IAPP Canada Privacy Symposium

Privacy and the Elderly
Risk Management for Financial Institutions

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Disclaimer

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Credits

This presentation draws from the work and insights of Judith Wahl, Executive Director of ACE

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Outline of Presentation

1. Our Aging Population
2. Aging and Money
3. Capacity and Consent
4. Confidentiality, Privacy and Consent
5. Powers of Attorney
6. Pending PIPEDA Amendments
7. Obligations and Risk Management
Our Aging Population

- Dramatic shift
  - 1971 – median age = 26.2
  - 2011 – median age = 39.9
- Seniors (over 65) growing as % of population
- By 2051 = 1 in 4 Canadians over 65

Source: HRDC, Canadians in Context – Aging Population (http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=33)
Ageism

Myth:
Seniors lose the ability to make prudent financial decisions

• Processing information more slowly ≠ lack of decisional capacity
• Mental decline is not as extreme as we think – ageism
• Best estimates are that a very small minority of the elderly lose all decisional capacity
• Even those with severe cognitive disabilities may have decisional capacity with appropriate support
Aging and Money

• Being Elderly ≠ Being Disabled
• Seniors are in paid and unpaid workforce
  • Care, financial support and other unpaid services to their families
  • Frequently main or sole caregiver to grandchildren
• 90% live in their own homes

Source: HRDC: Canadians in Context: People with Disabilities
(http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=40)

• However increasing incidence of disability (all kinds)
Financial Abuse / Exploitation

- Illegal or improper use of an elderly person’s financial resources

**Criminal Conduct**
- Theft s.322
- Theft by a Person Holding a Power of Attorney s.331
- Fraud s.380
- Extortion s.346
- Stopping Mail With Intent s.345
- Forgery s.366

**Conduct Short of Criminality**
- Misuse of funds
- Rapid depletion

- Possibly the most commonly reported form of elder abuse

- No reliable statistics on prevalence
  - Canadian Association of Retired Persons says 10% of older Canadians
  - Ryerson study says at least 4% of non-institutionalized seniors experienced some type of mistreatment

- Probably underreported
  - Frequently perpetrated by persons on whom the elderly person has some emotional, physical or financial dependence

Common Examples of Financial Abuse / Exploitation

- **Joint Accounts and Guaranteeing Loans**
  - Pressuring senior to transfer financial assets to joint accounts
  - Misusing joint bank accounts
  - Pressuring senior to guarantee a loan

- **Powers of Attorney**
  - Pressuring senior to provide a power of attorney for property
  - Misusing a power of attorney for property

- **Taking of Money or Property**
  - Borrowing money or property and refusing to return it
  - Disposing of property against the wishes of the senior
  - Stealing

- **Refusing to Provide Services or Goods**
  - Requiring senior to pay for services or goods that are not provided
Capacity & Consent
Myths and Reality

- **Myths**
  - We only have to worry about capacity for older people
  - You have capacity or you don’t
  - Capacity should be tested by an assessor
  - Bad choices indicate a lack of a capacity
  - An attorney for property doesn’t have to consult with the senior even if the senior is capable
  - I can rely on consent given when the person was capable

- **Reality**
  - Age is irrelevant; “consent” is only meaningful from a capable person
  - Capacity is contextual
  - Capacity relates to a decision not a generalized test
  - Capable people make decisions that are not in their best interests
  - An attorney for property is an agent and must consult with the senior if the senior is capable
  - Is consent meaningful if it can no longer be withdrawn?
What is Capacity?

• Capacity in relation to property

• Able to understand information that is relevant to making a decision in the management of his or her property

• Able to appreciate the reasonably foreseeable consequences of a decision or lack of decision
Bankers & Confidentiality

• Common Law Duty of Confidentiality
  • No disclosure without consent of the state of the customer’s accounts, transactions on the account or any other information obtained through the provisions of services unless:
    • Compelled by court order
    • Circumstances give rise to a public duty of disclosure
    • Protection of the banker’s own interest requires it

Bankers & Duty to Make Inquiries

• **Common Law Duty of Care**
  • Act only on client’s instructions or those given by a **properly appointed** agent
  • Exercise such care as a **reasonable banker** would in the circumstances
  • Inquire into **suspicious or questionable** transactions

*Gold v. Toronto Dominion Bank, 2001 BCCA 170*
Bankers & Privacy Obligations

*Personal Information Protection and Electronic Documents Act, s.7(3)*

- an organization may disclose personal information *with knowledge or consent* of the individual

- may only disclose *without knowledge or consent* if the disclosure is:
  - made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization has *reasonable grounds to believe* that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed
  - 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
  - required by law
Banks and Provincial Regulation

• Federally regulated Banks must still comply with provincial legislation unless:
  • It impairs the basic, minimum and unassailable content of the federal Parliament’s banking power; or
  • The operation effects of provincial legislation conflicts with (in the sense of being incompatible with) federal legislation.

• Financial institutions that are not federally regulated Banks must comply with provincial legislation.

  *Canadian Western Bank v. Alberta, 2007 SCC 22*

  • Consider whether the following could apply
Mandatory Reporting Obligations (Ontario)

**Long-Term Care Homes Act, 2007**

24(1) A person who has reasonable grounds to suspect that any of the following has occurred or may occur shall immediately report the suspicion and the information upon which it is based to the Director:

[...]

2. Abuse of a resident by anyone or neglect of a resident by the licensee or staff that resulted in harm or a risk of harm to the resident

[...]

4. Misuse or misappropriation of a resident’s money.

- Must be in a Ministry of Health and Long Term Care Home
- “Abuse” includes financial abuse (s. 1 of LTCH Act)
- “Financial Abuse” means any misappropriation or misuse of a resident’s money or property (s. 2(1) of O. Reg. 79/10)
- Act ambiguous – does it permit report based on confidential particulars other than for certain practitioners?
- Director must investigate (s. 25 of LTCH Act)
Other Mandatory Reporting Obligations (Ontario)

• New *Retirement Homes Act, 2010*
  • Same mandatory reporting provisions as LTCH Act
  • Report to the Registrar (s. 75 of the RHA)

• A “retirement home” is
  • a residential complex or part of a residential complex
  • that is occupied or intended to be occupied by at least 6 people unrelated to the operator
  • who are 65 years of age or older
  • and the operator makes available directly or indirectly at least two care services

• Potentially very broad catchment
  • “care service” includes, among other things, certain
    • health care services
    • assistive services
    • meal services
• **Substitute Decisions Act, 1992**
  
  The Public Guardian and Trustee shall investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result. (s. 27(2) of the SDA)
  
  - Loss of a significant part of a person’s property
  
  - Failure to provide necessities of life for himself or herself (s. 27(1) of the SDA)

• **Incapacity =**
  
  - unable to understand information that is relevant to making a decision in the management of his or her property; OR
  
  - unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision (s. 6 of the SDA)

• Query whether Bank should be executing on instructions of incapable person
Pending PIPEDA Amendments

• New financial abuse provision
• s. 7(3)(d.2)

[…] an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure made on the initiative of the organization to a government institution, a part of a government institution or the individual’s next of kin or authorized representative and

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse, and

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse
What Does s. 7(3)(d.2) Accomplish?  

What Doesn’t s. 7(3)(d.2) Accomplish?

- Compliments disclosure provisions relating to breach of a law or life, health or security of a person
- Permits disclosure to person’s next of kin or authorized representative for the purpose of investigation
- Doesn’t define next of kin or authorized representative
- Doesn’t define financial abuse
- Doesn’t require Banker to seek consent first from senior (ageist?)
- Doesn’t resolve conflict between senior’s wishes and Banker’s concerns
- Doesn’t permit Banker to follow instructions of person’s next of kin or “authorized representative”
- Doesn’t say what happens next if abuse continues
Issues to Consider?

• Is disclosure without consent appropriate if the person is capable?
• Who decides who is next of kin?
• What if there is a division within the family? Which “next of kin”?
• Who is an authorized representative? Who? When appointed?
• If the person already has an authorized representative for PIPEDA purposes, why is this necessary?
• What if the incapable person would have preferred notification of someone else, his/her lawyer, sister, brother or trusted friend for example?
• How confident will the Banker be that he/she is not tipping the abuser? Aren’t next of kin and/or authorized representative are frequently the abuser?
Obligations: Separate the Issues

Determine Decisional Capacity for **Property**
- Understand the relevant information for managing property?
- Appreciate the consequences of a decision or not making a decision?

Determine Decisional Capacity for **Remedy**
- Understand the relevant information to participate in the remedy for the abuse?
- Understand the relevant information to participate in the remedy for the abuse?

Determine Decisional Capacity for **Consent**
- Understand the relevant information to give consent under PIPEDA?
- Understand the consequences of giving consent or not under PIPEDA?
Capable Person

1. Talk with Senior
2. Determine wishes and concerns
3. Assist to find legal / social supports
4. Repeat!
5. Consider whether any legal duty overrides
6. Follow instructions
Partly Capable Person (Most Frequent)

1. Talk with Senior
2. Determine wishes and concerns
3. May be able to consent to disclosure
4. Consider whether any legal duty overrides
5. Challenge Authority of Decision-Maker
6. Repeat!
Incapable Person (less common)

Review Situation

Challenge Authority of Decision-Maker

Report to PGT

Repeat!

Consider whether any other legal duty over-rides

Report Crime to Police
Risk Management

• Know Your Customer
  • at home? in a retirement home? in a long-term care home?
  • has a relationship with a lawyer?
  • changes in banking practices
  • a person showing unusual interest in the senior’s financial affairs
  • unauthorized ATM withdrawals
  • transfers of financial assets
  • capable customer relinquishing authority
  • suspicious documentation

• Know Your Resources
  • You can disclose personal information if the person has decisional capacity (low!)
  • You can report a crime to the police
    • e.g. Theft by a Person Holding a Power of Attorney s.331
  • You can report incapacity to the PGT
  • You probably must report financial abuse of a resident of a retirement home or long-term care home
  • You can facilitate the person seeking legal advice
Additional Resources

Advocacy Centre for the Elderly has many free resources www.advocacycentreelderly.org
Thank you!

Questions?