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ENDURING POWERS of ATTORNEY AND FINANCIAL ABUSE
OF OLDER PERSONS:
ARE EXISTING SAFEGUARDS SUFFICIENT?

by

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Submitted in partial fulfilment of the requirements
for the degree of Master of Laws

at

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Dedication:

This thesis is dedicated to the memory of my dear late mother, Sheila R. Pender-Wedge (1938 – 2007) who always knew this was possible.

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Abstract:

Research has shown that older persons, particularly those with diminished capacity, are vulnerable to financial abuse by enduring power of attorney, which is otherwise an effective estate planning tool. Current legislation in Nova Scotia is not adequate to protect older persons from such financial abuse, which can be extremely devastating for them not only financially but physically and emotionally. Improvements to legislation are one part of the multi-dimensional solution to the problem. Educational initiatives for donors, attorneys and others is critical. Non-adversarial remedial measures to abuse, such as restorative approaches and elder mediation, must be fostered, as they provide for reconciliation, not retribution. An effective enforcement body, such as a remodeled Public Trustee's Office, with a Registry for enduring powers of attorney and a mandate to investigate and take action to remedy financial abuse by attorneys, is essential. While all measures involve expending more public funds, the public policy benefits would certainly justify the costs.

List of Abbreviations Used:

ACE – Advocacy Centre for the Elderly

APA – Adult Protection Act

APS – Adult Protective Services

BCCEAS – British Columbia Centre for Elderly Advocacy & Support

BCLI – British Columbia Law Institute

BCPG & T – British Columbia Public Guardian & Trustee

CCEL – Canadian Centre for Elder Law

CNPEA – Canadian Network for the Prevention of Elder Abuse

EPA – Enduring Power of Attorney

FEAI – Federal Elder Abuse Initiative

HRSDC – Human Resources and Skills Development Canada

IFA – International Federation on Ageing

IPA – Incompetent Persons Act

LRCNS – Law Reform Commission of Nova Scotia

MMSE – Mini Mental Status Examination

MPP – Member of Provincial Parliament

NICE – National Initiative for Care of the Elderly

NSPOAA – Nova Scotia Powers of Attorneys Act

PHAC – Public Health Agency of Canada

POA – Power of Attorney

PPCA – Protection of Persons in Care Act

PTA – Public Trustee Act

PTO – Public Trustee’s Office

RCMP – Royal Canadian Mounted Police

WCLRA – Western Canada Law Reform Agencies

WHO – World Health Organization

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Chapter 1: Introduction

(1) Planning for Incapacity:

Anticipating a time when you will no longer be able to manage your own affairs and make important decisions is not something most people like to think about. As the population ages, financial planners and lawyers are increasingly encouraging their older clients to engage in estate planning in anticipation of such a likelihood occurring. The older person generally has a choice: be proactive and engage in the recommended estate planning while he or she is still capable, on his or her own terms and in accordance with his or her express wishes, or wait until mental incapacity sets in, and have the courts decide his or her fate in a guardianship application brought by a concerned family member. In a guardianship application, the older person's wishes are not paramount and it can be an expensive and undignified process for the older person. For these reasons, the former course is the preferred route, although it is not without its perils. Even when older persons plan ahead for a time when they may become mentally incapacitated, they are not immune from being taken advantage of by those in whom they place their trust and well-being.

(2) Focus of this thesis: Are existing safeguards sufficient?

When older persons choose to do estate planning ahead of incapacity, it may be a simple or complex process, depending on the client's personal and financial circumstances. Normally, at minimum, it involves the preparation of a Will, an Enduring Power of Attorney ("EPA") and a Personal Directive for personal care and health care decisions. EPAs will be described in greater detail in the following chapter. Essentially, an EPA enables a person, the donor, to designate another person, the attorney, to be his or

her substitute decision-maker in the event the donor becomes mentally incapable of managing his or her own assets and personal affairs. It has been said of EPAs that, “[F]or most people, they are efficient, cost-effective and private way to ensure management of one’s financial affairs.”¹

Most of the time, attorneys discharge their duties and responsibilities faithfully and honestly. However, not all attorneys are pure of heart or even well-suited for the task, and increasingly, older persons are falling victim to financial abuse by their attorneys, particularly when they become so incapacitated that they can no longer supervise the activities of the attorney. As Cunningham points out: “Once again, the 80/20 rule applies However, for years EPAs have been a tool (or a weapon) for committing financial abuse.”² An attorney who engages in financial misuse or abuse against a donor is described as a “rogue attorney”.³

This thesis will focus on the financial abuse of older persons granting EPAs and analyze and critique whether existing safeguards are sufficient in protecting older persons from such financial abuse, particularly those individuals who have become incapacitated. While legislation and reports from other provinces will be canvassed where relevant, the primary focus of this inquiry will be Nova Scotia. Where gaps or deficiencies in the existing safeguards are identified, recommendations for reform will be made.

This introductory chapter first defines “older person” and “financial abuse”. Next it describes the extent of the problem of financial abuse of older persons, and why

¹ Kathleen Cunningham, “Financial Abuse: The Ways and Means”, online: Canadian Centre for Elder Law <<http://www.bcli.org/ccel/resources>> (August 2012) at 13

² *Ibid*

³ Coastal Elder Law Corporation, “Rogue Attorney under Power of Attorney”, online: Coastal Elder Law <<http://coastalelderlaw.com>>

approaches to strengthening safeguards against the misuse of EPAs is a subject worthy of examination. Following this, profiles of abusers and victims will be provided. The devastating consequences of financial abuse will also be discussed. Lastly, there will be a preview of upcoming chapters.

(3) Terminology:

(a) “Older person”:

The term “older person” is used in this paper to describe the subject group that fall prey to such financial abuse but is not meant to limit the victims to a particular or arbitrary age cut-off. Some of the authorities referred to herein will use the terms “elder abuse” or “senior abuse” without precisely defining the terms, largely because of a lack of consensus about the terms or age limits. A helpful reference is this: “An older adult is not just a person who is over 65 years old. An adult who is younger than 65 can be a victim of elder abuse or neglect if the circumstances of abuse relate to aging and a need for assistance or support.”⁴

According to Statistics Canada, the 2011 Census counted 4, 945, 060 people 65 and older, an increase of 14.1% between 2006 and 2011. This rate of growth was more than double the 5.9% increase for the Canadian population as a whole. The population group experiencing the fastest growth increase were the 60 – 64 year olds, which suggests that aging population will accelerate in Canada, as the large baby boom generation, those born between 1946 and 1965, reaches 65 years.

⁴ Canadian Centre for Elder Law, “A Practical Guide to Elder Abuse and Neglect in Canada” (2011), online: Canadian Centre for Elder Law <<http://www.bcli.org/ccel>> at 7 [CCEL, “Practical Guide”]

(b) “Financial Abuse”:

Academics and researchers are still striving for a uniform definition of “financial abuse”. Spencer found the following definition useful:

In recent years, the National Initiative for Care of the Elderly (NICE) ‘Defining and Measuring Elder Abuse’ Project funded by Human Resources and Skills Development Canada (HRSDC) has been working towards a consensus on abuse definitions for use in Canadian research. The definition of financial/material abuse developed by NICE is: ‘An action or lack of action with respect to material possessions, funds, assets, property or legal documents, that is unauthorized or coerced, or a misuse of legal authority.’⁵

Ann Soden, an acknowledged expert in the field of elder law, offered her own definition:

Financial abuse refers to the misuse of an older adult’s funds and assets, loss or damage to an older person’s assets or property, obtaining property without that person’s knowledge and full consent, or in the case of an adult who is not mentally capable, not representing or acting in that person’s best interests.... Financial abuse is often accompanied by other forms of abuse, such as psychological abuse, physical abuse or denial of rights.⁶

Other types of victimization older adults experience include such things as home renovation scams, roofing or paving rip-offs, mass marketing or investment frauds.

However, as one commentator has observed, “Not every harm to an older adult is ‘abuse’.”⁷ It is important to make the distinction between what could be described as the “stranger danger” and the financial abuse that arises out of a trusting and ongoing

⁵ Charmaine Spencer, “Financial Abuse of Adults” (Ottawa: Human Resources and Skills Development Canada, 2003) at 3

⁶ Ann Soden, ed. Advising the Older Client (Markham, Ont.: LexisNexis Butterworths, 2005) at 203

⁷ Spencer, *supra* note 5 at 5

relationship, given that: “Generally speaking, the appropriate community strategies, government policies and remedies will also be significantly different.”⁸

(4) The extent of the financial abuse of older persons:

According to the World Health Organization (“WHO”) there is little on the extent of the problem of abuse in elderly populations, but the few population-based studies that are available suggest that between 4% and 6% of elderly people have experienced some form of financial abuse in the home. Financial abuse of the elderly in institutions has been found to be significantly higher.⁹

In Canada, there have thus far been only two surveys dedicated to the study of crimes against seniors. The first, in 1989, known as the Ryerson Study, found that about 40 persons per 1,000 of the elderly population recently experienced some serious form of maltreatment in their own home, at the hands of a partner, relative or significant other. The Ryerson Study found that material or financial abuse was the most prevalent form of maltreatment, with a rate of approximately 25 cases per 1,000 respondents or 2.5% of the survey sample.¹⁰ The second study was the General Social Survey (“GSS”) by Statistics Canada in 1999, which calculated the incidence of financial abuse at between one and two and a half percent (or 10 to 25 out of every 1,000 adults over the age of 65).¹¹ Using the 2011 Census figures, Spencer determined “that would represent between 49, 730 and 125,325 older adults in Canada who have experienced some form of financial abuse in the

⁸ *Ibid*

⁹ World Health Organization Elder Abuse Fact Sheet (2002) online: <http://www.inpea.net/images/Elder_Abuse_Fact_Sheet.pdf> at 1

¹⁰ Elizabeth Podnieks et al, “National Survey on Abuse of the Elderly in Canada” (Toronto: Ryerson Polytechnical Institute, (1990); See also Robert M. Gordon, “Material Abuse and Power of Attorney in Canada: A Preliminary Examination” (1992) *Journal of Elder Abuse & Neglect*, Vol. 4 (1/2), at 173-174

¹¹ Spencer, *supra* note 5 at 22

past year.”¹² She concluded that the survey’s findings were conservative and “may markedly under-represent the extent of the issue.”¹³

A more recent Statistics Canada publication, released in 2012, found a growing incidence of financial abuse of older Canadians, particularly among older single women,¹⁴ The International Federation on Ageing (the “IFA”), comprised of academics and elder law experts, met in 2013 to examine this disturbing trend and identified several contributing factors, including: “the rapidly ageing population in Canada; both the increasing wealth but also the volatility of the economic climate impacting all Canadians, and more specifically, the growing population of older people, over 20% of whom will experience mild cognitive impairment, which can negatively impact one’s decision-making abilities.”¹⁵

The IFA cited an assertion from Podnieks, who led the 1989 Ryerson Study, that financial abuse constituted up to 50% of all reported cases of abuse perpetrated against older Canadians.¹⁶ The IFA further contended that financial abuse is also the most difficult kind of abuse for service providers, police services, and judicial systems to respond to.¹⁷

¹² *Ibid*

¹³ *Ibid*

¹⁴ Statistics Canada, “Victimization of Older Canadians.” (2012) Statistics Canada Catalogue no. 85-002-x. Ottawa. Online:<<http://www.statscan.gc.ca/pub/85-002-x/2012001/article/11627-eng.pdf>>

¹⁵ International Federation on Ageing, “Summary Report-Financial Abuse of Seniors Meeting.” (Toronto: 26 March 2013) at 2 Online:<<http://www.ifa-fiv.org/wp-content/uploads/2013>>

¹⁶ *Ibid*; See Podnieks, E. National Survey on abuse of the elderly in Canada. Journal of Elder Abuse & Neglect (1992) Vol. 4, at 5-58.

¹⁷ *Ibid*

It has been observed that:

It is generally stated that 4-10% of older adults in Canada experience some form of abuse or victimization in later life, and that only one in five incidents come to the attention of authorities or community services.¹⁸

Consistent with a theme that will recur in this thesis, the IFA found that most financial abuse is hidden and many victims are unaware of the abuse. Furthermore, evidentiary difficulties, family attitudes, and low financial literacy all contribute to the low prosecution of offenders.¹⁹ These factors, too, will be examined in this thesis.

The British Columbia Centre for Elder Advocacy and Support (“BCCEAS”) also states that: “Financial abuse of the seniors has been called ‘the crime of the 21st century.’ One out of 12 (8%) of seniors in BC have been financially abused – losing an average of \$20,000. Women make up 92% of older adults who have experienced financial abuse.”²⁰

In 2009, Senator Marjory LeBreton, the then-Federal Minister of State for Seniors, speaking at the annual meeting of the Federal/Provincial/Territorial Ministers responsible for Seniors, identified the financial abuse of Canada’s seniors as a “tip-of-the-iceberg scenario”, with financial exploitation being one of the major issues facing Canada’s fastest – growing population.²¹

Thus, the evidence continues to mount that the financial abuse of older persons is a growing problem. Yet older persons, in order to do effective estate planning, must place their faith and trust in others. They are encouraged to grant an EPA to a family member or

¹⁸ Spencer, “Financial Abuse” *supra* note 5 at 3

¹⁹ *Supra* note 15 at 2

²⁰ BCCEAS, “Elder Abuse and Neglect”, online BCCEAS <<http://www.bcceas.ca/information> at 4>; it has been suggested that women are more vulnerable due to lack of financial literacy: See Spencer, *supra* note 5 at 38

²¹ Jamie Hall, “Financial abuse of seniors a hidden crisis: Minister”, Edmonton Journal (10 September 2009), online: Canada.com <<http://www.canada.com>>

trusted associate, to prepare for the time they can no longer manage their own affairs. Put in the proper hands of a trustworthy attorney, the EPA will serve the purpose for which it was intended. However, as has been previously stated, the best laid plans do not always come to fruition. Rogue attorneys will surface and older persons will be exploited by the misuse of their EPAs.

According to the BCCEAS:

Powers of attorney can be seen as part of the solution for an older adult who is unable to manage their funds, but it can also be part of the problem. The most common form of financial elder abuse is a ‘rogue’ power of attorney – these documents have been called ‘a license to steal’. The attorney can literally bankrupt the older adult.²²

The problem of the financial abuse of the elderly and particularly problems around EPAs has even attracted the attention of the mainstream media, including Maclean’s, the Toronto Star, even Reader’s Digest. In a July 2011 article entitled “Stealing from Mom and Dad”, Maclean’s’ reporter Risha Gotlieb wrote:

With the epic shift of Canada’s aging demographics, POA [Power of Attorney] documents will be used increasing to appoint trusted family members or others to handle financial decision-making in the event of medical or cognitive impairment. Today approximately 500,000 Canadians are living with Alzheimer’s disease or a related dementia – within a generation this number will more than double to 1.1 million.²³

Gotlieb went on to say: “Financial abuse by POA can run the gamut from small amounts of money being pilfered from chequing accounts to making off with entire multi-

²² BCCEAS, “Elder Abuse and Neglect”, online: BCEAS <<http://bceas.ca/information>> at 4

²³ Risha Gotlieb, “Stealing from Mom and Dad”, Macleans.ca (14 July 2011) online: Macleans.ca <<http://www2.macleans.ca/>2011/07/14 at 20

million dollar estates.”²⁴ Further on she quotes Lynn Butler, a lawyer and estate planner at Scotia Private Client Group that “one of the reasons POA abuse is rampant is because it’s happening in the shadows. No one is watching or supervising the POA’s actions.”²⁵

Reader’s Digest published an article in 2010 entitled “The Vulture Generation: How to Stop Power of Attorney Abuse”, also by Risha Gotlieb. In it, Gotlieb recounted the story of an Oshawa, Ontario woman who was convicted in 2009 of defrauding her mother, an Alzheimer’s patient, of \$92,000 while acting as her power of attorney. The daughter was sentenced to two years house arrest, three years’ probation and ordered to pay restitution of the \$92,000.²⁶ For the article, Gotlieb interviewed Laura Watts, then – national director of the Canadian Centre for Elder Law in Vancouver, who described the financial abuse situation as a “national crisis”, which is forcing legislators, the courts and police to re-evaluate their response to reports of POA misuse. Gotlieb also spoke with Sgt. John Keating of the Durham Regional Police who was instrumental in the conviction of the Oshawa woman described above. In his view, “the whole system needs to be revamped ... we need to start recognizing theft by POA for what it really is: a crime”.²⁷

²⁴ *Ibid*

²⁵ *Ibid*; For a glimpse into larger scale POA pilfering at the highest levels of New York City Society, one must read Meryl Gordon’s Mrs. Astor Regrets (New York: Houghton Mifflin Harcourt, 2008) which tells the story of how Anthony Marshall, the 85 year old son of philanthropist and socialite Brooke Astor, who died in 2007 at age 105, was charged with defrauding and stealing tens of millions of dollars from her as she suffered from Alzheimer’s in later life. He was ultimately convicted and sentenced to three years in prison.

²⁶ Risha Gotlieb, “The Vulture Generation: How to Stop Power of Attorney Abuse”, Caregiver News (27 February 2011) (From the December 2010 issue of Reader’s Digest) online: <<http://caregivingmatters.ca>> at 3

²⁷ *Ibid* See also Section 331 of the Criminal Code, RSC 1985, c C-46 [the “Criminal Code”]

(5) Why is this subject worthy of examination?

The problem of financial abuse of older persons is indeed real, and as the population ages, it is expected to worsen. It has been observed that:

With Canada's seniors population expected to rise to approximately 23% by 2036 (from about 14% in 2011), it will be increasingly important to support individuals in effective planning for older age and to broaden awareness of ways to safeguard against financial abuse.²⁸

One of the best ways to safeguard against financial abuse is to plan ahead with the granting of an EPA. However, EPAs may not always provide the safeguards they should, for reasons to be discussed. Proactive solutions are required but as will be seen in this thesis, most of the responses to the financial abuse of older persons, particularly in Nova Scotia, has been reactive in nature and have done little to address the problems of improving safeguards against financial abuse by EPA. A compelling statement made by the IFA was that: "Proactive solutions based responses that counters this serious escalating social issue are urgently required not only by service providers, police, and the judicial system but also individuals and the wider community."²⁹

In trying to determine the reasons for the prevalence of financial abuse of older adults, one must consider complex social and relationship dynamics. Ageism also plays a role.³⁰

²⁸ Spencer, "Financial Abuse" *supra* note 5 at 3

²⁹ *Supra* note 15 at 2

³⁰ Ageism has been described in this way: "Ageism is a negative social attitude towards older adults. Ageism is based on negative beliefs about aging and assumptions that older adults are weak, frail or incapable. People who make ageist assumptions view older adults in demeaning, discriminatory or dismissive ways. An older adult who encounters ageist attitudes may experience an increase in stress or worry associated with mistreatment and a reduced sense of capacity to stop the abuse." CCEL, "Practical Guide", *supra* note 4 at 10

(6) Profiles of Abusers and Victims:

The BCCEAS has developed profiles of abusers and victims of financial abuse that is instructive:

Abusers may:

- Resent expectations to provide care and support
- Be dependent on the senior for assistance, housing or money
- Have substance abuse problems
- Have a history of mental illness or emotional problems
- Just seem normal

Victims may:

- Be socially isolated
- Be under the control or influence of the abuser
- Have some degree of physical impairment or incapability
- Be physically frail but mentally capable
- Be widowed or living alone
- Not appear to be vulnerable in any way³¹

The abuser is often a trusted person in the older adult's life such as a spouse or partner, a family member (often an adult child), a caregiver, or a friend.³² Older adults are not only susceptible to being financially victimized by people they trust. As previously noted, strangers are also known to prey on an adult's vulnerability, isolation and perhaps even a lack of sophistication, often in commercial matters.

On a broader societal level, the significant amassing of wealth by the baby boomer generation have emerged as a factor in financial abuse against older persons. A U.S. study determined that: "As baby boomers approach their golden years, the U.S. is on the brink of the largest intergenerational transfer of wealth in its history. Bequests are expected to

³¹ BCCEAS, *supra* note 20 at 3

³² Soden, *supra* note 6 at 203

total \$10.4 trillion between 1990 and 2040”.³³ Of course, the numbers in Canada will be proportionately less but the essence of the findings are still compelling. Faced with the prospect of a future inheritance, the heirs, particularly dependent children, can easily fall under the spell of a “culture of entitlement”, which can be very powerful and destructive.

As one writer explained:

In regards to perpetrators of financial abuse, research shows that a sense of entitlement is commonly a factor. If the perpetrator is an heir to property he or she may justify the behaviour as taking an advance from a future inheritance or protecting future assets from being spent on care for the older adult. Perpetrator greed, combined with victim loneliness has been suggested as one of the most critical factors motivating financial abuse.³⁴

The consequences of being a victim of financial abuse can be devastating to an older adult in ways that go beyond the loss of money or property. Such abuse has been said to have social, mental health and health impacts on the older adult.³⁵ Spencer has observed:

Older adults view financial abuse as [a] fundamental violation of their trust by someone close to them, in many cases someone they loved and cared for throughout their lives. Financial abuse at any age often occurs in conjunction with emotional abuse, robbing people of their dignity and sense of self-worth. Money is often a means of exerting power and control in abusive relationships.³⁶

Without question, the financial abuse of older adults is grounded in complex social, legal and relationship issues. No one single response is sufficient to safeguard the

³³ Kristen Gerencher, “Fighting elder financial abuse”, CBS Market Watch.com (July 18 2003) online: <<http://www.marketwatch.com>>

³⁴ Joan Braun, “Elder Abuse: An Overview of Current Issues and Practice Considerations” (Paper delivered at a Continuing Legal Society course, Vancouver, 2009) at 8

³⁵ Canadian Centre for Elder Law, “Financial Abuse of Seniors: An Overview of Key Legal Issues and Concepts.” (March 2013) online: Canadian Centre for Elder Law <<http://www.bcli/ccel>> at 5 [CCEL, “Financial Abuse”]

³⁶ Spencer *supra*, note 5 at 10

financial interests of older adults, as it seems that each case must be evaluated on its own facts. One thing is for certain, however: it is no longer society's dirty little secret. To paraphrase one observer, "[Financial] abuse, like Domestic Violence and Drinking and Driving, has come out of the closet. It is now discussed openly, and no more do the elderly have to suffer it in silence."³⁷

As will be discussed, there is much more to be done than simply acknowledge the problem of financial abuse of older persons; action must take the place of words. It may not be possible to solve all the vulnerabilities in the system of safeguards against EPA abuse or to rid society of all rogue attorneys. The best that can be done is to construct the most effective safeguards possible against EPA abuse.

(7) Upcoming Chapters:

While the issue of financial abuse by EPAs has now emerged from the shadows, there remains much left to be analyzed and addressed. This will be undertaken in the ensuing chapters of this thesis. Chapter 2 will involve a more in-depth look at Powers of Attorney, and in particular EPAs as provided for in the Nova Scotia *Powers of Attorney Act* ("NSPOAA").³⁸ Particular attention will be paid to the powers of the donor and the powers and duties of the attorney. The next three chapters will explore the various difficulties with existing safeguards. Chapter 3 will examine problems associated with EPAs and their misuse and abuse, the ingredients for abuse such as common scenarios; aspects concerning the donor; choosing the right attorney and a look at the issue of lack of oversight of attorneys. Chapter 4 will describe and critique the legislative void in Nova

³⁷ Ramsay Law Office, "Elder Abuse: Powers of Attorney and Abuse", online: Ramsay Law Office <<http://www.nt.net/ramsaypr>>

³⁸ RSNS 1989, c 352 (as amended)

Scotia as well as the existing safeguards for older adults in the province from financial abuse, ranging from criminal and civil proceedings; recent amendments to the provincial *Adult Protection Act*;³⁹ and some practical measures that may be of assistance. Chapter 5 will explore some of the other challenges in providing safeguards to protect older persons from financial abuse, including the role of financial institutions and privacy laws. Chapter 6 will describe and analyze some of the developments and alternatives emerging in Nova Scotia and other jurisdictions to combat financial abuse using EPAs, including legal, legislative and practical developments. In Chapter 7, Law Reform Initiatives reports from the Western Canada Law Reform Agencies on EPAs and the Law Reform Commission of Nova Scotia on the *Power of Attorney Act* will be reviewed and critiqued for possible solutions. Finally, in Chapter 8, conclusions will be drawn and recommendations made to improve safeguards to further protect older adults from financial abuse by their attorneys.

³⁹ RSNS 1989, c 2

Chapter 2: The Law Regarding Powers of Attorney and Enduring Powers of Attorney

In this chapter, Powers of Attorney (“POAs”) and Enduring Powers of Attorney (“EPAs”) will be examined in some detail, within the context of the common law and the *Nova Scotia Powers of Attorney Act* (“NSPOAA”).⁴⁰ Specifically, commentary will be provided on the general requirements and formalities and particular emphasis on the powers of the donor and the powers and duties of the attorney.

(1) Powers of Attorney at Common Law:

At common law, a POA is a legal document containing the written authority for a specified individual⁴¹ to act on behalf of the person executing the document (the grantor or donor)⁴². In terms of formalities, the donor must be of age,⁴³ and have the requisite mental capacity.⁴⁴ According to Sweatman, there is no definitive common law test for capacity, although after the canvassing both British and Canadian jurisprudence, she states: “At a minimum, ... it would appear that, at common law, the donor of a power of attorney must ... have the capacity to understand the document and the nature of the authority being conferred.”⁴⁵ Witnesses do not appear to be required nor must the document be under seal.⁴⁶ As for the attorney, he or she must also be of age and have the requisite mental capacity to act.⁴⁷

⁴⁰ *Supra* note 38

⁴¹ Although the term “attorney” is used, the individual so appointed need not be a lawyer.

⁴² Robert M. Gordon and Simon Verdun-Jones, *Adult Guardianship in Canada* (Toronto: Carswell, 1992) at 3-110 [Gordon and Verdun-Jones]

⁴³ In Nova Scotia, this would be age 19, pursuant to the *Age of Majority Act*, RSNS 1989, c 4, s. 2(1)

⁴⁴ M. Jasmine Sweatman, *Guide to Powers of Attorney* (Aurora, Ont.: Canada Law Book Inc., 2002) at 9

⁴⁵ *Ibid* at 10

⁴⁶ *Ibid* at 10-11

⁴⁷ *Ibid* at 11

The document gives the attorney the legal power or capacity to act on behalf of the donor and a POA may be limited or general in scope.⁴⁸ A general POA can be all-encompassing and enable an attorney to make virtually any type of decision relating to the donor's property (with the exception of making a Will). A limited POA is more restrictive. It is usually utilized to complete a specific task or financial transaction when the donor is on vacation, is ill or is otherwise unable to attend in person. It may be limited to a specific period of time or to the type of power it gives the attorney.⁴⁹ Ned Chase, Q.C., a noted elder law lawyer in Kentville, Nova Scotia has been quoted as saying: "What I tell my clients is that the power of attorney is the most powerful document they will ever sign."⁵⁰

Gordon and Verdun-Jones have said that "A POA is a form of 'agency' and associated principles are drawn from the common law of agency."⁵¹ In an authoritative text on the subject of POAs, Sweatman suggest a wider range of sources: "A Power of Attorney is unique, embodying the law of agency, borrowing from the law of contract and adopting the law of fiduciary obligations."⁵² While agency and contract law have some relevance, Sweatman concludes however that historically a POA was not really an agency relationship, nor was it really a trust relationship or a contractual one. Instead she

⁴⁸ Gordon and Verdun-Jones, *supra* note 42 at 3-110

⁴⁹ Law Reform Commission of Nova Scotia, Final Report, "Enduring Powers of Attorney in Nova Scotia", September 1999. Online: <<http://www.lawreform.ns.ca>> at 5 ["Final Report"]

⁵⁰ Leanne Delong, "Seniors have the right to keep what's theirs", Digby Courier (12 January 2010). Online: <<http://www.novanewsnow.com/article-418776>>

⁵¹ Gordon and Verdun-Jones, *supra* note 42 at 3-111

⁵² Sweatman, *supra* note 44 at 1

characterizes a POA as fundamentally a fiduciary relationship.⁵³ Each of these possible characterizations will be briefly examined in turn.

Sweatman explains that: “Agency law permitted a person to create an oral or written contract, or a written direction, specifying those acts that another person, the agent, was authorized to carry out for him or her, the principal. In speaking about powers of attorney, the law of agency is clearly influential.”⁵⁴ There are various ways an agency relationship may arise. If by contract, all the common law principles of contract would apply and the agency relationship would be governed by the contract document itself. Sweatman states that: “Implied in that contract are the requirements that the agent perform the contract, be obedient to the principal, use skill and care, not delegate, respect the principal’s title, not act in conflict and be accountable. The agent must follow the principal’s instructions using the degree of skill and care normally applied in carrying out the agent’s activities.”⁵⁵ She concludes by stating: “The donor/attorney relationship is accordingly, at common law, typically based in contractual agency with the power of attorney being merely the instrument that supplies the terms of that agreement or defines the parameters of the relationship.”⁵⁶

According to Sweatman, what differentiates a contractual relationship from a donor/attorney relationship is that “while contractual principles do apply and the relationship typically involves two or more people required to do something, a power of

⁵³ *Ibid* at 1-5

⁵⁴ *Ibid* at 1-2

⁵⁵ *Ibid* at 2

⁵⁶ *Ibid* at 2-3

attorney is really ‘a one-sided instrument, an instrument which expresses the meaning of the person who makes it; it is not necessarily a contract *per se*.’⁵⁷

Sweatman also clarifies that at common law, the donor/attorney relationship is not that of trustee-beneficiary. “The donor/attorney relationship does not obligate the holder of the title (as a trustee would) to deal with the assets in the manner set out in the trust document. The agent does not acquire title to the principal’s property....” Furthermore, “a trustee does not act as the settlor’s agent and, as the trustee holds the title to the trust property, the settlor cannot interfere in the exercise of that authority.... The death of the settlor is irrelevant to the trustees; the death of either the principal or agent will terminate the agency relationship.”⁵⁸

According to Sweatman at common law a POA is best understood as a fiduciary relationship. A fiduciary relationship is one which exhibits all three of the following elements:

1. There is scope for the exercise of some discretion or power.
2. The agent can unilaterally exercise that discretion or power so as to affect the principal’s interest.
3. The principal is vulnerable or relying on the agent’s discretion or skill.⁵⁹

An attorney acting under a power of attorney will be seen as acting as a fiduciary and must adhere to the common law duties of a fiduciary; Sweatman notes that “although

⁵⁷ *Ibid* a 4-5

⁵⁸ *Ibid* at 4

⁵⁹ *Ibid* at 5

the fiduciary duties of agents, attorneys and trustees may vary in intensity, they are essentially the same.⁶⁰

Among the fiduciary duties owed by the attorney to the donor, first and foremost, it the duty of loyalty, which has been described as

“a multidimensional set of obligations that require the attorney to, among other things, obey the donor’s instructions, avoid conflicts of interest, refrain from making secret profits, and avoid benefitting himself or a third party without the donor’s informed consent. The attorney is also subject to a duty of care, a duty to account, and a duty to keep the donor’s property separate from the property of the attorney and other people.”⁶¹

Further, “An attorney must... exercise diligence and prudence in the management of the donor’s property.”⁶²

At common law, the POA ordinarily becomes effective as soon as it is executed by the donor, who retains the ability to direct, monitor and generally supervise the actions of the attorney. A donor may revoke a POA at any time. At common law a POA automatically terminates upon the death or bankruptcy of the donor or if the donor becomes mentally incapable.⁶³ The latter event thus creates a dilemma. If the common law does not recognize an “enduring” POA which continues to operate despite the donor’s mental incapacity, a POA cannot function as an effective estate planning tool. Legislation was required to overcome this aspect of the common law and allow POAs to operate as an enduring grant of authority.

⁶⁰ *Ibid* at 6

⁶¹ Law Reform Commission of Nova Scotia, “Discussion Paper on the *Powers of Attorney Act* (Halifax: 2014) at 9 [the “Discussion Paper”]

⁶² Final Report, note 49 at 5

⁶³ Sweatman *supra* note 44 at 5-6 and Gordon and Verdun-Jones note 42 at 3-111

(2) Emergence of Enduring Powers of Attorney:

In his text on mental disability law, Robertson notes that during the 1970s, 80s and 90s, several provincial law reform commissions studied the dilemma of POAs terminating in the event of the donor's incapacity. "[A]ll concluded that the common law rule is unsatisfactory and should be replaced by legislation providing for enduring powers of attorney."⁶⁴ According to the Alberta Law Reform Institute, as quoted by Robertson:

EPAs provide a relatively simple and straightforward means of enabling people to plan for their own incapacity. The concept of a power of attorney seems ideally suited to the situation where a person anticipates becoming unable to manage his or her own affairs. For the law to revoke the attorney's authority at the very point when it is most needed is, in our view, illogical and unacceptable... .

An EPA enables people to plan for their own incapacity, giving them the freedom to choose someone whom they feel is most likely to act in their best interests. This sense of control over one's life after incapacity promotes self-determination and autonomy, and enhances personal dignity. It also helps to ease some of the anxiety which people feel in knowing that they may soon lose the ability to manage their own affairs.⁶⁵

Currently, all the common law jurisdictions in Canada have legislation which provides that if a power of attorney is duly executed according to the legislative requirements, "the attorney's authority is not revoked by reason only of the principal's subsequent mental incapacity."⁶⁶

⁶⁴ Gerald B. Robertson, Mental Disability and the Law in Canada, 2d (Toronto: Thomson Canada Limited, 1994) at 178

⁶⁵ *Ibid* it is noted that this view reflects the fundamental rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*. Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11["the *Charter*"]

⁶⁶ Robertson, *supra* note 64 at 179

Section 3 of the *NSPOAA* reads:

3. A power of attorney, signed by the donor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the donor, is
- a) an enduring power of attorney;
 - b) not terminated or invalidated by reason only of legal incapacity that would, but for this Act, terminate or invalidate the power of attorney; and
 - c) valid and effectual,
- subject to any conditions and restrictions contained therein that are not inconsistent with this Act.

While all common law provinces have legislation providing for EPAs, the language used in the various statutes is not consistent, which can sometimes create confusion. In Nova Scotia and British Columbia,⁶⁷ for example, the term EPA is used. In Ontario, this type of instrument is referred to as a “continuing power of attorney for property”.⁶⁸ Where authorities referenced herein use the term “POA” when actually discussing EPAs, this will be clarified.

As at common law, a donor must be mentally capable at the time of creating an EPA. Although their mental capacity has not been clearly defined in this context⁶⁹, both Robertson and Soden agree that any assessment must “be consistent with the fundamental principle that legal capacity is task specific; incapacity in one area does not necessarily mean incapacity in another.”⁷⁰

Soden goes on to explain:

One should not ask whether the donor is generally mentally competent, or is competent in other areas, but rather whether the donor has the capacity to understand the nature and

⁶⁷ *Power of Attorney Act*, RSBC 1986, c.370

⁶⁸ *Substitute Decisions Act, 1992*, SO 1992, c 30, s.71 (as amended)

⁶⁹ Robertson, *supra* note 64 at 179

⁷⁰ Soden, *supra* note 6 at 117 and Robertson, *supra* note 64 at 180

purpose of the specific matter at hand, namely the execution of the EPA.⁷¹

Some jurisdictions have filled the gap existing in the common law by expressly providing in the legislation the aspects of an EPA that the donor must understand in granting one.⁷² In Ontario, the donor must appreciate that the attorney may misuse the EPA, and must also know what kind of property he or she has, its approximate value, and must be aware of the obligations owed to dependents. Robertson concluded that Ontario's requirements "adopt in essence the standard of testamentary capacity."⁷³

As with a common law POA, an EPA takes immediate effect upon execution, unless the donor specifies otherwise. This does not mean that the donor is automatically deemed to be mentally incapable; rather, the opposite is true. According to Gordon and Verdun-Jones, "...[P]ersons do not lose the legal capacity to make decisions and they are entitled to the general presumption of competence, until the contrary is proved."⁷⁴ A donor under an EPA may set out whatever conditions and limitations he or she wishes in the EPA, including when it is to take effect. Soden writes: "Most people who are considering having an EPA do not want it to take effect as soon as it is signed. They want their attorney to have the power to take over their affairs only if they become incapable of managing things themselves. In other words, they want the EPA to 'spring' into effect upon incapacity, and to be ineffective until then."⁷⁵

⁷¹ *Ibid* at 117

⁷² See *Powers of Attorney Act*, SA 1991, c P-13-5, section 3 and the *Substitute Decisions Act, 1992*, *supra* note 68, section 8

⁷³ Robertson, *supra* note 64 at 181

⁷⁴ Gordon and Verdun-Jones, *supra*, note 42 at 3-111-112; in Nova Scotia, the *Hospitals Act*, RSNS 1989, c 218, s.2 (6) provides that all persons of legal majority are presumed to be mentally capable of making their own decisions unless and until the contrary is proven.

⁷⁵ Soden, *supra* note 6 at 122-23

Springing EPAs are expressly provided for in some but not all provincial legislation.⁷⁶ Even where the legislation is silent, both Robertson and Soden are of the opinion that it can still be done. Robertson writes: “At common law, there is no reason in principle why a donor cannot grant a power of attorney which is contingent upon a specified future event, with the power remaining in abeyance until the occurrence of that event. Indeed, there is case law which supports the concept.”⁷⁷ Thus, the donor retains a large degree of control over the EPA but is also faced with having to decide how and when the triggering event occurs and the attorney knows that he or she has the authority to act. The EPA itself should clearly stipulate when and by what means the springing EPA comes into effect. Soden offers a practical solution:

For example, the EPA might provide that it takes effect when the donor is no longer mentally capable of managing his or her own financial affairs, and that the donor’s spouse (or family physician) will have exclusive and binding authority to decide when that time has arrived. This mechanism of appointing an ‘arbiter of incapacity,’ which is expressly recognized in the legislation in some provinces, removes any doubt surrounding whether the springing EPA has taken effect.⁷⁸

If such a mechanism is chosen, the donor would have to possess utmost confidence in the person designated to be the “arbiter of incapacity” and be reasonably certain that his or her family members are prepared to accept that arbiter’s decision.

An EPA can be terminated in many of the same ways an ordinary POA terminates, with the key exception being that an EPA continues in the case of the donor’s incapacity. A competent donor may revoke the EPA. It should also be explained to the donor that he

⁷⁶ *Ibid* at 123, n.70

⁷⁷ Robertson, *supra*, note 64 at 182, in which the author cites *Sinclair v Dewar* (1872), 19 Gr. 59 (Ont. CA)

⁷⁸ Soden, *supra* note 6 at 123

or she will not be able to revoke the EPA while the donor is incapable.⁷⁹ It has been stated that: “A person is considered incapable of managing property if unable to understand information that is relevant to making a decision in the management of one’s own property, or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.”⁸⁰ The EPA lapses when the donor dies. An attorney may renounce the appointment and if there is no alternate attorney, the EPA terminates, although there is usually legislative provision to appoint an alternative attorney. The same would apply if the attorney dies or becomes incapacitated.⁸¹

The authority of an attorney under an EPA may also terminate in the event of the appointment of a guardian for the donor by a court, for example, where it is alleged that an attorney is not acting in the best interests of the donor, or where the donor requires a guardian of the person.⁸² Practices appear to vary among the provinces and in some cases, the position is unclear. In Nova Scotia, the seminal case is *Re: Isnor Estate*,⁸³ in which a nephew applied to be appointed guardian of 87 year old Mrs. Isnor, where there was already an attorney acting under an EPA. Mrs. Isnor had been determined to be mentally incompetent, pursuant to section 3(1) of the *Incompetent Persons Act*⁸⁴ (“IPA”). In *Inisor*, LeBlanc, J. held that because the *NSPOAA* allows individuals to make their own choices

⁷⁹ Laura Watts and Kevin Zakreski, “Powers of Attorney: Moving Towards Best Practices in Canada”, (Paper delivered at the Canadian Bar Association Canadian Legal Conference, St. John’s, 13-15 August 2006) online: <<http://www.beli/ccel>> : at 9

⁸⁰ *Ibid* note 18 at 14

⁸¹ *Supra* note 38 at Section 5

⁸² Gordon Verdun-Jones, *supra* note 42 at 3-116; a delegate may be designated to make personal care decisions for another person pursuant to the *Personal Directives Act*, SNS 2008, c 8. A Personal Directive can work in conjunction with an EPA: see section 23.

⁸³ 2001 CanL11 25721 (NSSC)

⁸⁴ RSNS 1989, c 218

regarding future care, the *NSPOAA* should prevail over the *IPA*.⁸⁵ He further held that: “A valid power of attorney will thus prevail over other applications unless there are valid reasons for overriding it, for cause, in the best interests of the incompetent person.”⁸⁶ LeBlanc, J. found that the attorney had been properly discharging her duties and thus upheld the EPA, dismissing the guardianship application. A fuller discussion of *Isnor* may be found in Chapter 4. LeBlanc, J’s conclusions were cited with approval several years later by Robertson, J. in *Re: Wilson Estate*.⁸⁷

(3) Powers of the Donor:

The powers of the donor of an EPA are virtually without limit, prescribed only by law and drafting instructions the donor gives to his or her lawyer. The donor has the ability to choose a single attorney or joint or multiple attorneys as well as alternates. The donor can decide whether the EPA is to take effect immediately, in which event the donor can monitor and supervise the activities of the attorney. This can be useful in that it allows the donor to ascertain whether he or she has made the right choice in an attorney. Or, the donor can opt for a “springing EPA” as discussed earlier, and determine the contingent event, incapacity, for example, that will activate the EPA and thus, the authority of the attorney. If this option is chosen, the donor must use utmost care in specifying who will be the “arbiter of incapacity”. The donor may wish to circumscribe the authority of the attorney with restrictions or conditions, or may simply describe his or her values and principles to help guide the attorney. As Robertson observed:

Unless otherwise provided in the document, an attorney under an enduring power of attorney has very wide powers

⁸⁵ *Supra* note 83 at para. 45

⁸⁶ *Ibid* at para. 46

⁸⁷ 2008 CanL11 418 (NSSC)

with respect to the [donor's] estate. Legislation and precedents often refer to the attorney having the power to do anything on behalf of the [donor] which the [donor] can lawfully do by an attorney.⁸⁸

(4) Powers and Duties of the Attorney:

Many provinces have codified the common law where the power and duties of attorneys under an EPA are concerned and in some cases, have expanded such powers.

The Newfoundland and Labrador statute specifically imposes a duty on an attorney under an EPA to act in the best interests of the incapacitated donor or suffer the consequences:

6 (1) An attorney shall exercise his or her powers in the manner that protects the best interests of the donor, and where the attorney fails to do so, the attorney shall be liable to compensate the donor for loss occasioned by the attorney's failure.

(2) An attorney shall be considered to be a trustee of the property of the donor.

(3) Notwithstanding subsection (1), where an attorney proves to the satisfaction of the court that he or she has acted honestly, reasonably and in good faith, the court may relieve the attorney from the personal liability either wholly or partially.⁸⁹

The New Brunswick statute allows the court, upon an application by an attorney under an EPA where the donor is mentally incompetent, to vary the attorney's powers "in respect of the managing and administering the estate of the donor if it is in the best interests of the donor."⁹⁰

It is to be noted that the EPA statutes in British Columbia and Ontario, and to a lesser extent, Alberta,⁹¹ contain much more substantive provisions to assist an attorney under an EPA discharge his or her duties and responsibilities, as well as to protect older

⁸⁸ Robertson, *supra* note 64 at 183

⁸⁹ *Enduring Powers of Attorney Act*, RSNL 1990, c E-11

⁹⁰ *Property Act*, RSNB 1973, c P-19, s.58.4

⁹¹ *Supra* note 67 and the *Powers of Attorney Act*, RSA 2000 c P-20

persons from becoming victims of financial abuse. More about this will be discussed in succeeding chapters.

Unfortunately, the Nova Scotia statute does not provide much guidance so recourse must be had to the common law. At common law, very broad powers could be granted:

The scope of the attorney's authority was virtually unlimited. In the area of property or finances, the donor could grant the power to do anything that he or she could do – except make a will for the donor, or make a gift of the donor's property or otherwise use it for the benefit of anyone other than the donor... The scope of the authority on its face was broad. The power to do anything that the donor himself or herself could do was, however, strictly construed by the courts: the instrument had to be restricted to its four corners.⁹²

An attorney cannot delegate the authority that has been granted, as the principle of *delegatus non potest delegare* (a delegate may not delegate) applies.⁹³

In addition to the duties the donor may prescribe, the attorney has the following duties at common law:

- a) Stay within the scope of the authority delegated;
- b) Exercise reasonable care and skill in the performance of acts done on behalf of the donor (if acting gratuitously, the attorney is held to the standard of a typically prudent person managing his or her affairs; if being paid, the attorney is held to the standard applicable to a professional property or financial manager);
- c) Not make secret profits;
- d) Cease to exercise the authority if the POA is revoked;
- e) Not act contrary to the interests of the donor or in conflict;
- f) Take no compensation unless agreed on or granted by the court;
- g) Account for dealings with the affairs of the donor when lawfully called on to do so;
- h) Not make, change or revoke a will on behalf of the donor; and

⁹² Sweatman, *supra* note 44 at 11

⁹³ Sweatman, *supra* note 44 at 15

- i) Not exercise the POA for personal benefits unless authorized to do so by the document, or unless the attorney acts with the full knowledge and consent of his or her principal.⁹⁴

As has been noted, *supra*, an attorney owes a fiduciary duty to the donor, which carries with it an obligation of loyalty and utmost good faith.⁹⁵ Further, as a fiduciary the attorney has a duty to account to the donor, the ultimate beneficiaries of the donor and the court.⁹⁶ This duty to account has been codified in statute.⁹⁷ The *NSPOAA* reads as follows:

- 5 (1) Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may, for cause, on application,
 - a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
 - b) require the attorney to attend to show cause for the attorney's failure to do anything that the attorney is required to do as attorney or any order made pursuant to this Act;
 - c) substitute another person for the attorney;
 - d) allow or disallow all or any part of the remuneration claimed by the attorney;
 - e) grant such relief as the judge considers appropriate;
 - f) make such provision respecting costs as the judge considers appropriate.
- (2) Where an attorney is ordered to have accounts passed, the attorney shall submit the accounts for approval to the Court or, where a judge of the Court so orders, to the Public Trustee at such intervals as the judge may order and, when approved, the attorney shall file the accounts with the prothonotary of the Supreme Court for the county where the application is heard.
- (3) An attorney may apply to a judge of the Trial Division of the Supreme Court for an order substituting another person as attorney in the same manner as a person interested in the estate of the donor, upon giving notice

⁹⁴ *Ibid* at 16

⁹⁵ Robertson, *supra* note 64 at 183

⁹⁶ Sweatman, *supra* note 44 at 18

⁹⁷ *Supra* note 36

of the application to the Public Trustee at least ten days before the application is heard.

- (4) Nothing in this Section prevents an attorney from submitting accounts to the Public Trustee for approval and the Public Trustee shall consider accounts when submitted by an attorney.
- (5) Nothing in this Section prevents a donor from applying for an accounting by the attorney, if the donor has the legal capacity to do so.

Among other things, fulfilling this duty means the attorney must maintain proper accounts; not co-mingle the donor's property or accounts, with that of his or her own or of others; and render the accounts when requested to do so. Usually an accounting is rendered when the donor dies but can be requested at any time subject to the legislation.

According to Sweatman,

The ultimate goal of an accounting is to eliminate the fiduciary's obligations to the grantor, the ultimate beneficiary and the court, so that at the end of a successful passing, the fiduciary is relieved of any further accounting with respect to that period relating to the accounts just passed, except on account of fraud or mistake.⁹⁸

Under the *NSPOAA* there have not been many cases of applications for accountings and where there have been, the Courts generally reject them, on the basis that "cause" in section 5(1) has not been established by the applicants. When a donor of an EPA still has legal capacity, he or she may apply to the Supreme Court for an accounting from the attorney if the donor has concerns about how the attorney is managing the donor's affairs: see s.5(5) of the *NSPOAA*. In theory, this approach appears fairly straightforward. But what if the attorney has absconded with or otherwise mismanaged the donor's financial resources, leaving the donor impoverished? There are few options. Nova Scotia Legal Aid has recently expanded its menu of services beyond family and

⁹⁸ Sweatman, *supra* note 44 at 20

criminal matters to include social justice issues; however, protecting older adults from financial abuse is not among them.⁹⁹ There are no dedicated elder law clinics in Nova Scotia such as ACE or the BCCEAS, *supra*. It would appear the affected donor has no recourse, unless he or she can find a lawyer to take on the case on a *pro bono* basis.

In an odd twist, a mentally incapable donor may find him or herself in a better position than a capable one. When issues arise concerning the attorney's actions in relation to an incapable donor's affairs, relatives often appear on the scene to pursue or attempt to pursue civil proceedings against the attorney. Family dynamics often come to the fore and the process can be very contentious and expensive. Proceedings may be brought under the *NSPOAA* for an accounting from the attorney under the s.5(1)(a) or even for the substitution of the attorney by another person pursuant to s.5(1)(c). Section 5(1) requires such applications to be brought "for cause". Another approach is for an adult child or other relative to bring an application for guardianship of the donor pursuant to the Nova Scotia *Incompetent Persons Act ("IPA")*,¹⁰⁰ which will be explored in Chapter 4.

In *Burns v. Burns*,¹⁰¹ LeBlanc, J. dealt with a disgruntled son who was previously the attorney under his father's EPA but the father subsequently gave a new EPA to his wife, another son and daughter. The previous attorney made application pursuant to the *NSPOAA* for an accounting from the new attorney, alleging irregularities in how the affairs of the donor were being administered. LeBlanc, J. reviewed the circumstances and

⁹⁹ Karen Hudson, QC, Remarks made in the Plenary Session on Access to Justice made at the Canadian Bar Association- Nova Scotia Branch Mid-Winter Conference, Halifax, 7 February, 2014

¹⁰⁰ *Supra* note 84

¹⁰¹ [2003] NSJ No. 280 (QL) (SC)

found that all the transactions by the attorneys were completed with proper authorization and were in good faith; thus, an accounting was not warranted.

Another case where an accounting was determined not to be necessary was in *Wright et al. v. Cournoyer*.¹⁰² For seven years the mother Wright lived with her daughter Cournoyer and had given her a general POA and opened a joint account in order that Cournoyer could do her banking and look after other affairs. The mother reviewed the monthly bank statements and was competent. After the mother's death, five siblings applied for an accounting from Cournoyer, alleging improprieties. Edwards, J. held that the mother was mentally competent and able to manage her affairs until her death; therefore, Cournoyer was not required to provide an accounting pursuant to the *NSPOAA*.

The case of *BFH v DDH*¹⁰³ details a particularly convoluted application for an accounting under the *NSPOAA* involving siblings. In July 2004, the mother, JH, gave her daughter DDH an EPA. On March 19, 2005, JH wrote a cheque in favour of DDH for \$25,000. On March 22 and September 15, 2005, DDH wrote herself cheques using the EPA, each for \$6,000. The Applicant BFH, JH's son, also received payments from his mother during this time. In December 2006, JH was diagnosed with Alzheimer's and DDH continued to use the EPA. In 2008, JH required full-time care and DDH arranged to sell her house for \$695,000. DDH's solicitor proposed that both son and daughter take \$250,000 each from the proceeds of sale as an advance on their inheritance. The son, BFH, disagreed, on the basis the proceeds were needed for the mother's care. Nonetheless, on September 4, 2008, DDH wrote herself a cheque for \$200,000 as an advance. In March 2010, JH was found to be incompetent under the *IPA* to manage her

¹⁰² [2003] NSJ No. 155 (QL) (SC)

¹⁰³ [2010] NSJ No. 562 (QL) (SC)

own affairs and the Bank of Nova Scotia was appointed guardian of her estate and DDH was appointed guardian of her person. Also in 2010, the son, BFH brought an application to remove his sister DDH as guardian of JH and for restitution, on behalf of his mother JH, for alleged inappropriate transactions that occurred while DDH was her attorney under the EPA. DDH argued that the Court could only consider transactions arising after JH was declared incompetent in 2010.

LeBlanc, J. disagreed, noting the sections of the *Act* relating to the substituting of an attorney and restitution were not restricted by reference to the donor's mental capacity¹⁰⁴ and he found that by giving the *NSPOAA* an "expansive" interpretation, he could consider all the attorney's transactions.

Given that an EPA creates a fiduciary relationship from the moment of creation, "all transactions made by the attorney may be reviewed by the court pursuant to applications under s. 5(1) of the *Act*."¹⁰⁵

LeBlanc, J. also provided a clear statement of the law regarding a donor's gift to an attorney. DDH had argued that the payments of \$25,000, \$6,000 and \$6,000 in 2005 were gifts from her mother. The applicant argued that the donor's intentions must be established beyond a reasonable doubt. His Lordship agreed, citing earlier cases to the effect that "the onus of proof is upon the defendant to prove a valid gift *inter vivos*...as to the standard of proof necessary to prove the gifts...it must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far, then the contention of a gift fails."¹⁰⁶

¹⁰⁴ *Ibid* at para. 27

¹⁰⁵ *Ibid* at para. 28

¹⁰⁶ *Ibid* at paras. 29 and 30

LeBlanc, J. found the \$25,000 to be a valid gift as the cheque was prepared and signed by the donor, but held that the two cheques for \$6,000 each were not valid gifts, saying that: “There is no evidence ...that allows the Court to say that Mrs. H. fully understood their effect.”¹⁰⁷ Further, the transfer of \$200,000 from the sale of the home “was inappropriate and cannot be sanctioned simply because counsel recommended it.”¹⁰⁸ Accordingly, DDH was ordered to repay the amounts wrongfully taken from her mother, with interest.

Relatives should be counselled to exercise caution when deciding whether to apply for relief under the *NSPOAA* in light of the decision of Coady, J. in *Beairsto v Stirling*.¹⁰⁹ The Respondent Stirling held an EPA for both her parents, the Tonnings. Her niece and nephew applied for an accounting under the *NSPOAA*, alleging incapacitation of the attorney. Coady, J. rejected the application as an effort to harass the aunt, and ordered the applicants to pay the respondent solicitor and client costs with no indemnity out of the estate. Coady, J. found that the respondent was a gratuitous attorney whose actions were genuine and entirely appropriate¹¹⁰

It is gratifying to see how some judges, such as LeBlanc, J. in *BFH v DDH*, are prepared to adopt an “expansive” interpretation of the *NSPOAA* in an accounting application to safeguard the interests of the older adult. By deciding that a court can look at an attorney’s transactions occurring before the donor becomes incapacitated, LeBlanc, J. is sending a message to attorneys to act in the donor’s best interests throughout the duration of the EPA, or suffer the consequences.

¹⁰⁷ *Ibid* at para. 37

¹⁰⁸ *Ibid* at para. 39

¹⁰⁹ [2007] NSJ No. 490 (QL) (SC)

¹¹⁰ *Ibid* at para. 12

The passing of accounts is also the opportunity for the attorney to have his or her compensation fixed, if it had not been previously agreed to. In Nova Scotia, this would be done in accordance with the provisions of the *Trustee Act*.¹¹¹ In this province, it is also permissible for an attorney to enter into a contingency fee agreement pursuant to Rule 77.14 of the Nova Scotia Civil Procedure Rules.

(5) The Nova Scotia Powers of Attorney Act: Commentary

In both size and substance, the *NSPOAA* is quite sparse. It contains only seven sections, the last of which was only added in 2010,¹¹² to enable an EPA with two or more attorneys to continue in effect in the event of the death or unavailability of the other attorney or attorneys.

Beyond that, the Nova Scotia statute fails to lay out any statutory guidelines by which attorneys acting under an EPA should govern themselves. The *NSPOAA* is similar in its meagre nature to the other EPA statutes in the Atlantic Provinces,¹¹³ with a few notable exceptions.

The *NSPOAA* does little more than provide the basics for establishing the EPA as an effective estate planning tool. In Section 5(1), it requires the attorney to pass accounts, which is a critical safeguard. Further, the court can require an attorney to show cause for his or her failure to do anything the attorney is required to do, and to substitute another person for the attorney. The *Act* does give the Courts broad powers for the granting of relief where appropriate. Beyond these provisions, the *NSPOAA* measures poorly against legislation in the other common law jurisdictions.

¹¹¹ RSNS 1989 c 479, s.62

¹¹² *Powers of Attorney Act (amended)*, SNS 2010, c 70

¹¹³ *Property Act*, RSNB 1973, c P-19; *Enduring Powers of Attorney Act*, RSNL 1990, c E-11; *Powers of Attorney Act*, RSPEI 1988, c P-16

Where does this leave an attorney under an EPA in Nova Scotia? For those attorneys intending to act in good faith toward the donor, there is a legislative void. It would be prudent for such an attorney to consult the advice of a lawyer knowledgeable in the area. For attorneys who may have nefarious leanings, it could be a field day.

Chapter 3: The Potential for the Misuse and Abuse of Enduring Powers of Attorney

As noted earlier, EPAs are highly recommended as a useful tool in the estate planning process for older adults: an EPA allows people to plan for their own incapacity which promotes self-determination and autonomy, and enhances personal dignity.¹¹⁴ Further, an EPA can “minimize family conflict during one’s lifetime and prevent unnecessary, expensive and avoidable litigation”.¹¹⁵ Unfortunately, it can also be an instrument of misuse and abuse leading to “fraud, neglect and depletion of wealth.”¹¹⁶

Soden provides a similar view of the potential of an EPA:

An EPA usually confers a wide range of powers on the attorney to manage the donor’s financial affairs. Its very purpose, of course, is to enable those powers to be exercised after the donor has become mentally incompetent, by which time the donor will be incapable of monitoring the conduct of the attorney. Clearly this creates a potential for abuse, and a risk that mismanagement by the attorney (either negligent or fraudulent) may go undetected.¹¹⁷

(1) Common Scenarios:

An abusive attorney may be either a predator or an opportunist. Further, harm to the donor can be caused by a well-intentioned but inept attorney.

i. “The Predator”:

This form of abuse arises out of an existing relationship, normally a familial one where the older person is approached to grant an EPA to someone they know under the guise that it will take some of the burden off the older person in managing his or her

¹¹⁴ See Chapter 2, note 65

¹¹⁵ Kimberly A. Whaley and Joel Marques de Souza, “Presentations on Elder Law Litigation and Older Adults in the Courtroom: Lessons Learned” (Paper delivered at the Canadian Bar Association National Elder Law Conference, Toronto, 15 April 2013), [unpublished] at 1

¹¹⁶ *Ibid*

¹¹⁷ Soden, *supra* note 6 at 113

financial affairs, when the intention from the outset is to use the EPA to defraud or steal from the older person.

Predators target those who may suddenly find themselves alone or vulnerable. Older persons may be “predisposed to vulnerability if they are dependent on another for certain necessities of life. Such dependence may be attributable to physical or mental disability, or simply to the overwhelming task of suddenly managing all of their own affairs.”¹¹⁸

Once an EPA is granted, the attorney can begin to plunder bank accounts, incur debt and even mortgage or sell the donor’s home. The attorney can re-direct mail such as financial or bank statements so the donor is left with no idea of the attorney’s actions. The donor at best could experience a depletion of financial resources; at worst, the donor may be left destitute and homeless. Even a donor who is still mentally competent may be at risk, given that “when an attorney begins to act under the authority of an EPA, third parties tend to take instructions from the attorney, even if the adult is still capable”.¹¹⁹

One of the worst predator cases of recent note is set out in *R. v Kaziuk*,¹²⁰ where a 57 year old son was convicted of frauds he committed against his widowed 88 year old mother who had given him her power of attorney for property in Ontario. Mrs. Kaziuk emigrated from Poland after WW11 and when her husband died in 1999, she owned two mortgage free condos in Oakville, a mortgage free house in Miami, a car, credit cards and

¹¹⁸ Kimberly Whaley, Amy Cull and Ian Hull, “Financial Abuse, Neglect and the Power of Attorney” (Paper delivered at the Canadian Conference on Elder Law World Study Group on Elder Law 2010, Toronto, 28 October 2010), [unpublished] at 10

¹¹⁹ *Ibid*

¹²⁰ See *R. v. Kaziuk* (2013) 2013 Carswell Ont 3847, 2013 ON CA 217 (Ont-CA); affirming *R. v. Kaziuk* (2011), 2011 ONCJ 851, 2011 Carswell Ont 15692 (Ont-CJ.), varied *R. v. Kaziuk* (2012), 2012 Carswell Ont 781 (Ont C.J.)

over \$1 million in the bank. The son was given the power of attorney in 2006 and in five years fraudulently used it to put unauthorized mortgages on her properties for his own use as well as to plunder her remaining assets. In 2011, she was evicted from her condo because the mortgage was in default and was forced to live in a Salvation Army homeless shelter, with no assets to her name. The son maintained his mother had agreed to his use of her assets in order to get his own house out of foreclosure and to help with his struggling bus business. She denied this. The son had a long criminal record of fraud and other financial crimes. In sentencing the son to 10 years for the frauds, Madam Justice Baldwin stated:

I do not need a psychiatric report to conclude that this offender has the characteristics of a psychopath. This offender is incapable of feeling empathy and has no conscience.... Mr. Kaziuk would rip-off the wings of all the angels in heaven and sell them to the devil for his own gain if he could.¹²¹

His 10 year sentence was later reduced to 8 years on appeal.

ii. “The Opportunist”

Some attorneys may not set out to defraud an older adult who has granted him or her an EPA but circumstances may arise in the course of the relationship that enable the opportunistic attorney to take advantage of the situation. For example, the donor may have been fully capable when granting the EPA but over time as his or her cognitive abilities deteriorate,¹²² the attorney may start to act in a little self-interest.¹²³

¹²¹ *Ibid* paras. 95 and 96 (Ont. C.J.)

¹²² This is often due to dementia, which is described as: “Dementia is a progressive degenerative condition that causes deterioration in think ability and memory. It also affects behaviour, mood and emotions, as well as the ability to perform everyday activities. There are several forms of dementia, including Alzheimer’s disease.”

Such financial exploitation may begin as innocently as the attorney suggesting the donor purchase a new car for the attorney to enable him or her to drive the donor to appointments, etc. The attorney may also be experiencing his or her own financial pressures or additional issues that necessitate an inflow of cash into his or her own bank accounts.¹²⁴

Self-interest may be exacerbated by the “culture of entitlement”, especially among the adult children of older persons who have an expectation of an inheritance. “Where the perpetrator is an heir to property he or she may justify the behaviour as taking an advance from a future inheritance or protecting future assets from being spent on care for the older adult.”¹²⁵ The *NSPOAA* contains little in the way of guidelines or safeguards to thwart the behaviour of the predators and opportunists.

iii. “The Incompetent Attorney”:

Some attorneys under an EPA may be well-meaning but simply not be suited to the task and so may negligently breach of his or her fiduciary duty to the donor.

An incompetent attorney may lack the requisite financial acumen to manage substantial assets or not know where to seek assistance, and so may waste the donor’s assets, either by spending in frivolous ways or make imprudent investment decisions.

Spencer went on to state that: “Somewhat surprisingly, there is little if any research on financial abuse by family giving care to people who have dementia, although it is well recognized that people with dementia may be susceptible to exploitation.” Spencer, *supra* note 6 at 36

¹²³ *Ibid* at 37

¹²⁴ See Chapter 1, Profiles of Abusers

¹²⁵ Braun, *supra* note 34 at 8

Some provinces, such as British Columbia and Ontario, provide attorneys acting under an EPA with statutory guidelines on their duties and responsibilities¹²⁶ which is of enormous benefit (provided the attorneys abide by them!). Unfortunately, Nova Scotia's legislation does not contain such guidelines, thus leaving attorneys to their own devices.

A donor's vulnerability to a dishonest or incompetent attorney may be exacerbated by the donor's lack of knowledge, by the difficulties inherent in choosing the right attorney and by the lack of oversight of the attorney.

(2) A Donor's Lack of Knowledge with Regard to an EPA:

Unless properly advised by his or her lawyers, a donor may not understand that an EPA takes effect from the moment it is signed, except where the instrument itself provides for some contingent event for its activation.¹²⁷ The donor may not fully appreciate the scope of the powers the attorney is being given: "A POA is a powerful document which enables an attorney to do virtually anything on the [donor's] behalf in respect of property that the [donor] could do if capable, except make a Will."¹²⁸

Especially in a province like Nova Scotia which does not set out statutory guidelines on what an attorney acting under an EPA can or cannot do, it is essential that a donor be made aware that he or she can tailor the EPA to best suit his or her concerns and wishes. Working in concert with a lawyer, the donor can stipulate specific duties and responsibilities for the attorney. For example, the donor can direct that the attorney continue to use the donor's investment manager using clear instructions, thus reducing the

¹²⁶ *Power of Attorney Act*, RSBC 1996, c370 and *Substitute Decisions Act, 1992*, SO 1992, c 30 (as amended)

¹²⁷ See Chapter 2

¹²⁸ Kimberly A. Whaley, "The Power of Attorney: Its Misuse, Abuse and Fraud". (2008) online: <<http://www.whaleystatelitigation.com>> at 9

opportunity for the attorney to make unauthorized or rogue investments. The donor may also set out a statement of beliefs and values by which the attorney is to be guided when managing the donor's assets when he or she becomes incapable. Further, a donor should have more than a rudimentary understanding of the nature and extent of his or her assets, which will ultimately come under the control of the attorney. However, with some older adults, dealing with financial matters is an unfamiliar exercise, which could be exploited by an unscrupulous attorney.

(3) Choosing the Right Attorney:

This is a critical step for a donor of an EPA and is one fraught with potential minefields. For example, a donor may have to choose one child over another, or be dependent on a particular child and feel pressure to appoint that child as attorney to the exclusion of others.¹²⁹

Family dynamics aside, it is also necessary for the donor to ensure that the prospective attorney agrees to act and understands the significance of the appointment, i.e. that it creates fiduciary obligations and what that entails. In addition, the donor should consider whether the prospective attorney has the requisite values of honesty, integrity and accountability.¹³⁰ Some donors opt to appoint joint attorneys, although this should be accompanied by a clause in the EPA to resolve any conflicts between the attorneys. Finally, a donor can appoint a trust company to act as attorney for a fee.

¹²⁹ Such action can serve to foment family discord. In advising a client on drafting an EPA, it has been said that: "The lawyer must be particularly alive to the possibility of undue influence, hidden violence or abuse.": Watts, *supra* note 79 at 5. It has also been suggested as good practice for the lawyer taking instructions for an EPA to meet with the client alone, to among other things, enable the client the best opportunity to express his or her true wishes.

¹³⁰ Whaley, *supra* note 103 at 5

(4) Lack of Oversight:

Lack of oversight of attorneys contributes significantly to the potential for financial abuse or mismanagement. Unfortunately,

In the majority of provinces, there is no mechanism whereby the activities of a donor using an enduring power can be monitored and supervised to ensure that the donee is acting in a donor's best interests. In most instances, a donor will be unable to oversee the actions of an attorney because of mental incapacity. This is not to suggest that attorneys are always likely to act in a dishonest manner; however, many may lack the skills necessary to manage an estate effectively and, in the absence of guidance, may make costly errors and incur personal liability. External monitoring is, thus, as much in the interests of a donee as a donor.... Certainly, an attorney may be required to give an accounting of his or her activities on demand. However, this will first require some evidence that the attorney is acting in an inappropriate manner and, given the low-visibility nature of a donee's activities, the necessary evidence might be extremely difficult to secure.¹³¹

The problem of lack of oversight of attorneys is a theme that appears frequently in the literature, specifically the Law Reform Commission Reports discussed in Chapter 7. The challenge appears to be finding the right balance between the least intrusive method of oversight with instituting meaningful and effective safeguard for donors.

¹³¹ Gordon and Simon Verdun-Jones, *supra* note 42 at 3 - 122

Chapter 4: An Overview and Critique of Existing Safeguards from Financial Abuse of Older Adults

(1) Introduction:

In this chapter, existing statutory and other measures to safeguard older adults from financial abuse from rogue attorneys acting pursuant to an EPA will be examined and critiqued. This will include discussion of the *NSPOAA*: the criminal law and its participants; the availability of civil proceedings by victims of financial abuse; adult protection laws in Nova Scotia; adult guardianship; the role of the Public Trustee's Office; and finally, some practical measures that may be of assistance.

It has been stated that:

Legal approaches to abuse and neglect of older adults are primarily reactive; they focus on stopping abuse or reducing harms after abuse has occurred. (Emphasis added)

Laws are applied in a wide range of circumstances, ranging from situations where abused or neglected older adults have no difficulties with mental capability, to situations where the person's mental capability is in flux, deteriorating or minimal. The scope of the laws and the ways in which they are operationalized are important factors in their effectiveness in preventing abuse, or addressing it if it occurs.¹³²

(2) Legislative Void in Nova Scotia: the NSPOAA:

As stated earlier, the *NSPOAA* contains few protective provisions to address financial abuse by an attorney. The most significant provision is that in Section 5 (1)(a), which requires the attorney to pass his or her accounts. The donor or another interested party may apply to the Supreme Court for cause for such an accounting. Someone other than the donor might apply where, for example, a friend or family member suspects the attorney may not be acting appropriately with the donor's assets. Upon such an

¹³² Soden, *supra* note 6 at 221-22

application, the court pursuant to Section 5(1)(e) may “grant such relief as the judge considers appropriate;” however, there is no specific provision for attorney’s personal liability or other specified penalties. The Courts have stepped in to fill this void, in particular in the latter event, by ordering restitution from the attorney: see *BFH v DDH*¹³³, *infra*.

Further, pursuant to Section 5(1)(b), the Court can “require the attorney to attend to show cause for the attorney’s failure to do anything that the attorney is required to do as attorney or any order made pursuant to the Act.” Like Section 5(1)(a), this provision is reactive in nature. While there is no case law on this particular clause, presumably there would have to be an allegation that the attorney was not discharging his or her fiduciary duties to the donor. The onus would be on the attorney to refute this allegation. Failure to do so would result in a finding of a breach and the judge, pursuant to Section 5(1)(e), would grant the appropriate relief, which could include an order to act in accordance with his or her fiduciary duties, an order for restitution if funds were used inappropriately, or perhaps an order substituting the attorney for another, pursuant to Section 5(1)(c). While such orders would rectify the attorney’s misbehaviour, the harm to the donor would have already been done.

If the *NSPOAA* contained positive duties on the attorney in the first instance, there would be less likelihood of the harm occurring. Stipulating the “dos and don’ts” for the attorney in the legislation has been done in other jurisdictions as noted in Chapter 2. This has benefits for both the donor and the attorney in that it enables both parties to know what is expected of the attorney. Of course, the attorney must adhere to

¹³³ (2010) 295 NSR (2d) 365 (NSCC)

his or her obligations, which may not always be the case. That is where the other available safeguards to be discussed may be utilized.

(3) Criminal Proceedings: Pros and Cons:

Many forms of abuse against older persons are also crimes under the *Criminal Code*,¹³⁴ including Theft (ss. 322, 328-332, 334), Criminal Breach of Trust (s. 336) and Fraud (s. 380 (1)). More significantly, there is s.331 – Theft by Person Holding Power of Attorney, which reads:

Every one commits theft who being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it or fraudulently converts the proceeds of a sale, mortgage pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

One would expect that with the rise of instances of EPA abuse of older persons, there would be more reported case reports of violations of s.331 of the *Criminal Code* but that is not the case.

In speaking about theft by power of attorney, Beaulieu and Spencer had this to say:

A power of attorney is one of the most commonly used ways that an older person is financially abused... In one study, it represented one half of the financial abuse situations seniors were experiencing. Abuse of power of attorney potentially affects over 40,000 older adults in Canada. Yet, according to the Uniform Crime Survey II, in the past three years, there have only been five instances where charges of abuse of powers of attorney have been laid anywhere in Canada, and in all five, the charges were stayed or withdrawn.¹³⁵

¹³⁴ *Supra* note 27 see also Soden, *supra* note 6 at 226

¹³⁵ Marie Beaulieu and Charmaine Spencer, "Older Adults' Personal Relationships and the Law in Canada: Legal, psycho-social and ethical aspects." (Ottawa: Law Commission of Canada Research Paper, September 1999) at 35

A retired Saskatoon police investigator familiar with crimes against older adults offers two reasons why this may be occurring: firstly, when confronted with an allegation of attorney wrong-doing under an EPA, police have been known to advise the victim that such behaviour is a civil, not criminal matter; secondly, he observes this about s.331:

This section has been in existence for many decades now, and yet very few police officers have heard of it. One of the reasons for this may be the fact this section is not a charging section, but what is referred to as a descriptive section. When someone is charged with stealing funds from a senior, the charge is section 334-Theft, 331 ccc. This causes confusion, however no matter how it's viewed, a theft is a theft, and an investigation needs to be undertaken by the police.¹³⁶

While the *Criminal Code* is rarely used, *R v Kaziuk*¹³⁷ discussed in Chapter 3 would suggest that it can be a useful tool. The defendant was charged with two *Criminal Code* offences: s.334- Theft over \$5000 and s. 380(1) – Fraud over \$5000. The judge held that the Crown had also proven a charge under s. 331, which she took into account as an aggravating factor in sentencing.

Extrapolating from seniors' unwillingness to report violent crime, other relevant factors may include:

...[L]ess willingness among older adults and others to identify the harmful actions of family or other trusted person as 'crimes'; the responses within social service and justice systems to abused or neglected older adults, or the greater isolation of older adults, making crimes by family members more likely to be hidden.¹³⁸

¹³⁶ Sgt. R.B. Trainor (ret.), "P.O.A. Abuse: Civil or Criminal?" (2007) online: <<http://www.trainorcommunications.com/poa-abuse-civil-or-criminal.html>>

¹³⁷ *Kaziuk*, *supra* note 120

¹³⁸ Soden, *supra*, note 6 at 226

It has been suggested that older persons tend not to want to deal with the legal system when they are exploited by their attorneys, finding it too adversarial and rife with barriers.¹³⁹ Some of these barriers have been identified as a lack of understanding of the needs and issues of older crime victims by participants in the legal process such as police, lawyers, Crown attorneys, even Judges. More appropriate victims' services are required, tailored to the older person. The justice system must adapt to accommodating older witnesses who may be experiencing diminished mental capacity. It must also develop protocols for preserving evidence from the older person in the event he or she is unable to testify due to deteriorating health or death prior to trial.¹⁴⁰

(4) Efforts to Increase Access to the Justice System:

Efforts are being made to enhance access to the justice system through education – both of those who work within the justice system, and of seniors themselves. While police as a rule have not been quick to respond to complaints of EPA abuse against older adults, presumably due to confusion as to whether it was a civil or criminal matter. More recently, police services around the country are taking a more proactive approach toward elder abuse in general and financial abuse of older adults in particular. Police in many municipalities are educating themselves and older adults on abuse issues. At a recent Canadian Bar Association Conference on Elder Abuse in Toronto, police officers from the Toronto and Calgary Police Services gave presentations on how cases of elder abuse are investigated by more dedicated and better-equipped police officers.¹⁴¹ Initiatives include a

¹³⁹ *Supra* note 135 at 35

¹⁴⁰ Soden, *supra* note 6 at 226-227

¹⁴¹ Toronto Police Constable Patricia Fleischmann, “Legal, Societal and Policy Issues Affecting the Older Adult”, delivered at the CBA National Elder Law Conference, Toronto, April 16, 2013

specialized investigative unit to deal with elder abuse and financial crimes and fraud, where police work with other service providers such as social workers to combat such problems, and an e-learning resource for law enforcement agencies which offers police training specifically on Theft by Power of Attorney.¹⁴² In addition, the National Initiative for the Care of the Elderly (NICE) has prepared online resource guides for police to investigate Theft by Person Holding Power of Attorney – s.331 of the *Criminal Code*.¹⁴³ However, the work is just beginning: “Only a handful of police detachments in Canada have staff specifically trained on abuse issues,”¹⁴⁴ and factors such as isolation of seniors or lack of mental capacity to make a complaint continue to present challenges.

Besides a focus on training police to deal more effectively with financial abuse of older adults, other provincial training initiatives are aimed at seniors themselves or those who work with older individuals in the community.

The Nova Scotia Department of Seniors (“the Department”) has been instrumental in these efforts. In 2005, when the Department was known as the Seniors’ Secretariat, it published the “Nova Scotia Elder Abuse Strategy: Towards Awareness and Prevention” (“the Strategy”). Among the key initiatives identified in the Strategy was Prevention of Financial Abuse. Included in the actions to be undertaken were:

¹⁴² *Ibid*

¹⁴³ National Initiative for the Care of the Elderly (NICE) – online <[http://www.nice-tools.ca/de.aspx?id=1772+1=Theft+By+Person\(s\)+Holding+Power+Attorney+-+Officers+Investigation+Guide](http://www.nice-tools.ca/de.aspx?id=1772+1=Theft+By+Person(s)+Holding+Power+Attorney+-+Officers+Investigation+Guide)

¹⁴⁴ Spencer, *supra* note 5 at 24: Ottawa Police Services has a dedicated elder abuse unit. Between 2005 and 2010 it conducted 680 investigations. Sixty-two per cent of these involved allegations of financial abuse. The Elder Abuse Intervention Team in Edmonton (a combination of police and social services) notes that in 2010 about sixty per cent of the more than 600 calls they received were related to financial abuse. The common types of calls included using debit cards, and misuse by people holding a power of attorney or joint account.

- Educate seniors about financial abuse, including what it is, how to prevent it, and what to do if it happens;
- Educate key service providers such as financial institutions and legal professionals on elder abuse, in general, and detecting and responding to financial abuse, in particular; and
- Educate those involved in the administration of justice on the issue of financial abuse of seniors.¹⁴⁵

In 2007 the Department established the Senior Abuse Information and Referral Line, a toll-free service for Nova Scotia seniors with concerns about dealing with abuse. Referrals are made to legal services, the police, health care services, Adult Protection and Protection of Persons in Care. At a recent conference, staff from the Department reported that 38 per cent of calls related to financial abuse.¹⁴⁶

The Department also supports an RCMP initiative called Seniors' Safety Programs that exist in 14 counties in Nova Scotia. Each site has a Senior Safety Coordinator who is a civilian working with the RCMP and local resources to enhance the independence, health and safety of seniors through a variety of free services, including information on EPAs and elder abuse. The Seniors' Safety Program in the Halifax Regional Municipality is expected to start up in 2014.

Other initiatives of the Department include training "community champions" on a toolkit entitled "Understanding Senior Abuse" for the purpose of encouraging community engagement to raise awareness of the issue. A similar training module has been developed for interdisciplinary healthcare providers, with pilot workshops being undertaken. Finally, the Department is working as part of a group known as the Fundy Network, comprised of other government departments and agencies, community service providers, police,

¹⁴⁵ Seniors' Secretariat, "Nova Scotia Elder Abuse Strategy: Towards Awareness and Prevention" (Halifax: 2005) at 2

¹⁴⁶ Jocelyn Yerxa, "So Now What" (Paper delivered at the Canadian Bar Association-Nova Scotia Branch Elder Law Conference, Halifax, November 15, 2013)

academics, lawyers and seniors, which is looking at the issue of elder abuse in a holistic way and using practices and tools to support seniors and their families to “heal the harms and move forward positively”, including the use of restorative justice principles.¹⁴⁷

The Legal Information Society of Nova Scotia, a not-for-profit service, has published a very useful booklet for older adults and their rights entitled “It’s In Your Hands – Legal Information for Seniors and Their Families”,¹⁴⁸ which in plain language explains topics of interest to seniors, including powers of attorney and abuse of older adults.

Other measures designed to break down the barriers older adults face in accessing assistance from the justice system include specialized legal clinics and community based networks. At this time, there are two specialized legal clinics for older adults: the Advocacy Centre for the Elderly (“ACE”) in Toronto, which has provided legal services and advocacy since 1984 and is funded through Legal Aid Ontario; and the British Columbia Centre for Elderly Advocacy and Support (“BCCEAS”), which formally began serving and educating clients in 2008 and receives funding from the British Columbia Law Foundation. Both ACE and BCCEAS have excellent online resources for clients, legal professionals and other service providers wanting to know more about elder law issues. Community based networks operate mainly in British Columbia but are also found in Alberta and Ontario. These networks use a collaborative process that “leads to the

¹⁴⁷ *Ibid*

¹⁴⁸ Legal Information Society of Nova Scotia, “It’s In Your Hands: Legal Information For Seniors and Their Families, 2d” (Halifax: 2011)

development of interagency protocols and coordination of prevention and intervention efforts.”¹⁴⁹

At the national level, programs and services designed to increase prevention and awareness of elder abuse are becoming more prevalent. In 2008, the federal government allocated \$13 million over three years to the Federal Elder Abuse Initiative (FEAI), with approximately half of that amount targeted for a national elder abuse awareness television and print campaign.¹⁵⁰ Turning to social media, specifically YouTube, in February 2012 a new national campaign specifically focusing on financial abuse was launched through the FEAI.¹⁵¹ The Federal/Provincial/Territorial Ministers Responsible for Seniors Forum has been proactive in making brochures available for older adults on topics such as financial planning and protection from financial abuse. An excellent resource is a brochure entitled “What Every Older Canadian Should Know About: Powers of Attorney (for financial and property matters) and Joint Bank Accounts.” In a plain language format, the brochures lay out the pros and cons of these two significant estate planning tools.¹⁵²

Through FEAI, a variety of initiatives have been undertaken by several federal ministries, such as Human Resources and Skills Development Canada (HRSDC), the Public Health Agency of Canada (PHAC) and the federal Department of Justice, to help identify and understand abuse issues from many perspectives. The New Horizons Program for Seniors, working in conjunction with the HRSDC, funded several abuse

¹⁴⁹ Soden, *supra* note 6 at 221

¹⁵⁰ Spencer *supra* note 5 at 46

¹⁵¹ *Ibid*

¹⁵² Available online: <http://www.seniors.gc.ca/eng/working/fptf/brochure_attorney.pdf>

projects, including those aimed at ethno cultural seniors and strengthening regional and community responses.¹⁵³

Another national group, the Canadian Network for the Prevention of Elder Abuse (CPNEA), also promotes the development of resources for older adults including in the area of the criminal justice system. CPNEA has produced a web resource, prepared by Charmaine Spencer, a noted elder law author and researcher, on “Improving Access to Justice”, which again in a plain language format de-mystifies many of the challenges older adults face in dealing with the criminal justice system, and offers possible solutions.¹⁵⁴

Educating both those who work within the criminal justice system and older adults should start to ameliorate some of the systemic barriers encountered by older adults who experience financial abuse. Key to this would be to debunk the ageist attitudes that permeate the justice system and society as a whole.

(5) Civil Proceedings:

A donor may find him or herself the subject of civil court proceedings, other than in applications for accounting, previously discussed in Chapter 2, as a result of family members trying to challenge the donor’s wishes in an EPA by applying for a guardianship order under the *IPA*,¹⁵⁵ or by being at odds in respect of the management of the donor’s assets. In the cases surveyed below, the Courts generally take a dim view of these actions and side with respecting the donor’s wishes.

¹⁵³ Spencer, *supra*, note 9 at 46

¹⁵⁴ Canadian Network for the Prevention of Elder Abuse, “Improving Access to Justice” online: <<http://www.cpnca.ca/resources>>

¹⁵⁵ *Supra* note 84

As indicated in Chapter 2, the seminal case is *Re: Isnor Estate*,¹⁵⁶ in which Mrs. Isnor's nephew, KG, applied to be appointed guardian of her person and estate pursuant to s.3(1) of the *IPA*, despite Mrs. Isnor having executed a limited EPA in favour of a friend, BG, while she was still competent in June 2000. Mrs. Isnor had made it known on many occasions that she did not wish KG to be involved in her affairs. In November 2000, Mrs. Isnor was declared to be a person in need of protection "under s.3(b)(ii) of the Nova Scotia *Adult Protection Act*,¹⁵⁷ it having been determined that she was not competent to accept the assistance of the Minister of Health in accordance with s.9(3)(a) of that *Act*. She was eventually returned to her home with full-time nursing care, with BG, the attorney, continuing to act for her. LeBlanc, J. reviewed the history and legislative intent of the *NSPOAA* as well as its relationship to the *IPA* to determine whether the guardianship application would invalidate the pre-existing EPA.

His Lordship found that:

As a matter of policy, the *Powers of Attorney Act* thus provides a statutory expression of the importance of individuals being able to make for themselves significant decisions concerning their future welfare, medical care, or financial arrangements that will endure beyond mental incapacity, in effect, so that their own wishes will prevail over other's.¹⁵⁸

Further, he stated:

Using the 'implied repeal rule of paramountcy, and giving attention to the legislative intent behind the *Powers of Attorney Act*, I find that in cases of conflict between the two acts in question, the *Powers of Attorney Act* will prevail over

¹⁵⁶ *Isnor*, *supra* note 83

¹⁵⁷ *Supra* note 37

¹⁵⁸ *Isnor*, *supra* note 83 at para. 42

the *Incompetent Persons Act* to the extent of the inconsistency.¹⁵⁹

Finally, he found:

A valid power of attorney will thus prevail over other applications unless there are valid reasons for overriding it, for cause, in the best interests of the incompetent person.¹⁶⁰

LeBlanc, J. surveyed some of the case law concerning the standard by which the actions of the attorney would be measured in such circumstances. He cited with the approval the words of Hickman, C.J.T.D. in a similar Newfoundland case of *Re Hammond*, [1999] NJ No. 28 (T.D.), in which His Lordship stated at para. 31 that “[T]here must be strong and compelling evidence of misconduct or neglect on the part of the donee duly appointed under an enduring power of attorney before a court should ignore the clear wishes of the donor and terminate such power of attorney. LeBlanc, J. quotes from *Banton v Banton*, [1998] OJ No.3528 (Gen. Div.) where the court found the standard to be “good faith” and with honesty and integrity “(para. 156) for sons who held a power of attorney for property.¹⁶¹

LeBlanc, J. held:

For an attorney to be removed under the *Powers of Attorney Act*, the court must thus gauge Ms. Griswold’s duty towards Mrs. Isnor according to her abilities and remove her only upon a finding of misfeasance or compelling evidence of misconduct or neglect. The evidentiary requirement is consistent with the policy underlying the *Powers of Attorney Act* that respects donors’ ability to select a donee and grant to him or her powers of their choosing.¹⁶²

¹⁵⁹ *Ibid* at para. 45

¹⁶⁰ *Ibid* at para. 46

¹⁶¹ *Ibid* at para. 59

¹⁶² *Ibid* at para. 60

Leblanc, J. stated that: “The standard for removal is not that the care and attorney gives is the best available, or the most financially or medically prudent, but that it is undertaken in good faith and for the donor’s interests.”¹⁶³ He found that BG had discharged her duties appropriately and thus there was no “cause” to remove her. He denied KG’s application for guardianship on the basis of his finding that the *NSPOAA* prevailed over the *IPA*.

*DB v JMJ*¹⁶⁴ is another case in which an application for guardianship was brought under the *IPA* where an EPA already existed. HMRE (the mother), while competent, executed an EPA in favour of her friend JMJ. Her family complained that they were not consulted by the attorney JMJ and were not provided with an accounting. The family, through daughter DB, applied for guardianship and alternatively, for an accounting from JMJ pursuant to s. 5(1)(a) of the *NSPOAA*. There was no dispute about the care and well-being of the mother, HMRE. In the course of the application under the *IPA*, she was found by two doctors to be incompetent. Bryson, J. noted *Re Isnor Estate* with approval.¹⁶⁵

Bryson, J. found that the only “cause” alleged by the family, that is, that JMJ failed to keep them informed and to provide an accounting did not meet the test to have her removed as attorney. He held that in the absence of misconduct or other evidence that the best interests of HRME were not being met, the donor’s appointment of her attorney should be respected.

¹⁶³ *Ibid* at para. 64

¹⁶⁴ [2010] NSJ No. 248 (QL) (SC)

¹⁶⁵ *Ibid* at para. 10

In *RH v. JD*,¹⁶⁶ Mr. Justice Scaravelli reached a different result than in the previous two cases, although still on the basis of the best interests of the donor. In this case, the daughter JD applied for guardianship under the *IPA* for her mother MEH, who had Alzheimer's, and for a declaration that the appointment of MEH's husband, RH, as attorney was not valid pursuant to the *NSPOAA*. RH contested the application. MEH had suffered from dementia, then Alzheimer's, since 2006. By 2009, in-home supports were required. In 2011, arrangements were made for MEH and RH to live with JD in her home. After three months, RH returned to his own home and wanted MEH to live there with him until she needed to be placed in a care facility.

Scaravelli, J. cited six factors from previous case law to be considered:

- 1) the ability of the applicant to meet the duties and responsibilities by Statute;
- 2) the wishes of the incompetent to the extent that such can be ascertained;
- 3) the history of the relationship of each applicant to the incompetent;
- 4) the probable result of the appointment of one applicant over the other;
- 5) the independent views of the personnel in the health care field;
- 6) the concerns and views of the other relatives of the incompetent.¹⁶⁷

Scaravelli, J. held that RH did not have the necessary capacity to carry out the duties imposed by the power of attorney, nor did he have the necessary insight or ability to meet the needs of MEH due to his own declining health. Thus, he appointed JD as MEH's guardian, finding that was in her best interests, having determined there was "cause" to remove RH as attorney.

¹⁶⁶ [2012] NSJ No. 146 (QL) (SC)

¹⁶⁷ *Ibid* at para. 6

Other cases under the NSPOAA have seen siblings or others relatives go after each other, alleging improprieties by the attorney and demanding restitution or the substitution of the attorney.

In *Legg v. Nicholson*,¹⁶⁸ Goodfellow, J. had to contend with two warring siblings and allegations of undue influence on the donor. In June 1996, Mrs. Legg, the mother, executed an EPA for her son, Legg and daughter, Nicholson to act as joint attorneys. At the same time, she executed a Will in which she left substantially all of her estate to both children equally and made them co-executors. In November 1996, the son had his mother open a joint bank account with him solely. In March 2007, the son transferred almost \$110,000 from the joint account to his own bank account and in June 1997, he transferred out another \$4000, taking the balance of the account after her death in August 1997. Mrs. Legg's doctor testified that she was experiencing progressive mental/cognitive deterioration in the fall of 1996 and that she lacked capacity from that time onwards. On June 11, 1997 she was found to be an "adult in need of protection" under the *APA*, s. 3(b)(ii). When the son applied for probate after Mrs. Legg died, Nicholson, the daughter, contested the matter and alleged undue influence and misconduct. Goodfellow, J. found that: "Mr. Legg committed an egregious breach of trust and theft of his sister's entitlement in accordance with the intention of their late mother as set out in her last will and testament"¹⁶⁹

Goodfellow, J. followed earlier case law as to the test to be applied in determining whether the gift of the joint bank account should be set aside on the basis of the doctrine of undue influence:

¹⁶⁸ [2002] NSJ No. 415 (QL) (SC)

¹⁶⁹ *Ibid* at para. 29

The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.¹⁷⁰

Goodfellow, J. found Mrs. Legg was in a vulnerable position when she went along with her son's request to open a joint bank account because she relied on him as her daughter lived some distance away, and found not just the potential for undue influence, but "actual domination."¹⁷¹

Goodfellow, J., ordered the son to pay the sister half of the proceeds of the joint bank account, half of another \$60,000 bank account plus other proceeds.

It can be said these case illustrate that the Courts take seriously the financial abuse of vulnerable older adults, and also subscribe to the notion that, wherever possible, the wishes of the donor as stipulated in an EPA be respected. In the cases of *Re: Isnor Estate* and *DB v JMJ, supra*, the Courts gave considerable weight to the intent of the *NSPOAA*, which is to respect a donor's ability to select an attorney in which he or she has confidence, and not to disturb that arrangement except where "cause" exists. This should be of some comfort to older adults in the process of doing their estate planning and contemplating the use of an EPA. They will know that if they choose their attorney wisely, and construct a carefully worded EPA, they should not have to suffer the indignity of a guardianship application when they can no longer manage their own affairs.

¹⁷⁰ *Ibid* at para. 22, citing *In Re Muttart et al. v Jones* (1985), 137 NSR (2d) 116 (NSSC)

¹⁷¹ *Ibid* at para. 23

(6) Amendments to the Nova Scotia *Adult Protection Act*: Regarding Financial Abuse

Nova Scotia's adult protection legislation, the *Adult Protection Act* ("APA"),¹⁷² which came into force in January 1986, requires mandatory reporting of suspected cases of abuse and neglect of persons sixteen years of age or older. At this time, there is no protection from financial abuse in the *APA*, although this is likely to change as a result of the passage of Bill 76, which is now the *Adult Protection Act (amended)*.¹⁷³ Coming into force of the amended *APA* is subject to proclamation, to allow the various government departments and agencies time to put in place regulations and an implementation plan for the investigation of financial abuse of seniors. Once proclaimed, the amended *APA* will have implications for attorneys and EPAs.

Bill 76 contains housekeeping and definition changes but its main purpose is to extensively amend the *APA* to allow intervention on the basis of "financial abuse" against person 65 years of age or older with a permanent mental incapacity.¹⁷⁴

A perplexing feature of the new legislation is that it restricts the class of older adults who will be protected from financial abuse to those 65 years of age or more. Financial predators and opportunists do not target only those vulnerable adults over the age of 65.

¹⁷² *Supra* note 39

¹⁷³ SNS 2013, c 13

¹⁷⁴ In the amended *APA*, Section 3(a) will read:

- a) "abuse" means one or more of the following:
 - (i) Physical abuse
 - (ii) Sexual Abuse
 - (iii) Emotional Abuse
 - (iv) **Where the victim of the abuse is sixty-five years of age or more and has a permanent mental incapacity, financial abuse** (emphasis added)

Once proclaimed, the amended *APA* will give the Minister of Health and Wellness (through the Adult Protection Services) greatly expanded powers to investigate and deal with situations where a person meets the requirements of being a victim of financial abuse. New provisions in Sections 10A through 10D allow the Minister to apply to the court for financial audit or forensic accounting orders for the financial records of the victim and the suspected abuser; exert entry and inspection powers; obtain search warrants to enter premises and take possession of relevant records and property-freezing orders where there has been or is likely to be substantial damage to the estate of the person or substantial loss to the person's estate.

The amended *APA* will also expand the powers of the court in situations where an application is made under Section 9 of the *APA* for an order declaring a person to be “an adult in need of protection”. The court may issue: a protective intervention order directed to any person who, in the opinion of the court, is a source of danger to the adult in need of protection; a temporary custody order appointing a temporary guardian for the adult or that adult's estate for a period of thirty days, which is renewable; or a supervision order directed to the substitute decision-maker of the adult in need of protection, which order may include terms and conditions related to that adult's estate. The new definition of “substitute decision-maker” in Section 3(h) includes a person who is legally authorized to act on behalf of an adult under, *inter alia*, the *NSPOAA*.

The amended *APA* also requires the police to assist the Minister performance of his or her duties under the Act. Upon the conclusion of an investigation into an allegation of financial abuse, the Minister may refer the results of the investigation to the police and the police may determine whether a charge is to be laid in respect of the allegation.

While these amendments may be a step in the right direction, questions remain. It is to be noted that there is no definition of “permanent mental incapacity” and no direction as to by whom and by what means it is to be determined in the amended *APA*. Another notable aspect of the legislation is that reporting of such financial abuse will be voluntary, not mandatory like the rest of the *APA*. A new Section 5(1B) reads as follows:

5 (1B) Every person who has information, whether or not it is confidential or privileged, indicating that an adult is in need of protection by reason only of being a victim of financial abuse may report that information to the Minister (emphasis added).

There are also issues of resources and training as one observer noted:

[M]ost protective services agencies, which are charged with investigating financial abuse cases, do not adequately train their caseworkers to handle the problem. Usually, adult protective services (APS) caseworkers either are trained as social workers or come from other public service agencies that emphasize the caregiving or social service aspect of elder care. While this kind of background equips APS workers to deal with abuse or neglect cases, it does not provide them with expertise in investigating financial cases involving the transfer of monies and properties from incapacitated or vulnerable adults.¹⁷⁵

Another question is how well-equipped will the police be to “assist” the Minister in discharging his or her duties under the amended *APA*. Police services have the same budgetary pressures as most public sector entities and may not have the staffing resources to provide careful consideration of cases referred under Section 15A rather than simply a cursory review to determine if a charge should be laid. The police will have to make such a determination in conjunction with the Public Prosecution Service’s Crown Attorneys. That, in turn, raises the question of how will the Crowns regard dealing with cases where the victim, as a condition precedent, must have a “permanent mental incapacity”? Will

¹⁷⁵ A. Paul Blunt, “Financial Exploitation: the best kept secret of elder abuse.” *Aging* 367(Spring 1996) 62

that person be a viable and dependable witness? If there is little likelihood of securing a conviction, the Crown will not wish to proceed with a charge or a trial. For the victim, there are all the considerations already canvassed in Section 3 of this chapter; in short, the victim may be fearful, reluctant or incapable of co-operating with the police and Crown Attorneys.

Amendments will have implications for attorneys acting under EPAs. For instance, if an allegation of financial abuse is made and proved against the attorney and the Minister refers the result of the investigation to the police to determine if charges should be laid, does the attorney still have authority to act or does the EPA somehow become null and void? If so, what happens to the donor's estate? If the donor is found to be "an adult in need of protection" due to the financial abuse, does the Minister have a responsibility to ensure that the person and estate of the donor are protected or is it left to the Office of the Public Trustee to make application for guardianship of the estate pursuant to the *IPA*? If that were to occur, it would completely negate the donor's wishes, made while still competent, to have someone of his or her own choosing manage his or her financial affairs. If the donor made provision for an alternate attorney in the EPA, would that person be allowed to step into the shoes of the impugned attorney and carry on according to the donor's wishes? What would be the appropriate forum in which to have these questions answered? At best the matter could be dealt with under the *APA*; at worst, there could be duelling applications under the *APA*, the *IPA* and the *NSPOA*, depending on which body i.e. the Minister or the Public Trustee, or individual wishes to protect the best interests of the donor.

Perhaps some of these questions and others will be answered in the regulations and implementation plan being worked on now by Government. Nevertheless, it is difficult to see how the amended *APA* will be an improved safeguard against financial abuse of vulnerable seniors by unscrupulous attorneys. As will be seen in Chapter 7, the Law Reform Commission of Nova Scotia in its Discussion Paper raises many questions about the amended *APA*'s shortcomings.

(7) Guardianship:

The *Nova Scotia Incompetent Persons Act* (“*IPA*”),¹⁷⁶ provides a process by which a person may be declared incompetent and a guardianship order granted in respect of that person and/or his or her estate, or both. Often, one individual is named guardian of both. In some instances, a family member is named guardian of the person while a financial institution or even the Public Trustee is named guardian of the estate. Where a guardianship order is made, the incompetent person loses virtually all control over decision-making in relation to his or her personal and financial affairs and there is no guarantee that his or her wishes will be respected. It has been said that guardianship should be pursued only as a last resort as “the process involved in obtaining a guardianship order is time-consuming and expensive, and stigmatizes the older adult”.¹⁷⁷

Further, as discussed above, Courts are loathe to nullify an EPA in favour of guardianship, absent a “finding of misfeasance or compelling evidence of misconduct or neglect.”¹⁷⁸ Absent such egregious behaviour, the donor’s wishes are to be respected.

¹⁷⁶ *Supra* note 84

¹⁷⁷ Soden, *supra* note 26 at 84

¹⁷⁸ *Isnor*, *supra* note 83 at para. 46

Thus, guardianship does not appear to be a viable safeguard from financial abuse by an attorney, except in the worst cases.

(8) Public Trustee:

In Nova Scotia, the Public Trustee's Office ("PTO") derives its powers from the *Public Trustee Act* ("PTA").¹⁷⁹ There is no specific obligation or power in the *PTA* to enable the PTO to step in when a complaint of financial abuse is made against an attorney under an EPA. Anecdotally, it has been suggested that if a person contacts the PTO with such a complaint, he or she is directed to contact a lawyer or the police.

If a donor of an EPA is mentally incapacitated and the attorney is removed or is no longer able to act and no alternate attorney is named, and there is no one else available to apply for a guardianship order under the *IPA*, the PTO may make application under that *Act* to be made the guardian of the incompetent donor's estate but not of the person.

It remains to be seen what expanded role the PTO may have as a result of the amendments to the *APA*, discussed above. If an allegation of financial abuse is founded against an attorney under the amended *APA*, it is not yet clear whether the PTO will be expected to step in to become the guardian of the estate of the donor.

(9) Practical Measures:

With careful thought and good legal advice during the estate planning process, the donor of an EPA can do some practical things to safeguard himself or herself from financial abuse by an attorney. A few measures are:

- Obtain good legal advice; there are commercially available EPA forms or kits a person can use to draft an EPA without a lawyer, but these are not

¹⁷⁹ RSNS 1989, c 379 (as amended)

recommended, particularly for those with large or complex estates. Spending a little extra money at the beginning of the estate planning process can likely prevent potential grief later;

- Choose the right attorney (and alternates, where applicable) with care and due diligence; if the donor's estate is relatively straightforward, it may be appropriate for a family member or trusted friend to act as attorney. If the estate is large and financially complex, consideration should be given to have a trust company act as attorney, perhaps jointly with the family member or friend. The trust company will charge a fee for this service, usually a percentage of the value of the assets under the attorney's control; however, such an arrangement adds another level of accountability for the donor. If a family member or friend is the attorney, be clear about remuneration, if any, for that person, as this has an impact on the standard of care expected of the attorney.
- Ensure as much as possible that remaining family members are comfortable with the choice of attorney, particularly if it is a family member – this can reduce discord;
- Ensure that the EPA document clearly and specifically sets out the donor's wishes and requirements, and contains sufficient accountability clauses for the attorney to abide by, such as providing an accounting at regular intervals to the donor or other designated person such as a monitor; have these clauses reviewed by the attorney with the donor to ensure the attorney understands his or her duties and responsibilities. Make certain that the EPA is clear about the

authority (limited or broad) being given to the attorney. Above all, verify that the donor understands the legal consequences of granting an EPA;

- Be aware of what assets the donor has and where they are located; do an inventory and leave a copy with a lawyer or financial advisor;
- Notify financial institutions and others, like accountants and financial advisors, of the existence of the EPA and the identity of the attorney, even leaving a copy with them;
- Periodically review and as required, update the EPA to ensure it continues to reflect the donor's wishes.

Chapter 5: Other Challenges to Protecting Older Persons from Financial Abuse

(1) Introduction:

Given the various factors, discussed in Chapter 1, that contribute to the prevalence of financial abuse of older persons, and given the potentially dire consequences of such abuse, do financial institutions have an obligation to their older clients to be on the “lookout” for irregular activity and to report it? Related to this is whether the amendments to the *Adult Protection Act*¹⁸⁰ will cause financial institutions to be more vigilant? Further, what role does the law on privacy and confidentiality play in this context?

(2) The Role of Financial Institutions:

Banks and other financial institutions can be seen both as part of the problem and part of the solution. To date, the financial industry has approached the issue of financial abuse of older adults with considerable caution, even though it has been observed that:

Banks and other financial institutions are viewed as well-positioned to recognize signs of financial abuse among their older clients and to provide appropriate counsel. Preventing fraud and assuring the legitimacy of banking transactions are legitimate interests of the banking and credit union industries.¹⁸¹

It has proved somewhat difficult to obtain useful data on how the financial industry is dealing with the issue of rogue attorneys exploiting their older clients. There is a reluctance to speak of specifics, other than to say it is on their “radar” and they are aware of the problem; however, it has been found that in the U.S., only about 0.4% of all reports received by Adult Protective Services come from banks.¹⁸²

¹⁸⁰ *Supra* note 39

¹⁸¹ Spencer, *supra* note 5 at 42

¹⁸² *Ibid*, at 43

Case law has established a bank's duty to investigate fraud based on the principles of negligence; however, there is little case law on the specific issue of fraud under an EPA.

One of the key cases on banker's liability for fraud is *Groves-Raffin Construction Ltd. et al v Bank of Nova Scotia et al.*¹⁸³ In that case, the defendant Bank had honoured a company cheque signed by Groves, an officer of the plaintiff company with bank signing authority, which cheque was made out in favour of the same Groves. The cheque was for a very large amount, for almost all of its funds. The Court of Appeal held that:

A banker's duty to his customer involves not only the primary and axiomatic obligation to carry out its function as a banker to honour and pay its cheques when funds are on credit, but to exercise such care as a reasonable banker would consider requisite to ensure that what is suspicious or questionable is queried. So, duty of care may involve in circumstances a duty to make inquiry. The test is an objective one, that of a 'reasonable banker'.¹⁸⁴

At trial in the same case, the court held that the bank had a duty under its contract with its customer to exercise "reasonable care and skill" in discharging its obligation with regard to operations within its contract and its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers.¹⁸⁵ These principles were followed in *Armstrong (Public Trustee of) v Byers et al.*¹⁸⁶ where the Court found the Bank of British Columbia had honoured a forged cheque presented by an attorney without making any inquiry and thus, did not discharge its duty to the donor to exercise reasonable skill and care.

¹⁸³ (1975) 64 DLR (3d) 78 (QL) (BCCA)

¹⁸⁴ *Ibid* at 90-91

¹⁸⁵ (1974) 51 DLR (3d) 380 (QL) (BCSC)

¹⁸⁶ [1986] B.C.J. No. 3184 (QL) (SC)

Similarly, in *J&F Transport Ltd. v Markwart et al.*,¹⁸⁷ the defendant Bank was found to have been negligent in failing to make inquiries. A company bookkeeper fraudulently opened a second account in the company's name, giving himself sole signing authority. He then misappropriated cheques payable to the company by depositing them into the second account and subsequently withdrew the funds. The bank breached its duty of care by failing to investigate when the account was opened.

Courts have not, however, provided banks with much direction as to how to detect fraud or what steps they can undertake to stop fraudulent activity that do not breach the donor's confidentiality. The next section considers whether customer confidentiality and privacy laws protect banks from having to take action when it comes to responding to complaints of suspected fraudulent activity.¹⁸⁸

(3) Privacy Laws and Confidentiality:

Canada's privacy laws, dealing with the use, collection and disclosure of personal information, exist at the federal, provincial and territorial level. Banks, which are considered a federal undertaking or business, fall under the jurisdiction of the *Personal Information Protection and Electronic Disclosure Act* ("PIPEDA"),¹⁸⁹ while many but not all provincial enterprises fall under provincial legislation, which in Nova Scotia is the *Freedom of Information and Protection of Privacy Act* ("FOIPOP").¹⁹⁰ Each will be reviewed separately.

¹⁸⁷ [1982] SJ No. 481 at paras. 16-17 (QL) (SC)

¹⁸⁸ Spencer, *supra* note 5 at 44

¹⁸⁹ PIPEDA, SC 2000, c 5 (as amended), s.2

¹⁹⁰ FOIPOP, SNS 1993, c 5 (as amended)

(a) *PIPEDA*:

The purpose of *PIPEDA* “is a balancing of the goals of, on the one hand, personal information protection, and on the other hand, enabling reasonable commercial practices with respect to the collection, use, and disclosure of personal information.”¹⁹¹ One observer has noted:

The general rule is that consent is required to disclose a person’s information. However, few laws create absolute rules and privacy law is no different: it is legal to disclose a person’s information without consent in various circumstances set out in section 7(3) of the Act.¹⁹²

The applicable portions of subsection 7(3) of *PIPEDA* are set as follows:

(3)...an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(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 ground 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,

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

(i) required by law

There has been concern expressed that these exceptions are insufficient to address situations where bank personnel suspect an older person is potentially the victim of

¹⁹¹ *PIPEDA*, *supra* sections 3 and 4

¹⁹² CCEL, “Financial Abuse” *supra* note 35 at 10

financial abuse and would like to disclose this information without the older person's consent.¹⁹³ Section 7(3)(d)(i) permits disclosure of personal information where a crime "has been, is being or is about to be committed" (emphasis added). There is nothing preemptive in this clause, to assist front line bank personnel who have a suspicion a crime may be committed by the attorney, for example, where an older bank client who frequents the bank regularly to pay bills and withdraw small amounts of money on her own suddenly appears with another person whom she introduces as her attorney and begins to withdraw significant sums of money on a regular basis and hands the cash over to the attorney. The bank teller may regard this obvious and sudden change in spending habits to be a "red flag" that something suspicious is occurring. However, no apparent crime is being committed; the older customer has sufficient funds to cover the larger withdrawals and does not appear to object to doing so. Does the teller alert his or her manager to these new developments? What does the manager do with this information? Is the manager bound to make inquiries of the client to determine if everything is alright, i.e. to exercise reasonable care and skill of a banker to ensure there is no fraudulent activity taking place? Or does the manager circumvent the customer entirely and contact a family member to alert them to the substantial change in banking habits? In so doing, would the manager be in breach of *PIPEDA*?

There are no easy answers to these questions. Adding to the uncertainty is the exception in section 7(3)(i) of *PIPEDA* where disclosure of personal information is permitted where "required by law". It has been suggested that this clause could permit disclosure without the older person's consent to report abuse where it is mandatory to

¹⁹³ *Ibid* at 9-10

report financial abuse.¹⁹⁴ Unfortunately, in Nova Scotia, it is not mandatory to report financial abuse and even the new provisions of the *Adult Protection Act* (“*APA*”)¹⁹⁵ will only make reporting of suspected financial abuse voluntary, not mandatory in restricted circumstances. It also remains to be seen if the Minister’s expanded powers of investigation of allegations of financial abuse, search and seizure and property-freezing orders, once proclaimed, will require the banks and other financial institutions to cooperate, particularly if the police are assisting the Minister in discharging his duties under the *APA*.

Another possible avenue to safeguard an older person from financial abuse of a rogue attorney may be found in section 7(3)(e) of *PIPEDA*, where disclosure of personal information is permitted “because of an emergency that threatens the life, health or security of an individual...” If broadly construed, this clause could enable a bank manager to conclude that sudden changes in banking habits of an older customer which seriously deplete the customers assets, do constitute an “emergency” that threatens the “security” of the older person. It may be a bit of a stretch but perhaps enough to permit the bank manager to contact the older customer’s family or the police to alert them to the situation without fear of breaching that customer’s privacy and being in contravention of *PIPEDA*.

In speaking of some of the shortcomings of *PIPEDA*, one observer stated: “In terms of financial abuse...the ability to act is very much tied to the occurrence of a criminal act”.¹⁹⁶ Recently, there was anticipation that this situation might change with the

¹⁹⁴ *Ibid* note 13 at 10

¹⁹⁵ *Supra* note 39 not yet proclaimed

¹⁹⁶ CCEL, “Financial Abuse”, *supra* note 35 at 11

introduction of Bill C-12, an *Act to amend the Personal Information Protection and Electronic Documents Act (Safeguarding Canadians' Personal Information Act)* by the Minister of Industry in September 2011. The Bill would have amended subsection 7(3) of *PIPEDA* to permit disclosure of information in circumstances to prevent, detect or suppress fraud, or if there were reasonable grounds to believe that an individual has been, is or may be the victim of financial abuse.¹⁹⁷ For the first time a notion of prevention was being inserted into *PIPEDA*, even in the absence of crime.¹⁹⁸ While the Bill had the backing of the financial industry and other interested groups, it did not progress past First Reading and died on the Order Paper when Parliament was prorogued.¹⁹⁹

(b) Nova Scotia Legislation:

The Nova Scotia *FOI/OPA*²⁰⁰ governs the collection, use and disclosure of personal information in the provincial public sector, which includes hospitals among others.²⁰¹ The key provision in *FOI/OPA* dealing with the disclosures of personal information is section 27, which reads in part:

- 27 A public body may disclose personal information only
- (a) in accordance with this Act or as provided pursuant to any other enactment;
 - (m) to a public body or law-enforcement agency in Canada to assist in an investigation
 - (i) undertaken with a view to a law-enforcement proceeding, or

¹⁹⁷ Spencer, *supra* note 5 at 44

¹⁹⁸ CCEL, "Financial Abuse", *supra* 33 at 11

¹⁹⁹ A similar Bill was tabled in the Senate of Canada in April 2014 but has not proceeded.

²⁰⁰ *Supra* note 190

²⁰¹ Trust companies incorporated under the provincial *Trust and Loan Companies Act* or credit unions under the *Credit Union Act* would be governed by *PIPEDA*, as it applies in provinces where no law has been created to deal with confidential information in the possession of private bodies.

(o) if the head of a public body determines that compelling circumstances exist that affect anyone's health or safety;

Like *PIPEDA*, under *FOI/POPA*, an individual can consent to the disclosure of his or her personal or health information.

The prohibitions in *FOI/POPA* would not apply in a situation, for example, where a health professional working in a hospital, such as a nurse or social worker, becomes aware or has suspicions that an older adult is being financially exploited by his or her attorney. This is because the Nova Scotia Government brought in protective legislation for vulnerable persons with the *Protection of Persons in Care Act* (“*PPCA*”).²⁰² It applies to hospitals, residential care facilities, nursing homes or homes for the aged or disabled persons under *the Homes for Special Care Act*,²⁰³ or to an institution or organization designated as a “health facility” by the regulations (s.2(a)). The *PPCA* places a duty on health facility administrators, employees and volunteers to report the abuse to the Department of Health and Wellness for investigation and follow-up. This duty to report applies even if the information on which the person's belief is based is confidential and its disclosure is restricted by legislation or otherwise, but it does not apply to information that is privileged because of a solicitor-client relationship (s.5(2), s.6(2)). Thus, in the example used above, the health care professional would be protected if he or she has a reasonable belief that the patient is, or is likely to be abused.

Another promising tool in the effort to facilitate disclosure of potential or actual wrongdoing by an attorney, if proclaimed, is the new Section 14A of the *APA*. This section allows an investigation into an allegation that a person is sixty-five years of age or more, has a permanent mental incapacity and is the victim of financial abuse, the Minister has wide-ranging powers to obtain information about that person and his or her estate from both a public body (as defined by *FOI/POPA*) or perhaps more significantly, under subsection 14A (2)(a), “from a person carrying on a business”. This is very broad and not defined in the *APA*. It could be used to capture banks, credit unions and trust companies, investment dealers and financial managers who might otherwise attempt to hide behind client confidentiality in cases of financial abuse. It may not impose a positive duty on

²⁰² SNS 2004, c 33 (as amended) – came into force in 2007

²⁰³ RSNS 1989, c 203 (as amended)

such entities to report the abuse but it does “open up the books” to investigators under the *APA* to determine if there has been abuse by an attorney.

(c) Other Confidentiality Hurdles:

(i) Solicitor –Client Privilege:

Solicitor-client privilege is often cited as a reason not to disclose that an older adult may be a victim of financial abuse at the hands of his or her attorney. In *Descoteaux v Mierzwinski*,²⁰⁴ the Supreme Court of Canada determined that “Solicitor-client privilege is a legal principle that ensures the confidentiality of all information clients give their lawyers in order to obtain legal advice and given in confidence for that purpose.”

According to one source,

“A lawyer is required to maintain solicitor-client confidentiality at all times, unless:
(1) the client consents to disclosure,
(2) the exceptions regarding criminal communications, public safety or the right to make full answer and defence apply, or
(3) disclosure is authorized or required by another law.”²⁰⁵

In *Smith v Jones*,²⁰⁶ the Supreme Court of Canada recognized the solicitor-client privilege as being of fundamental importance to the administration of justice, and that the privilege allows clients seeking legal advice to speak freely to their lawyers with the knowledge that their information will not be disclosed without their consent. As noted above, the *PPCA* does not apply to information that is privileged because of a solicitor-client relationship. Even in the amended *APA* protects the privilege in information gathering (s. 14A(4)).

(ii) Other Professionals and Advisors:

Professionals who work in the health care and social services fields have obligations under regulatory and licencing schemes or codes of conduct not to disclose confidential personal and health information regarding their patients or clients. This may

²⁰⁴ (1982) 70 CCC 385 (SCC)

²⁰⁵ CCEL, “A Practical Guide” *supra* note 4 at 13

²⁰⁶ [1999] 1 SCR 455 at paras. 35 and 46; *Ibid* at 13

appear to conflict with other duties, such as to report abuse. However, as noted earlier, privacy laws are not absolute and exceptions do exist for these professionals. They would fall under the same *FOIOPA* and *PPCA* exceptions, already explored above.

After surveying the regulatory landscape for such professionals, one observer noted:

In summary, professional licencing rules do not pose a barrier to either exchanging information or reporting abuse in the context of practice. Rather rules that apply to the professions are consistent with the laws that apply to adult protection and the confidentiality of personal and health information. Informed patient or client consent is always the ideal. Disclosure should also be limited as much as possible: only as much information as is necessary in order to address concerns regarding abuse or neglect should be disclosed. However, personal and health information may be disclosed without consent where authorized by adult protection and related legislation.²⁰⁷

Other professionals who work with older clients, such as accountants, investment dealers and financial managers are subject to regulatory legislation or code of ethics that impose strict confidentiality requirements regarding confidential client information. Often they do not have a duty to report any suspicious activity under such regimes. However, it is contended that they would have an obligation to disclose under *FOIOPA* or *PIPEDA* for the reasons discussed earlier.

(4) Summary:

While there are challenges to protecting older persons from financial abuse, these are not as insurmountable as they may first appear. Those in the banking industry do have the tools, under subsection 7(3)(i) of *PIPEDA*, to step in when they suspect wrongdoing by an attorney; they simply must have the fortitude to use them. Bankers were among those who supported the failed amendments to *PIPEDA* in 2011, so they do recognize there is a problem for older persons and financial abuse. The *PPCA* is another useful tool, placing a positive duty on caregivers to report suspected abuse in institutional settings. If

²⁰⁷ Canadian Centre for Elder Law, “The Counterpoint Project - Discussion Paper – Moving from Scrutiny to Strategy: An Analysis of Key Canadian Elder Abuse and Neglect Cases.” (2011) Canadian Centre for Elder Law <<http://www.bcli.org/ccel>> at 62

given a broad and purposive interpretation, *FOIPOPA*, along with *PIPEDA*, can allow disclosures of suspected abuse by other professionals who have dealings with older persons. It remains to be seen what assistance may result from the anticipated expanded investigatory powers in the *APA* but they are bound to be an improvement over the *status quo*.

Chapter 6: Developments and Alternatives

(1) Introduction:

As stated in Chapter 2, most Canadian jurisdictions introduced legislation recognizing enduring powers of attorney (“EPAs”) by the 1970s and 1980s. Much of it was based, including the *NSPOAA*, on the *Uniform Powers of Attorney Act* adopted by the Uniform Law Conference of Canada in 1978²⁰⁸. “This EPA legislation contains few formalities and safeguards and is very brief.”²⁰⁹ The *NSPOAA* is a good example of such modest legislation.

This chapter will examine and critique the evolution of a number of safeguards and alternatives aimed at reducing or responding to the financial abuse of older adults, particularly those who have become mentally incapacitated. These measures include expanded EPA legislation, tougher sentencing guidelines, Joint Accounts, Representation and Co-decision-making agreements, Restorative Justice initiatives, Elder mediation and some proposed solutions put forward by academics.

(2) Expanded EPA Legislation:

By the 1990s, some provinces, notably Ontario and British Columbia, began to realize that more formalities and enhanced safeguards were required to protect those using EPAs from abuse, mostly older adults who were mentally incapable.

²⁰⁸ Law Reform Commission of Nova Scotia, “Final Report,” *supra* note 46 at 7

²⁰⁹ *Ibid*

(a) Ontario Developments:

Following a comprehensive review of capacity and substitute decision-making known as the Fram Report,²¹⁰ the Ontario government enacted the *Substitute Decision Act, 1992*,²¹¹ (“*the SDA*”) but did not proclaim it in force until April 3, 1995. The *SDA* is very comprehensive piece of legislation that in many respects goes far beyond the scope of this thesis, which is to examine whether existing safeguards from EPA abuse are sufficient to protect older persons. The *SDA* deals with continuing powers of attorney for property; management of property by the Office of the Public Guardian and Trustee and its alternates; court appointments to manage property; powers of attorney for personal care and related matters.²¹² Part 1 of the *SDA* made significant changes to the formalities, duties and liabilities of an attorney under a continuing power of attorney for property (among other things),²¹³ and codified much of the common law duties and responsibilities of the attorney.

Section 32 of the *SDA* stipulates that the attorney is “a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit” (s.32(1)). The *SDA* expands upon an attorney’s common law duties and sets out duties that can be described as facilitating the autonomy and self-determination of the incapable person. For example, the attorney must explain his or her powers and duties to the incapable person (s.32(2)); the attorney must encourage the incapable person to participate, to the best of his or her abilities, in the attorney’s

²¹⁰ Final Report of the Advisory Committee on Substitute Decision-Making for Mentally Incapable Person,” (1998) Chair: Stephen v. Fram, QC. [the “Fram Report”]

²¹¹ *Supra* note 68

²¹² Sweatman, *supra* note 44 at 40

²¹³ *Ibid*; a continuing power of attorney for property is largely the equivalent of a Nova Scotia EPA

decisions about the property (s.32(3)); the attorney shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person (s.32(4)); and the attorney shall consult from time to time with those aforementioned persons as well as persons from whom the incapable person receives personal care (s.32(5)). By imposing such duties on the attorney, the likelihood of the incapable person becoming isolated and thus, more vulnerable to abuse, is lessened.

Other statutory duties include keeping accounts of all transactions involving the incapable person's property (s.32(6)) and to prepare an annual report.²¹⁴ The standard of care expected of an attorney under the *SDA* depends on whether or not the attorney is receiving compensation for managing the property. Pursuant to s.32(7), an attorney who does not receive compensation must exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs. If the attorney does receive compensation, s.32(8) provides that the attorney shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

Pursuant to s.33(1), an attorney is liable for damages resulting from a breach of his or her duties; however, if the court is satisfied that an attorney who committed the breach of duty acted honestly, reasonably and diligently, it may relieve the attorney from all or part of the liability, in accordance with s.33(2). Sweatman pointed out that: "Despite s.32, there is little in the statute (as compared to s.49 of the *Estates Act* which applies to estate trustees) that deals with misconduct or negligence. It appears to remain in the inherent

²¹⁴ *Ibid* at 79

jurisdiction of the court to deal with such behaviour, perhaps by analogy to those in fiduciary positions.”²¹⁵

The *SDA* has been amended a number of times over the past several years to make it more practical. Most recently, there have been three attempts by way of Private Members’ Bills, to make significant amendments to it. On June 1, 2009, Member of Provincial Parliament (“MPP”) John O’Toole tabled Bill 189, *An Act to Amend the Substitute Decisions Act, 1992 with respect to powers of attorney*, which added, *inter alia*, two key provisions to make attorneys under a continuing power of attorney more accountable by firstly, requiring annual accounting information to be provided to the Office of the Public Guardian and Trustee and secondly, for the Public Guardian and Trustee to establish and maintain a registry of attorneys under a continuing power of attorney for property, which would record contact information for the attorney as well as any restrictions on the attorney’s authority and the date the attorney’s authority took effect. This kind of registry would be of a repository nature and would not validate the execution and terms of the instrument. Specific members of the donor’s family could request the information from the Public Guardian and Trustee. Bill 188 was passed on Second Reading and referred to the Standing Committee on Justice Policy, from which it never emerged. MPP O’Toole put forward substantially the same Bills in March 2010 and again in February 2013 but to no avail.

If one were to speculate on the reasons why Mr. O’Toole’s Bills failed to gain traction with his MPP colleagues, the answers are likely money and resources. What he proposed would have placed a tremendous burden on the Office of the Public Guardian

²¹⁵ *Ibid* at 90

and Trustee, which would have had to add more staff resources to manage the oversight of attorneys acting under a continuing power of attorney for property. There may have also been policy considerations at work. For example, continuing powers of attorney for property are designed to be a donor's private and autonomous way of planning for a time when he or she can no longer manage financial affairs or property. To establish a registry and have a bureaucratic functionary manage the flow of private information concerning the donor's affairs appears to run contrary to the purpose for which the instrument was intended.

The amendments proposed by MPP O'Toole were undoubtedly founded upon good intentions to make attorneys more accountable. However, they were really only half-measures. To require an annual accounting from the attorney to the Office of the Public Guardian and Trustee without giving that body the power to investigate suspicious accounts renders the requirement somewhat meaningless. True, it may dissuade some attorneys from engaging in improper behaviour, knowing they must file the accounting but it still requires the attorneys to operate on the "honour" system. To set up a registry that is really only a repository of continuing powers of attorney for property does not amount to much of a safeguard. It should have gone further to set up a system of validating the instruments in respect of formalities of execution as well as terms and restrictions' placed on the attorney's authority. That would provide greater assurance to family members that they would be dealing with a duly appointed attorney and on what terms.

Viewing the *SDA* as a whole, as it has evolved over the years, it can be said to be a vast improvement over the patchwork of legislation that preceded it.²¹⁶ Sweatman captures the earlier scheme in the following quote from the Fram Report:

While these laws do not technically conflict with one another, no attempt was made in Ontario to develop a principled approach to substitute decision making. Instead, each statute was enacted and amended to meet particular concerns that have arisen from time to time. One result is that there is a lack of coherence in the rules governing when and how persons may have their rights to control their lives or property removed and the powers and duties of those who act as substitute decision makers.²¹⁷

Sweatman observed that the *SDA* “reflects the values of no unnecessary intervention, self-determination and access. It reflects the fundamental rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*.”²¹⁸ This is the type of legislation Nova Scotia needs.

b) British Columbia Developments:

Since 1978, British Columbia has authorized the use of EPAs. Just over a decade later, the review process began, in part due to the recognition that more safeguards were needed to prevent the abuse and misuse of EPAs.²¹⁹ In 2002, the government released the “McClellan Report” or the “Review of Representation Agreements and Enduring Powers of Attorney”,²²⁰ which was a catalyst for significant changes to the province’s *Power of*

²¹⁶ These included: *Mental Incompetency Act*, RSO 1980, c 264; *Mental Health Act*, RSO 1980, c 262; *Developmental Services Act*, RSO 1980, c 118; and the *Powers of Attorney Act*, RSO 1980, c 262

²¹⁷ Sweatman, *supra* note 44 at 36

²¹⁸ *Ibid* at 23

²¹⁹ Cunningham, “Financial Abuse” *supra* note 1 at 14

²²⁰ A. J. McClellan, Q.C. “Review of Representation Agreements and Enduring Powers of Attorney (2002), online: <<http://www.ag.gov.bc.ca/public/McClellan-Report.pdf>>

Attorney Act (“*BCPOAA*”).²²¹ It took several more years for the changes to come into effect, which was on September 1, 2011. According to Cunningham,

...a legislative response requires a balancing act. For the majority who use the document honestly and appropriately, too many safeguards can make things onerous. However, changes were required to deal with the minority who abuse and misuse the EPOA, whether deliberately or because of a lack of understanding of the true nature of the document and the attorney’s responsibilities.²²²

Part 2 of the *BCPOAA*, as amended, sets out new rules for the formalities of an EPA in terms, *inter alia*, of who may be a witness as well as the requirement that both the donor and the attorney must sign the document. It codifies much of the common law in relation to the attorney’s duties, responsibilities and rights.²²³ Section 19 sets out in some detail the duties of the attorney, who is expected to “exercise the care, diligence and skill of a reasonably prudent person” (s.19(1)(6)). The attorney must also make him or herself aware of not only the statutory duties and powers (set out in Section 20) but also any limits the donor may have placed on the attorney’s powers and authority in the EPA itself.²²⁴

Other safeguards include requiring the attorney to act in the donor’s best interests, “taking into account the adult’s current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney” (s.29(2)), and must involve the adult in decision-making “to the extent reasonable” (s.19(3)(c)). The attorney must keep the donor’s property separate and keep records of decisions and transaction (s.19(1)(d)). Gifts, donations and loans may be made by the attorney only in accordance

²²¹ *Supra* note 112

²²² Cunningham, *supra* note 1 at 14

²²³ *Ibid*

²²⁴ *Ibid* at 15

with the legislation and regulations (s.20(1)) and may only receive a gift or loan if the EPA specifically allows for it (s.20(2)(3)).

To support attorneys who may, through inadvertence or lack of knowledge, be floundering, s. 20(4) enables the attorney to retain the services of a “qualified person” to assist the attorney in discharging his or her prescribed duties. Attorneys must not be compensated unless the EPA expressly authorizes the compensation and sets out the terms (s. 24).

A key provision in the *BCPOAA* is s. 34(2) which enables “any person” to make a report to the Public Guardian and Trustee if there is reason to believe that the attorney abusing or neglecting the donor, is incapable of acting as an attorney or otherwise failing to comply with the EPA or the statute. After reviewing the report, the Public Guardian and Trustee has options, including conducting an investigation to determine the validity of the report. Pursuant to s.35, the Public Guardian and Trustee may undertake an investigation of its own volition. If an investigation bears out the allegations, a Court may change, revoke or terminate the EPA but must consider the wishes, instructions, beliefs and values of the donor and must not make a contrary order unless the adult is incapable and the order is in the best interests of the adult (s. 36(5) and (6)).

Another noteworthy feature of the *BCPOAA* is that the authority of an attorney ends, *inter alia*, if the attorney is convicted of a prescribed offence or an offence in which the adult is the victim (s. 29(2)(d)(v)). (Emphasis added)

Inquiries to the Public Guardian and Trustee in British Columbia have revealed there are still growing pains with the revised *BCPOAA*.²²⁵ A perhaps unintended aspect of the new laws is the issue of accessibility. It is now more expensive for older adults to have EPAs prepared and executed in accordance with the revised legislation. While not prohibitive, it may still deter some older adults from spending the extra money to have the EPA done properly, thus depriving them of an important estate planning tool. To remedy this issue, perhaps the private bar could be encouraged to more *pro bono* work for older clients wishing to have an EPA drafted. Also, the BCCEAS might be called upon to offer its services.

Other aspects of the legislation that have generated feedback or comment from attorneys include complying with the Section 19 duties of an attorney as well as the issue of compensation, if such is being authorized for the attorney by the donor. The question has arisen whether it should be included in the EPA itself or in a separate document that is incorporated by reference. If, for example, the EPA must be registered to effect a property conveyance, an attorney may not wish his or her compensation to be made part of the public record at the Land Titles registry. The gifting provisions have been identified as another area of concern in terms of whether the regulatory thresholds are adequate. Attorneys may benefit from education sessions on their new duties, perhaps put on by the Public Guardian and Trustee or the province's public legal information organization. In terms of attorney compensation, it makes sense to have it set out in a separate document that is incorporated by reference. It may take time to determine if the gifting provisions

²²⁵ Telephone conference with Kathleen Cunningham, Manager, Legal and Legislative Projects, Public Guardian and Trustee of British Columbia on March 11, 2014.

are adequate; however, since they are in the regulations, the process to change them is fairly straight forward.

In terms of reports made to the Public Guardian and Trustee about attorneys, it is estimated the office receives approximately 1200 call per year. Many reports are resolved informally by the office, by way of direct communication with the attorney.

Approximately a quarter of the calls/reports require more formal intervention by the Public Guardian and Trustee. There is no definitive data available on the number of attorneys who have had their authority revoked.

Overall, the revised *BCPOAA* appears to be a vast improvement on the very basic legislation that preceded it. At least now, both donors and attorneys have the opportunity to know their respective rights and responsibilities in some detail. There are still some gaps; for example, there is no formal process to require the attorney to notify any interested parties that the donor is no longer capable and the attorney is proceeding to act. British Columbia is not alone in failing to have such a provision, as will be discussed in Chapter 7. Given the length of time the most recent amendments took to come to fruition, it is unlikely the *BCPOAA* will be amended again anytime soon.

(3) Amendments to the *Criminal Code of Canada*:

It was noted in Chapter 4 that there is no crime of “elder abuse” or “elder financial abuse” in the *Criminal Code*.²²⁶ However, the Federal government did take steps in 2012 to address the issue of elder abuse by passing Bill C-36, the *Protecting Canada’s Seniors Act*,²²⁷ which became law in January 2013. This Act amends the *Code’s* sentencing provisions, specifically paragraph 718.2(a) by adding age and other personal

²²⁶ *Supra* note 27

²²⁷ SC 2012, c 29

circumstances of the victim such as health and financial situation as aggravating factors, which would warrant harsher penalties on the perpetrators. The impetus for this amendment came from the June 3, 2011 Speech from the Throne, which stated in part, “Our Government will continue to protect the most vulnerable in society and work to prevent crime. It will propose tougher sentences for those who abuse seniors.”²²⁸ It is not clear how this new provision will work to prevent crime, other than in accordance with the criminal law principles of general deterrence in sentencing. Since these provisions have been in effect for little more than a year, it is not yet known whether or how they will influence sentencing or deter crime against older persons. However, they do recognize the significant impact crime can have on older persons.

(4) Alternatives to Enduring Powers of Attorney:

a) Joint Accounts:

Financial and estate planners, as well as financial institutions, will often advise their older clients that instead of executing an EPA, which can be expensive, a more affordable and convenient alternative is to open a joint account with a spouse, adult child or friend. It is suggested as “a means to simplify estate administration, avoid probate fees and/or make it easier to look after a senior’s financial affairs.”²²⁹ The joint account can consist of cash in a bank account or investments. With joint accounts, either party has the legal right to deposit, withdraw or otherwise deal with the account, regardless of which party originally contributed all or most of the assets. Joint ownership of an account carries with it the right of survivorship, which means when one of the owners dies; the survivor

²²⁸ Department of Justice, “Backgrounder on Elder Abuse Legislation.” Online: <<http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc - 32716.html>>

²²⁹ Cunningham, *supra* note 1 at 17

acquires legal title to the remaining assets. Therefore, the assets in a joint account do not form part of the deceased person's estate, to be distributed according to that person's will.

However, not every arrangement understood by a lay person as a jointly held account will be construed as such by the courts; a key issue will be the true intent behind setting up a joint account, and whether a right of survivorship was intended. In *Pecore v Pecore*,²³⁰ a father gratuitously transferred his assets into his and his adult daughter's joint names. The daughter's estranged husband who was a beneficiary under the father's will argued that this was not a true joint account. The Supreme Court of Canada held that the presumption of resulting trust was the general rule for gratuitous transfers and the onus was on the daughter to prove, on a balance of probabilities, that a gift of what remained in the accounts was intended for her and did not form part of the father's estate to be distributed according to his will; however, there was strong and ample evidence adduced by the daughter to show the father's intention of a gift of the balance in the joint accounts and thus rebut the presumption.

In light of the principle from *Pecore*, an older person must take care and obtain good legal advice in choosing to transfer assets into a joint account "for convenience" with an adult child. Good documentation as to intention is crucial, particularly if there are other children who will not benefit to the same extent. Litigation could ensue over the ownership of the assets in the joint account, which could be prolonged, expensive and divisive for the family. There are other reasons, according to Soden, to be prudent:

There may be many instances where a reckless rush into joint tenancy without proper advice may trigger unexpected and negative tax consequences. If the joint owners are

²³⁰ [2007] 1 SCR 795 (SCC); cited with approval in *Comeau v Gregoire*, 2007 NSCA 73 (CanLII)

spouses, there will be no tax consequences when one spouse dies and the property passes to the survivor. If the joint owners are not spouses, there may be a deemed disposition which may trigger tax consequences. Therefore, caution should be exercised before transferring assets into joint ownership with a non-spouse to avoid probate fees.²³¹

While a convenient device, a joint account may leave an older person more susceptible to financial abuse. Risks include the possibility of coercion or undue influence at the outset; not fully understanding the legal implications of setting up the joint account;²³² losing control over the funds in the account to a spendthrift joint account holder. Further, if the joint account holder and his or her spouse separate or divorce, the money in the joint account could be disputed in those proceedings; if one of the account holders has financial problems or declares bankruptcy, creditors could make claims on the money in the account; and perhaps most significantly, if there is a falling out between account holders, the financial institution may require both to give approval to remove the other from the account.²³³ If there is a suspicion of financial abuse against the older joint account holder, it may be difficult for investigators to have financial institutions produce information about the account without the consent of the other joint account holder,²³⁴ as financial institutions will cite client privacy considerations.

All things considered, there is less risk to an older person to execute an EPA rather than open a joint account with another, particularly if the chosen joint account holder is

²³¹ Soden, *supra* note 6 at 74

²³² Cunningham, *supra* note 1 at 18

²³³ Forum for Federal Provincial and Territorial Ministers Responsible for Seniors, “What every older Canadian should know about Powers of Attorney (for financial matters and property) and Joint Bank Accounts” (Ottawa: 2013) online:

<[http://www.seniors.gc.ca/eng/working/fptF/brochure attorney.pdf](http://www.seniors.gc.ca/eng/working/fptF/brochure_attorney.pdf)>

²³⁴ Cunningham, *supra* note 1 at 17

one of many siblings and there is a clear intention of the parent to benefit one child with the account balance on death rather than have it form part of the residue of the person's estate, to be dealt with in accordance with the terms of a Will. There is little or no oversight on joint accounts. At least with an EPA, there is the possibility of a donor supervising the attorney's actions while still capable; and if the donor is incapable, an interested party, or in some instances any person, may apply to the courts for the attorney to produce an accounting. Some provinces have further safeguards to protect the interests of the incapable donor, although Nova Scotia is not one of them.

b) Representation and Co-Decision-Making Agreements:

In some instances, an older person may require assistance with the activities of daily living but fall short of the need for the extensive powers in an EPA. The Western Provinces, in particular British Columbia and Saskatchewan, have anticipated such a need, which serves as a third option besides an EPA and full court-appointed guardianship, thus preserving some degree of autonomy and self-determination of the older person in managing his or her affairs.

The provinces that utilize such an option, which is a creature of statute, each take a slightly different approach but have many principles in common, such as the "best interests of the adult" and the "least intrusive" option. The "gold standard" of such legislation is said to be the British Columbia *Representation Agreement Act*.²³⁵ The United Nations Secretariat for the Convention on the Rights of Persons with Disabilities

²³⁵ RSBC 1986, c 405 (as amended)

“hailed British Columbia as one of the leading jurisdictions in incorporating supported decision-making into law, policy and practice”, and promoted the *Act* as a model.²³⁶

The British Columbia legislation in Section 7 enables an adult to make a representation agreement to either help the adult make decisions, as a supported or co-decision-maker, or make decisions on behalf of the adult, as a substitute decision-maker, depending on their individual needs, on the following areas: personal care, routine management of the adult’s financial affairs (including paying bills, receiving and depositing income, purchasing food and lodging and other personal care services and making investments), and obtaining legal services for the adult. Anything more involved than the foregoing would require a guardianship order by the court, for example, the conveyance of property.

There is a lower threshold for capacity for an adult to make a representation agreement, as opposed to an EPA, as set out in Section 8. Even if the adult is incapable of making a contract, managing his or her health or legal matters or routine financial matters, he or she may still enter into a representation agreement. One might think this could leave the adult vulnerable to the possibility of abuse by the representative; however, there is further provision in Section 12 that the adult must appoint another person as monitor to oversee the activities of the representative, if the representative is assisting or making decisions in respect of routine financial matters. Pursuant to Section 16, the representative also owes fiduciary duties to the adult, and the monitor may, if he or she has reason to believe that the representative is not complying with his or her duties, make a report to the

²³⁶ “Discussion Paper,” *supra* note 61 at 234

Public Guardian and Trustee of British Columbia, which will investigate. The Public Guardian and Trustee may also investigate on its own initiative.

This is not to say that a representative may not attempt to take financial advantage of an adult under a representation agreement but at least there are checks and balances in the person of the monitor, as well as the Public Guardian and Trustee. That is more than can be said of an older person who has a joint account with someone else, where there is virtually no oversight.

Saskatchewan's legislative scheme is more complicated than the British Columbia *Act*. The *Adult Guardianship and Co-Decision-Making Act*²³⁷ provides that an application for a personal co-decision-maker or a property co-decision-maker may be made to the Court of Queen's Bench. If the Court finds it to be in the best interests of the adult, whose capacity is impaired and requires assistance, to have such a co-decision-maker, instead of a court-appointed guardian, it will so order. There appears to be an effort to give priority to the "least intrusive" option when it comes to intervening in the affairs of the incapacitated adult but there is less opportunity for the adult to customize the intrusion as there is in the British Columbia *Act*, so there is less deference paid to the concepts of autonomy and self-determination of the adult.

No such legislation exists at this time in Nova Scotia, although the Commission in its Discussion Paper, *infra*, raises the issue of pursuing such arrangements in this province.

²³⁷ SS 2000, c A-5.3

(5) Restorative Justice Initiatives:

Restorative justice as used here refers to initiatives relating to criminal matters while elder mediation, discussed in the next section, is utilized for mainly civil matters.

It has already been noted in Chapter 4 that older adults are reluctant to pursue remedies for financial abuse in the criminal justice system because it is considered too adversarial. If the perpetrator of the abuse is a family member, in particular, there is even more reluctance to pursue a criminal case, out of fear of retribution, fear of being denied access to grandchildren, ongoing dependence on the abuser or even embarrassment about being abused by a person the older adult trusted or perhaps brought up. “It is suspected that a small portion of abuse of older adults ever comes to the attention of the justice system.”²³⁸

According to a source at the Nova Scotia Department of Seniors,²³⁹ most older victims of financial abuse just want the abuse to stop and are less interested in criminal proceedings or restitution. They wish to have a continued relationship with the abuser but without the abuse. They do not want to have further family discord or upheaval.

It has been suggested that restorative justice approaches may be appropriate for dealing with certain types of abuse because it responds to crime in ways that restore relationships and build community.

First, some definitions according to Groh:

A restorative justice approach considers abuse as a violation of people and relationships rather than a violation of the law. This holistic approach focuses on a wider range of considerations, including the need to speak the truth; giving

²³⁸ Beaulieu et al., *supra* note 135 at 70

²³⁹ Telephone conference with Jocelyn Yerxa, Community Development Coordinator, Nova Scotia Department of Seniors on February 14, 2014

equal voice to all affected individuals; healing and restoration of relationships; respect for individuals' values and preferences, and the prevention of further harm.²⁴⁰

Soden states that: "Restorative justice can be achieved through various practices such as victim-offender mediation, sentencing circles, or family group and community conferencing."²⁴¹ Use of such approaches has taken hold in the past decade in many areas of the country and interest is growing in Nova Scotia.

This represents a fundamentally different approach to the traditional "retributive" justice approach of the criminal justice system, which is to determine guilt or innocence and if there is in fact a violation of the law, to administer the appropriate punishment.²⁴² "It does not consider the fact that abuse occurs for a complex series of reasons, with a complex series of results. Furthermore, retributive justice provides no opportunity for healing or reconciliation."²⁴³

Soden has already identified some of the typical types of restorative justice practices that are used. The appropriate method would depend on the situation,²⁴⁴ for instance, physical abuse of an older person might require different treatment than a theft of money using an EPA. A common method is a "healing circle", which generally adheres to the following process that has been utilized in Waterloo, Ontario:²⁴⁵

- A community agency or group offering the restorative approach is accessed by someone making a referral; it could be the victim or his or her representative, a health professional, the police, even the abuser;

²⁴⁰ Arlene Groh, "Restorative Justice: A Healing Approach to Elder Abuse." (2003) online: <<http://www.mcmaster.ca/mjtm/5-ib.htm>> at 4

²⁴¹ Soden, *supra* note 6 at 232

²⁴² Groh, *supra* note 240 at 4

²⁴³ *Ibid*

²⁴⁴ *Ibid* at 5

²⁴⁵ *Ibid* at 6-7

- The first step is the intake process, where screening takes place to determine whether all parties consider it safe to proceed; whether the person who caused the harm accepts responsibility for it; whether the older person is capable of understanding and participating in the process. Not all cases are suited for the process, particularly ones in which there is concern over the mental capacity of the older person;
- After screening, two facilitators are assigned to the case; one meets with the victim to obtain his or her story; the other meets with the abuser to get his or her version of events. With permission, the facilitators may contact supporters of either party; the facilitators are not advocates, rather they are there to achieve consensus of the parties;
- Depending on the circumstances, prior meetings with the interested parties may be necessary so it may take some time to organize and constitute the circle;
- Once the circle is constituted, each participant is given an opportunity to speak. They are asked to speak the truth and express their feelings and ideas about how to resolve things. Together they reach a consensus about why the situation happened, how to repair the harm and how to prevent harm in the future. The facilitators ensure the chosen solution addresses the relevant needs and workable;
- Follow-up occurs with the participants at 3 and 6 month intervals.

In Chapter 4, mention was made of the Nova Scotia Healing Approaches to Senior Abuse: the Fundy Network Project. Commonly known as the Fundy Network, this is a collaboration between the Department of Seniors, Community Services and Justice, Senior

Safety Program Co-ordinators, the RCMP, lawyers working in elder law, academics, restorative justice practitioners, the Nova Scotia Human Rights Commission, community service providers and of course, seniors themselves, in a region of the province from West Hants through the Annapolis Valley and around the Tri-County region. The Fundy Network has developed a planned intervention model, based on restorative approaches, to respond to the harm that arises in senior abuse cases. The Senior Safety Coordinators, working with the restorative justice specialists, help identify seniors who may have experienced abuse and are interested in pursuing restorative approaches to healing that harm.²⁴⁶

In speaking with one of the Senior Safety Coordinators,²⁴⁷ she echoed the sentiments expressed by the representative from the Department of Seniors, *supra*, that the process is responding to what the seniors say they want: for the abuse to stop, to restore relationships and not to see the matter proceed into the criminal justice system. The “holistic” restorative approach is designed to offer supports to both the older person who has been harmed as well as the perpetrator, and to build capacity within the community to address the abuse and its causes. If the case involves financial abuse, restitution is possible but is voluntary. This initiative is still in the growing phase but initial feedback has been positive among participants.

²⁴⁶ Department of Seniors’ Statement of Mandate 2013-14; online at http://www.novascotia.ca/seniors/pub/BusPlan/2013-14_Statement_of_Mandate.htm at 7-8.

²⁴⁷ Telephone conference with Sharon Elliott, Coordinator for the Annapolis County Seniors’ Safety Program on March 10, 2014

(6) Elder Mediation:

For some years now, mediation has been used as an alternate dispute resolution mechanism in family law, labour relations and commercial disputes when negotiations reach an impasse. Now it is increasingly being used in the elder law field, to the extent This is becoming recognized as a specialty in the mediation continuum.²⁴⁸

Black's Law Dictionary defines "mediation" as:

Intervention; interposition; the act of third person in intermediating between two contending parties with a view to persuading them to adjust or settle their dispute.²⁴⁹

So what is "elder mediation"? Once source has defined it in the following way:

In its most basic description, many people understand elder mediation to be a process in which a professionally trained elder mediator utilizes a 'mediation process model' to address disputes involving the older adult addressing age related issues...Elder mediation is a co-operative process...that assists people in addressing the myriad of changes and stresses that often occur throughout the family life cycle...With regard to abuse and neglect, elder mediation can provide a safe, trusting environment where any suspected abuse can be named and plans can be safely put into place to prevent any future abuse or neglect. Sometimes, relationships can be rebuilt while other relationships can be renewed or established.²⁵⁰

Much like restorative justice approaches, elder mediation is informal, private and voluntary. The mediator, like a restorative justice facilitator, does not give advice, remains neutral and does not judge what participants have to say. Any agreement reached must be acceptable to all participants. The elder mediation practitioner must be familiar

²⁴⁸ Department of Justice (Canada), "Exploring the Role of Elder Mediation in the Prevention of Elder Abuse." (30 March 2013) online: <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/pl.html>> at 1 ("DOJ Report")

²⁴⁹ Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979) at 885

²⁵⁰ DOJ Report, *supra* note 248 at 1-2

with the aging process and age-related issues.²⁵¹ One key difference between restorative initiatives and elder mediation, is that the elder law practitioner will report new allegations of elder abuse to the authorities for investigation: “Mediation [will] not occur between an elder and another person if elder abuse has been substantiated.”²⁵² This suggests that elder mediation will occur in a more proactive manner than the restorative justice approach. With elder mediation, there does not appear to be a harm that has to be acknowledged and repaired; rather, it focuses on the development of communication within families on issues that are often difficult to negotiate, such as health care and living arrangements, progressive dementia, financial and legal issues (estate, inheritance, power of attorney) to identify but a few.²⁵³ “Elder mediation is based on a wellness model that promotes a person-centered approach for all participants – tapping the collective creativity while exploring the many ways that will best work to enhance the right of the older person and promote quality of life for all concerned.”²⁵⁴

The focus on co-operation, wellness and the promotion of a person-centered approach differentiates elder mediation from mediation in the traditional form, where the mediator as “neutral” often shuttles between the contending parties parked in separate rooms. The mediator, for example in the labour relations context, often utilizes an interest-based approach with the parties, bringing the parties together face-to-face only after he or she has been able to convince each party to amend or alter their position to the point where agreement can be achieved. In elder mediation, more open dialogue appears

²⁵¹ *Ibid* at 3

²⁵² *Ibid*

²⁵³ *Ibid* at 2

²⁵⁴ *Ibid*

to be the norm, giving each party or participant the opportunity to air their concerns or grievances with the group.

Once interesting aspect of elder mediation is that it “provides a way to combat the potential loss of dignity brought on by the onset of old age.”²⁵⁵ Due to the informal setting in which elder mediation operates, older persons are more likely to speak freely and feel they have been heard, something less likely to occur in criminal proceedings or civil litigation due to their adversarial nature, as previously discussed. If the older person has the opportunity to fully participate in the elder mediation process, together with family members and other interested parties, there is the greater likelihood of them coming together to reach an agreement about the identified issues. There are no winners and losers as one would find in the civil litigation or criminal justice context.

Another benefit identified in the elder mediation process is that of confidentiality of the proceedings. While it is not mandatory, parties often sign confidentiality agreements when entering into mediation,²⁵⁶ thus making it possible to delve into areas such as finances or mental capacity without fear that they will be in the public domain, like a guardianship proceeding. Any airing of a family’s “dirty laundry” can be done under a cone of confidentiality, thus reducing the stress of the dispute on the older person.²⁵⁷

Elder mediation is not without its drawbacks and thus, may not be suited for every family dispute. Family dynamics and potential power imbalances may emerge that the

²⁵⁵ James Musgrave, “Mediation and Guardianship and Power of Attorney of Attorney Disputes.” (Paper delivered at the Canadian Bar Association-Nova Scotia Branch conference “Elder Law in the Next Decade” at Halifax, 26 March 2010) [unpublished] at 3

²⁵⁶ *Ibid* at 5

²⁵⁷ *Ibid* at 6

elder mediation practitioner cannot overcome. For example, “if a specific family member has a history of dominating discussions or influencing the elderly person involved, mediation may not be an appropriate choice for the resolution of the dispute.”²⁵⁸

Another area of concern is that of the older person’s mental capacity and if this is, or becomes, an issue, the elder mediation practitioner may insist that the older person have a representative or advocate, or it may not be possible to proceed. Social conditioning may also be a factor where an older person is reticent to assert their own interests, and thus be at an unfair disadvantage.²⁵⁹

Elder mediation may be an emotionally charged experience for some, depending on the issues being discussed. If a participant, particularly the older person, is not able to negotiate from a rational perspective, the process will not be effective.²⁶⁰ It has been suggested, however, that:

Mediation can be effective in elder law situations when the parties involved would benefit from an ongoing relationship, are willing to and able to mediate, have a dispute which involves non-legal issues in some way, and there are minimal power imbalances.²⁶¹

In summary, while neither restorative justice initiatives nor elder mediation may be the ultimate panacea to safeguarding older persons from abuse, financial or otherwise, they are still evolving as invaluable tools to use in that regard. As sources have indicated, older persons are reluctant to become involved with the courts to either resolve harms or disputes. These newer initiatives shift the focus away from retribution and toward healing and in the process, respect the dignity and wishes of older persons. Better still, they may

²⁵⁸ *Ibid*

²⁵⁹ *Ibid*

²⁶⁰ *Ibid* at 7

²⁶¹ *Ibid*

be used in a proactive manner, by being utilized of an earlier stage of suspected or actual abuse, thereby possibly minimizing the trauma to the older person as well as salvaging relationships.

(7) Some Proposed Solutions:

Academics have taken their turn in suggesting alternatives that would further safeguard older persons using EPAs. One solution that Gordon and Verdun-Jones appear to favour is to require that all EPAs become valid only after registration with a public trustee service, like Nova Scotia's Public Trustee Office, and that attorneys be required to provide a full accounting to the Public Trustee at prescribed intervals.²⁶² They suggested that the Public Trustee assume more of a "policing" role by being given investigative powers and access to the donor's assets and financial records.²⁶³

The authors did concede that such a regime might be met with opposition from government, which would have to expend greater resources and money to support it; from attorneys, who may not wish to accept an appointment if their activities were to be so closely scrutinized; and from the donor's families, who would prefer that the private action of granting an EPA be monitored by them, not the government.²⁶⁴ To these concerns the authors countered by saying:

In the absence of registration, there is no way of determining who holds an enduring power for whom and the extent to which attorneys are acting appropriately.... [And] some families are neither close and caring nor effective in monitoring and supervising the management of an adult's estate.²⁶⁵

²⁶² Gordon and Verdun-Jones, *supra* note 42 at 3-123

²⁶³ *Ibid*

²⁶⁴ *Ibid*

²⁶⁵ *Ibid*

Mandatory registration was not the only solution offered by Gordon and Verdun-Jones. In addition, they proposed that donors should provide clear, written instructions to the attorney in the EPA, that limits be imposed by statute on the powers and authority an attorney can exercise; and that the common law duties of attorneys be codified in legislation.²⁶⁶ Bearing in mind that these authors' views were expressed in 1992, some but not all of these proposals have been implemented in legislation, e.g. in British Columbia and Ontario.²⁶⁷ In defence of their assertions, the authors stated: "It is clear that safeguards are required, especially since continuing and new problems and deficiencies could erode public and professional confidence in this important alternative to guardianship."²⁶⁸ But they did acknowledge the need to strike a reasonable balance: "Too many safeguards and procedural impediments, however well-intentioned, could erode the right to self-determination and destroy the very purpose of this option. Excessively onerous duties could deter prospective donees."²⁶⁹

In a separate article of his own, Gordon maintained that the key to addressing the problem of material abuse through the use of EPAs was prevention, rather than through the criminal courts and civil litigation, which he regarded to be of "limited utility".²⁷⁰ He went on to state that "there can be little doubt that the avoidance of loss in the first instance is to be preferred."²⁷¹ The remedial measures he endorsed were those identified by the Ryerson researchers, which were improved donation requirements and procedures at the outset and regulation of the estate management practices of the attorney once the

²⁶⁶ *Ibid* at 6 – 42 - 43

²⁶⁷ *Supra* note 126

²⁶⁸ Gordon and Verdun-Jones, *supra* note 42 at 6 - 44

²⁶⁹ *Ibid*

²⁷⁰ Gordon, *supra* note 10 at 186-7

²⁷¹ *Ibid* at 188

donor becomes impaired and begins to act on his or her own, without the donor's oversight.²⁷² In terms of the latter, he advocated that the donor should be encouraged to nominate a "monitor", which he described as "an individual or agency that is to oversee the activities of the attorney and guard against misconduct and misappropriation once the donor becomes eventually incapable of supervision."²⁷³

Gordon envisioned the attorney having to provide an annual accounting to the monitor, and the monitor should be empowered to request an accounting at any time if there are reasonable grounds for believing that misconduct or misappropriation are occurring. To strengthen the powers of the monitor, Gordon maintained that if the attorney failed to provide an accounting, the monitor should be able to apply to the courts for a review of the attorney's activities and, if warranted, a replacement of the attorney or a revocation of the EPA and the appointment of an estate guardian. While these would be drastic steps and certainly run counter to the wishes of the donor while competent, the designation of a monitor does appear to be a reasonable safeguard against EPA abuse. The donor would have to exercise the same due diligence in selecting a monitor as in appointing an attorney to ensure it is a meaningful and effective safeguard.

Do the authors' proposed solutions have merit? They do, to some degree. Mandatory registration of an EPA with the Public Trustee's Office would not be too onerous on existing resources, if that is as far as it goes. Mandatory accounting at prescribed intervals would create too great an administrative and financial burden on both attorneys and bureaucrats alike at present, but perhaps random requests from the Public Trustee for periodic accounting from an attorney might be required.

²⁷² *Ibid*

²⁷³ *Ibid* at 189

Donors must be encouraged to clearly set out their instructions, wishes and values in an EPA as guidance to the attorney in discharging his or her duties. Reasonable limits may be imposed by statute on the powers and authority an attorney can exercise, on the understanding that attorneys would still operate on the “honour system” in adhering to them. What may be more effective is imposing or increasing the statutory penalties for attorneys who fail to abide by such statutory requirements. Codification of an attorney’s common law duties in legislation to serve as further guidance to the attorney is critical. The recommendation of a donor naming a “monitor” to whom an attorney is required to account is particularly useful. It is time to put some meat on the meagre bones of the *Nova Scotia Powers of Attorney Act*.²⁷⁴ With such safeguards in place, donors would be better served and attorneys would act with greater knowledge. Well-intentioned attorneys would discharge their duties more effectively and those attorneys inclined to make mischief might think twice about doing so.

It should be noted that in its Discussion Paper, the Law Reform Commission of Nova Scotia proposed the designation of a monitor by the donor in the EPA. However, as will be seen in Chapter 7, the proposal regarding monitors does not contain the same powers as advocated by Gordon and therefore, may not have the same impact.

²⁷⁴ *Supra* note 38

Chapter 7: Law Reform Initiatives

(1) Introduction:

As discussed in Chapter 2, the provinces' law reform agencies were instrumental in the 1970s and 1980s in having enduring powers of attorney ("EPAs") recognized by statute, thus creating an extremely useful estate planning tool for the public.

By the 1980s, many agencies, including the Law Reform Commission of Nova Scotia ("the Commission"), began receiving complaints about EPAs, in particular how the legislation lacked adequate procedural and substantive safeguards to prevent financial abuse against donors who had appointed attorneys to manage their financial affairs. In 1997, the Commission began to study EPAs and in September 1999 published its 'Final Report on Enduring Powers of Attorney in Nova Scotia,' which contained more than two dozen recommendations for procedural and substantive amendments to the Nova Scotia *Powers of Attorney Act* ("the NSPOAA").²⁷⁵ Unfortunately, the Final Report was not acted upon by the successive provincial governments.

The Commission's 1999 Final Report will not be examined to any great extent as it has been superceded by the Commission's "Discussion Paper on the *Powers of Attorney Act*", released in March 2014 ("the Discussion Paper"). Briefly, the Commission's Final Report made recommendations designed to bring the Nova Scotia legislation more in line with that in other provinces in terms of procedural and substantive requirements and safeguards for donors. Among the recommendations were that donors should be able to name any number of attorneys to act on their behalf and should be able to appoint alternate attorneys to act successively. It rejected the notions that mandatory legal advice

²⁷⁵ *Supra* note 38

should be required for an EPA to be valid, nor should registration of EPAs be mandatory. It maintained strongly that the legislation should deal with contingent powers of attorney (also known as “springing powers of attorney”) with a procedure set out to determine whether the contingency had occurred.

To augment the common law, the Final Report recommended imposing on the attorney a duty to act, if the attorney knew or ought reasonably to have known that the donor is mentally incompetent, *inter alia*. It also recommended that the donor be able to request an accounting at any time. If the donor is mentally incompetent, the attorney would then be required to provide an accounting upon demand by any person named for that purpose in the EPA. If no such person is named, the attorney would provide an annual accounting to the donor’s nearest relative, thus providing some level of protection to the mentally incompetent donor. The remainder of the recommendations were largely procedural in nature, for example, dealing with the termination, renunciation or revocation of an EPA as well as when substitution of attorneys may occur.

The Discussion Paper was initiated by a reference received from Nova Scotia’s Attorney General, which requested the Commission’s general recommendations for the “improvement and modernization” of the *NSPOAA*.²⁷⁶ The Discussion Paper is comprehensive in nature and contains dozens upon dozens of proposals for discussion on changes to the *NSPOAA*. In this chapter, the Discussion Paper will be examined in some detail, with a particular emphasis on safeguards against the abuse and misuse of EPAs.

Reference will first be made to the Western Canada Law Reform Agencies’ Enduring Powers of Attorney: Areas for Reform, Final Report 2008 (“WCLRA Report”),

²⁷⁶ “Discussion Paper” *supra* note 61 at 43

which was a collaborative effort of the four western provinces' law reform agencies to bring uniformity to certain key provisions of each province's statute governing EPAs.²⁷⁷ In some respects, it laid the groundwork for many of the proposals for discussion in the Commission's 2014 Discussion Paper.

2) Western Canada Law Reform Agencies Report:

The WCLRA consists of the British Columbia Law Institute, the Alberta Law Reform Institute, the Law Reform Commission of Saskatchewan and the Manitoba Law Reform Commission. As mentioned above, this group came together in its first report to propose uniform provisions in these key areas in each province's statute governing EPAs, specifically: a) recognition of EPAs; b) duties of attorneys under EPAs; and c) safeguards against misuse of EPAs. In all other respects, each province's statute would remain unique.²⁷⁸ The Final Report contained fourteen main recommendations, each with several sub-recommendations. The WCLRA Report's recommendations did not lead to change in any of the provinces.²⁷⁹

It was noted in the WCLRA Report that none of the legislation in the western provinces provided attorneys with detailed guidance with respect to their duties under an EPA. For this reason, the report recommended that a uniform list of attorney duties be included in the legislation, which would be of assistance to both donors and attorneys in

²⁷⁷ Western Canada Law Reform Agencies, "Enduring Powers of Attorney: Areas for Reform" Final Report 2008 at xi

²⁷⁸ *Ibid*

²⁷⁹ Telephone conference with Kathleen Cunningham, Manager, Legal and Legislative Project, British Columbia Public Guardian and Trustee on March 11, 2014 and e-mail from Margaret Hall, Associate Professor, Thompson Rivers University Law School (lead researcher and writer on the WCLRA Report) on April 20, 2014.

reducing confusion and uncertainty about the nature and scope of these duties.²⁸⁰ The seven statutory attorney duties that would arise upon the incapacity of the donor were:

- a) act honestly, in good faith and in the best interests of the donor;
- b) take into consideration the known wishes of the donor and the manner in which the donor managed the donor's affairs while competent;
- c) use assets for the benefit of the donor;
- d) keep the donor's property and funds separate from those others, except as permitted by the statute;
- e) keep records of financial transactions;
- f) provide details of financial transactions upon request, and
- g) give Notice of Attorney Acting²⁸¹

It was also maintained that there be a legislated standard of care against which the attorney would be measured in discharging his or her duties. The standard recommended was that of "a prudent person in comparable circumstances (including having comparable experience and expertise)."²⁸² No distinction was made between an attorney acting for compensation or without. Normally, an attorney acting for compensation is held to a higher standard of care, discussed previously.

A theme running through the WCLRA Report, be it in describing attorney duties or safeguards against misuse of an EPA, was the need for increased education for donors, attorneys and the public. With people being better informed about what an EPA is and does, and what an attorney can and cannot do, the likelihood of misuse is lessened. It was noted that: "Increased awareness by attorneys of their duties is likely to decrease the risk of misuse of authority because informed attorneys are likely to be vigilant attorneys."²⁸³

The WCLRA Report defined "misuse" as "a breach of duty by an attorney or an action outside the scope of the attorney's authority, and includes both deliberate and

²⁸⁰ *Supra* note 277 at 30-33

²⁸¹ *Ibid* at 40-41

²⁸² *Ibid* at 41

²⁸³ *Ibid* at 51

inadvertent breaches and actions.”²⁸⁴ Its recommendations were aimed at “address[ing] misuse, whether deliberate or inadvertent, by creating mechanisms that can bring an attorney’s conduct out into the open and that can keep other people in the donor’s life informed.”²⁸⁵ Earlier in this thesis, it was observed that attorneys often operate in the shadows, away from the scrutiny of the donor’s family or friends and this creates a fertile environment for abuse and misuse.

In terms of preventing misuse of an EPA, the WCLRA Report stipulated several practical measures that should be taken:

1. Efforts should be made to ensure the donor is not being coerced by the attorney into granting the EPA;
2. It should be ascertained in advance that the attorney is willing and has the ability to act;²⁸⁶
3. Attorneys should be made aware of the nature and scope of their duties under an EPA;
4. The means of scrutinizing an attorney’s activities should be increased, with more monitoring mechanisms, particularly when the donor is incapable and lacks the capacity to monitor the activities of the attorney;
5. Increasing the awareness of donors, family members and other interested parties about the attorney’s duties is likely to increase the accountability of attorneys by reducing the opportunities for misuse.²⁸⁷

One of the key recommendations in the WCLRA Report was the adoption of a statutory provision requiring an attorney to serve on a specified group, including the donor, the donor’s designate and the donor’s family, a document called “Notice of Attorney Acting” following a determination that the donor lacked the capacity to manage

²⁸⁴ *Ibid* at xxi

²⁸⁵ *Ibid* at 51

²⁸⁶ It should be noted that the WCLRA Report rejected the idea that a formal attorney acknowledgement of duties be part of the making of an EPA. Instead, the preferred approach was to educate the attorney to encourage the attorney’s advance informed consent; *Ibid* at 53-54

²⁸⁷ *Ibid* at 51-52

property and financial affairs.²⁸⁸ The rationale for this Notice appeared to be that since the donor lacked capacity, he or she could no longer supervise the activities of the attorney and interested persons should be alerted to this to create an informal mechanism of scrutiny of the attorney.²⁸⁹ The list of persons to be served with the Notice ought not to be so extensive as to dissuade people from becoming attorneys but sufficient to act as an effective prevention mechanism. It was recommended that in addition to the donor, the list should include the donor's designate and the donor's immediate family. The WCLRA did not support serving any public official with the Notice, stating: "...[N]otice alone would serve no functional purpose. Notice would have to be accompanied by the imposition of obligations on the public official."²⁹⁰

The WCLRA believed that "...[B]ecause Notices will contribute to the transparency of attorney activities, attorneys will be less vulnerable to attack by uninformed person who are kept in the dark."²⁹¹ It further believed that the attorney should be under a duty to give the Notice of Attorney Acting and failure to do so be dealt with by general law.²⁹² It had considered whether to recommend statutory penalties or damages for breach of this duty but rejected them as too difficult to enforce. It stated:

An attorney's failure to give a Notice of Attorney Acting is a breach of the attorney's statutory duties and a court could hold an attorney personally liable for any resulting harm to the donor's financial interests. In addition, Manitoba and British Columbia each have a general offence provision which penalizes the failure to comply with any legislation with a small fine, imprisonment or both.²⁹³

²⁸⁸ *Ibid* at 57

²⁸⁹ *Ibid*

²⁹⁰ *Ibid* at 58

²⁹¹ *Ibid* at 57

²⁹² *Ibid* at 60

²⁹³ *Ibid*; see the *Offence Act*, RSBC 1996, c. 338 ss. 4,5

Arguably, statutory penalties or damages for breach of an attorney's duties does belong in a province's power of attorney legislation to alert and inform attorneys of the consequences of their failure to act in accordance with the EPA and the legislation. The WCLRA Report did not specify why it would be too difficult to enforce such penalties or damages. In most provinces, the courts have broad discretion in awarding relief upon application by an interested party regarding the actions of an attorney. Section 5(1)(a) of the *NSPOAA* provides that the Supreme Court may for cause, on application, "grant such relief as the judge considers appropriate." This can include ordering an accounting or imposing a restitution order but the court could, if it found the actions of the attorney to be so egregious, impose a financial penalty if the legislation allowed. Doing so would certainly signal to all attorneys the seriousness of their responsibilities. Having it in the power of attorney legislation makes more sense.

The Notice of Attorney Acting would contain the same list of the attorney's statutory duties as found in the EPA, together with an Acknowledgement and Acceptance of duties signed by the attorney, thus providing "a level of assurance that the attorney is aware of the attorney's duties and accepts the responsibility of acting as an attorney."²⁹⁴ The WCLRA Report had recommended that a non-mandatory short-form EPA and a Notice of Attorney Acting be included in the regulations of each provinces' legislation to further guide and educate donors and attorneys.²⁹⁵ It went on to reject the idea of establishing a public registry of Notices of Attorney Acting after balancing the practical benefits of doing so, among them giving notice to others of the attorney acting under the

²⁹⁴ *Supra* note 277 at 61

²⁹⁵ *Ibid* at 25 and 61

donor's most recent EPA, with some difficult questions as to whether such a measure would be at odds with the donor's autonomy and privacy and the philosophy of minimalist intervention.²⁹⁶ A less intrusive option may be to recommend to donors that they register their EPAs with the Nidus Registry, *infra*, which restricts the access to the documents.

In terms of reporting and investigating suspected abuse of an EPA, each western province takes a different approach. In British Columbia, an interested person may direct concerns to the Public Guardian and Trustee, pursuant to the *Public Guardian and Trustee Act*,²⁹⁷ where action will be taken if the donor is incapable and there is a risk to his or her financial assets or property. However, an official of that office indicated that the workload and resources of that office are a problem.²⁹⁸ Manitoba's Public Trustee has limited powers to investigate suspected abuse. Under the *Powers of Attorney Act*,²⁹⁹ the Public Trustee may apply to the court concerning an EPA but in practice it does not investigate complaints or allegations about attorneys unless or until it is itself appointed by the court as committee, substitute-decision maker or attorney. Without such appointment, the Public Trustee has no jurisdiction to compel anyone to provide information about an accounting.³⁰⁰ At the time of the WCLRA Report, the Public Trustee in Alberta did not have the authority to investigate concerns about attorneys. An interested person may apply to the court for an order compelling an accounting by an attorney or an order terminating the EPA.³⁰¹ The Public Trustee will only act if sufficient evidence of misuse

²⁹⁶ *Ibid* at 63

²⁹⁷ RSBC 1996, c 383

²⁹⁸ *Supra* note 271 at 64; also see note 273 referring to telephone conference with Kathleen Cunningham of the British Columbia Public Guardian and Trustee

²⁹⁹ CCSM c P97, s.24(2)

³⁰⁰ *Supra* note 277 at 65

³⁰¹ *Powers of Attorney Act*, RSA 2000 c. P-20, ss 10-11

is provided to it and not other person is able or willing to pursue matters against the attorney.³⁰²

Under Saskatchewan's *Powers of Attorney Act, 2002*,³⁰³ an individual designated by the donor or adult family member as defined in the legislation of the donor may request an accounting from an attorney. If the attorney fails to do so, any interested person may request the Public Guardian and Trustee to direct the attorney to make an accounting. In 2001, Saskatchewan introduced amendments to its *Public Guardian and Trustee Act*³⁰⁴ for the protection of vulnerable adults who are suspected of being subjected to financial abuse. This model informed the WCLRA Report's recommendations, *infra*. The definition of "vulnerable adult" is found at section 40.5 (1)(c) and means an individual, 16 years of age or more who has an illness, impairment, disability or aging process limitation that places the individual at risk of financial abuse, which Section 40.5 (1)(a) defines as "the misappropriation of funds, resources or property by fraud, deception or coercion." Of the four provinces, British Columbia and Saskatchewan have the more effective mechanisms for safeguarding the interests of a vulnerable donor.

The three response mechanisms provided for in the revised legislation included:

- 1) the freezing of funds by a financial institution for up to five business days where there are reasonable grounds to believe that the person is a vulnerable adult who is being financially abused, or is unable to make reasonable judgments about estate matters and the estate is likely to suffer serious damage or loss.

³⁰² *Supra* note 277 at 65

³⁰³ SS 2002, c P-20.3, s.18

³⁰⁴ SS 1983, c.P-36.3, ss.40.5-40.9 as amended by SS 2001, c.33m s.19

The financial institution must immediately advise the Public Guardian and Trustee of the suspension;

2) Under the authority of the Public Guardian and Trustee, a financial institution to freeze funds for up to 30 days. The Public Guardian and Trustee must have reasonable grounds to believe the person is a vulnerable adult and have received an allegation that the person is being subjected to financial abuse, among other things;

3) The Public Guardian and Trustee has broad powers to investigate allegations of financial abuse, including to request information, examine records and if necessary, may obtain a warrant to enter premises and search for the necessary records.³⁰⁵

The freezing of funds permits the Public Guardian and Trustee sufficient time to exercise its broad investigative powers and to ensure that any further alleged financial abuse is minimized.

The WCLRA took note of the support during the consultation process for the formation of a supervisory body to receive reports of concern and to investigate allegations of EPA misuse. After examining the legislative schemes in the four provinces, it declined to recommend they pursue a uniform approach for such a body but instead, it identified certain essential features such a body should have.³⁰⁶ Among these were:

- a public official should be designated to receive reports of concern about the conduct of an attorney under an EPA;
- the reporting of concerns should be voluntary;
- there should be no retaliation against a person who reports misuse unless the person acted maliciously or without reasonable and probable grounds;

³⁰⁵ *Supra* not 277 at 66-67

³⁰⁶ *Ibid* at 68-69

- the public official receiving reports should have the discretion to investigate any suspected EPA misuse;
- investigations should occur where the public official has grounds to believe that the donor of the EPA has been declared incapable and the attorney has breached one or more of the attorney duties listed in the EPA statute;
- the public official should have investigation powers and authority similar to those found in the Saskatchewan model;
- the public official should have authority to apply to the court to terminate the EPA or appoint a new attorney;
- the public official should undertake an educative and supportive role in order to prevent the occurrence of EPA abuse;
- in addition, financial institutions should have the authority and duties similar to those in the Saskatchewan model.³⁰⁷

The WCLRA Report's recommendation for the designation of a public official to receive reports about suspected financial abuse of donors of an EPA is critical to the protection of incapable older persons. What is disappointing is that the reporting of such abuse or misuse is recommended only to be voluntary, not mandatory. If person who make reports of abuse in good faith are protected from retaliation, why not make the reporting mandatory? Many jurisdictions make it mandatory to report suspected physical, psychological or sexual abuse of vulnerable seniors. Suspected financial abuse is no less traumatic to the individual affected. In many instances, it occurs in concert with other types of abuse. Often EPA donors who are being subjected to financial abuse are not capable of bringing forward their concerns about the possible breach of the attorney's duties under the EPA. If it is left to the discretion of the public official to investigate any suspected abuse, the risk exists that some donors who are being abused will slip through the cracks and the abuse will go on unchecked. While it is true that money and resources to support such a scheme are not plentiful, this involves those among society's most vulnerable citizens and they deserve better.

³⁰⁷ *Ibid* at 73-74

(3) Law Reform Commission of Nova Scotia Discussion Paper on the *Power of Attorney Act*

As noted in the Introduction to this Chapter, in March 2014, the Commission released its Discussion Paper on *The Powers of Attorney Act* (“the Discussion Paper”), which contains extensive proposals for discussion on the reform of the existing legislation that is essentially the same as when it was first enacted in 1988. For the purposes of this thesis, not all the proposals will be discussed. Rather, the focus will be on analyzing the key procedural and substantive safeguards against the abuse and misuse of the EPAs by attorneys.

According to the Commission’s Executive Director, the goal of the proposals, if accepted, “is to ensure that the enduring power of attorney (“EPA”) remains an accessible, effective tool for planning for potential incapacity, while guarding against abuse and misuse by attorneys”.³⁰⁸ Several themes run through the Discussion Paper, among them maintaining the EPA as the least intrusive method of incapacity planning; preserving the autonomy and right of self-determination for the donor; ensuring effective safeguards and oversight of attorneys; having effective mechanisms to ensure that abuse and misuse are dealt with appropriately when they occur; and embarking on public legal education initiatives for donors, attorneys and third parties on their respective rights and responsibilities.

It was observed in the Discussion Paper that “ensuring that both donors and attorneys are aware of the nature of an effect of an EPA, particularly with respect to donor

³⁰⁸ Letter from Law Reform Commission of Nova Scotia Executive Director Angus Gibbon to Paula Wedge dated April 2, 2014 at 1

rights and attorney responsibilities, will help curb misuse of EPAs”³⁰⁹ The Commission proposed that the provincial government, in collaboration with relevant stakeholder organizations and professional bodies, should develop and disseminate an accessible plain-language standard form EPA and accompanying educational materials.³¹⁰ The standard form EPA would not be mandatory but would serve as a guide to donors in developing an EPA best suited for his or her needs and it would also discourage donors from using those commercially available “power of attorney kits” which may not be accurate or meet provincial requirements.³¹¹ If it were to be made mandatory, it would deprive the donor from fully expressing his or her values, beliefs and instructions to the attorney. These are important safeguards to ensure the attorney discharges his or her duties properly. The Commission envisioned that the standard form EPA could be disseminated through websites for the Departments of Justice and Seniors, Access Nova Scotia, the Legal Information Society of Nova Scotia, the Public Trustee’s Office, the Nova Scotia Barristers’ Society and public libraries. What the Commission did not say was which arm or department of the provincial government would be the lead in developing such a mechanism, nor did it indicate how and by whom the mechanism would be maintained as current. Notwithstanding these criticisms, a standard form EPA is a beneficial concept. It may well not dissuade the predators and opportunists from engaging in abuse or misuse of the EPA but it would provide guidance for the diligent attorney to know what is expected of him or her.

The Commission contemplated an additional benefit:

³⁰⁹ *Supra* note 61 at 81

³¹⁰ *Ibid* at 83

³¹¹ *Ibid*

Furthermore, in the case of deliberate abuse, a criminal prosecution may be assisted by the terms of an EPA that sets out the exact parameters of the attorney's authority. A broadly drafted EPA may not provide the Crown with enough evidence of the donor's intent in drafting the EPA and accordingly, it might be difficult to show that the attorney's action was contrary to that intent.³¹²

Among the more significant substantive provisions addressed in the Discussion Paper are including an attorney's fiduciary duties in the legislation. Other provinces have done so³¹³ to ensure that attorneys are aware of their responsibilities to the donor. In the Discussion Paper, the following proposal for discussion was put forward:

The *Act* should expressly provide that an attorney is bound by the following duties:
-the duty of loyalty, including but not limited to:

- the duty to act according to the donor's directions;
- the duty to act in the donor's best interests;
- the duty to act in good faith;
- the duty to avoid making secret profits;
- the duty to avoid a conflict of interest;
- the duty to refrain from acting for the attorney's own benefit or for the benefit of third parties without the informed consent of the principal.

-the duty of care³¹⁴

Without question, Nova Scotia should adopt the practice of the other provinces in this regard as safeguards for donors. In terms of the standard of care expected of an attorney, the Commission recommended that "the Act should provide that an attorney is required to exercise the judgment and care that a reasonably prudent person in comparable

³¹² *Ibid* at 86

³¹³ Powers of attorney legislation in British Columbia, Saskatchewan, Ontario and Nunavut provide that an attorney has a duty to act honestly and in good faith in carrying out her duties as attorney. Ontario's *Substitute Decisions Act, 2002* provides that an attorney must perform his duties "diligently, with honesty and integrity and in good faith, for the incapable person's benefit. Legislation in Nunavut, Saskatchewan, British Columbia and Newfoundland and Labrador further provides that an attorney must carry out his appointment in the best interests of the donor. *Ibid* at 121

³¹⁴ *Ibid* at 122

circumstances would exercise,”³¹⁵ regardless of whether or not the attorney is receiving remuneration. This is similar to the proposed WCLRA standard.

By including the attorney’s fiduciary duties in the legislation, the attorney is afforded more guidance in discharging his or her duties but some provinces, the Commission pointed out, have gone further by imposing additional duties on the attorney, particularly where the donor has become incapacitated and the attorney is acting without the donor’s supervision. This is when the donor is most vulnerable and in need of additional safeguards. Again, Nova Scotia should bring its legislation in line with that in other provinces. One area that requires attention is providing the attorney with criteria as to how to determine what is in the best interests of the donor. The *NSPOAA* is currently silent on the issue.

The Commission addressed this void by proposing that the new legislation must include provisions “that preserve and emphasize the autonomy of the donor as a self-determining individual.”³¹⁶ To achieve this, the Commission maintained that “The attorney should be aware, and the Act should confirm, that a ‘best interests’ determination is not an occasion simply to impose the attorney’s view of right and wrong over and above the directions, wishes, values and beliefs of the donor.”³¹⁷ The Commission commented that the trend in substitute decision-making has been to set out how the attorney is to make decisions on behalf of the donor. The Commission also noted that some jurisdictions, such as Ontario and British Columbia, even stipulate in their legislation that attorneys must encourage the incapacitated donor’s participation in any decision-making regarding

³¹⁵ *Ibid* at 135

³¹⁶ *Ibid* at 128

³¹⁷ *Ibid*

his or her property, so far as is practicable.³¹⁸ Much would depend on the cognitive abilities of the donor at the time the decision is to be made but the Commission was of the view that encouraging such active participation by the donor would ensure greater transparency and accountability.³¹⁹ It is also consistent with the Commission's themes of maintaining the EPA as the least intrusive method of incapacity planning, and perhaps more significantly, preserving the autonomy and right of self-determination of the donor.

Isolation of the donor from family and friends is often identified as providing an opportunistic attorney with a fertile environment in which to take advantage of the donor, particularly if he or she is incapacitated. Ontario's legislation places a positive duty on the attorney to take steps to reduce such isolation and to maintain contact and consult with supportive family and friends about the welfare of the donor.³²⁰ This type of safeguard adds another layer of supervision on the attorney, which in most circumstances would not be an onerous one nor is it unreasonable, unless there is significant family discord. The Commission's proposal for discussion in this regard is as follows: "The *Act* should provide that an attorney is under a duty not to unreasonably interfere with or prevent personal contact between the donor and supportive friends and family."³²¹ While perhaps not as forceful as the Ontario legislation's positive duty, it certainly strengthens the supervision of the attorney by those persons who have an interest in the well-being, financial and otherwise, of the incapacitated donor. Perhaps the Commission would consider using more positive language in its proposal by saying that an attorney has a duty to "encourage" personal contact by the donor with supportive friends and family.

³¹⁸ *Ibid* at 125

³¹⁹ *Ibid* at 128

³²⁰ *Substitute Decisions Act, 1992*, SO 1992, c 30, ss 32(4) and (5)

³²¹ *Supra* note 61 at 133

One particular safeguard against financial abuse that gave rise to a considerable amount of attention in the Discussion Paper was the development of a registry system for EPAs. The concept of registration prompts a number of questions, such as: should it be voluntary or mandatory; would it be a repository of EPAs or would it confirm the validity of the terms of the EPA; who should oversee such a registry and who should be allowed access to its contents; are the privacy rights of donors adversely affected by registration; and would the costs of registration discourage EPA use? This list is not intended to be exhaustive but is sufficient to start the conversation.

At present, voluntary registration of EPAs exists with the Public Trustee Offices in Manitoba, Nunavut and the Northwest Territories. In British Columbia, a not-for-profit organization called the Nidus Personal Planning Resource Centre and Registry which provides public legal education on advance planning, operates as a resource centre and repository for EPAs, Representation Agreements and Advance Directives for donors, attorneys and other interested parties.³²²

The Commission reported that in 1992, a report on elder abuse and neglect in Nova Scotia recommended mandatory registration of EPAs, to protect against abuse and more recently, “some members of the Nova Scotia estate planning bar have recommended that EPAs should be registered with either the Probate Court or the Public Trustee’s office when the donor no longer has legal capacity.”³²³ Although not specifically mentioned, it would appear these practitioners envisaged a registry that was more than a mere repository of EPAs but rather one that would validate the contents and terms for use by lawyers,

³²² *Ibid* at 148; see Nidus Personal Planning Resource Centre and Registry at <<http://www.Nidus.ca>>

³²³ *Ibid* at 143

police and financial institutions to ascertain their existence and the donors' intentions. The Commission was of the view that an EPA registry would not prevent all financial abuse but it would strengthen the EPA system and that the concerns about costs and privacy could be minimized by the design of the system, which they believed, should be voluntary rather than mandatory.³²⁴ A voluntary registry would respect the donor's privacy, autonomy and right to self-determination, but that is not to say that such rights could not be respected with a properly constituted mandatory registry. Making registration mandatory could be costly, as there would have to be infrastructure to ensure compliance. A mandatory registry working in concert with an oversight body, described *infra*, would be worthwhile. The two proposals for discussion put forward by the Commission were: firstly, that the *Act* should provide for a provincial registry of powers of attorney, and the Government of Nova Scotia should institute such a registry, and secondly, public legal education materials should encourage public awareness of the registry and the benefits of registration.³²⁵

The Commission maintained quite correctly that it was imperative to have oversight of such an EPA registry by a public body with powers to investigate and address financial abuse. It stated: "A registry system that is actively monitored by a public body would provide an important safeguard against the abuse of EPAs."³²⁶ It submitted four possible scenarios, not all of which would have an oversight capability:

³²⁴ *Ibid* at 144

³²⁵ *Ibid*

³²⁶ *Ibid* at 147

a) The Nova Scotia Public Trustee:

The Commission envisioned the Public Trustee being responsible for authenticating registered EPAs, sending out notification of registration to interested parties, and investigate “red flags” such as the multiple revocations of an EPA.³²⁷

b) The Repository Alternative:

This scenario would simply be a repository for registered documents. There would be no guaranteed validity of an EPA. There would be no way of ensuring that the most up-to-date EPA was on file, for the purpose of verifying the appointed attorney and the scope and limits of his or her authority. There would be no powers to investigate and address financial abuse.³²⁸

c) The Courts:

This model would be similar to the Repository Alternative, which envisions a process similar to probating a Will. An attorney would be required to account to the court on a set interval. Again, there would be no powers to investigate breaches by the attorney.³²⁹

d) Vital Statistics Division:

This is the registration arm of the provincial department of Service Nova Scotia responsible for keeping records of births, deaths, marriages and other events pursuant to the *Vital Statistics Act*.³³⁰ It would simply be a repository and resource centre at Access

³²⁷ *Ibid*

³²⁸ *Ibid*

³²⁹ *Ibid* at 148

³³⁰ RSNS 1989, c 494

Nova Scotia sites but there would be no investigative powers, although it could restrict access to EPAs to pre-approved users.³³¹

Of the four scenarios, the only one having any prospect of functioning as a true oversight body with investigative powers to address financial abuse is the first, the Public Trustee's Office. Its strengths and weaknesses in this regard are identified further in this Chapter. Of course, having it perform that function would involve an amendment and expansion of its legislative mandate, its human and administrative resources, with the associated costs, and a public legal education component to ensure donors, attorneys and third parties understood its new role. The question arises who would bear the additional costs of such a new system – an already financially strapped provincial government or through the imposition of user fees? Given the provincial government is already in deficit, it is unlikely it would entertain funding such a new system lightly. Therefore, it could be left to the users, identified above, to bear the costs. It is difficult to say whether donors would be discouraged from using such a system if they had to pay for it, even though having such an oversight body could bring peace of mind to the donors. Active monitoring of registered EPAs does provide an important safeguard for donors that a mere repository function would not.

It is worthwhile noting for comparative purposes that in the Discussion Paper, the Commission made reference to the registration model used in England and Wales. Their equivalent of EPAs are Lasting Powers of Attorney (“LPAs”), the registration of which is the responsibility of the Public Guardian, which confirms the validity of a LPA before it is registered to ensure it complies with the relevant legislative requirements. The Public

³³¹ *Supra* note 61 at 148

Guardian notifies attorneys and donors when applications for registration are received and if there any parties objecting to the LPA registration. It is the responsibility of the Public Guardian to actively monitor for abuse. The Public Guardian's investigative function is carried out by a "Court of Protection Visitor" who is a field worker appointed to visit a donor or attorney and compile reports on suspected misuse for the Public Guardian and/or the Court of Protection, which is a court of superior jurisdiction responsible for overseeing LPAs and guardianships.³³² The Commission stated in this regard that "Canadian courts have also taken note that the developments of a registry has afforded England and Wales an important safeguard against abuse, and that better oversight and safety of EPA use may also increase their accessibility."³³³

To be sure, to follow the lead of England and Wales would be an expensive proposition; however, one is struck by how seamless and comprehensive the process appears to be, starting with a mechanism for not only registration but validation, a clearly defined investigative function and finally, a venue for adjudication. Ideally, adoption of such a model would place Nova Scotia in the forefront of donor protection in the country, which indeed would be worthwhile.

The last aspect of EPA registration to be considered is that of privacy. Earlier in this thesis it was noted that creating an EPA is a private alternative for a person to organize his or her financial affairs and property in anticipation of a time when he or she can no longer manage them due to incapacity. The Commission conceded that registration of an EPA does create a number of privacy issues for the donor, and perhaps even the attorney. It stated: "EPAs may contain information about a donor's assets, and many

³³² *Ibid* at 147

³³³ *Ibid* at 143

donors may not wish this information made a matter of public record. More fundamentally, the donor may not wish the existence of an EPA, or the name of the attorney to be widely available. The attorney too may wish this information to be kept private.”³³⁴ In the Commission’s view, such privacy concerns could be addressed by restricting access to the registry and to the information recorded therein. The Commission recommended a record containing basic information about the donor, the EPA execution date, the name of the attorney, any conditions or limits on the attorney’s authority and summaries of any court orders dealing with the EPA among other things. It maintained that the registry should not require information indicating the donor’s capacity or specific property.³³⁵ It further recommended that the donor should be able to specify which parties have access to the registry. It used the example of the Nidus Registry, *supra*, which allows donors to specify which pre-authorized third parties should have access.³³⁶

Subject to any express direction by the donor, access to the registry should be made available online, to financial institutions holding assets of the donor, law enforcement officials, civil agencies with responsibility to investigate or address allegations of financial abuse of vulnerable adults, the donor’s legal counsel and health care provider and any other person or class of persons named by the donor.³³⁷

The proposal of the Commission appears reasonable, so long as the donor has the last word on who has access to the registry and its contents.

One duty of an attorney that does not currently appear in the *NSPOAA* but is found in the legislation of most provinces is that of the duty to account to the donor. Pursuant to section 5(5) of the *NSPOAA* a donor who has capacity may apply to the court for an

³³⁴ *Ibid* at 149

³³⁵ *Ibid*

³³⁶ *Ibid* at 150

³³⁷ *Ibid* at 151

accounting when the attorney fails to do so voluntarily. The Commission proposed that the attorney have a duty to account to the donor upon demand and specified what should be included in such an accounting. It further maintained that public legal education materials be provided to give guidance to attorneys on how to do a proper accounting.³³⁸ Such a duty appears to be quite basic for an attorney to owe to a donor and should be included in the revised legislation.

Chapter 3 of this thesis discussed of one commentator's view that as an additional safeguard against abuse and misuse of an EPA, the donor should be able to nominate an individual or agency to serve as a "monitor" to oversee the activities of the attorney and to receive an accounting from the attorney at regular intervals. According to the Commission, "several provinces in Canada have extended the equitable duty to account to the donor to third parties when the donor is incapacitated."³³⁹ Thus, if a donor has nominated someone as a "monitor" in the EPA, the attorney must account to that person on demand, thereby providing additional oversight of the attorney's activities without the need for an extensive public monitoring system.³⁴⁰ The Commission in its 1999 Report on EPAs recommended that Nova Scotia adopt a similar system but as previously mentioned, that Report was never acted upon.

In the Discussion Paper the Commission again recommended correctly that the donor may name a monitor in an EPA to receive an accounting from the attorney on demand, made at reasonable intervals. If the donor failed to name a monitor, the Commission recommended there be a default list of interested persons, family members,

³³⁸ *Ibid* at 157

³³⁹ *Ibid*

³⁴⁰ *Ibid* at 158

to receive an accounting from the attorney.³⁴¹ One curious aspect of the Commission’s proposal for discussion was that “The *Act* should provide that a monitor or other person who is entitled to demand an accounting is under no obligation to do so, and upon receiving an accounting is under no duty to take further action and bears no liability for failing to do so.”³⁴² Such a proposal begs the question – why have a monitor at all? How can it be said that a monitor with no responsibilities is any kind of safeguard against abuse by the attorney? For example, if an attorney submits a rather suspect-looking accounting to a monitor, the monitor would have no duty to act upon any of the “red flags” in the accounting. The attorney could then continue to engage in suspect activities or even grow emboldened to commit actual financial abuse against the donor. Surely the Commission would wish to revisit this proposal and add more accountability on, and oversight by, the monitor. If the attorney has breached his or her fiduciary duties to the donor, the monitor is well-positioned to hold the attorney to account.

The Commission also noted in relation to this proposal that it did not include the Public Trustee’s office in the default list of interested parties who could demand an accounting from the attorney because that office rarely receives attorneys’ accountings now. It did acknowledge it would be appropriate to include the Public Trustee’s Office in the statutory list of default monitors, “as a last resort”, in the event that office is given greater authority to investigate and respond to complaints of financial abuse using an EPA, as previously discussed.³⁴³ The Commission’s reasoning is somewhat curious to

³⁴¹ *Ibid* at 161

³⁴² *Ibid*

³⁴³ *Ibid* at 160

leave the Public Trustee's Office as a "last resort", while other provinces give it a more prominent role.

In the Introduction to this Chapter, it was noted that the Commission's work on the Discussion Paper was informed to some extent by the WCLRA Report, which was released in 2008 (and discussed in Section 2 of this Chapter). One aspect of the WCLRA Report, which received a certain amount of attention from the Commission, was the proposal that EPA legislation provide that the attorney have a duty to issue a document called a "Notice of Attorney Acting" ("the Notice"). This device would notify third parties that the attorney had begun to "assume exclusive decision-making authority over the donor's property and financial affairs."³⁴⁴

The Commission agreed in principle with the WCLRA recommendation but differed on some of the specific requirements of the Notice. As an example, the WCLRA recommended that the Notice be distributed by the attorney within a reasonable period after the donor had lost capacity. The Commission had privacy and practical difficulties with this approach and stated: "In our view, the notice should be sent within a reasonable time after the attorney has begun to exercise any authority granted by the EPA"³⁴⁵.

Presumably, this view was adopted because it is not always clear exactly when the donor loses capacity, as it can be gradual. The Commission's view provides for more flexibility. The Commission also disagreed with the WCLRA recommendation that the donor should not be allowed to opt out of having the Notice requirement in the EPA. The Commission

³⁴⁴ *Ibid* at 151

³⁴⁵ *Ibid* at 153

was of the view that it should be left to the donor to decide who received the Notice.³⁴⁶ In the interests of the autonomy and self-determination of the donor, this is a reasonable one.

The Commission proposed that the contents of the Notice include: the name of the donor, the name of the attorney(s), the name of any alternate attorneys and any named monitor, the date of execution of the EPA, a list of the attorney's duties, a summary of possible consequences for breach of those duties, any limits on the attorney's authority, and an outline of remedies available under the Act to prevent and respond to potential abuse or misuse.³⁴⁷ If adopted, this Notice would be an invaluable tool for family members and third parties dealing with the attorney. They would know what was expected of the attorney in clear terms and how to respond if it appeared the attorney was in breach of his or her duties. It would certainly enhance the attorney's accountability and perhaps make one think twice about engaging in any suspect behaviour.

In Section 12 of the Discussion Paper, the Commission devoted a considerable amount of attention to the ways in which abuse and misuse of EPAs may be dealt with once they are detected through appropriate enforcement and other remedies.³⁴⁸ This work was intended to complement the earlier sections of the Discussion Paper, which the Commission summarized as follows:

An amended *Powers of Attorney Act* will help prevent misuse and abuse of EPAs. Provisions for execution safeguards, stronger and clearer attorney duties, registration and third-party monitoring are all intended to ensure that abuse and misuse are prevented in the first instance, and are more easily detected when they occur.³⁴⁹

³⁴⁶ *Ibid* at 153-154

³⁴⁷ *Ibid* at 154

³⁴⁸ *Ibid* at 184

³⁴⁹ *Ibid*

The Commission examined enforcement and remedies through civil courts, the criminal process, restorative justice, adult protection and put forth some thought-provoking proposals on an ideal framework for response to financial abuse.

In terms of recourse through the civil courts, a donor who still has capacity may bring an application for cause under the *NSPOAA*, Section 5(5), requesting an order for an accounting from the attorney; the removal of the attorney; and the restitution of money or property that the attorney may have misappropriated under the court's jurisdiction to grant such relief as it considers appropriate.³⁵⁰ As already indicated in Chapter 4 of this thesis, there may be financial and practical impediments to a donor bringing such an application. To address this, the Commission proposed that the Government of Nova Scotia, working with relevant professional bodies, organizations and institutions, should develop and implement programs for accessible legal services for seniors, including specialty legal aid clinics, legal aid certificates and *pro bono* services.³⁵¹ The Commission recognized the work of organizations such as the Advocacy Centre for the Elderly in Toronto and the British Columbia Centre for Elder Advocacy and Support, in Vancouver, and their objective to enhance access to justice for the vulnerable elderly. The Commission lamented that there were no such organizations for older persons in this province:

An integral component to access to justice, besides education and information, however, is access to legal services – whether in the form of summary advice or assistance in granting an EPA at the front end, or access to full legal representation to address abuse in court. Access to legal services is critical to preventing and remedying abuse of EPAs, particularly in Nova Scotia where there is no 'public body charged with civil investigation and enforcement in cases of EPA abuse. Lack of access to legal

³⁵⁰ *NSPOAA*, section 5(1)(e)

³⁵¹ Discussion Paper, *supra* note 61 at 194

services may make a donor more likely to be a victim of EPA abuse, and will limit opportunities to seek effective remedy and redress.³⁵²

It is submitted that the Commission has made a compelling case for a move toward providing access to legal services for older persons who are or may be vulnerable to financial abuse by attorneys under an EPA. Again the issue of who should pay for this becomes an issue. Nova Scotia Legal Aid would be an obvious choice since it has recently moved into the realm of social justice issues, as discussed in Chapter 4.

The Commission also addressed the issue of who should be considered an “interested party” to bring an application under Section 5 of the *NSPOAA* and when it would be appropriate to do so. At this time, the *Act* is silent on the question and the only criteria are that the donor be legally incapacitated and the application be “for cause”. In the past, applications have been brought by relatives of incapacitated donors, including children, and nieces and nephews as well as executors of the donor’s estate.³⁵³ The Commission stated: “We continue to believe that there should be a fairly liberal interpretation of who should qualify as an interested party for the purpose of beginning an application in Supreme Court.”³⁵⁴ It went on to develop a list of almost a dozen persons or entities that would fall within the definition of “interested persons” able to bring an application to court for a variety of supervisory and remedial orders.³⁵⁵ Having such a list serves to balance the “liberal interpretation” which could have the effect of opening the floodgates to frivolous applications.

³⁵² *Ibid* at 192

³⁵³ *Ibid* at 185

³⁵⁴ *Ibid* at 186

³⁵⁵ *Ibid* at 187; Ontario’s *Substitute Decisions Act, 1992, supra*, has a similar list

The Commission questioned the criteria that the donor be incapacitated before an interested person could bring an application before the court and correctly decided to propose that it not be a requirement. To protect the donor's autonomy, it further proposed that notice of the interested party's application must be served on the donor and the attorney and if the donor objected to such an application, the Court may refuse to hear the matter.

The Commission also took the opportunity to expand upon the types of orders the court could issue in respect of applications brought under Section 5(1). The Commission was of the view that: "Ensuring the Court is able to exercise its jurisdiction to order an accounting for the entire period that the attorney acts under the EPA may be necessary to address financial abuse which has occurred while the donor was legally capable, but unaware that the EPA was being misused, or incapable of taking action."³⁵⁶ This recommendation provides further protections for the donor which makes eminent sense. Other types of orders it proposed for discussion were: permitting an interested party to bring an application for advice and direction from the court;³⁵⁷ providing that the court may declare a person to be incapacitated in respect of some decisions or class of decisions; and providing that the court may declare an EPA to be valid, invalid, in effect or terminated.³⁵⁸ Providing potential applicants with clarification on the power of the Court is certainly beneficial.

³⁵⁶ *Ibid* at 189

³⁵⁷ Power of Attorney legislation in Alberta, British Columbia, Manitoba, the Northwest Territories, Nunavut, Ontario, Saskatchewan and the Yukon all provide that the court may provide directions and advice with respect to an EPA, which would be invaluable to an attorney new to the task or unclear as to how to proceed with complex matters involving the donor.

³⁵⁸ *Supra* note 61 at 191

For many victims of EPA abuse, recourse through the civil courts is simply out of reach for the reasons already identified. The Commission maintained there were public avenues that could be developed or better utilized in order to assist victims of EPA abuse.

It stated:

In particular, we consider the need for a public body that would be responsible for preventing and remedying financial abuse involving and EPA, particularly on behalf of those who lack capacity to take action for themselves. In our view, the creation of an agency which is responsible to receive and investigate allegations of such abuse, and to take remedial measures to protect the interests of victims both in and out of court, would be a highly beneficial public policy measure.³⁵⁹

Earlier in this section, commentary was made with regard to the Commission's consideration of the creation of a public agency in Nova Scotia, designed to "ensure that vulnerable persons receive the help and support they need while maintaining their autonomy and dignity to the greatest extent possible."³⁶⁰ The agency would have authority to investigate and respond to financial abuse of vulnerable persons, including abuse of EPAs.³⁶¹ Nova Scotia is not completely without some investigative mechanisms. Firstly, the Public Trustee's Office, which manages the estates of incapacitated persons may investigate financial abuse in the context of the clients under their jurisdiction. Secondly, Adult Protection Services, at the Department of Health and Wellness, functioning under the *Adult Protection Act*³⁶² ("the *APA*") does investigate and respond to allegations of abuse and neglect of persons over the age of sixteen in the areas of physical or sexual abuse, mental cruelty or self-neglect. As discussed in Chapter 4, amendments to the *APA*

³⁵⁹ *Ibid* at 195

³⁶⁰ *Ibid* at 204

³⁶¹ *Ibid* at 195

³⁶² *Supra* note 39

were passed to include financial abuse in certain restrictive circumstances but these amendments have yet to be proclaimed in force.

The Commission examined some existing processes to deal with victims of financial abuse which could be better utilized, starting with the criminal process. The Commission regarded the criminal law as having an important role in EPA abuse because of the opportunity for punishment as well as a deterrent effect it would have on future potential abusers. It also acknowledged that the criminal law was under-utilized in dealing with financial abuse victims; the consequence of which was: “Failing to address forms of financial abuse as a crime can reinforce the idea in society that elder persons...are not deserving of the same security and protection by the state afforded to others.”³⁶³

The Commission discussed the role of section 331 of the *Criminal Code* – Theft by Person Holding Power of Attorney and how charges are rarely laid using it, for many of the reasons already examined in Chapter 4 of this thesis. To summarize, the police have not been adequately trained to lay charges using that section of the *Criminal Code* or in dealing with the unique needs of an ageing population; the victims of abuse may not be the best witnesses, which leads to evidentiary problems; the Crown may not wish to pursue a matter where there is little likelihood of conviction, due to a lack of material evidence of theft using an EPA or because the EPA was so broadly drafted that, there is difficulty proving the attorney acted against the intent of the donor.³⁶⁴ In the Commission’s view, “A standard form EPA could encourage donors to convey the attorney’s authority in very specific provisions, which would aid prosecution to this

³⁶³ *Ibid* at 196

³⁶⁴ *Ibid* at 197

extent.”³⁶⁵ In addition, the Commission pointed to other of its proposals that may assist in improving the chance of successful prosecutions, including: making the actions of attorneys more transparent, narrowing attorney authority in the EPA and expanding the class or classes or entities that can request an accounting from an attorney.³⁶⁶ Without question, these measures would aid in using the criminal law to address theft by power of attorney but they are only part of the equation for success. There must be a paradigm shift in attitude of the police and the Crown and the courts away from ignoring or discounting the legitimate complaints of older persons who have been victimized simply because they put their trust in the wrong person. As the Commission pointed out: “Treating theft using a power of attorney as a civil or family problem may trivialize the rights of any person who has entrusted the management of his or her property to an attorney.”³⁶⁷

The Commission reported that some elder law experts advocated the use of restorative justice approaches to deal with situations of financial abuse of older persons. Restorative justice initiatives in Nova Scotia have already been examined in Chapter 6 of this thesis and those comments are much in line with what the Commission described. The Commission did highlight some additional benefits of using this as an alternative by stating:

Restorative justice approaches may have the potential to remedy some of the shortcomings of the current system in this area, including making the donor the centre of the process and putting him or her in more control of the proceedings, and avoiding the intrusive and stigmatizing process of the criminal courts. As a consequence, restorative justice options may encourage better reporting

³⁶⁵ *Ibid*

³⁶⁶ *Ibid* at 199

³⁶⁷ *Ibid* at 196

and more successful resolution of claims of financial abuse using and EPA.³⁶⁸

The Commission also acknowledged some of the negative aspects of using the restorative justice approach to address financial abuse, which include having a victim with capacity issues, impacting on his or her ability to participate; an unequal power relationship between the victim and the abuser; and the perception that using a non-traditional approach may in some way minimize the impact of the crime on the victim.³⁶⁹

In terms of how other Canadian jurisdictions respond to financial abuse, the Commission noted that adult protection legislation regimes and philosophies differ across the country. For the most part in the Atlantic Provinces, the legislation is definitely “protectionist”, focusing on the welfare of the adult, much along the lines of child protection legislation. The Commission explained that: “Other jurisdictions expressly require attention to an adult’s own choices, values, wishes and interests in decision-making, and may require that the least intrusive option for intervention is always to be favoured.”³⁷⁰

In its Discussion Paper, the Commission set forth what it described as “An ideal framework for a public agency which would have the authority to respond to financial abuse.” It will be quoted here in its entirety because of its importance:

General Principles

- a) express recognition of an adult’s right to be heard in any proceeding;
- b) express provision that incapacity in regard to one areas is not a basis for presuming incapacity in other areas, that incapacity may be task and decision specific, and that an adult’s way of communicating is not a ground for determining incapacity;
- c) recognition of an adult’s right to live at risk and make individual choices;

³⁶⁸ *Ibid* at 201

³⁶⁹ *Ibid*

³⁷⁰ *Ibid* at 210

- d) provision for a subjective, rather than objective best interests ‘test’: legislation requires attention to an adult’s own choices, values, wishes and interests in decision-making;
- e) requirement for a support and assistance plan, tailored to the adult’s needs, with as much of that adult’s input as possible;
- f) legislative provision, and sufficient resources, for a broad range of possible outcomes including involvement of community networks or other community resources – with removal of the adult and/or guardianship as the last possible resort;
- g) extensive public education and support services to prevent EPA misuse;

Investigative Authority

- a) authority to require production of any record or information necessary to the investigation;
- b) ability to obtain a warrant to enter premises, and seize and take possession of any information that is being refused;
- c) authority to require details of financial transactions from attorneys;
- d) provision for a court order for a forensic audit;

Enforcement & Remedies

- a) provision of legal counsel and financial management services to the adult;
- b) authority to direct financial institutions to suspend the withdrawal or payment of funds from a person’s account for up to thirty days if there are reasonable grounds to believe that a vulnerable adult is the victim of financial abuse;
- c) authority to halt the disposition of any real or personal property, including withdrawal of funds, to divert income to the authorized protection agency, and to take any other reasonable steps necessary, for up to thirty days, where the agency suspects that an adult’s affairs are in need of immediate protection;
- d) ability to obtain an order varying or terminating an EPA;
- e) authorization to report the conclusions of any investigation to police;
- f) ability to seek appointment as the attorney or guardian of the incapacitated donor;
- g) ability to seek an order for restitution of monies or property misappropriated by attorneys, as well as other remedies provided under the *Powers of Attorney Act*.³⁷¹

The Commission has, with its Ideal Framework, effectively captured many of the more progressive elements of power of attorney, adult protection and public guardian and trustee legislation as well as law reform initiatives found across the country. Without a

³⁷¹ *Ibid* at 218-220

doubt, it represents an ambitious undertaking for any province considering updating its protective scheme against financial abuse of vulnerable older persons. The costs alone of implementing such a scheme would likely be substantial but it does serve as a basis for informed further discussion. At minimum, any scheme should be the least intrusive intervention option for the donor, to preserve his or her autonomy and right to self-determination. The General Principles certainly respect this. Investigative powers are key as are robust enforcement mechanisms that are proactive, such as the freezing of funds, and the authority to halt disposition of property where concern exists. Remedies must be meaningful and restorative for the donor. Restitution of monies or property misappropriated by attorneys is key; otherwise many donors may be left destitute. Reporting of the conclusions of any investigation by the public agency to the police will underscore the importance of bringing the alleged perpetrators to justice. Finally, an education component for donors and attorneys alike on preventing EPA abuse is essential.

The Commission measured the new financial abuse provisions in the amended *APA* against its Ideal Framework in the Discussion Paper. While acknowledging the amendments as a definite improvement in terms of investigative and enforcement provisions, it found them lacking in the areas of “questionable eligibility criteria of age and mental capacity.”³⁷² The Commission took issue, quite correctly, with the fact that:

Rather than being available to an ‘adult in need of protection’ under the Act’s general definition, protective measures specific to financial abuse are instead limited to person of 65 years or more, who have a permanent mental incapacity. These limits appear arbitrary.³⁷³

³⁷² *Ibid* at 221

³⁷³ *Ibid*

The Commission echoed the concerns raised in Chapter 4 of this thesis that persons under the age of 65 and those who do not have a permanent mental capacity who are victims of financial abuse are left without any protection under the *APA* and must rely on the limited avenues of the criminal law or civil proceedings. The Commission found the amended *APA* lacking in many other respects,³⁷⁴ which in its words “may compromise its effectiveness in responding to the problem – in particular with regard to restricted eligibility for services, respect for victims’ continuing capacity, and procedural rights.”³⁷⁵

It maintained that a provincial agency should have jurisdiction to deal with victims of financial abuse not currently eligible under the amended *APA* “and provide investigative and remedial services tailored to the person’s particular situation and needs. The powers of the agency and the services it provides should be consistent with the ideal framework suggested above.”³⁷⁶ Such a contention is admirable but problematic in the current environment of government budgetary constraints. Until the fiscal landscape improves, an interim solution would be to eliminate the offending eligibility thresholds from the amended *APA* and offer the same protections to those under the age of 65 and remove the requirement of having permanent mental incapacity.

³⁷⁴ For example, it found the “permanent mental incapacity standard too vague; the *APA* relies on an outdated “all or nothing” conception of capacity – once an adult is found to lack capacity and to be in need of protection, the *APA* requires the welfare of the adult is the paramount consideration. This is an objective standard, familiar from child welfare legislation, and there is no express recognition of the adult’s continuing capacity or right to self-determination. Too many remedial provisions still reside in the Adult Protection Policy Manual rather than legislation; there are no express provisions for legal counsel or financial management services, nor is the Minister required to submit a support and assistance plan tailored to the adult’s needs, with as much of the adult’s input as possible. See *Ibid* at 221-24 for further criticisms.

³⁷⁵ *Ibid* at 204

³⁷⁶ *Ibid* at 224

In the Discussion Paper, the Commission did not propose a specific agency to investigate and respond to allegations of financial abuse of adults who are under age 65, and those who do not have a permanent mental incapacity, but invited readers to comment on the question of who or what may be most appropriate. It did offer this thought:

The most likely candidates are Adult Protection Services, and the Office of the Public Trustee. In the alternative, a new agency, or new form of collaboration among existing provincial agencies with relevant capabilities and expertise, may be best suited to fulfill the functions we have proposed.³⁷⁷

The Commission proceeded to weigh the strengths and weaknesses of Adult Protection Services and the Public Trustee Office as quoted here:

1) Adult Protection Services:

a) Strengths:

- is, or will be, relatively well-placed to respond to allegations of financial abuse of adults who are significantly incapacitated
- receives reports of abuse and actively investigates allegations
- has authority to obtain protective orders against abusers
- employs field workers to assess a vulnerable adult's living situation and capacity to provide for his or her own protection and well-being
- has the capacity to other types of abuse, since financial abuse may occur where other forms of abuse and neglect are present

b) Weaknesses:

- does not currently have the expertise to respond to financial matters (but the amended *APA* provides for referral to accountants and police)
- will have to add such capacity in order to effectively respond to allegations of financial abuse
- APS workers have no experience in administering estates, in investigating financial abuse or in dealing with financial institutions and courts to halt unauthorized financial transactions and restitution of misappropriated monies or property
- the *APA* as it currently stands may not be suited to more limited interventions designed to resolve instances of EPA abuse or misuse while otherwise preserving the adult's autonomy and chosen lifestyle.³⁷⁸

³⁷⁷ *Ibid* at 224-225

³⁷⁸ *Ibid* 224-225

2) Office of the Public Trustee:

a) Strengths:

- already undertakes a number of responsibilities in connection with allegations of financial abuse, when the alleged victim is already a client, including
- reviewing accounts, communicating with banks and freezing accounts, referring persons to adult protection, initiating court applications for accountings and restitution of misappropriated monies
- has the authority under the *Powers of Attorney Act* to receive and review accounts from attorneys
- may seek an order to be appointed guardian where a person is not capable of looking after his or her financial affairs and there is no other suitable person available
- in such a role, the Public Trustee may initiate an application for an accounting and restitution
- has some experience dealing with the property of adults found to be in need of protection under the *Adult Protection Act*
- Trusteeship services may be particularly appropriate to support the continuing autonomy of an adult who lacks capacity with finances but who is otherwise able to maintain him or herself at home.

b) Weaknesses:

- does not actively investigate complaints of abuse
- while it may investigate and address mismanagement and misappropriation of property of its' clients estates, it does not employ field workers to investigate abuse and assess the vulnerability of clients
- it does not provide social work or capacity – building services – such as home care or financial management advice – which may assist vulnerable persons to take charge of, or remain involved in, the management of their affairs
- it deals with the estates of ‘incompetent persons’ in the guardianship context and has little experience with adults who may be vulnerable but who retain some capacity and continued interest in their affairs
- having the Public Trustee transform into an office that investigates and responds to financial abuse, with effective powers to address the abuse while supporting the victim, would be a substantial undertaking, requiring appropriate financial resources, personnel and enabling legislation.³⁷⁹

Certainly, Adult Protection Services and the Public Trustee’s Office have significant strengths in responding to allegations of financial abuse of vulnerable older adults; however, they also have significant weaknesses. Responding to this problem requires a multi-dimensional approach, which may not be possible in an environment such

³⁷⁹ *Ibid* at 225-26

as the provincial government, known more for its operational silos than its collaborative approaches. In the Conclusion and Recommendation section of this thesis, more will be said about a possible solution to this issue.

In the Discussion Paper, the Commission also noted that financial institutions are “integral to any strategy to better ensure the safe use of EPAs.”³⁸⁰ It went on to describe some of the constraints banks operate under by virtue of the *Personal Information and Protection of Electronic Documents Act (PIPEDA)*,³⁸¹ and commented on the amendments to *PIPEDA* sought by the banking industry. As discussed above, Bill C-12, would have allowed a bank to disclose a customer’s personal information to the customer’s next of kin or to a government institution where there were reasonable grounds to believe that the customer was a victim of financial abuse.³⁸² The Commission believed that disclosure to family members may be problematic and not a suitable substitute for public enforcement. Instead it proposed that “...the better option is to empower a public body with authority to take civil action on behalf of victims of financial³⁸³ abuse, in which case disclosure without consent should be allowed only to that agency.” It could indeed be problematic to notify family members of potential irregularities since it is often family members who are misusing the EPA.

The Commission also reviewed and commented on the viability and utility of supported decision-making and co-decision-making agreements as alternatives to EPAs,

³⁸⁰ *Ibid* at 229

³⁸¹ *PIPEDA* was already discussed in some detail in Chapter 5

³⁸² *Supra* note 61 at 229-30

³⁸³ *Ibid* at 230

concluding that “...despite their limitations, EPAs are the preferred choice of estate plan for many, in contemplation of loss of decision-making capacity.”³⁸⁴

While supported decision-making agreements and co-decision making agreements may allow an individual to retain greater autonomy and self-determination in the management of his or her affairs, the Commission concluded that there remains the same potential for abuse as with EPAs, particularly for those with diminished capacity. Preferably, the focus ought to remain on modernizing the *NSPOAA*.

Without question, with its Discussion Paper the Commission performed yeoman’s service on a very important and complex subject. It has provided the provincial government with a comprehensive and thought-provoking treatise on what is lacking with the *Powers of Attorney Act* and placed focus on numerous proposals for improving the *Act* and ensuring greater safeguards against abuse and misuse of EPAs by attorneys. For all its positives, there are, as discussed in this chapter, a few areas that the Commission should reconsider. For example, the idea of developing a Standard Form EPA is indeed a beneficial one; however, the Commission failed to identify which department of the provincial government would maintain it as current. The concept of a Registry system is also favourable, although only having it be a voluntary option and simply a repository of EPAs may not be as valuable as one which validates the execution and terms of the EPAs on file. The Commission may also want to revisit imposing some duties and accountability on a Monitor designated by the donor in the EPA. Another issue that requires further thought is whether it is practical to have two provincial schemes to respond to and investigate allegations of financial abuse, i.e. the *APA* scheme (if

³⁸⁴ *Ibid* at 232

proclaimed) for person 65 years of age or more with a permanent mental incapacity, and then the Commission's proposal for a similar agency for those not covered by the *APA* scheme. Would it not make more sense to find a way to integrate the two, or better still, have one civil enforcement agency to investigate allegations of financial abuse?

Chapter 8: Conclusion/Recommendations

An older person needs a private and effective estate planning mechanism to rely on when he or she is no longer able to manage his or her financial affairs, as an alternative to a guardianship application in the courts, which can be costly and humiliating for the older person. An EPA is an extremely useful tool for an older person, provided it is used properly by the attorney and there are appropriate safeguards to protect the older person.

Regrettably, financial abuse of older persons who have granted EPAs is a growing problem. It is also a hidden problem, as older persons are often unable, unwilling or fearful of coming forward and acknowledging the problem. While there have been no specific studies on EPA abuse *per se*, the available data canvassed in this thesis suggested that financial abuse constituted up to 50% of all reported cases of abuse perpetrated against older Canadians.

Predators and opportunists will continue to prey on older persons who have granted EPAs so long as there is a fertile environment for them to do so. Other attorneys may be well intentioned but cause significant harm through incompetence. Donors of EPAs are often ill-informed about the extent of the authority and powers they grant to their attorneys, and in Nova Scotia at least, there is no oversight body to monitor the activities of attorneys.

Currently, the existing safeguards to protect older persons from EPA abuse are not sufficient in Nova Scotia. Our power of attorney legislation, the *NSPOAA*, is meagre, out-of-date and of little assistance in dealing with financial abuse by attorneys. Adult protection legislation, as it is now written, does not include investigation of financial abuse within its purview. The Public Trustee's Office does not have legal jurisdiction to

become involved in allegations of financial abuse by EPA, unless it involves one of its current clients.

The criminal justice system is largely failing older persons. While not all donors will want to turn to the criminal justice system to deal with financial abuse, those involved in the criminal justice system must better inform themselves on how best to deal with older persons who do opt to pursue a complaint of theft by holder of power of attorney. More police services must create dedicated elder abuse investigative units. Crown prosecutors and judges must better acquaint themselves with elder law issues and challenges, such as dealing with witnesses who may have capacity issues.

Some small improvements in responding to financial abuse of EPAs have been initiated in Nova Scotia. For example, the introduction of restorative approaches and elder mediation to address the financial abuse of older persons are two mechanisms that enable the victimized older person to be heard and for relationships to be healed. Educational initiatives being undertaken by the Nova Scotia Department of Seniors, the Legal Information Society of Nova Scotia and the Senior Safety Co-ordinators working with the RCMP must be supported and augmented with more financial resources. Older persons who are better educated about their rights and available remedies are less likely to become victims of financial abuse.

Greater change is needed. This has been identified by the Law Reform Commission of Nova Scotia Discussion Paper on the *Powers of Attorney Act*, in which a complete overhaul of the *Act* is proposed, with particular emphasis placed on ensuring enhanced procedural and substantive safeguards against the abuse of EPAs by attorneys.

The Provincial Government must give serious consideration to the proposals set forth in the Commission's Discussion Paper. While it is not yet in Final Report form, the Commission's document provides the Government with a comprehensive roadmap for modernizing the *NSPOAA*. As mentioned in Chapter 7 of this thesis, the Discussion Paper contains dozens upon dozens of proposals for amending the *Act*. There are a few that deserve specific mention in terms of serving as excellent safeguards for donors against abuse by their attorneys. It was proposed that a Standard Form EPA be included in the Regulations to any amended *NSPOAA*, to be used as a guide for a donor in establishing the parameters of an attorney's powers and authority as well as obligations, among other things. Educational materials would be made available to ensure both the donor and attorney were aware of their respective rights and responsibilities.

Another safeguard of note proposed by the Commission was to provide for the designation of a Monitor in the EPA, an independent third party to whom the attorney could render an accounting, if requested. This proposal does not go far enough: the Monitor must be given the authority to demand an accounting at reasonable intervals from the attorney, where the donor is incapacitated, and then take remedial steps to deal with an attorney who is in breach of his or her fiduciary duties.

A further measure to enhance attorney accountability is for attorneys to provide a document known as Notice of Attorney Acting to designated entities within a reasonable time after the attorney has begun to exercise any authority granted by the EPA. The Commission determined that the donor ought to have the right to opt out of this requirement, which was contrary to the view of the WCLRA Report. It is submitted here that the issuance of the Notice be mandatory: to the donor, to the donor's immediate

family (unless the donor specifically excludes a family member) and to third parties with whom the attorney will be expected to do business, such as banks, investment or financial managers. The Notice would include, *inter alia*, a list of the attorney's duties, a summary of possible consequences for breach of those duties, any limits on the attorney's authority, and an outline of remedies available under the *NSPOAA* to prevent and respond to potential abuse or misuse. As mentioned earlier, such a Notice would be an invaluable tool for family members and third parties dealing with the attorney.

One measure the Commission did not endorse, but which has merit as a deterrent to attorneys who may be inclined to engage in financial abuse, is for the *NSPOAA* to prescribe specific penalties and damages for attorneys who breach their EPA or statutory duties. Other jurisdictions leave it to the general law to penalize attorneys who are in breach of their duties.

Legislation alone will not completely address the problem of financial abuse of older persons through the use of EPAs. There must be a multi-dimensional approach to this problem. Education and prevention measures must be enhanced by a greater infusion of money and resources. This may not be a popular notion but it is not without precedent. As noted in Chapter 4, the Federal Government in 2008 allocated \$13 million over three years for programs and services designed to increase awareness and prevention of elder abuse as part of its Federal Elder Abuse Initiative. Such programs must be continued. The Provincial Government, too, must support similar initiatives of its own.

For example, access to justice is a problem for many older persons who require assistance in planning for future incapacity or in dealing with attorneys who may be engaging in financial abuse under an EPA. The Provincial Government must consider

funding Nova Scotia Legal Aid to serve older persons who find themselves in such circumstances, in much the same way that Legal Aid of Ontario supports the Advocacy Centre for the Elderly in Toronto. As already mentioned in this thesis, Nova Scotia Legal Aid has recently expanded its menu of services to include social justice issues. Serving older persons in need due to EPA abuse issues would be a logical extension of that expanded mandate.

There must also be structural change. At present, there is no civil oversight body in Nova Scotia to regulate and investigate the activities of attorneys acting under EPAs who may be in breach of their fiduciary duties. The amended *APA*, not yet proclaimed, will establish mechanisms to investigate financial abuse of persons 65 years of age or more who have a permanent mental incapacity. While it may capture some attorneys who have committed financial abuse under an EPA, the amended *Act* only addresses a part of the problem.

Predators and opportunists do not only target older persons over the age of 65 who have who have a permanent mental incapacity, which is not even defined in the amended *APA*. There are older persons under the age of 65 who are still mentally capable yet are victims of financial abuse by their attorneys. Their only recourse is through the courts, either in an application for an accounting under the *NSPOAA* or to go to the police and file a complaint under Section 331 of the *Criminal Code* – theft by holder of power of attorney. The victimized donors may not have the financial resources to go to court for an accounting and they may be reluctant to seek help from a police service unused to dealing with elder abuse issues, although that situation is improving somewhat. And what of the

victims of financial abuse under the age 65 who are mentally incapacitated? To whom do they turn for help? This gap must be filled.

The Commission in its Discussion Paper proposed that there be a separate provincial entity with jurisdiction to deal with victims of financial abuse who would not qualify under the amended *APA*, if proclaimed, with powers and services to be in accordance with the Ideal Framework the Commission proposed and which was discussed in Chapter 7. Thus, there would be two parallel investigative entities: one under the amended *APA* and the second under either the auspices of the *APS*, the Public Trustee or a new agency. It was suggested that such an arrangement would be problematic in the current environment of government budgetary constraints. An interim solution was offered, that being that the government eliminate the offending eligibility thresholds from the amended *APA* and offer the same protections to those under the age of 65 who do not have a permanent mental incapacity.

There is another possible solution the government may wish to consider, one that may cost more in the short term but achieve the objectives of providing sufficient safeguards for older persons from EPA abuse in the longer term. It is being proposed here that the government not proceed with the proclamation of the amendments regarding financial abuse in the *APA*. Instead, it should consolidate the response and investigation of financial abuse, including EPA abuse, of any adult in Nova Scotia, regardless of age or mental capacity, under the auspices of a revamped Public Trustee's Office. The government's decision to amend the *APA* was well-intentioned but not really feasible, as the Adult Protective Services division, comprised mainly of social workers and others in the helping professions, is ill-equipped to fulfill the new mandate given in the

amendments. On the other hand, the Public Trustee's Office strengths in the area of financial accountability (laid out in some detail in Chapter 7) make it the logical agency to assume this expanded role. Of course, the mandate and powers in the *Public Trustee Act* would require amendment to give the Public Trustee the authority to respond to, investigate, and remedy financial abuse. It is recommended that the General Principles, Investigative Authority, and Enforcement and Remedies of the Commission's Ideal Framework form the basis for the restructured Public Trustee's Office. These elements go beyond what is found in the *APA* amendments and would better serve the autonomy and self-determination of the older persons who would seek its assistance. There is no question that a restructured Public Trustee's Office would require considerable augmentation of its human and administrative resources to discharge its new mandate, however, some of the money earmarked for the APS could be re-directed to the Public Trustee for this purpose.

The Public Trustee's Office could partner with other government departments and agencies, such as the Department of Seniors, Justice, Community Services, Health and Wellness and Human Rights Commission to engage in educational initiatives about EPAs and the rights and responsibilities of donors and attorneys, which has been identified as a critical component of improving the safeguarding of older persons from EPA abuse. The Public Trustee already plays a part in the Nova Scotia Fundy Network committed to expanding restorative approaches to financial abuse of older persons as an alternative to pursuing civil or criminal remedies in the courts.

As the Commission noted that, the Public Trustee's Office currently deals with estates of incompetent persons in the guardianship context and does not have much

experience dealing with adults who, although vulnerable, may retain some capacity and continued interest in their own affairs. If the Office were restructured as recommended above, there would have to be the commitment to involve the new clientele, whenever possible, in the management of their financial affairs, or at the very least, give them an opportunity to be heard.

The Public Trustee's Office would not be expected to deal with other forms of abuse that may accompany financial abuse. Instead, it would have an obligation to report such abuse to the Adult Protective Services under the *APA*.

There remains the issue of having a Registry of EPAs, which has been identified as another safeguard against abuse. The restructured Public Trustee's Office could also be the site for the recommended Registry of EPAs, as is the case in Manitoba, Nunavut and the Northwest Territories. While these aforementioned registries are voluntary, it is recommended here that the Nova Scotia EPA Registry be mandatory. It would be more than repository in nature; rather it would validate the contents and terms of the EPA with access restricted to a limited number of entities, e.g. lawyers, law enforcement and financial institutions, to protect the donors' rights and privacy. An attorney would be required to register the EPA with the Public Trustee's Office upon commencing to act under it. The costs of registration would be borne by the donor's estate but should not be excessive. Attorneys would be required to provide periodic accounting, upon request, which they should not regard as too onerous. Mandatory registration, together with the requirement for an attorney to issue a Notice of Attorney Acting to designated interested parties, set out in the legislation, would serve as excellent safeguards against the misuse and abuse of EPAs.

For an older person, no longer being able to make decisions for oneself can be difficult. To place one's trust in an attorney to be one's substitute decision-maker involves diligence and a little bit of faith that the right person has been chosen to assume that responsibility. An older donor should not have to leave it to chance that his or her attorney under an EPA will properly exercise the powers and discharge the duties of that office. That is why having effective safeguards for donors is so critical. Nova Scotia has lagged behind other provinces in instituting such measures and it is time for that to change.

The proposals put forth by the Law Reform Commission in its recent Discussion Paper provide the Government of Nova Scotia with an array of significant safeguards to incorporate in a modernized *Powers of Attorney Act*. The recommendations in this thesis take some of these safeguards and remedial measures a step further and place them in the context of a multi-dimensional approach to the problem of EPA abuse. While all these safeguards and measures involve expending more public funds, it would be money well-spent if it means protecting the safety, security and well-being of some of society's most vulnerable citizens. The public policy benefits would certainly justify the costs.

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