

ELDER ABUSE CHECKLIST: CIVIL AND CRIMINAL REMEDIES

Kimberly A. Whaley

As our Canadian population ages, elder abuse is an increasingly prevalent issue in our society. Elder abuse can take on many forms including financial, physical, psychological (mental or emotion), sexual, and neglect. It is often perpetuated at the hands of a trusted family member, caretaker, or familiar person whom the older adult relies on and/or who can easily exert control or influence over the victim.

Financial Abuse

One of the more common types of elder abuse, financial abuse, is often perpetuated using a Power of Attorney document. Some instances of financial abuse include:

- Misusing or abusing a Power of Attorney document;
- Stealing an older adult's money, pension cheques, or possessions;
- Committing fraud, forgery or extortion;
- Sharing an older adult's home without paying a fair share of the expenses; and
- Unduly pressuring a senior to:
 - Sell personal property
 - Invest or take out money
 - Buy alcohol or drugs
 - Make or change a will
 - sign legal documents they do not understand including documents that transfer assets into joint names
 - Give money to relatives, caregivers or friends, or
 - Engage in paid work to bring in extra money.

Indicators of Financial Abuse

There are several “red flags” to look for which may indicate the perpetration of elder financial abuse, including:

- Changes in living arrangements, such as previously uninvolved relatives or new friends moving in, with or without the older adult’s permission;
- Unexplained or sudden inability to pay bills;
- Unexplained or sudden withdrawal of money from accounts;
- Poor living conditions in comparison with the older adult’s assets;
- Changes in banking patterns due to pressure;
- Changes in the older adult’s appearance;
- Controlling an older adult’s spending;
- Confusion or lack of knowledge about financial situations and signing of legal documents;
- Being forced to sign multiple documents at once;
- Being coerced into a situation where a an older adult is being overworked and underpaid;
- Unexplained disappearance of possessions (lost jewellery or silverware);
- Changes in an older adult’s power of attorney;
- Necessities of life denied or not provided by an older adult’s attorney under a power of attorney document (shelter, food, medication, assistive devices);
- Being overcharged for services or products by sales people or providers; or
- Denying an older adult his/her right to make independent financial decisions.

Underreporting of Financial Elder Abuse

Financial elder abuse is often under-reported (either to the police or to other support person) for several reasons, including that:

- The older adult feels shame or embarrassment that they have been victimized;
- They are fearful of the perpetrator or have a fear of the police or other authorities;
- They are dependent upon the perpetrator for their physical well-being;
- They want to protect the abuser, especially if they are a family member;
- The older adult may feel that an unhealthy relationship is better than no relationship at all, especially if the perpetrator is their only family member or friend;
- They feel guilty for becoming a victim or they blame themselves;
- They may minimize or rationalize away the abuse or they may deny the abuse;
- They may not recognize it as abuse altogether; or
- They may not report it even they have the desire to given limited physical or mental capabilities, including if suffering from dementia.

What Remedies Can be Sought?

When abuse of older adults is suspected (especially financial abuse), remedies to correct the wrong or punish the perpetrator can be sought both under provincial laws (e.g., legislation governing property, guardianship, capacity, health, and social services), and/or under federal laws (e.g., the *Criminal Code*).

There are several factors to consider when deliberating which avenue to proceed by:

CIVIL SUIT

- Can be started by anyone;
- Goal is restitution (*i.e.*, putting the victim back in the place they would have been had the wrongful act not occurred – payment of damages)
- May allow for a custodial sentence, if necessary;
- Court can make a “declaration” that property belongs to the older adult;
- Evidence must prove wrong on a “balance of probabilities” – lower standard of proof = more like than not that the perpetrator caused the harm; and
- May be costly and time-consuming.

CRIMINAL SUIT

- Can only be started by the Crown;
- Goal is to punish the perpetrator;
- May allow for some restitution but not the main purpose;
- Court cannot make a “declaration” that property belongs to the older adult;
- Evidence must prove wrong “beyond a reasonable doubt” – higher standard of proof; and
- May be time-consuming.

What Civil Remedies are Available in Financial Abuse Situations?

There are several remedies available when there has been suspected financial abuse of an older adult, including:

- Removal of an Attorney under a Continuing Power of Attorney for Property** to prevent them from acting further on behalf of the older adult (*see: British Columbia (PGT) v Ferrier, 2017 BCSC 2142, Carey v Carey, 2018 ONSC 4564*)
- Order of an Attorney to Account** (produce evidence of how money was spent while acting on behalf of the older adult) (*see: McMaster v McMaster, 2013 ONSC 1115*)
- Order for the Repayment of Property or Money improperly taken** from the older adult (*see: Sangha (Re), 2013 BCSC 1965, Servello v Servello, 2015 ONCA 434, Sarzynick v Skwarchuk, 2021 BCSC 443,*)
- Setting Aside of a transfer of tile or bank accounts** put into joint names with the perpetrator (*see: Galloway v Barski, 2016 BCSC 1588*)
- Restitution through unjust enrichment/constructive trust or resulting trust** (*see: Sull v Pengelly, 2019 BCSC 1565, Sarzynick v Skwarchuk, 2021 BCSC 443*)
- Setting Aside or Declaring a Predatory Marriage as “void”**

What Other Non-Criminal Avenues are Available to Address Elder Abuse?

Elder Abuse or its effects may alternatively be addressed using other non-criminal remedies provided for in legislation such as:

- Adult protection laws;
- The Public Guardian and Trustee Legislation
- Legislation protecting adults living in residential care;
- Domestic violence laws;
- Human Rights laws; and
- Neglect legislation.

In British Columbia, the *Adult Guardianship Act* (“**AGA**”) provides protection to vulnerable older adults who experience abuse and neglect in the province.

What Criminal Remedies are Available in Financial Abuse Situations?

The Canadian *Criminal Code* plays a role directly and indirectly, in protecting older adults from financial abuse and exploitation. While the *Criminal Code* does not provide for the specific offence of "elder abuse", or "financial abuse" there are certain offences under which such a perpetrator could be charged, including:

- Section 215: Failing to provide the necessaries of life (criminal neglect);**
- Section 220: Causing death by criminal negligence (where neglect leads to death of older adult);**
- Section 264.1: Uttering threats;**
- Sections 265/266: Physical assault;**
- Section 271: Sexual assault;**
- Section 279: Unlawful confinement;**
- Section 322: Theft;**
- Section 331: Theft by a person holding a power of attorney;**
- Section 336: Criminal breach of trust (Conversion by Trustee);**
- Section 342: Theft or forgery of a credit card;**
- Section 346: Extortion;**

- Section 366: Forgery;**
- Section 386-388: Fraud; and**
- Section 423: Intimidation**

Further, sentencing provisions introduced in 2013 found at **section 718** of the *Criminal Code* notably provide aggravating factors which can be considered by the Court determining appropriate sentencing principles. Specifically, 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.

It is always best to consult a criminal lawyer when interested in pursuing a criminal claim.

See also: R v Kaziuk, 2011 ONCJ 851 (Theft, Fraud, Theft by a person holding a power of attorney), R v Taylor, 2012 ONCA 809 (Fraud), R v Cousineau, 2013 BCSC 947 (Fraud), R v Bernard, 2015 BCPC 107 (Fraud over \$5,000), R v Davy, 2015 CanLII 10885 (ONSC) (Failure to provide the necessaries of life), R v Hooyer, 2016 ONCA 44 (Theft by a person holding a power of attorney), R v Reynolds, 2016 BCPC 69 (Theft), R v Bruyns, 2016 ONCJ 207 (Theft, Fraud over \$5,000, Criminal breach of trust), R v Curreri, 2016 ONSC 3598 (Fraud over \$5,000), R v Llanto, 2018 BCPC 102 (Assault), R v Siwicki, 2018 MBQB 115 (Causing death by criminal negligence, Failure to provide the necessaries of life), R v Fernandez, 2018 ONSC 272 (Assault causing bodily harm), R v Saucier, 2019 ONSC 3611 (Fraud over \$5,000, Forgery, Uttering a forged document), R v Barker, 2019 NSPC 24 (Fraud over \$5,000), R v Banoub, 2019 ONCJ 681 (Theft, Theft over \$5,000), R v Duffeenais, 2021 NLPC 1320A00344 (Assault).

Questions to Ask and Steps to Take When Investigating Financial Abuse

- Is there evidence of money or property missing or unaccounted for? Does the alleged offender hold a power of attorney for property?
- If the victim is capable, visit the victim and obtain financial particulars (the name of the attorney, name of their bank, contact information at the bank branch, account numbers, Old Age Security and Canada Pension Plan information etc.). Once authorized by the victim, look for alternative sources of information (e.g. family members, friends, lawyer who represented the victim when POA was signed).
- Obtain from the victim a completed consent form for the release of their financial records / bank information. Also obtain a copy of the POA for Property.
- Contact the financial institutions immediately. Speak to a senior employee of the financial institution (a branch manager, customer service manager etc.) and advise them that you are conducting an investigation into the accounts of the victim. Confirm with them that the information that the victim gave you is accurate.
- Take the victim's consent form to their financial institution(s), government offices (OAS, CPP) and ask to be provided with the pertinent financial records/evidence.
- Let the victim know they have a right to revoke the POA (if capable to do so¹). Suggest that the victim get legal advice about how to do so as soon as possible.
- Take a formal statement from the victim. Obtain a video statement, audio statement or written statement (be mobile – take a camera to the victim when resources allow. In some cases, a dying declaration may be required. Consult your local Crown Attorney for guidance).
- Continue to investigate as required. Identify other means of obtaining evidence (e.g. production order, search warrant, other judicial orders of suspect's account(s), records from retirement home or long-term care facility, etc.)
- If there is adequate evidence, recommend or lay the appropriate charge.
- Conduct your investigation and document evidence in a way that enables the Crown to recommend an increased penalty under appropriate sentencing provisions due to age related vulnerability of the victim.
- If a criminal charge is recommended or laid, consider having the accused resign as the attorney. Their resignation could also be a condition of release.²

¹ See Capacity Checklist http://www.welpartners.com/resources/WEL_SummaryofCapacityCriteria.pdf

² Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

If the victim has been found mentally incapable of making property decisions or incapable of giving consent to release financial documents:

- Consider enlisting the aid of other agencies (ex. Public Guardian and Trustee) to provide support to the victim.
- Contact the financial institution immediately and request disclosure of required financial information as per the relevant privacy legislation and the decision of *R v. Lilloo*.³ Financial institution staff can release general information without a warrant under certain circumstances. Request that the financial institution exercise 'due diligence' in relation to the victim's accounts from this point forward.
- Still take a formal statement from the victim.
- Obtain consent from any person named as attorney in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (production order, search warrant, other judicial orders). Attend financial institutions to gather pertinent financial records / evidence.⁴

³ 1994 CanLII 7548 (ON SC), upheld on appeal 1999 CanLII 2836 (ON CA)

⁴ Excerpted from <http://www.nicenet.ca/tools-theft-by-persons-holding-power-of-attorney-officers-investigation-guide>

Relevant Provincial/Territorial Legislation

Alberta

- *Adult Guardianship and Trusteeship Act*, SA 2008 c A-4.2 <http://canlii.ca/t/522k5>
- *Protection Against Family Violence Act*, RSA 2000, c P-27 <http://canlii.ca/t/5347k>
- *Protection for Persons in Care Act*, SA 2009 c P-29.1 <http://canlii.ca/t/52dxl>

British Columbia

- *Adult Guardianship Act*, RSBC 1996, c 6 <https://canlii.ca/t/544c1>
- *Adult Guardianship Act, Designated Agencies Regulation*, BC Reg 19/2002, <http://canlii.ca/t/jjwx>
- *Community Care and Assisted Living Act, Residential Care Regulation*, BC Reg 96/2009, Schedule D <https://canlii.ca/t/549r3>
- *Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2000 <http://canlii.ca/t/lck8>
- *Public Guardian and Trustee Act*, RSBC 1996, c 383 <http://canlii.ca/t/53j4w>
- *Health Professions Act*, RSBC 1996, c 183 <http://canlii.ca/t/534hx>
- *Personal Information Protection Act*, RSBC 2003, c 63 <http://canlii.ca/t/52pq9>
- *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, <https://canlii.ca/t/557mn>

Manitoba

- *Protection for Persons in Care Act*, CCSM, c P144 <http://canlii.ca/t/8gp4>
- *Vulnerable Persons Living with a Mental Disability Act*, CCSM c V90 <http://canlii.ca/t/8gnj>
- *The Domestic Violence and Stalking Act*, CCSM c D 93 <http://canlii.ca/t/8gkx>

New Brunswick

- *Family Services Act*, SNB 1980, c F-2.2 <http://canlii.ca/t/88bd>
- *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 <http://canlii.ca/t/8j1c>
- *Public Trustee Act*, SNB 2005 c P-26.5 <http://canlii.ca/t/888p>

Newfoundland

- *Adult Protection Act*, SNL 2001, c A-4.01 <http://canlii.ca/t/8pff>
- *Family Violence Protection Act*, SNL 2005, c.F-31 <http://canlii.ca/t/8b2k>
- *Personal Health Information Act*, SNL 2008 c P-7.01 <http://canlii.ca/t/89st>
- *Access to Information and Protection of Privacy Act*, SNL 2015, c A-1.2 <https://canlii.ca/t/55cbh>

Nova Scotia

- *Adult Protection Act*, RSNS 1989, c 2 <http://canlii.ca/t/87m6>
- *Protection for Persons in Care Act*, SNS 2004 c 33 <http://canlii.ca/t/87gw>
- *Domestic Violence Intervention Act*, SNS 2001, c 29 <http://canlii.ca/t/87rr>

Ontario

- *Long-Term Care Homes Act*, SO 2007, c 8 <http://canlii.ca/t/34x>
- *Substitute Decisions Act*, 1992, SO 1992, c 30 <http://canlii.ca/t/2tq>
- *Health Care Consent Act*, 1996, SO 1996, c 30 Sch A <http://canlii.ca/t/2wh>
- *Mental Health Act*, 1990, RSO 1990 c M7 <http://canlii.ca/t/2k9>
- *Residential Tenancies Act*, SO 2006 c 17 <http://canlii.ca/t/33p>
- *Consumer Protection Act*, 2002 SO 2002 c 30, Sch A <http://canlii.ca/t/31w>
- *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F 31 <http://canlii.ca/t/2d9>

Prince Edward Island

- *Adult Protection Act*, RSPEI 1988, c A-5 <http://canlii.ca/t/8d3b>
- *Victims of Family Violence Act*, RSPEI 1998, c V-3.2 <http://canlii.ca/t/8dcl>

Quebec

- Charter of Human Rights and Freedoms, CQLR c C-12, art 48 <https://canlii.ca/t/542k6>
- *Public Curator Act*, CQLR c C-81 <https://canlii.ca/t/54vg1>
- *Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1 <https://canlii.ca/t/55crm>

- *Act to Combat maltreatment of seniors and other persons of full age in vulnerable situations*, CQLR c L-6.3 <https://canlii.ca/t/555hf>
- *Professional Code*, CQLR c C-26 <https://canlii.ca/t/557gc>
- *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 <https://canlii.ca/t/557k4>

Saskatchewan

- *Victims of Domestic Violence Act*, SS 1994, c V-6.02 <http://canlii.ca/t/wbh>
- *The Public Guardian and Trustee Act*, SS 1983, c P-36.3 <http://canlii.ca/t/wts>

Yukon

- *Adult Protection and Decision Making Act*, SY 2003, c 21 Sch A <https://canlii.ca/t/551px>
- *Family Violence Prevention Act*, RSY 2002, c 84 <http://canlii.ca/t/8jfp>
- *Public Guardian and Trustee Act*, SY 2003, c 21 Sch. C, Part 2 <http://canlii.ca/t/8lrs>

Nunavut

- *Family Abuse Intervention Act*, SNu 2006, c 18 <http://canlii.ca/t/8l4w>

Northwest Territories

- *Protection Against Family Violence Act*, SNWT 2003, c 2 <http://canlii.ca/t/8hvh>

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Kimberly A. Whaley, Whaley Estate Litigation Partners, 2022