002 Toronto Declaration on the Global Prevention of Elder Abuse:

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>13</sup>

The government of Canada provides a similar definition on its website, but refers to a “relationship of trust” rather than an “expectation of trust,” and defines a lack of action separately as “neglect.”<sup>14</sup> In the United States of America, the Centers for Disease Control and Prevention (the “CDC”) defines elder abuse as:

An intentional act or failure to act that causes or creates a risk of harm to an older adult.<sup>15</sup>

A consistent definition for elder abuse would be helpful in combatting violence against older adults. In the June 2021 report *Elder Abuse: Identifying the Issue and Combatting all Types of Abuse*, the Standing Committee on Justice and Human Rights recommended that the federal government, in consultation with the provinces, territories, and other relevant stakeholders, develop options to standardize the definition(s) of elder abuse in Canada and conduct a comparative analysis of the advantages and disadvantages of those options.<sup>16</sup>

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

<sup>14</sup> Government of Canada, “Elder abuse: It’s Time to Face the Reality.” (July 26, 2012), accessed online: <https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/prevention-resources-older-adults/elder-abuses-time-face-reality.html>

<sup>15</sup> Centers for Disease Control and Prevention, “What is Elder Abuse” (June 2, 2021), accessed online: <https://www.cdc.gov/violenceprevention/elderabuse/definitions.html>; the CDC defines an “older adult” as “someone age 60 or older.”

<sup>16</sup> *House of Commons*, Standing Committee on Justice and Human Rights, “Elder Abuse: Identifying the Issue and Combatting all Types of Abuse” (June 2021) at 1 [Standing Committee].

Unfortunately, elder abuse has been poorly or imprecisely defined, defined specifically to reflect the unique statutes or conditions present in select locations (e.g. states, countries, or cities), or has been defined specifically for research purposes.

In the absence of a universal definition, there is still a generally sound understanding of what elder abuse may entail.<sup>17</sup> Elder abuse includes but is not limited to the misuse of a power of attorney document,<sup>18</sup> acts of theft and fraud,<sup>19</sup> the imposition of a shared residence,<sup>20</sup> undue influence,<sup>21</sup> psychological abuse,<sup>22</sup> a failure to provide the necessities of life,<sup>23</sup> predatory marriages,<sup>24</sup> and violence or assaults.<sup>25</sup>

There are subtle and unsubtle indicators that an older adult may be suffering from abuse. These may include physical signs of abuse such as unexplained injuries or bruising, changes in living arrangements (new friends or relatives moving in without permission or consent, as an example), an unexplained or sudden inability to pay bills, an unexplained or sudden withdrawal of money from accounts, poor living conditions in comparison to the value of the older adults assets, changes in banking patterns, changes in appearance or social behaviors, another person controlling the spending of an older adult, confusion or lack of knowledge about a certain financial situation or the execution of legal documents,

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<sup>17</sup> See generally, for more information on the particulars of Elder Abuse, the resources available from the Advocacy Centre for the Elderly (“ACE”), accessed online: [http://www.advocacycentreelderly.org/elder\\_abuse\\_-\\_introduction.php](http://www.advocacycentreelderly.org/elder_abuse_-_introduction.php).

<sup>18</sup> A Power of Attorney for Property is a legal document in which a person (the “grantor”) gives another person (the “attorney”) the legal authority to make financial decisions on the grantor’s behalf and can be abused by the attorney who engages in self-dealing or financial misappropriation, for example.

<sup>19</sup> Acts of theft and fraud can include but are not limited to, stealing an older adult’s money, pension cheques, or possessions, and/or committing fraud, forgery or extortion.

<sup>20</sup> A form of elder abuse includes sharing an older adult’s home without paying rent or a fair share of the expenses.

<sup>21</sup> Often, perpetrators of elder abuse will unduly exert pressure on an older adult in order to sell personal property, invest or take out money, buy alcohol or drugs, make or change a testamentary document, draft and/or execute documents that are not understood by the older adult, give money to relatives or caregivers or even friends, and/or engage in paid work to bring in extra money.

<sup>22</sup> Psychological abuse includes isolating an older adult, or threatening such isolation. It can also include withholding of social and familial relationships in order to gain control or leverage a benefit (e.g., an adult child who threatens their older adult parent that he or she cannot see their grandchildren unless they guarantee a loan or give the adult child money).

<sup>23</sup> An attorney under a Power of Attorney document or similar fiduciary relationships are obligated to provide the grantor or vulnerable person with the necessities of life which include, for example, shelter, food, medication, and assistive devices.

<sup>24</sup> Predatory marriages occur when an unscrupulous marries and older adult or similarly vulnerable person in order to gain access to their money and assets.

<sup>25</sup> Violence and/or assaults against older adults includes domestic violence, physical, and sexual abuse.

being forced to sign multiple documents at once, being coerced into a situation involving overwork and underpay, an unexplained disappearance of possessions (e.g. lost jewelry or silverware), changes in power of attorney documents, being overcharged for services or products by providers, and/or being denied the right to make independent financial decisions.<sup>26</sup>

One of the biggest contributors to the spread of elder abuse is ageism. The Ontario Human Rights Commission defines ‘ageism’ as 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 adults.<sup>27</sup> Ageism is present in the media, the justice system, healthcare institutions, and workplaces.

Elder abuse has significant negative impacts and can lead to early death, cause harm to the physical and psychological health of an older adult, destroy social and family ties, and lead to devastating financial loss, amongst other concerns. In fact, any type of mistreatment can leave the abused older adult feeling fearful and depressed. Often, the victim believes the abuse they’ve suffered is a fault of their own. Intervention from adult protective service agencies, support groups and counseling can be instrumental to help the abused person heal from emotional wounds.<sup>28</sup>

There are also notable risk factors which increase the chance of becoming a victim of abuse. These factors include functional dependence and/or disability, poor physical health, cognitive impairment, poor mental health and low income. There are also individual level characteristics which increase the risk of becoming a perpetrator of abuse such as mental illness, substance abuse and dependency (often financial) of the abuser on the victim. At the relationship level, the type of relationship (e.g., spouse/partner or child/parent) and marital status may be associated with an elevated risk of abuse, but these factors vary by country and region. Community and societal-level factors linked to

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<sup>26</sup> For more information on the indicators of elder abuse, see generally, Elder Abuse Prevention Ontario, “Learn the Facts”, online: < <https://eapon.ca/learn-the-facts/>>.

<sup>27</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>28</sup> National Institute on Aging, “Elder Abuse” (July 21, 2023), accessed online: <https://www.nia.nih.gov/health/elder-abuse>

elder abuse may include ageism against older people and certain cultural norms (e.g., normalization of violence).<sup>29</sup>

Where it concerns the prevalence of elder abuse in Canada, a recent study using data from the Canadian Longitudinal Study on Aging (CLSA) found one in ten adults aged 65 and older experience some form of elder abuse each year in Canada.<sup>30</sup>

## 2.2 – Financial Elder Abuse

Financial abuse has been defined as “the misuse of someone’s property and resources by another person,”<sup>31</sup> or the “misappropriation of an older person's money or property,”<sup>32</sup> Financial abuse is also one of the most prevalent forms of elder abuse. Determining the level of financial abuse in Canada, however, is challenging for many reasons, including differences in age criteria and definitions of financial abuse,<sup>33</sup> resulting in probable under-reporting of financial abuse.

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, misappropriation or theft of an older adult’s assets, the unauthorized or improper transfer of real property, ATM fraud, undocumented loans, or the withholding of an older adult’s pension or social assistance cheques to name a few.<sup>34</sup> Financial abuse can also include more subtle circumstances where an older adult is financially supporting family members due to coercion or pressure.

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<sup>29</sup> World Health Organization, “Abuse of older people” (June 13, 2022), accessed online: <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>

<sup>30</sup> See Burnes, D., Pillemer, K., Rosen, T. *et al.* Elder abuse prevalence and risk factors: findings from the Canadian Longitudinal Study on Aging, (2022), *Nat Aging* **2**, 784–795 where the authors describe how being physically, cognitively and/or emotionally vulnerable increased the risk for elder abuse as does maltreatment in childhood, living with others, identifying as black, and reporting financial need. The authors also argued that “our findings may actually underestimate the true population prevalence because older adults tend to underreport personal problems such as family violence.”

<sup>31</sup> Gray-Vickrey P. Combatting abuse, part 1. Learn how to assess the visible and invisible indicators and what to do if you recognize abuse in an older patient. *Nursing* 2000; 30(7): 6.

<sup>32</sup> National Center on Elder Abuse. Frequently asked questions. What is elder abuse? [https://ncea.acl.gov/FAQ-\(2\).aspx](https://ncea.acl.gov/FAQ-(2).aspx) (accessed 23 November 2021).

<sup>33</sup> The National Clearinghouse on Family Violence. *Abuse and neglect of older adults*. Health Canada, 1999.

<sup>34</sup> See 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].

No province or territory currently requires reporting of financial abuse for older adults outside a care facility.<sup>35</sup> Some investigatory agencies can impose a duty to report financial abuse after an investigation has been started. These institutions can disclose information to the government, next of kin, or authorized individuals when they suspect an individual is, or, has been a victim of financial abuse.<sup>36</sup>

The 2017, Vancity report, *Suffering in Silence: The financial abuse of seniors in British Columbia* revealed that 35 per cent of older adults surveyed who experience at least one form of financial abuse choose not to tell anyone. Of these older adults, 21 per cent say they didn't know who to tell. The report also revealed that over 80 per cent of seniors surveyed could not name any support services available for seniors who may be victims of financial abuse. The report also shared that the most common forms of financial abuse in B.C. reported to the Seniors Abuse and Information line were related to people exploiting seniors for shelter or money, pressuring them to give gifts or change their will, the misuse of a power of attorney, and real estate fraud.<sup>37</sup>

Recently, the Canadian Securities Administrators (“CSA”) conducted a joint online survey in which only 42 per cent of respondents said they were able to recognize the signs of financial elder abuse. Only 47 per cent said they knew where to report cases of abuse while 29 per cent said they personally know someone who's been the victim of such abuse. Overall, 81 per cent of those surveyed recognized that in cases of financial abuse, older adults are usually victimized by someone close to them.<sup>38</sup>

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

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<sup>35</sup> Ontario, for example, has a mandatory financial abuse reporting provision in its *Fixing Long-Term Care Act*, 2021, S.O. 2021, c. 39, Sched. 1 at s. 28(1).

<sup>36</sup> See *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

<sup>37</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> where the authors also note that there continues to be a large gap between unprompted reports of financial abuse (3 per cent) and reported abuse when respondents are presented with specific scenarios (36 per cent), indicating that many seniors may not understand the ways in which they may be victims.

<sup>38</sup> Leo Almazora, “Many Canadians ill-equipped to stop financial elder abuse” (June 15, 2021), *Wealth Professional*, accessed online: <https://www.wealthprofessional.ca/news/industry-news/many-canadians-ill-equipped-to-stop-financial-elder-abuse/357149>

of undue influence and may ultimately refuse 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.

### 2.3 - Reported Elder Abuse

In 2020, there were 389,919 victims of police-reported violence in Canada. Of this figure, 15,157 (four per cent) of all victims were older adults. Between 2010 and 2020, the rate of reported violence against older adults increased by 22 per cent.<sup>39</sup> In contrast, since 2015, the rate of victimization among younger Canadian cohorts only increased by 12 per cent. The largest increase among older adults was observed in adults aged 85 and older (39 per cent), a figure that was almost entirely driven by the violent victimization of older women.<sup>40</sup>

In 2020, there were 7,241 police-reported incidents of violence against older adults in which there was a single victim and a single accused. Of these incidents, nearly six in ten (58 per cent) persons accused of violence against seniors had charges laid or recommended against them. This is significantly lower than the percentage of those accused of violence against non-seniors (74 per cent).<sup>41</sup> Compared to younger victims, a larger proportion of seniors requested that no further action be taken against the accused, despite there being sufficient evidence to support a charge.<sup>42</sup>

Data also reveals that the overall rate of police-reported violence against seniors in Canada is higher in rural areas compared to urban centers (247 versus 214 per 100,000 population). Between 2010 and 2020, similar rate increases for seniors were documented

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<sup>39</sup> See Brijnath, B., Gartoulla, P., Joosten, M., Feldman, P., Temple, J. and B. Dow. 2021. "A 7-year trend analysis of the types, characteristics, risk factors, and outcomes of elder abuse in community settings." *Journal of Elder Abuse & Neglect*. Vol. 33, no. 4.; See also Weissberger, G. H., Goodman, M. C., Mosqueda, L., Schoen, J., Nguyen, A. L., Wilber, K. H., Gassoumis, Z. D., Nguyen, C. P. and S. D. Han. 2020. "Elder abuse characteristics based on calls to the National Center on Elder Abuse resource line." *Journal of Applied Gerontology*. Vol. 39, no. 10.

<sup>40</sup> There was a reported 63 per cent rate increase among women aged 85 and older (from 108 to 176 victims per 100,000 population) compared to a rate increase of only 3 per cent for senior men of the same age.

<sup>41</sup> Shana Conroy and Danielle Sutton, "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#n4-refa> [Conroy and Sutton].

<sup>42</sup> These figures, according to Statistics Canada, were 26 per cent and 18 per cent respectively.

in both urban and rural areas (a 22 per cent and 21 per cent increase, respectively). In urban areas, the rate increase was larger for senior men (25 per cent) than senior women (19 per cent). In rural areas, the rate increase was also higher for senior men (25 per cent) than senior women (16 per cent).<sup>43</sup>

Where it concerns rates of homicide perpetrated against older adults, despite the rapid growth of the population, much less attention has been paid to this area. Based on available data in the US, researchers have documented an increase in the homicide rate among people aged 50 and older since 2007.<sup>44</sup> A recent trend analysis in Canada, however, has not been explored.

Utilizing the available data from Statistics Canada, between 2000 and 2020, 944 seniors have died by homicide in Canada, accounting for 7 per cent of all homicide victims during this time. The large majority (88 per cent) of homicides of senior victims were solved by police, meaning an accused person was identified. This rate of resolution was actually more common among senior victims than non-senior victims (77 per cent).<sup>45</sup>

#### 2.4 - Unreported and Under-reported Elder Abuse

There are numerous reasons why an older adult may not report abuse to police including, but not limited to, fear of retaliation, dependency on the offender, shame or embarrassment, or a desire to protect the offender.<sup>46</sup> While police-reported data can be crucial to providing measurements of crime in Canada, they are limited to incidents that come to the attention of authorities. The majority of criminal incidents—especially those involving intimate partner violence and sexual assault—are not reported to police.

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<sup>43</sup> Conroy and Sutton, *supra* note 41.

<sup>44</sup> Allen, T., Salari, S. and G. Buckner, "Homicide illustrated across the ages: Graphic descriptions of victim and offender age, sex, and relationship." (2020), *Journal of Aging and Health*. Vol. 32, no. 3-4.; Logan, J. E., Haileyesus, T., Ertl, A., Rostad, W. L. and J. H. Herbst. 2019. "Nonfatal assaults and homicides among adults aged ≥ 60 Years—United States, 2002-2016." *CDC Morbidity and Mortality Weekly Report*. Vol. 68, no. 13.

<sup>45</sup> Conroy and Sutton, *supra* note 41.

<sup>46</sup> Dowling, C., Morgan, A., Boyd, C. and I. Voce. 2018. "Policing domestic violence: A review of the evidence." *Australian Institute of Criminology*.; Roger, K., Walsh, C. A., Goodridge, D., Miller, S., Cewick, M. and C. Liepert. "Under reporting of abuse of older adults in the Canadian prairie provinces." (2021), *Sage Open*.

In addition, elder abuse often goes unreported because of stigmatization, embarrassment, or lack of awareness or ability to properly vocalize concerns. As previously discussed, elder abuse is often perpetrated by persons familiar to an older adult. Victims may be dependent on their perpetrator for their care or physical well-being and may want to protect the abuse. As such, there is the added concern that reporting abuse will cause trouble or even eliminate the support which the older adult is reliant on.

Older adult victims may be fearful of their perpetrator or even fear the police or other authorities, making it difficult to report the abuse. Sometimes, an older adult victim may desire companionship, in which case they try to rationalize that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is a family member or friend. As previously discussed, an older adult victim may not even recognize the abuse. Additionally, they may not be able to report the abuse, physical or otherwise, even if they would like to (e.g., the victim may be suffering from dementia or lack the requisite capacity to make a report). Finally, some older adult victims may be worried about the stigma that could be placed on the family while others may be resistant to having strangers in their home to provide services that their abuser already provides.

## 2.5 - A Snapshot of the Perpetrators

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

Adult children who harm their parents may have various health concerns themselves, including issues related to mental health, substance abuse, social isolation, and employment and financial dependency on the older person.<sup>47</sup> The abuser may rationalize the abuse thinking that they deserve the benefit of the victim's money as they are the older adult's child.

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<sup>47</sup> Laura Tamblyn Watts, "Background Paper - Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts" (March 2013), *Canadian Centre for Elder Law*, accessed online: <https://canlii.ca/t/27wk>

The most recent statistics which address the rate of police-reported violence and family violence against seniors were compiled and released by Statistics Canada in 2019. These statistics revealed that one-third (32 per cent) of older adults who experienced violence were victimized by a family member (representing 4,518 victims in total).<sup>48</sup> Of this figure, the violence was most often perpetrated by an adult child (34 per cent), followed by a spouse (26 per cent) and a sibling (12 per cent).<sup>49</sup> The most commonly reported type of family violence perpetrated against seniors was physical assault.<sup>50</sup>

The rate of family violence against seniors was 1.4 times lower in Canada's largest cities, referred to as census metropolitan areas ("CMA"), than it was in non-CMAs (64 versus 89). Among the CMAs, rates were highest in Kitchener–Cambridge–Waterloo (123), Gatineau (107) and Kelowna (94). Meanwhile, they were lowest in Peterborough (26), Ottawa (28) and Thunder Bay (28).<sup>51</sup>

## 2.6 - Systemic Gaps

In 2021, the Canadian Centre for Elder Law told the Standing Committee on Justice and Human Rights that "Canada lacks a robust infrastructure to support charging and conviction,"<sup>52</sup> and that there is a lack of policy direction and professional development for police, Crown counsel, and the judiciary about elder abuse—seniors are not always taken as seriously as younger people when they report abuse and that their cases may be seen as un-prosecutable because of their age, frailty, or mental capacity.

The nature of the legal system can also discourage older adults from pursuing criminal charges. In Canada, most jurisdictions do not have Crown counsel policies to guide prosecutors working with victims and witnesses who may have mental capacity issues such as dementia. A lack of specific policies and knowledge can affect the quality of evidence in elder abuse cases and thus, the likelihood of conviction. As the Canadian Bar Association told the Standing Committee, "[e]vidence comes from witnesses. Witnesses

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<sup>48</sup> Statistics Canada, "Police-reported family violence against seniors in Canada" (March 2, 2021), accessed online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00001/04-eng.htm>

<sup>49</sup> This pattern was the same for female and male seniors. Women were also overrepresented as victims of family violence against seniors (58 per cent).

<sup>50</sup> Physical assaults accounted for 72 per cent of all victims representing a rate of 52 per 100,000 population.

<sup>51</sup> *Ibid.*

<sup>52</sup> Standing Committee, *supra* note 16 at 18.

who are safe and secure and receive proper supports in telling their story tell the most effective story—compelling stories. Those stories are what inform judges, what causes them to adjudicate matters, what causes them to find guilt in appropriate cases where elder abuse has happened.”<sup>53</sup>

### **3. Scams Targeting Older Adults**

Aside from the abuse perpetrated against seniors by persons generally known to them, there has been an alarming rise in the number of scams and exploitative schemes perpetrated against older adults in Canada. The following will examine some of the most prevalent reported scams.

#### **3.1 - Predatory Lending Scam**

Since approximately 2017, a cross-Ontario Mortgage and Notice of Security Interest (“NOSI”) scheme has been targeting vulnerable older adult homeowners. The scheme, which has been described by the Ontario Provincial Police (“OPP”) as a complex and multi-jurisdictional scam, targets highly vulnerable home-owning seniors and often starts with exploitative, unfair door-to-door sales contracts financed by high-interest loans that are secured with an NOSI or private mortgages.

As reported by the Advocacy Centre for the Elderly (“ACE”), adult homeowners are frequently approached by a “groomer”, who makes repeated visits and false promises to get the adults out of the unfair contracts, free of charge. They promise the homeowners “rebates” if they sign documents presented to them which can pay for “free” renovations. The older adults are pressured to sign immediately, not given time to review the documents, and not provided with copies of the documents they signed.<sup>54</sup> Afterwards, the lenders will register an NOSI on the title to their property to secure the loans. Often, the older adult has no idea this has taken place and is later induced to take out larger mortgage loans, secured against their homes, to pay off some of the NOSI and finance

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<sup>53</sup> *Ibid.*, at 19.

<sup>54</sup> Advocacy Centre for the Elderly, “Cross-Ontario Mortgage & Notice of Security Interest (NOSI) Scheme” (2023), accessed online: <https://www.ancelaw.ca/consumer-protection-resources/warning-scams-targeting-seniors/cross-ontario-mortgage-notice-of-security-interest-nosi-scheme/>.

further home renovations. The mortgages feature significantly higher than market interest rates and substantial lender and broker fees.<sup>55</sup> Under some of the mortgages, enforcement proceedings have been commenced where the homeowner defaulted on payments.

### 3.2 - Emergency/Grandparent Scam

Another prevalent scam targeting older adults is known as the grandparent or emergency scam. In these situations, a fraudster will place a phone call or send an email to an older adult, pretending to be their grandchild or other loved one. The fraudster will then claim to be in some sort of trouble and ask for help, usually proceeding to request money. The funds are supposedly for such things as bail, medical bills, fines, the cost of repairing something important (like a cellphone), or to pay bills. Scammers will often plead with the older adult to keep the transaction a secret from the rest of the family because they are embarrassed or scared.<sup>56</sup> In 2023, the Canadian Anti-Fraud Centre (“CAFC”) reported a variation of this scam which sees fraudsters claiming to be a family member or loved one saying their cellphone is broken or has been dropped in water. They will then provide an alternate number to contact them at and proceed to request funds to repair the broken phone or pay a bill.<sup>57</sup>

In February of 2023, a joint statement between the Royal Canadian Mounted Police (“RCMP”), the OPP, and the CAFC revealed that over \$9.2 million in losses were reported by older adults who fell victim to emergency or grandparent scams.<sup>58</sup>

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<sup>55</sup> See Caitlin Taylor, Stephanie Kampf, David Common, and Katie Swyers, “Elaborate scam leaves seniors with high-interest mortgages they didn’t want or understand” (March 31, 2023), accessed online: <https://www.cbc.ca/news/business/seniors-mortgages-marketplace-1.6795104> where a CBC Marketplace investigation found that most of the reported mortgages involve a one-year term with 25 per cent interest and monthly payments paid up front, meaning that most of the homeowners don’t realize they have a mortgage until it comes due a year later.

<sup>56</sup> Advocacy Centre for the Elderly, “Grandparent Scheme” (2023), accessed online: <https://www.ancelaw.ca/consumer-protection-resources/warning-scams-targeting-seniors/grandparent-scheme/>

<sup>57</sup> Canadian Anti-Fraud Centre, “Emergency” (May 16, 2023), accessed online: <https://www.antifraudcentre-centreantifraude.ca/scams-fraudes/emergency-urgence-eng.htm>

<sup>58</sup> Sean Boynton, “Grandparent scams cost seniors over \$9.2M last year. Here’s how to protect yourself” (February 2, 2023), *Global News*, accessed online: <https://globalnews.ca/news/9455006/emergency-grandparent-scams-canada-rcmp/>

### 3.3 - Cyber Scams

With the rise of cryptocurrencies and the use of social media, there has been a significant increase in the number of cyber scams targeting older adults. In fact, the OPP recently reported that older adults in Ontario lost over \$135 million to cyber-based scams in 2022.<sup>59</sup> One common type of cyber scam is known as phishing and is designed to trick victims into disclosing personal or financial information to facilitate fraud or identity theft.<sup>60</sup> Similar to phishing are smishing scams which involve fraudsters targeting their victims through the use of SMS messaging (text messages). According to Elder Abuse Prevention Ontario (“EAPO”), research suggests that people are more likely to trust a message that comes in through text versus email and are largely unaware of smishing attacks. In fact, while only 20 per cent of emails are opened, and 6 per cent are replied to, 90 per cent of text messages are opened, and 45 per cent are replied to.<sup>61</sup>

In the United States of America, the Federal Bureau of Investigations (“FBI”) reported that in 2022, 88,262 victims over the age of 60 lost of \$3.1 billion to internet-based crimes. The most commonly reported crime involved investment fraud.<sup>62</sup> The FBI’s Internet Crime Complaint Center’s Elder Fraud Report details the rise in cryptocurrency scams directed at older adults.<sup>63</sup> The Report revealed that in 2022, there were over 4,500 cryptocurrency investment scam victims over the age of 60 who reported just under \$1 billion in losses.<sup>64</sup>

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<sup>59</sup> See Jaime McKee, “Beware of people scamming seniors, police warn” (June 15, 2023), *CTV Northern Ontario*, accessed online: <https://northernontario.ctvnews.ca/beware-of-people-scramming-seniors-police-warn-1.6443281> where OPP Detective Constable John Armit reports that on average, seniors lose 33 per cent more than any other demographic. Despite this, Detective Constable Armit said that less than 10 per cent of victim’s report being scammed.

<sup>60</sup> Often, scammers will send an email that appears to be from a legitimate source, directing potential victims to a fake website. The fake website will look authentic by copying the brand name and logo of a real company and then ask the user for personal information such as credit card numbers, account numbers, passwords, date of birth, driver’s licence number, and social insurance or social security numbers.

<sup>61</sup> Elder Abuse Prevention Ontario, “5 Cyber Scams Targeting Seniors” (2023), accessed online: <https://eapon.ca/5-cyber-scams-targeting-seniors/>

<sup>62</sup> See 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>. at page 4 where the report explains how these frauds involve complex financial crimes which are often characterized as low-risk investments with guaranteed returns.

<sup>63</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>64</sup> *Ibid.*, at page 13.

### 3.4 - Romance Scams

Romance scams target older adults seeking companionship and occur when an online relationship begins, usually through a dating or social media site.<sup>65</sup> The fraudster is often from another country and declares their love. They may offer to visit or have the older adult visit them. At some point, they begin requesting money from the older adult.<sup>66</sup>

In February 2022, the CAFC reported that romance scams were responsible for the second highest amount of fraud-related dollar loss in 2021 (second only to investment scams). In 2021, the CAFC received over 1,300 complaints regarding romance scams from victims who reported combined losses of approximately \$43 million. These figures represent a sharp increase from 2018 where 760 victims reported losses of approximately \$22.5 million.<sup>67</sup> The CAFC also reported an increase in the number of cryptocurrency investment scams linked to romance scams.

#### *3.4-1 - Sha Zhu Pan*

A highly sophisticated romance and cryptocurrency investment scam originating from China has been targeting older adults across the globe and is known as the sha zhu pan or ‘butchering the pig’ scam. In these situations, fraudsters, mainly working for Chinese organized crime gangs, pose as attractive professionals or entrepreneurs looking for love.<sup>68</sup> The scammers use a combination of fake online profiles and psychological manipulation to gain victims’ trust while playing the role of the romantic partner of their dreams. Contrary to more traditional romance scams, these fraudsters convince their victims that they aren’t interested in their money, but rather, in building a future together by investing in cryptocurrency together as a couple. Once the victim lets their guard down,

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<sup>65</sup> See Competition Bureau of Canada, “The Little Black Book of Scams: Your Guide to Protection Against Fraud” 2012, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04333.html>.

<sup>66</sup> The reasons for the requests often include the need to cover expensive medical bills or to assist with a family emergency.

<sup>67</sup> Canadian Anti-Fraud Centre, “Fraud Alert – Romance Scams” February 2022, online: <https://www.anti-fraudecentre-centreantifraude.ca/scams-fraudes/romance-recontre-eng.htm>.

<sup>68</sup> See Carlo Handy Charles, “Analysis: Organized crime has infiltrated online dating with sophisticated ‘pig-butcher’ scams” March 2, 2022, *McMaster University Brighter World Research*, online: <https://brighterworld.mcmaster.ca/articles/analysis-organized-crime-has-infiltrated-online-dating-with-sophisticated-pig-butcher-scams/> where the author explains that these fraudsters use dating apps such as Tinder, Grindr, and Hinge, as well as social media platforms like Facebook and Instagram to match with their potential victims.

they are convinced into investing their money. Victims have emptied out their bank accounts, spent inheritances and life savings, taken out loans and mortgages, and sold houses and cars to invest in fake crypto currency platforms.

## 4. Criminal Remedies

### 4.1 - Criminal Code Offences

The *Criminal Code*<sup>69</sup> plays a role directly and indirectly in protecting older adults from financial abuse and exploitation. Select criminal offences can be particularly useful in deterring and penalizing perpetrators of financial abuse.

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

Section	Offence
<b>215</b>	Failing to provide the necessaries of life (e.g., criminal neglect)
<b>220</b>	Causing death by criminal negligence (e.g., where neglect leads to the death of an older adult)
<b>264.1</b>	Uttering threats
<b>265 &amp; 266</b>	Physical assault
<b>271</b>	Sexual assault
<b>279</b>	Unlawful confinement
<b>322</b>	Theft
<b>331</b>	Theft by person holding a power of attorney
<b>336</b>	Criminal breach of trust (i.e., conversion by trustee)
<b>342</b>	Theft or forgery of a credit card
<b>346</b>	Extortion
<b>366</b>	Forgery
<b>386-388</b>	Fraud
<b>423</b>	Intimidation

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<sup>69</sup> RSC 1985, c. C-46.

## 4.2 - Sentencing Factors

Notably, section 718 of the *Criminal Code*, a sentencing provision introduced in 2013, now provides our courts with additional factors that can be considered to increase the severity of sentencing, such as where the victims of these crimes are older and vulnerable. Furthermore, section 718 references a wide range of aggravating factors that can be considered by the court in determining appropriate sentencing principles. For example, longer sentences are warranted if the crime was motivated by age or disability and evidence exists that the offender abused a position of trust or authority in relation to the victim. A similar provision can be found in section 380.1 of the *Criminal Code*, which outlines aggravating circumstances in sentencing for certain financial crimes.

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>70</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>71</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>72</sup> The offender in that case received a 17-year prison sentence.

In 2015, the *Canadian Victims Bill of Rights*<sup>73</sup> came into force. This Bill provides clear rights for victims of crime, including the right to information, participation, protection, and restitution. Some examples of victim's rights include receiving information about the review of an offender's conditional release, timing and conditions of that release, and providing a current photo of the offender prior to release.

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<sup>70</sup> 2022 QCCQ 7241 [*D'Onofrio*].

<sup>71</sup> *D'Onofrio*, *supra* note 70 at para. 4.

<sup>72</sup> *Ibid.*, at para. 117.

<sup>73</sup> *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

In cases of financial abuse, courts can make orders for restitution (or compensation) which relate to losses suffered as a result of the crime. It can include such losses as stolen property, lost wages, and moving costs.”<sup>74</sup> The difficulty with restitution orders is that they are challenging to enforce, meaning victims will likely have to initiate their own court proceedings as restitution orders are not paid voluntarily in Canada.

### 4.3 - Reporting a Crime

Where there is suspected abuse, a family member or the victim can make a police report. According to the Canadian Resource Centre for Victims of Crime (“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 neighbors who may have evidence, taking photographs of evidence, performing a physical examination if a sexual or physical assault occurred, and identifying the abuser and testifying against him or her in court.”<sup>75</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>76</sup> Peace bonds last up to 12 months, don’t require a lawyer for an application, and can generally be accessed at a local Provincial court through its criminal division.

## **5. Criminal Considerations in the Estates Context**

### 5.1 - Forfeiture Rule

A person who commits murder is not allowed to retain assets acquired through their victim’s death. This is known as the forfeiture or ‘slayer rule’ and applies whenever a killer

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<sup>74</sup> *Ibid.*

<sup>75</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. 11.

<sup>76</sup> *Ibid.*, at para. 12.

otherwise would become entitled to property by reason of a deceased's death.<sup>77</sup> According to Professor Oosterhoff, "[a]though the property is allowed to pass to the wrongdoer, it is immediately impressed with a constructive trust in favour of the person who would have received it if the victim had outlived the murderer."<sup>78</sup>

The slayer rule commonly applies when a beneficiary murders a testator,<sup>79</sup> when an heir murders someone who dies intestate,<sup>80</sup> when a joint tenant kills the other joint tenant,<sup>81</sup> when a beneficiary of social insurance benefits kills the insured,<sup>82</sup> and when a beneficiary of an insurance policy kills the insured.<sup>83</sup> The slayer rule, however, does not apply if the killer was determined to be insane or if the killing was not intentional.<sup>84</sup>

It should also be noted that the court may refuse to apply the aforementioned rules even though the circumstances might demand otherwise. An example of this was seen in the decision in *Rosenfeldt v. Olson*,<sup>85</sup> a case involving notorious serial killer Clifford Olson. In that case, Olson was charged with the murders of children in British Columbia. The Crown was concerned the evidence was circumstantial and struck a deal with Olson: in exchange for a statement leading to the location of the bodies of ten children, the RCMP made a \$100,000 payment to Olson's wife and child. The money was paid into trust with the provision that Olson could not benefit from it. Based on the information provided to authorities, Olson was convicted of murdering eleven children.

In the 1950 Manitoba Court of King's Bench decision in *Re Johnson*,<sup>86</sup> the executors of Olina Johnson's estate sought the direction of the courts on a determination of the right

<sup>77</sup> Albert H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9<sup>th</sup> ed. (Toronto: Thomson Reuters, 2019) at 803 [Oosterhoff].

<sup>78</sup> Oosterhoff, *supra* note 77 at 803.

<sup>79</sup> See *McKinnon v. Lundy*, (1895) 24 S.C.R. 650.

<sup>80</sup> See *Nordstrom v. Bauman*, (1961) [1962] S.C.R. 147; *Re Missirlis*, (1970) 15 D.L.R. (3d) 257 (Ont. Surr. Ct.); *Re Gore*, (1971) 23 D.L.R. (3d) 354 (Ont. H.C.); *Re Charlton*, (1968) 3 D.L.R. (3d) 623 (Ont. C.A.).

<sup>81</sup> See *Re Gore*, (1971) 23 D.L.R. (3d) 354 (Ont. H.C.); *Re Charlton*, (1968) 3 D.L.R. (3d) 623 (Ont. C.A.); *Schobelt v. Barber*, (1966) 60 D.L.R. (2d) 519 (Ont. H.C.); *Singh Estate v. Bajrangie-Singh*, (1999) 29 E.T.R. (2d) (Ont. S.C.J.).

<sup>82</sup> See *R. v. National Insurance Commissioner, Ex Parte Connor*, (1980) [1981] 1 All E.R. 769 (Q.B.).

<sup>83</sup> See *Cleaver v. Mutual Reserve Fund Life Association* (1891), [1892] 1 Q.B. 147 (C.A.); *Re Gore* (1971), 23 D.L.R. (3d) 354 (Ont. H.C.); *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, 96 D.L.R. (4<sup>th</sup>) 609.

<sup>84</sup> Oosterhoff, *supra* note 77 at 804.

<sup>85</sup> (1986) 25 D.L.R. (4<sup>th</sup>) 472 (B.C. C.A.), reversing (1984), 16 D.L.R. (4<sup>th</sup>) 103 (B.C. S.C.).

<sup>86</sup> [1950] 2 D.L.R. 69, [1950] 1 W.W.R. 263 (Man. K.B.).

of Walter Johnson's estate to share in Olina's distribution. In 1945, Olina was murdered by Walter who then killed himself. Olina left a will which devised a substantial portion of her estate to Walter. In denying the claim of Walter's estate, Beaubien J. speaking for the Manitoba Court of King's Bench, quoted the statement of Fry L.J. in *Cleaver v. Mutual Research Fund Life Association* and also adopted the words of Lord Esher M.R. from the same case, stating:

That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy ... [a]nyone claiming through the [wrongdoer] is shut out by the rule of public policy; so that any assignee from [him], or other person through [him], cannot recover.<sup>87</sup>

As Professor Oosterhoff has shared in his blog *the 'Slayer Rule': The Bank of Nova Scotia Company v. Rogers*, while denying the murderer benefits flowing from the crime is often a simple application of the rule, it is sometimes more difficult determining who should get those benefits. That was the issue in *The Bank of Nova Scotia v. Rogers*.<sup>88</sup>

The facts in *Rogers* are complex and the terms of the wills made it a particularly difficult case for the court to resolve. The adopted son of David and Merrill Rogers murdered his parents in 2016, plead guilty in 2018, and was sentenced to two concurrent life sentences without the possibility of parole for 20 years. In applying an implied intention approach,<sup>89</sup> the adopted son was disentitled, Merrill's three brothers became entitled as per terms of certain annuities and the alternative beneficiaries became entitled as if the adopted son predeceased his parent with no issue living at his death.<sup>90</sup>

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<sup>87</sup> *Cleaver v. Mutual Reserve Fund Life Association* (1891), [1892] 1 Q.B. 147 (C.A.) at pp. 152, 155.

<sup>88</sup> 2021 ONSC 1747.

<sup>89</sup> As Professor Oosterhoff wrote, this was the approach followed in *Brissette Estate v. Brissette* (1991), 42 E.T.R. 173 (Ont. Gen. Div.), a case where a husband murdered his wife. Her will left the residue of her estate to him, but if he predeceased her or failed to survive her by 30 days, the residue was to be paid to other persons named in the will. If the result of what happened was an intestacy, the wife's mother would inherit her estate. The court held that it should not find in favour of an intestacy. It found an implied condition in the testator's will that the husband had to be a legal beneficiary. Since he was not, because he could not inherit from her for public policy reasons, the alternative beneficiaries named in the will should be allowed to take, as they were next in line. In the court's opinion, this was in accord with the testator's will.

<sup>90</sup> See Albert Oosterhoff, "The 'Slayer Rule': The Bank of Nova Scotia Company v. Rogers" (June 21, 2021), *WEL Blog*, accessed online: <https://welpartners.com/blog/2021/06/the-slayer-rule-the-bank-of-nova-scotia-company-v-rogers/>

Another decision which addresses the question of who is entitled to inherit when one person kills another feloniously is *Re Unger Estate*.<sup>91</sup> In that case, Ms. Unger was a widow with two sons, Clayton and Logan. In 2016, Ms. Unger died and Clayton pled guilty to the charge of second-degree of his mother. Clayton and his common law partner conceived a child which was born 11 days after the death of Ms. Unger. The terms of her will provided that should either of her two sons predecease her, leaving one or more children who were alive on her death, the deceased's son's share should be divided among his children. Her will also provided that if any part of her estate 'should fail to vest in anyone', that part of the estate should be paid to two charities in equal shares.

In *Re Unger Estate*, the court concluded that Clayton's share should pass to his daughter because of Ms. Unger's clear intention and because Clayton's daughter was a substitute or alternate beneficiary to Clayton. As Professor Oosterhoff has written, the court in *Re Unger Estate* accepted the submission of the executors and the PGT that the court should do its best to ensure that the testator's wishes are not defeated.<sup>92</sup>

## 5.2 - Ex Turpi Causa

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"<sup>93</sup> or "illegal, wrongful or of culpable immorality"<sup>94</sup> in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. The principle comes from the Latin maxim "no cause of action may be founded on an immoral or illegal act."<sup>95</sup> While this doctrine is similar to the doctrine known as the forfeiture or slayer rule, it is wider in scope.

The earliest reported decision dealing with *ex turpi causa* is the English decision of *Everett v Williams*,<sup>96</sup> also known as the *Highwayman's Case*. In that case, the plaintiff sued his "business partner," alleging that he did not receive his fair share of the partnership's

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<sup>91</sup> 2022 BCSC 189, 74 ETR 4<sup>th</sup> 34 [*Re Unger Estate*].

<sup>92</sup> See Albert Oosterhoff, "The Slayer Rule: Re Unger Estate" (August 29, 2022), *WEL Blog*, accessed online: <https://welpartners.com/blog/2022/08/the-slayer-rule-re-unger-estate/>

<sup>93</sup> *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.

<sup>94</sup> *Hall v. Hebert* 1993 2 S.C.R. 159.

<sup>95</sup> Lincoln Caylor and Martin S. Kenney, "In Pari Delicto and Ex Turpi Causa: The Defence of Illegality – Approaches Taken in England and Wales, Canada and the US." (September 2017) 18:3 *Business Law International* 259. [Caylor and Kenney].

<sup>96</sup> *Williams v Everett* (1725) 104 ER 725 (*sub nom The Highwayman's Case* (1889) 9 LQR 197).

proceeds. The complaint was particularly ambiguous<sup>97</sup> and the Court of Exchequer determined that the business itself was actually robbery, and that the claim amounted to a dispute between two ‘highwaymen.’<sup>98</sup> The claim was ultimately dismissed, the lawyers held in contempt of court, and the parties themselves were later arrested and hanged.

Approximately fifty years later, in *Holman v Johnson*, Lord Mansfield articulated the illegality defence as one which is grounded in public policy, stating that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.”<sup>99</sup>

In their text, *The Law of Restitution* Peter Maddaugh and John McCamus have written that “[a]s a general proposition, we would suggest that whenever a party commits a wrongful act, whether it be serious or not, with the express motive of obtaining some benefit from his victim, that party ought not be permitted to retain the benefit.”<sup>100</sup> In the absence of a specific motive, the authors argue that “so long as the wrongdoer commits a crime with the intention of causing harm to another, the wrongdoer should be prohibited from acquiring any benefits that are a direct result of the wrong done to the person whom the wrongdoer intended, and did in fact, harm.”<sup>101</sup>

In the Alberta decision in *O’Meara v Hall*,<sup>102</sup> the Alberta Court of Appeal dealt with the issue of whether a father should be prevented from sharing in an award to his child’s estate as his negligence had allegedly caused the child’s death. Here, the Court of Appeal cited *Re Bowlen (Estate)*<sup>103</sup> for the proposition that where a beneficiary is criminally responsible for the death of a testator, the beneficiary is excluded from a gift for reasons of public policy. In *O’Meara* the suggestion was that the respondent was contributorily

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<sup>97</sup> In *Williams*, *supra* note 96, the complaint was for ‘dealing for commodities with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch.’

<sup>98</sup> A highwayman was a robber who stole from travellers on the road, often by horse.

<sup>99</sup> *Holman v Johnson* (1775) 98 All ER 1120 at 1121.

<sup>100</sup> Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, 2<sup>nd</sup> ed. (Aurora: Canada Law Book Inc., 2004) [Maddaugh & McCamus].

<sup>101</sup> Maddaugh & McCamus, *supra* at 703 citing *McKinnon v. Lundy* (1894), 21 O.A.R. 560 (C.A.), at p. 562 where Burton J.A. held that “the crime must be of such a character as to show an intent to bring about the result,” then went on to say that “a party seeking to enforce a contract brought about by his own fraud, cannot recover, because he would be profiting by his own wrong; so a party who intentionally kills another cannot profit by that act.”

<sup>102</sup> 2006 ABCA 86 [*O’Meara*].

<sup>103</sup> 2001 ABQB 1014.

negligent in the accident which resulted in the death of his child.<sup>104</sup> The Court held that if the allegation of contributory negligence can be borne out, it may be that the appellant should be able to discount the distribution made to the respondent to the extent the award received by the child's estate was diminished as a result of his negligence. Counsel in *O'Meara*, however, were unable to offer authority for the proposition that the respondent, having been contributorily negligent, was therefore barred from any recovery. The Court was not persuaded that the position was correct in law.<sup>105</sup>

### 5.3 - Voidable Life Insurance Policies

Life insurance policies can have a significant impact on an estate. In most cases, the insurance policy of the deceased can add value to an estate, cover liabilities, or provide a designated beneficiary with financial support. However, as the next case demonstrates, a payout can be denied where it can be proven that the insured's death came about as a result of the insured committing a criminal act.

The Saskatchewan Court of Appeal decision in *Jantzen Estate v TD Life Insurance Company*<sup>106</sup> is illustrative on the subject. In that case, the insured was found dead of a cocaine overdose. A Court of Queen's Bench judge granted summary judgment dismissing the estate's claim under the applicable insurance policies.<sup>107</sup> The estate appealed that judgment to the Court of Appeal for Saskatchewan. At issue was whether the estate could collect on two policies that insured the debts of the deceased to Toronto-Dominion Bank [TD] in the face of exclusions that deny coverage if death is as a result of, or happens while committing, a criminal offence. The Court of Appeal dismissed the estate's appeal.

The deceased, Mr. Jantzen, was found dead in his home on February 1, 2018. The results of an autopsy disclosed that he had a fatal quantity of cocaine in his system. The pathologist listed the cause of death to be "a combined drug intoxication of cocaine and

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<sup>104</sup> The precise nature of his alleged contribution was not disclosed, however, it appears not to have been significant as his vehicle was struck from behind by another vehicle traveling at a very high speed.

<sup>105</sup> *O'Meara*, *supra* note 102 at para. 8.

<sup>106</sup> 2023 SKCA 76 [*Jantzen*].

<sup>107</sup> *Jantzen Estate v TD Life Insurance Company*, 2022 SKQB 113, [2022] 7 WWR 162.

alcohol.”<sup>108</sup> The deceased had two loans insured under two policies of insurance. Each policy featured its own exclusions, which were relied on by the insurer in denying coverage.<sup>109</sup>

In reaching a determination, the trial judge identified that, at the time of Mr. Jantzen’s death, the possession of cocaine was an offence under s. 4(1) of the *Controlled Drugs and Substances Act*.<sup>110</sup> There was also evidence from the pathologist that cocaine was found on the person of the deceased, in a small plastic bag and on a 20-dollar bill. The judge summarized the evidence and concluded on a balance of probabilities that Mr. Jantzen died while committing the criminal offence of possession of cocaine.

The Court of Appeal held that the insurers properly denied coverage because Mr. Jantzen died as a result of committing the crime of possession of the cocaine he consumed. As a result, it was held that the judge did not err in granting the insurers summary judgment dismissing the claim against them.

## 6. Expanding the Criminal Law

### 6.1 - Standing Committee on Justice and Human Rights

On February 2, 2021, the House of Commons Standing Committee on Justice and Human Rights (the “Committee”) agreed to conduct a study based on the following motion:

That pursuant to its mandate under Standing Order 108(2), the committee study the issue of elder abuse including the insufficiency of current laws in fighting elder abuse...explicitly penalizing those who neglect seniors under their care and how to more effectively combat elder abuse.<sup>111</sup>

Based on the findings of the Committee, they recommended that the federal government table amendments to the *Criminal Code* that would explicitly penalize elder abuse and in

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<sup>108</sup> *Jantzen*, *supra* note 106 at para. 7.

<sup>109</sup> See *Jantzen*, *supra* note 106 at para. 9 where the court provides that the Mortgage policy states that the insurers will not pay a life or terminal illness benefit if “*your* death is a result of or while *you* were committing a criminal offence.” The LOC policy exclusion which is worded more expansively states that no benefit would be payable if “*your* death is a result of, associated with, or happens while *you* are committing a criminal offence”

<sup>110</sup> SC 1996, c 19 [CDSA].

<sup>111</sup> Standing Committee, *supra* note 16 at 5.

doing so, consider the offence of criminal endangerment, specifically with elements covering failure to provide care where a contract for care exists and that failure endangers the health and/or safety of those in care.<sup>112</sup> The Committee also recommended that the federal government, in consultation with relevant stakeholders, examine the aggravating factors in sentencing in the *Criminal Code* and identify whether amendments to those sections could be made to strengthen referencing seniors in those sections.<sup>113</sup>

In testimony, advocate and witness Marie Beaulieu encouraged the Committee to consider amendments to criminal procedures such as allowing recorded testimony or testifying by videoconference for older adults, as is already done with other vulnerable witnesses.<sup>114</sup> Testifying on behalf of ACE was Graham Webb. Mr. Webb suggested that to address abuse and neglect in long-term care homes, a new offence is required, along with whistleblower protection, and personal criminal liability for directors and officers of such facilities.<sup>115</sup>

The Canadian Bar Association expressed concern that adding new offences to the *Code* “may be counterproductive because it can increase the complexity of the legislation without changing society’s response to the acts in question,” while the Canadian Centre for Elder Law cautioned against age-specific provisions in the *Code* because “specifications can further marginalize vulnerable groups.”<sup>116</sup>

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<sup>112</sup> *Ibid.*, at 1.

<sup>113</sup> *Ibid.*, at 3 where the Committee also recommends that consideration should be given to whether potential maximum terms of imprisonment and fines for long-term care administrators, officers, and directors convicted of offences related to incidents of elder abuse are adequate or require *Criminal Code* amendments.

<sup>114</sup> See Standing Committee, *supra* note 16 at 20 where Jody Berkes of the Canadian Bar Association testified that such measures already exist and could be used by vulnerable seniors, including sections 486.2 and 715.2 of the *Criminal Code*.

<sup>115</sup> See Standing Committee, *supra* note 16 at 24 where Mr. Webb suggested one or more new offences of criminal endangerment if an individual or organization has entered into a contract to provide care and/or supervision to a person, has failed to do so, and the result has been to endanger the health and/or safety of the person. Mr. Webb suggested a maximum penalty of five years’ imprisonment, with separate offences for criminal endangerment where bodily harm or death is caused, with higher maximum penalties. Mr. Webb also proposed an administration of justice offence for retaliation against a long-term care resident for making a complaint relating to criminal endangerment, modelled on sections 139(2) and (3) of the *Criminal Code*.

<sup>116</sup> Standing Committee, *supra* note 16 at page 25.

## 6.2 - The United States of America's Experience

The United States of America provides an appropriate case study in the debate on whether Canada should table legislation which creates an age-specific offence targeting elder abuse. The following will briefly summarize rates of elder abuse in the United States of America before turning its focus to the impact of some of the age-specific laws that have been implemented in the United States.

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>117</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>118</sup> Older adults who have been abused have a 300% higher risk of death when compared with those who have not been mistreated.<sup>119</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>120</sup>

A 2019 study reveals that older adults in America are more often scammed by members of their own families than by strangers. Experts at the Keck School of Medicine at the

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<sup>117</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>118</sup> NCOA Elder Abuse Facts, *supra* note 117 at 33.

<sup>119</sup> *Ibid.*

<sup>120</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>.

University of Southern California analyzed data from reports made to the National Center on Elder Abuse (“NCEA”) resource line. They found that more than 42% of the calls made logged abuse and 55% of those were financial abuse. Almost half of the calls alleged abuse by family members and of those 62% were of a financial nature, far exceeding the 35% citing emotional abuse and the 20% alleging neglect.<sup>121</sup>

### *6.2-1 - America’s Criminalization of Elder Abuse*

In 2012, Professor Nina Kohn wrote the first substantive critique of the American criminal justice response to elder abuse. In her article, Kohn argues that the criminalization of elder abuse can protect elder abuse victims and improve public attitudes toward the abuse of older adults, however, cautions that by failing to engage elder abuse victims in the punishment process and criminalizing certain consensual interactions involving older adults, the current criminal justice system response actually threatens to further oppress victims, perpetuate negative stereotypes about older adults, and may undermine the delivery of victim services.

According to Kohn, while advocates have worked hard to raise awareness that the acts constituting elder abuse can be classified as crimes, the federal legislative response to elder abuse has been limited. As an example, the federal government “has not made elder abuse a federal crime as it has domestic violence and certain instances of child abuse.”<sup>122</sup> Despite the above, the United States Department of Justice has supported, and to a degree, led collaboration among law enforcement personnel and provided funding to state-level programs which aim to prevent elder abuse.<sup>123</sup>

Notwithstanding the aforementioned, there has been a federal effort in the United States to develop forensic resources and knowledge surrounding elder abuse.<sup>124</sup> In support of

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<sup>121</sup> Steve Randall, “Seniors more likely to be scammed by their family than strangers” (August 16, 2019), *Wealth Professional*, accessed online: <https://www.wealthprofessional.ca/news/industry-news/seniors-more-likely-to-be-scammed-by-their-family-than-strangers/287367>

<sup>122</sup> Kohn, Nina A., “Elder (In)Justice: A Critique of the Criminalization of Elder Abuse” (August 1, 2012). *American Criminal Law Review*, Vol. 49, No. 1, 2012, at 6 where the author references 18 U.S.C. § 2261 (2010) (making interstate commission of domestic violence a federal offense); § 2251 (2010) (making sexual exploitation of children a federal offense in many situations) [Kohn].

<sup>123</sup> Kohn, *supra* note 122 at 6.

<sup>124</sup> *Ibid.*, where the author references Diana Cafaro Schnieder et al., *Elder Abuse Forensic Centres*, 22 J. ELDER ABUSE & NEGLECT 255 (2010).

this, President Barack Obama signed the Elder Justice Act into law in March 2010.<sup>125</sup> According to Kohn, the Act created a new role for the federal government in coordinating responses to elder abuse and neglect but also, to authorize funding for prevention and services. The Act also, “implicitly recognized the importance of the criminal justice system’s role in addressing elder mistreatment by authorizing significant funding for the development of forensic expertise to facilitate its prosecution.”<sup>126</sup>

At the state level, there has been a notable increase in legislation outlawing “abusive” behavior, even in situations where the victim may not see the behavior as abusive or may have even consented to it.<sup>127</sup> For example, the state of Illinois has created a separate crime for the “financial exploitation of an elderly person or a person with a disability [by a person] in a position of trust of confidence with the elderly person.” The law states one of the ways this crime can be committed is through the “misappropriation of ... assets or resources by undue influence.”<sup>128</sup>

Many states have also enacted new crimes which apply when the victim is above a certain age or has a qualifying disability or dependency. For example, California makes it a crime to willfully cause or permit a person 65 or older to suffer “unjustifiable pain or mental suffering” or to inflict such suffering on a person age 65 or older.<sup>129</sup> The penalties increase where the victim is at least 70 and suffers great bodily injury or death.<sup>130</sup> California also makes it a misdemeanor for a person who has care or custody of an older adult to “cause or permit” that adult “to be placed in a situation in which his or her person or health may be endangered.”<sup>131</sup>

California further amended its legislative regime on June 26, 2019 when the state approved Chapter 10 of the Acts of 2019 which amended the California Probate Code at Part 7, *Effect of Homicide or Abuse of an Elder or Dependent Adult*. These amendments

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<sup>125</sup> *Ibid.*, at 7 where the author references the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, subtitle H (2010) (subtitle H is referred to as the “Elder Justice Act”).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, at 9 where the author uses the example of legislation that seeks to attack the financial exploitation of older adults, by adopting statutory provisions that make undue influence a crime.

<sup>128</sup> *Ibid.*, at 11 referencing 720 ILL. COMP. STAT. ANN. 5/17-56(a), (c) (2011).

<sup>129</sup> *Ibid.*, at 8 referencing CAL. PENAL CODE § 368(b)(1).

<sup>130</sup> *Ibid.*, citing CAL. PENAL CODE § 368(b)(2).

<sup>131</sup> *Ibid.*, citing CAL. PENAL CODE § 368(c).

expand the presumption of fraud to include coverage for omitted spouse claims by caregivers and donative gifts to caregivers. The statute presumes fraud or undue influence when a donative instrument makes a gift to a caregiver who began a marriage with the grantor while providing services to the grantor or within 90 days of the cessation of such services and the relevant document was executed less than six months into the marriage.<sup>132</sup> California's Probate Code also precludes such a caregiver spouse from receiving a pretermitted spouse's share of the decedent's estate if the decedent died within six months from the marriage date, unless the caregiver can prove by clear and convincing evidence the marriage was not the product of fraud or undue influence.

### *Pros*

In her article, Kohn uses the criminal justice system's response to domestic violence to inform the evolution of the federal and state-level response to elder abuse. Kohn argues that "[a]s the criminal justice approach to domestic violence has evolved, it has been characterized by two key developments that parallel developments in the elder abuse arena: first, the recognition that domestic violence involves a prosecutable crime, and second, the creation of new legal tools to facilitate that prosecution."<sup>133</sup>

Kohn argues that treating elder abuse as a prosecutable crime will protect certain victims and would-be victims from future abuse but also, as a means to powerfully publicly communicate condemnation of elder abuse. It can also provide a strong deterrent to future offenders. There are, however, some notable critiques of this approach.

### *Cons*

Kohn looked at feminist critiques of victim disengagement in the context of domestic violence which suggest serious negative consequences emerge when victims are disengaged from the process of punishment. In this regard, Kohn argues that "by removing victims from the decision-making process, elder abuse laws and policies may have the counterproductive effect of promoting stereotypes about older adults."<sup>134</sup>

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<sup>132</sup> Mark J. Esposito, "Predatory Marriage," (2021) 17 *NAELA J* 1, at 11, where the author cites Cal. Prob. Code § 21380 (a) (4).

<sup>133</sup> Kohn, *supra* note 122 at 15.

<sup>134</sup> *Ibid.*, at 20-22.

Kohn also recognized that elder abuse victims are unique from traditional domestic violence victims in that when they are brought to the attention of authorities, they risk being stripped of a broad range of rights. Victims are frequently subjected to plenary guardianships and subsequently lose the right to make virtually every decision about their own lives as a consequence of their interaction with authorities.<sup>135</sup>

As a potential take-away for the debate on whether Canada should implement a federal crime targeting elder abuse, Kohn argues that:

in designing the criminal justice response to elder abuse, policymakers need to recognize that facilitating convictions of alleged abusers should not be their only—or even their primary—goal. If it is, the unintended consequences will likely include re-victimizing abuse victims, promoting harmful stereotypes, and undermining victim services. Ultimately, we may discover that the most effective criminal justice interventions for protecting older adults are not those that maximize elder abuse conviction rates.<sup>136</sup>

## 7. Caselaw examples

### 7.1 – R. v. Saucier - 2019 – Cornwall, ON

Offences: s. 380(1) (Fraud over \$5,000); ss. 368(1) and 366(1) (Forgery, use, trafficking or possession of forged document).

In this case, a financial advisor stole (i.e., defrauded and misused funds) from his elderly retired clients over a period of three years.<sup>137</sup> In doing so he forged and used forged documents. His clients paid him money expecting that it would be used for their life insurance premiums. Instead, he deposited the stolen money into two bank accounts that he controlled. Ultimately, however, when his clients asked for their money back, all of the money was repaid to the clients.

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

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<sup>135</sup> *Ibid.*, at 27.

<sup>136</sup> *Ibid.*, at 29.

<sup>137</sup> *R v Saucier*, 2019 ONSC 3611.

In the sentencing decision, the court noted that all of the funds had been returned to the victims. However, the victims had been impacted in other ways with trust issues and emotional impact. The court, in sentencing the offender to 15 months incarceration, also noted that:

many of the victims were vulnerable by reason of their age, relative lack of sophistication in financial matters, or because of their personal circumstances at the time the offences were committed. Many of the victims were of relatively modest means. ...some also needed the accused to translate documents and make out their cheques because of language and literacy issues...<sup>138</sup>

### 7.2 – R. v. Barker - 2019 – Pictou, NS

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

This decision opens with the words: “*This is a case of elder abuse.*” In *R v Barker*,<sup>139</sup> a married couple forced the wife’s 83-year-old mother, who had dementia, dysphasia, and needed around-the-clock care to sign a number of lending and financing documents. The mother lacked the requisite capacity to enter into the aforementioned financial services contracts, but she gave in to the pressure that the offenders placed on her. It is important to note that the mother was living with the offenders and dependent upon them for her care. The offenders made off with over \$50,000 of the mother’s money and left her on the hook for repayment of the loans.

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

Violence or threats of violence are not needed when one seeks to exploit someone who is elderly and infirm or incapacitated. Breach of trust which enables elder abuse may be as serious as employing violence against someone capable of putting up a fight.<sup>140</sup>

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

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<sup>138</sup> *Ibid.*, at para 15.

<sup>139</sup> 2019 NSPC 24 [*Barker*].

<sup>140</sup> *Ibid.*, at para 13.

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

### 7.3 – R. v. Banoub - 2019 – Halton, ON

Offences: s. 322 (Theft), s. 334 (Theft over \$5,000).

In this case, a daughter pled guilty to theft over \$5,000 for depleting her mother's bank accounts and investments by approximately \$161,000 in four years.<sup>141</sup> While her mother was in a long-term care home, the daughter, who was appointed as her mother's attorney pursuant to a Power of Attorney document, used her position of power to make consistent withdrawals and advances from her mother's accounts for her own personal benefit. She spent the money on things such as gambling, living expenses, and an overseas trip. What's worse was that, in doing so, she ceased paying her mother's long-term care home costs. Exacerbating these actions was the fact that the daughter offered "no reason" as to why she did these things.

In sentencing the offender to six months imprisonment, followed by a three-year probation order, the Court held:

The most aggravating factor is that instead of taking care of her mother, she took advantage of her. She treated her mother's money, which was entrusted to her on a fiduciary basis, as if it were her own... She took this money despite having been gifted \$288,000 following the sale of her mother's house...It is... an aggravating factor that this gift was not enough to satisfy her greed. Instead she stole the rest of her mother's assets. In the process she put her mother at risk of being denied the same level of services which she had been receiving at the long-term care facility.<sup>142</sup>

### 7.4 – R. v. Cvetas - 2022 – Toronto, ON

Offence: s. 322(1) (Theft Over \$5,000).

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<sup>141</sup> *R v Banoub*, 2019 ONCJ 681.

<sup>142</sup> *Ibid.*, at paras 87-92.

In this case, a banking executive plead guilty to the charge of theft over \$5,000 after admitting to taking \$317,000 from a bank account he held jointly with his 81-year-old godmother. In 2014, the older adult, who had no surviving family, grew close to accused and added him as joint holder on her bank accounts. She appointed him her attorney under a power of attorney for property and personal care as well as the executor and trustee of her estate.

At the time, the accused was an executive at the Bank of Montreal, earning approximately \$160,000 per year. However, between late 2015 and October 2016, the majority of the older adults' funds in the bank account were dissipated. By November 2016, there were insufficient funds in the account. By February 2017, after being told the money was moved to an investment account, the older adult contact a lawyer who then contacted the police.

On October 11, 2017, Mr. Nick Cvetas turned himself into police. Through his lawyer, he made restitution of the funds to the older adult. In reaching its decision, the court highlighted how Mr. Cvetas abused the trust of a vulnerable person and breached his fiduciary duty under a power of attorney. To this end, the court held that the most important objectives in sentencing for this crime are denunciation and general deterrence.<sup>143</sup> Mr. Cvetas was sentenced to 12 months in jail and two years' probation, including conditions prohibiting him from contacting the older adult and having authority over the real property, money or valuable security of another person.<sup>144</sup>

#### 7.5 - R. v. Brush - 2022 – Kamloops, B.C.

Offence: s. 215(2)(b) (Failing to provide the necessaries of life).

On March 9, 2021, a Kamloops-based care provider entered a guilty plea to the offence of failing to provide the necessaries of life in the decision of *R v Brush*.<sup>145</sup> The victim was an older adult in her 70s with significant physical and cognitive challenges requiring 24-hour care. She was under the care of the accused for 13 years.<sup>146</sup>

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<sup>143</sup> *Ibid*, at para 40.

<sup>144</sup> *Cvetas, supra* at para 60.

<sup>145</sup> 2022 BCSC 1194 [*Brush*].

<sup>146</sup> *Brush, supra* note 145 at para. 5 where the court explains that the accused was responsible for all of the older adult's care and was paid to provide that care. Her responsibilities included ensuring that the older

In May of 2019, the older adult’s physician grew suspicious after realizing she had not seen the older adult since 2017. He had his office call the accused. On May 6, 2019, the accused and the older adult attended the physician’s office. Immediately, the physician noticed the older adult was cachectic and had lost muscle mass to the point where she was “just almost bone.” Because of this condition, the older adult was taken to Royal Inland Hospital (“RIH”) immediately. She weighed 72 pounds on admission and was noted to have crust on her eyes and smelled strongly of urine.<sup>147</sup> The older adult received good care at RIH and was discharged on July 3, 2019. She currently lives in an assisted living facility in Kamloops.

On May 10, 2019, a police investigation commenced. After executing a search warrant on the residence of the accused, it was discovered that she had not been filling prescriptions for the older adult since July 2017, despite altering and initialing medical administration record sheets to indicate that she had.<sup>148</sup> A police search of the older adult’s residence revealed unsanitary conditions.

The accused had worked in the field of medical healthcare for 32 years. She had no prior criminal history, however, reported having a gambling addiction that began in 1991. Around 2010, she entered a lost her home and had her trailer repossessed and by 2013, she entered 12-step program for her addiction. In 2017, however, she began playing internet games that cost money.<sup>149</sup>

In determining an appropriate sentence, the court looked to the decision in *R. v. Davy*<sup>150</sup> where the court held at paras. 126-128:

[126] This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the victim] suffered from severe dementia and was vulnerable. In *R. v. Foubert* Justice McKinnon addressed elder abuse as a growing problem in our society that must be seriously addressed. At para. 30, Justice McKinnon states:

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adult attended medical appointments, received her medications, was properly fed, clothed, bathed, and housed.

<sup>147</sup> *Ibid.*, at paras 7 – 8 where the initial assessment of the older adult also revealed that she was emaciated, had unkempt and matted hair, overgrown nails, a pressure sore on her right hip and buttock, and had a sore on her head.

<sup>148</sup> *Ibid.*, at para. 9.

<sup>149</sup> *Ibid.*, at para 19.

<sup>150</sup> 2015 CanLII 10885 (ON SC) [*Davy*].

Caregivers of the elderly, particularly those suffering from Alzheimer's disease and dementia, owe tremendous power. That power cannot be abused.

[127] He goes on to state at para. 31:

Caregivers must know that if they abuse their position of trust and authority over vulnerable individuals, the court will deal with them harshly. Caregivers often work in environments where witnesses are not present. As such, they must deal with those entrusted to their care in the utmost good faith.

[128] At para. 32 he goes on to state:

In my view the only way to ensure that this bond of trust remains intact is for the courts to determine that caregivers who breach that trust will be sent to jail. In my view, incarceration is the only reasonable alternative to ensure a safe and secure environment for those extremely vulnerable individuals who are at the mercy of their caregivers.

The Court therefore determined that the appropriate sentence for the accused was a period of 18 months incarceration followed by an 18-month probation order. This sentenced was described as balancing the “serious nature of the offence, the specific harm it has been proven to have caused, the other aggravating factors, and the primacy of the objectives of denunciation and specific and general deterrence.”<sup>151</sup>

#### 7.6 - R. v. Wentworth - 2023 – Kingston, ON

Offences: s. 234 (Manslaughter); s. 343 (Robbery).

On June 2, 1995, 92-year-old Henrietta Knight was bound to a chair and beaten in the head in her small home in Kingston, where she lived alone. She was taken to the hospital and released the same day, but returned on July 1, 1995, showing signs of confusion. She was released on July 3<sup>rd</sup> and returned again on July 11 with bleeding on her brain. She remained in hospital and was eventually transferred to a chronic care facility where she sadly died on November 4, 1995.<sup>152</sup>

Were it not for a sworn videotaped statement Ms. Knight made to police three days after the attack, it might have been impossible to apprehend and convict her assailant. Over

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<sup>151</sup> *Brush*, *supra* note 145 at para. 76.

<sup>152</sup> *R. v. Wentworth*, 2023 ONSC 5319 at paras. 4-5.

the course of her 33-minute interview, Ms. Knight described the attack and provided a detailed description of her assailant.<sup>153</sup>

Nearly 27 years later, Mr. Wentworth was charged with robbery and manslaughter. The evidence presented at trial included photographs of Ms. Knight and her home following the invasion. The photographs revealed extensive bruising to her face, neck, shoulders, arms and hands. Some of Ms. Knight's skin had been torn off her arms where the accused taped her up. The photographs of her home revealed that it was ransacked while another photograph showed a chair with tape attached. The tape from the chair was analyzed and revealed to have samples of DNA consistent with Ms. Knight's.<sup>154</sup>

The court was unable to conclude based on the evidence available that Ms. Knight either died because the assaults produced the conditions that caused her death, or because the assault left her more vulnerable to death because of age-related decline or a pre-existing condition.<sup>155</sup>

In concluding that Mr. Wentworth was guilty of the robbery but not the manslaughter of Ms. Knight, Justice Lacelle held that:

One could much more easily reach a conclusion that Ms. Knight probably died because the accused either caused her death or because his conduct left her vulnerable to a hastened decline from other health issues. But proving something is probable (or likely) is not enough to satisfy the burden that the Crown bears. More is required in a criminal trial in order to rebut the presumption of innocence.<sup>156</sup>

Mr. Wentworth received a 12-year sentence for the robbery. He was also found guilty of the two unrelated murders of Richard Kimball in 1995 and Stephen St. Denis in 2001 and of robbing a TD Bank branch in Kingston in 1995 and a 2000 car bombing in Toronto that damaged homes and vehicles.

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<sup>153</sup> *R. v. Wentworth*, 2023 ONSC 5319 at paras. 36-42.

<sup>154</sup> *R. v. Wentworth*, 2023 ONSC 5319 at para. 9.

<sup>155</sup> *R. v. Wentworth*, 2023 ONSC 1165 at para. 395.

<sup>156</sup> *R. v. Wentworth*, 2023 ONSC 1165 at para. 396.

## **CONCLUDING COMMENTS**

ABUSES and predatory schemes targeting older adults continue to exist and rise in prevalence, the public, police, and those involved with advocating for the rights of older adults must be aware of the devastating impact of abuse. It is therefore, of utmost importance to keep a watchful eye out for older family members, neighbors, and acquaintances. While remedies exist to address the abuse of older adults once it is detected and reported, many may be under-utilized, unknown or simply unavailable. Where the elements of a criminal charge can be met by the evidence, criminal courts are often better equipped than civil courts to deal with abuse, especially when the victim may lack the resources or ability to advance a claim in civil courts.

## RESOURCES

Advocacy Centre for the Elderly: [www.advocacycentreelderly.org](http://www.advocacycentreelderly.org)

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

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

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

CBA Elder Law Section Website: [http://www.cba.org/cba/sections\\_Elder/main/](http://www.cba.org/cba/sections_Elder/main/)

Law Commission of Ontario, A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice (Toronto: April 2012) <http://www.lco-cdo.org/en/older-adults-final-report>

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

STEP Canada’s Client Service Resource: A Guide for Assisting Persons in Vulnerable Situations (2023): <https://online.fliphtml5.com/zskjb/zjwz/#p=1>

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

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

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

### **Alberta**

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

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

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

### **British Columbia**

*Adult Guardianship Act, RSBC 1996, c 6*

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

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

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

*Public Guardian and Trustee Act, RSBC 1996, c 383*

*Health Professions Act, RSBC 1996, c 183*

*Personal Information Protection Act, RSBC 2003, c 63*

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

### **Manitoba**

*Protection for Persons in Care Act, CCSM, c P144*

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

*The Domestic Violence and Stalking Act, CCSM c D 93*

### **New Brunswick**

*Family Services Act, SNB 1980, c F-2.2*

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

*Public Trustee Act*, SNB 2005 c P-26.5

## **Newfoundland**

*Adult Protection Act*, SNL 2001, c A-4.01

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

*Personal Health Information Act*, SNL 2008 c P-7.01

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

## **Nova Scotia**

*Adult Protection Act*, RSNS 1989, c 2

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

*Domestic Violence Intervention Act*, SNS 2001, c 29

## **Ontario**

*Fixing Long-Term Care Act*, SO 2021, c39 Sch 1

*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