



Theft by Power of Attorney Police Tool

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Statistics/Predictions

- Contemporary issue, expected to intensify in coming years as senior population is growing at a rapid rate.
- 2021- as many seniors as children living in Canada (19% nationally)
- 2036- 24% (nearly 1 in 4 people) living in Canada aged 65+ (HRSDC website)



Common Characteristics

- Abuser has power and control over an older person
- Abuser is usually a family member (stats)
- In some cases;
 - Drug/alcohol /gambling addiction
 - History of anti-social behaviour
 - Mental health problems
- Dependence on older person for \$\$ and/or shelter
- Victim often lucid BUT call to police usually generated by third party
- c. 70% of cases are financial abuse



Why is Elder Abuse Seldom Reported?

VICTIM:

- Afraid of repercussion
- Completely under the control of the abuser and dependent on him/her for basic needs (physically/mentally incapable)
- Fear of institutionalization
- Concern that abuser will be incarcerated/get criminal record
- Guilt/shame
- Misconception that police/social agencies cannot help
- Cultural/Ethnic values or beliefs



Cont'd

FAMILY/ FRIENDS/ SERVICE PROVIDERS:

- Do not know who to tell
- Do not want to get involved
- Older person asks them not to report it
- Fear of repercussion for the older person/ themselves
- Confidentiality issues/Privacy Legislation



Financial Abuse

- Theft/exploitation
- Money, property or assets



Sampling of Provisions within Criminal Code

- Theft Sec 334/Theft by Power of Attorney* S. 331
- Theft by or From Person Having Special Property or Interest S. 328
- Misappropriation of Money Held Under Direction S. 332
- Fraudulent Concealment of Money S. 341
- Theft by Person Required to Account S. 330 (1)
- Possession of Proceeds of Crime S. 354(1)(a)
- Criminal Breach of Trust for Named Person S. 336
- Fraud Sec 380/ False Pretences S. 362(1)
- Forgery S. 366(1)
- Extortion S. 346(1)
- Stopping Mail With Intent S. 345



Signs/Symptoms of Financial Abuse: (Assessment by Financial Institution)

- Unusual banking activity; large withdrawals or new loans
- Unexplained sudden transfer of assets
- Excessive ATM or debit card use
- Forged signatures on cheques or cheques made out to "cash"
- Inclusion of additional names on bank account, credit card (or other property)
- Point of Sale purchases for merchants/stores not likely to be frequented by the senior (ie; electronics)



Financial Abuse Assessment (by Financial Institution cont'd)

- Bank statements no longer sent to senior's home
- Abrupt change in Will, Power of Attorney or financial documents - (senior may not understand implications)
- Pension cheques being cashed by caregiver without authorization or no longer being deposited to account.



Financial Abuse Assessment (more generally)

- Standard of living is not in keeping with income/assets
- Sudden or unexplained inability to pay bills
- Senior feels afraid or worried when talking about money
- Senior is in debt but doesn't know why
- Unexplained disappearance of funds or possessions
- Senior's home is unexpectedly sold



Theft by Power of Attorney is VERY COMMON

Types of POA that relate (wholly or partially) to property:

-Durable, nondurable, general, specific, enduring, springing, continuing, bank POA

-whatever you want to call it, they're all subject to Section 334 of the Criminal Code as the substantive Theft charge to either Sec.331 (Ontario) or Sec 328, 330, 332, and 336.



Pitfalls

- Without "triggering clause" or "springing mechanism", POA for Property can be acted upon immediately.
- Forms can be downloaded from the internet and invoked without the assistance of a lawyer.
- No Registry or mechanism by which to monitor existence/(mis)management of POA.
- POA document enables attorney to do **anything** on grantor's behalf in respect of property, except make a Will.



Continuing Power of Attorney for Property
(Made in accordance with the Substituted Decisions Act (1992))

(Please print your full name here.)
I, _____, hereby revoke any previous continuing power of attorney for property made by me and **APPOINT** _____ to be my attorney(s) for property.
(Print or type the name of the person or persons you appoint here.)

2. If you have mental capacity and you want them to have the authority to act separately, insert the words "jointly and severally" here: _____
(This may be left blank.)

3. If the person(s) I have appointed, or any one of them, cannot or will not act as my attorney because of refusal, resignation, death, mental incapacity, or removal by the court, **REWRITE IT**.
(This may be left blank.)

4. I **AUTHORIZE** my attorney(s) for property to do on my behalf anything in respect of property that I could do if capable of managing property, except make a will, subject to the law and to any conditions or restrictions contained in this document. I confirm that neither I nor do or even if I am mentally incapable.

5. **CONDITIONS AND RESTRICTIONS** Attach, sign, and date additional pages if required. **None**
(Please print or type here.)

6. **DATE OF EFFECTIVENESS**
Unless otherwise stated in this document, this continuing power of attorney will come into effect on the date it is signed and witnessed.

7. **COMPENSATION**
Unless otherwise stated in this document, I authorize my attorney(s) to take annual compensation from my property in accordance with the law as prescribed by regulation for the compensation of attorneys for property made pursuant to Section 90 of the Substituted Decisions Act, (1992).

8. **SIGNATURE:** _____ **DATE:** _____
(Please print name in the presence of two witnesses.)
ADDRESS: _____
(Insert your full current address here.)

9. **WITNESS SIGNATURE**
(Note: The following people cannot be witnesses: the attorney or his or her spouse or partner; the grantor; spouse or child of the person making the document; or someone that the person trusts as his or her child; a person whose property is under guardianship or who has a guardianship of the person; a person under the age of 18.)
Witness #1: Signatures: _____ Print Name: _____

Police advice to Seniors;

-draft POA with assistance of solicitor (document should be notarized)

-use the “restrictions and conditions” area to add a “triggering clause”, clearly outlining where, when and under what circumstances the POA should be invoked (springing POA*)

-consider joint POA; this can minimize the temptation and increase accountability for persons named

-leave POA documents w/solicitor

You can revoke POA anytime you wish



Theft by Person Holding Power of Attorney: Section 331 C.C.

- In a nutshell; Person who has a legal POA document appointing/authorizing him/her to make financial decisions for someone else, and who misuses that authority for their own financial gain.
- The Substantive Offence is Theft, as per 334(a) Over \$5000 or 334(b) Under \$5000, of the Criminal Code of Canada.



Key Questions for Police

- 1- Is there evidence of \$ or property missing?
- 2- Does the offender have Power of Attorney for property?
 - If yes to both;
- 3- Is the victim “cognitively capable”?

Presumption in law that one is capable until deemed/proven otherwise



Capable Victim Section of Tool

- 1) Ideal situation is to visit the senior in person, as opposed to just calling them (more controlled environment).
- 2) Again, presumption of capacity can be beneficial. *Signature. Copy of POA not always available.
- 3) Empower/educate re: revocation of POA and, possibly, drafting new POA consent form (can be written or typed- no set template).



Capable Victim cont'd

- 4) (as well as points 6 and 7) With consent, contact bank/pension sources for records (fax will often suffice). Production Order or Search Warrant is the SAFEST means by which to obtain info on a **suspect's** account (Lillico for tombstone info on suspect only- search warrant or Prod Order is perceived as a fishing expedition if reasonable grounds are not articulated)



- 5) "KGB" statements (sworn videotaped statements) are the standard "ideal", however an application for Commissioned Evidence can protect the statement further (R vs KHELAWON).
- 6) and 7) spoken to in point #4
- 8) lay (or recommend laying) charges
- 9) Resignation of attorney should be considered (creativity—condition of release)



Incapable Victim Section of Tool

- 1) Obtain financial particulars (where does victim bank) through whatever means possible
- 2) Notice to PGT or equivalent. Contact with financial institution (due diligence evermore important- P.I.P.E.D.A.)
- 3) Re: sworn videotaped statements-(courts' exposure to victim's vulnerability)
- 4) Joint POA can provide consent/info. If no cooperation or not possible-P.I.P.E.D.A (otherwise prod order, search warrant, etc) for collection of records for evidence



P.I.P.E.D.A. (Personal Information Protection and Electronic Documents Act)

- S. 7(3) **Disclosure Without Knowledge or Consent**;
- For the purpose of clause 4.3 of Schedule 1*, and despite the note that accompanies that clause, an **organization may disclose personal information without the knowledge or consent** of the individual only **if** the disclosure is;
- (c.1) **made to a government institution** or part of a government institution **that has made a request for the information, identified its lawful authority to obtain it...and indicated that**;



P.I.P.E.D.A. cont'd

- (ii) the disclosure is requested **for the purpose of enforcing any law of Canada...carrying out an investigation relating to the enforcement of any such law, or gathering intelligence** for the purpose of enforcing any such law.
- **Organization** means an association, a partnership, a person and a trade union (includes federal undertakings – ie: **banks**, crown corporations, railroads, telecommunications, etc)



P.I.P.E.D.A.; Schedule 1, clause 4.3

- “In **certain circumstances** personal **information can be** collected, used or **disclosed without the knowledge or consent** of the individual. For example, **legal, medical** or security **reasons** may make it impossible or impractical to seek consent. **When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information.** Seeking consent may be impossible or inappropriate when the individual is a **minor, seriously ill, or mentally incapacitated.**



- S. 7(3) **Disclosure Without Knowledge or Consent**;
- For the purpose of clause 4.3 of Schedule 1*, and despite the note that accompanies that clause, an **organization may disclose personal information without the knowledge or consent** of the individual only **if** the disclosure is;
- **Sec 7 (d) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization**
 - (i) **has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed**



P.I.P.E.D.A cont'd

- 22. (1) **No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith as a result of the performance or exercise or purported performance or exercise of any duty or power of the Commissioner under this Part.**



Case Study: Mr W

- 60 year old with undiagnosed cognitive condition (described as “simple”)
- Lived independently in community, but quite vulnerable to predatory behaviour.
- June 2009, Mr W met the suspect (“C”) at a neighbourhood pub (his regular hangout)
- C “befriended” Mr W and within 3 weeks became his POA for Property (shortly after, beneficiary to 50% of his estate)



- Mr W owned a modest duplex in an older part of central Ottawa and had some long-standing tenants (young family) renting the main floor unit while he occupied the top floor unit.
- Good rapport with tenants for approx 3 years (ie: Mr W invited over for dinner, also became friends with parents of the young couple)
- Within days of taking over as POA, “C” told Mr W that she was going to convert his home into a bed and breakfast. Despite Mr W’s protest, “C” insisted that this would increase the value of his home and, using her newfound POA, authorized the work to begin.
- Tenants on main floor began to ask Mr W about this new friend, “C” and her intentions.



- Tenants noted “C”’s initial gestures of ‘friendliness’ as disingenuous and, soon afterward saw her true colours (ie: screaming at and belittling Mr W, controlling his movements and who he talked to).
- “C” became a bully to Mr W as well as the tenants.
- In July, 2009 “C” served the tenants with an eviction notice.
- By this time, “C” had called the police countless times, complaining about the tenants.
- Canvassed neighbours advised that “C” was often seen strutting up and down the sidewalk with her POA papers, telling anyone who would listen that she was Mr W’s POA and was taking care of him.



- “C” told others that she had brought Mr W to a doctor to be assessed and that he had been deemed incapable. She was taking over as the landlord of Mr W’s property and would be handling things from now on...
- Tenants protested their eviction and at Tenant Protection tribunal, Mr W did not say a word to protest (nor was he asked about) “C”’s assertions to be rid of the tenants in order to build the b&b.
- The decision was in favour of “C”, the landlord of Mr W’s address, and the tenants moved out (resulting in \$1000 less revenue per month for Mr W)
- Within days of the tenants being forced to move, “C” had labourers, trucks and demolition crews in to begin the conversion of Mr W’s home to a b&b.



- Front and back steps leading into the house were taken away. Walls were torn down and floors pulled up; nothing was restored.
- Required building permits to commence this work were never attained and contractors failed to complete the work.
- Mr W ended up living in a tiny makeshift room in the basement of his once adequate home (one of the labourers who felt sorry for him built it before leaving for good, stating that “C” wasn’t paying him for any of his work).
- Mr W’s home ended up in such poor condition that the City Building Inspector told him he had to move out.





- The young tenant's father initiated a call to police when Mr W was taken in to live with them.
- EAS attended the friend's home and invited Mr W to the police station to discuss his situation.
- Mr W had a moderate speech impediment and appeared quite lucid, yet very much controlled by "C".
- His cell phone rang 18 separate times while in his 2 hour interview with police. Each time he answered he could not assert himself, despite repeated prompting by police.
- The interview and subsequent investigation revealed a number of items, namely;



- That between September 2009 and December 2009, approx \$135,000 was w/d from Mr W's account-largely by means of cash w/d (he had one bank card which "C" expropriated at the outset of their relationship).
- \$63,850 was accounted for in wages, building materials and repairs to "C" s car (most of which were done against Mr W's wishes, who was verbally abused into submission if he'd tried to protest).
- Cell phone bills in Mr W's name (for Mr W and C) were astronomical (\$300-\$400 per month)



Outcome

- "C" was arrested and charged with; Criminal Harassment, Harassing Phone Calls, Mischief, Theft by POA, Misappropriation of money held under direction, Fraudulent concealment of property and Theft by Person Required to Account. (several conditions, incl: no comm. w/Mr W and not to seek/obtain POA for any person)
- Mr W revoked the POA and cancelled his cell phone accounts.
- Too costly to restore property.



Helpful Tips for Police Investigation

- Flag/make inquiries with;
 - Land Registry Office*
 - Credit Bureaus
 - CRA
 - Canada Post
 - Pension Sources (re-direct)



Fundamental Considerations

- Victim has the right to self determination
- What are the victims wishes throughout the investigation and possible judicial process? If not capable, what is in their best interests (**PGT, other family/advocates)
- What services will the victim need from the outset and then throughout and following the investigation? (CCAC, Victim Services, etc)



*“The prevention of abuse and neglect of older adults is a **community challenge** which will not be resolved quickly by one person or one approach. It will require a **community effort** to create an environment which reaffirms the rights of older adults to self-determination, respect and dignity.”*

*(***well-being and security***)*

Teresa Lukawiecki