

ELDER ABUSE AND NEGLECT IN INSTITUTIONAL SETTINGS: A RECENT OVERVIEW OF ADULT PROTECTION LEGISLATION AND RELATED INITIATIVES IN CANADA

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INTRODUCTION

The changing demographic trend in Canadian society towards an increasingly older population presents many challenges for the Canadian health care system. Over the past three decades, one of these challenges involves the abuse and neglect of older adults in institutional care facilities. Responding to this trend, Canadian provinces and territories are implementing adult protection legislation and related programs to counteract abuse and neglect among vulnerable elder residents. Abuse and neglect may occur in several forms, ranging from mental abuse to financial abuse to self-neglect. Usually found under the rubric of domestic violence, elder abuse and neglect is occurring with greater frequency in institutional settings.

This paper provides a broad overview of adult protection legislation across Canada, while highlighting recent initiatives to curb abuse and neglect of older adults in institutional care settings. In surveying the Canadian jurisdictions, it is argued that adult protection regimes are involving more integrated and multidisciplinary approaches in responding to abuse and neglect. Efforts to modernize adult protection legislation demonstrates a sincere commitment to alleviate harm against vulnerable persons, while fostering meaningful partnerships between government, health care providers, community-based groups, and institutional care facilities. Understanding that responses can vary widely among the provinces and territories, a healthy comparison of adult protection regimes can provide valuable insight into the nature of public policy planning in the context of elder abuse and neglect.

Part I provides a brief background of Canada's health care system, including the role of institutional care facilities in the context of caring for older adults. Part II outlines the legal aspects of elder abuse and neglect, including legal definitions and the treatment

of traditional legal principles that guide protection of vulnerable persons. Moreover, the interrelationship between adult protection and federal laws and federal agencies is discussed. Part III describes the history of adult protection, and lists each form of adult protection legislation applied across Canada. Part IV of this overview includes a discussion of each jurisdiction's legislation, along with recent initiatives. Some jurisdictions are treated in more detail than others, but many principles overlap. This section also discusses mandatory reporting and common adult protection principles applied in domestic legislation. Please note the discussion on Québec is treated somewhat differently because of its designation as a civil code jurisdiction. Finally, Part IV describes the influence of U.S. adult protection legislation on Canada.

I. BACKGROUND

A. Canada's Health Care System

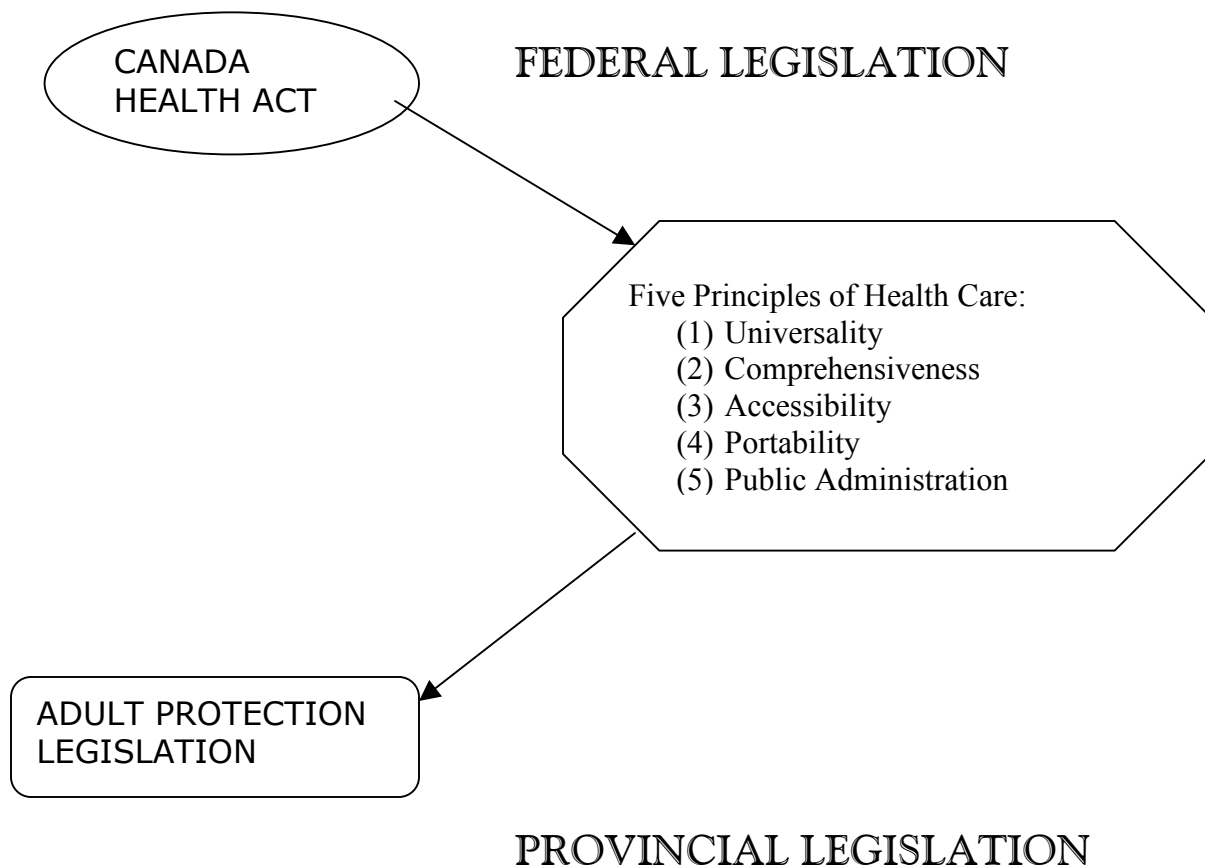
The core of Canada's health care system consists of publicly-funded health insurance plans administered by each province and territory within guidelines set by the federal government.¹ Each citizen qualifies for health coverage regardless of medical history, personal income, or standard of living. As such, a starting point for examining elder law issues within Canada's health care system lies with the Canada Health Act, which is a broad federal statute that guides all provinces and territories in the nature of health care delivery to all citizens.² To be funded by the federal government under the Canada Health Act, the provinces and territories must fulfill five conditions: (1) *Universality* (all insured residents are entitled to the same level of health care); (2) *Comprehensiveness* (all necessary health services such as hospitals, physicians, and dentists must be insured); (3) *Accessibility* (all insured residents have reasonable access to health care facilities); (4) *Portability* (a resident moving to a different province, territory, or country is entitled to coverage from their home jurisdiction); and (5) *Public*

¹ CANADIAN HEALTH CARE, available at <http://www.canadian-healthcare.org/index.html> (last visited Jan. 12, 2006).

² HEALTH CANADA, available at http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2000/2000_46bk1_e.html (last visited Jan. 12, 2006). The Canada Health Act was passed by Parliament in 1984. The purpose of the Act is to establish conditions on which the provinces and territories must meet in order to receive full cash contributions from the federal government.

Administration (all health insurance duties must be carried out by a public authority on a non-profit basis, being accountable to the province or territory).

From these principles, the provinces and territories enact legislation (such as adult protection legislation) for the benefit of their citizens. Most provinces and territories regulate health care activities and programs through local agencies known as ‘regional health authorities’.³ These bodies normally function under a branch of the provincial or territorial government. This system of health care represents the modern trend in integrating and streamlining existing health services and programs for better delivery of care. Under this regime, regional health authorities provide a continuum of services ranging from health promotion to long-term care. But with the gradual emergence of adult protection initiatives, other groups are becoming an integral part of the response to elder law issues.



³ NAT'L COALITION ON HEALTH CARE, available at <http://www.nchc.org/facts/Canada.pdf> (last visited Jan. 12, 2006).

B. The Elderly and Institutional Care Facilities

There is a growing body of literature on abuse and neglect among older adults in the context of an aging population. Elder persons, usually 65 years of age or older, often require specialized health services with regard to medical assessment, treatment, and rehabilitation care. In particular, elder persons require special attention and care in community care or institutional care facilities. As Canadians increase their life spans, the demands placed on institutional facilities to deliver quality care of elder residents becomes critical in public policy planning. By virtue of age, physical and mental condition, and other social factors, elderly persons become extremely vulnerable to those providing support. Statistics Canada predicts a substantial growth in the senior population in Canada from 3.5 million people in 1996 to 6.9 million by 2021.⁴ Approximately seven percent of older adults live in institutional settings across the nation, but hidden abuses are occurring. The paucity of research on institutional abuse and neglect suggests that more analysis needs to be done.⁵

Institutional care facilities include hospitals, personal care homes, nursing homes, community and residential care facilities, and intermediate care facilities.⁶ Long-term care services normally consist of medical treatment (including administering medication), rehabilitative programs, and daily activity plans. On this point, adult protection legislation encompasses the nature of care and lifestyle of vulnerable elder residents. More specifically, various protocols are applied in circumstances of abuse and neglect among older adults by providing emergency intervention, counseling, legal advice or action, and home care.⁷

⁴ Seniors Resource Centre Association of Newfoundland and Labrador, *Strategic Plan to Address Elder Abuse in Newfoundland and Labrador* (2005), at 21.

⁵ BULL. OF THE NAT'L ADVISORY COUNCIL ON AGING, *Hidden Harm: The Abuse of Seniors*, Vol. 17, Number 1 (Winter 2004-04), available at http://www.ccna.ca/expression/17-1/pdf/exp17-1_e.pdf (last visited Jan. 12, 2006) [hereinafter BULLETIN]. This bulletin is prepared by the Department of National Advisory Council on Aging under the Canadian government. Representatives from each province and territory comprise this Council.

⁶ HEALTH CANADA, *Abuse and Neglect of Older Adults: A Discussion Paper*, (2000), available at <http://www.phac-aspc.gc.ca/nfv-cnivf/familyviolence/pdfs/Abuse%20and%20Neglect.pdf> [hereinafter HEALTH CANADA PAPER]. This paper was prepared by L. McDonald and A. Collins for the Family Violence Prevention Unit, Health Canada.

⁷ BRITISH COLUMBIA SENIORS' ADVISORY COUNCIL, *A Delicate Balance: Assisting Elderly Victims of Abuse and Neglect* (Dec. 1992), available at <http://www.healthservices.gov.bc.ca/seniors/publications/abuse.html> (last visited Jan. 12, 2006). This is a position paper that was prepared as part of the Council's deliberations in 1991-92. The British Columbia Seniors' Advisory Council was established under the Seniors Advisory Council Act in June 1989. The

Older adults residing in institutional care facilities often depend upon such essential services to maintain a quality lifestyle outside of the family home. In this respect, elder residents become a vulnerable group, and may lack the means to protect themselves from potential wrongdoing, while having little understanding of their rights in the event they are subject to such behavior. As such, the abuser is usually in a position of trust or influence. Some modern challenges faced by institutional care facilities include a lack of reporting of abuse and neglect, poor responses to reported cases; and background checks of negligent employees. The lack of reporting abuse and neglect against elder residents depends upon the level of commitment from care facility operators and the system of response within that facility. As will be seen, the response to this challenge is adult protection legislation requiring mandatory reporting, an increased multidisciplinary collaboration of agencies, and criminal records checks. These challenges highlight the need to protect elder residents from abuse and neglect by understanding the interrelationship between the nature of institutional care and adult domestic legislation.

II. LEGAL ASPECTS OF ELDER ABUSE AND NEGLECT

A. Legal Definitions and the Nature of Elder Abuse and Neglect and Adult Protection

The most common legal definition of abuse is the deliberate mistreatment of an adult that causes the adult (a) physical, mental or emotional harm, or (b) damage to or loss of assets, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors.⁸ The social definition of abuse is any act or omission which causes physical, psychology or financial harm to an elderly person.⁹ Subtle forms of abuse may also occur, including the over-administration of drugs and

Council consists of a chair appointed by the Minister of Health and Minister Responsible for Seniors. Members are selected based on regional representation, age, gender, ethnicity, and relevant experience. The mandate of the Council is to act on behalf of seniors throughout the province, advise the relevant Ministers, and maintain close communication links with seniors' organizations and other care providers.

⁸ Dictionary of Canadian Law 3 (Daphne Dukelow ed., 3rd ed. Thomson Canada Ltd. 2002).

⁹ Anna S. Pellatt, *Seniors and the Law: A Resource Guide*, 2nd edition. Alberta Civil Liberties Research Centre (2000), available at

<http://www.aclrc.com/Seniors%20Book%20Updated/Seniors%20chapter2.htm#Chapter%20Two%20Introduction> (last visited Jan. 12, 2006).

medication, or setting activities that isolate the elder resident from others within the facility, thereby restricting communication with others.

The legal definition of neglect is a lack or failure to provide necessary care, aid, guidance or attention which causes or is reasonably likely to cause the victim severe physical or psychological harm or significant material loss to his estate.¹⁰ Symptoms of neglect include: (1) dehydration and malnutrition; (2) poor hygiene and inappropriate clothing; (3) poor skin conditions, being tied to a bed or chair (physical restraints); (4) failure to monitor restraints; and (5) failure to allow outside services or medical appointments.¹¹ Neglect also includes self-neglect whereby the elder resident is not capable of maintaining their own physical and mental faculties. Self-neglect may contribute to soiling oneself in their bed, not taking proper medication, failing to consume food or liquid as required, and failing to communicate with others.

Applying these definitions, the National Clearinghouse on Family Violence (a national resource centre focusing on family violence in Canada) lists four factors constituting abuse and neglect: (1) *Physical Abuse*, involving inappropriate restraints, pinching, slapping, and pushing; (2) *Psychological Abuse*, including verbal abuse, feelings of guilt, shame, fear, or passivity, depression, and withdrawal; (3) *Financial Abuse*, and (4) *Neglect*, including inappropriate feeding practices and lack of mobility.¹² Among these, financial abuse is the most common form of elder abuse in Canada.¹³ Financial abuse generally occurs when there is an unauthorized use of an elder resident's money or property by others. This type of abuse typically involves the disappearance of the elder resident's property, lack of accounting for the resident's finances, and unexplained changes to a deed, will, or other legal instrument.¹⁴

These definitions are incorporated in all forms of adult protection legislation to define response management. Despite the setting of these criteria, however, traditional criticisms of adult protection legislation include the use of paternalistic models that treat older adults as children, and giving little right of self-determination (including mandatory

¹⁰ Dictionary of Canadian Law, *supra* note 8, at 275.

¹¹ HEALTH CANADA PAPER, *supra* note 6, at 19.

¹² THE NAT'L CLEARINGHOUSE ON FAMILY VIOLENCE, *available at* <http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/pdfs/abuseneg98en.pdf> (last visited Jan. 12, 2006). This is a fact sheet published under the Department of Health Canada. The National Clearinghouse on Family Violence is comprised of the Family Violence Prevention Unit, Health Issues Division, the Health Promotion and Programs Branch, and Health Canada.

¹³ Pellatt, *supra* note 9, at 7.

¹⁴ HEALTH CANADA PAPER, *supra* note 6, at 20.

reporting, which is scrutinized by commentators as preventing older adults from deciding what courses of action suit their needs under varying circumstances). Perhaps the most important criticism of adult protection regimes is the lack of coordinated responses from different agencies to assist vulnerable elder residents in extenuating circumstances.

Adult protection legislation therefore draws from other disciplines, and does not exist in isolation. As Inions notes:

Other provincial legislation touches upon related issues such as mental health, family violence, dependent adults or trusteeship and guardianship, health professions, civil rights and financial and person directive legislation. It is important to keep related legislation in mind to complete the picture of adult protection.¹⁵

Much of the procedural aspects of adult protection legislation incorporate protocols from other disciplines, which is why a discussion of these related disciplines would be helpful in portraying the core concepts of adult protection. One of the core concepts involves legal recourse in providing adequate protection to vulnerable adults. This form of assistance under the *parens patriae* jurisdiction in the common law gives power to the courts to protect vulnerable adults from wrongdoing through various legal means. Wills, guardianships, and powers of attorney provide legal protection for persons incapable of making financial or personal care decisions due to reasons of incapacity.

B. Legal Instruments and Services

Legal instruments such as wills, powers of attorney, health care directives, and legal services such as guardianships and trusteeships, are all available to provide necessary legal protection and health care for older adults who experience incapacity. A *will* provides an opportunity for a testator or testatrix to distribute property or assets to designated beneficiaries.¹⁶ Seniors often draft and execute wills to designate personal representatives (either executors or administrators) and beneficiaries. For those elderly

¹⁵ Noela Inions. *A Commentary on the Protection for Persons in Care Act*, 8 Health L. Rev. No. 2, 22 at 4 (1999). The author distinguishes Alberta's approach to adult protection from other Canadian jurisdictions by outlining some of the strengths and weaknesses of Alberta's legislation. The author argues that mandatory reporting poses some problems with regards to privacy matters, and that it should be applied only when the adult is not mentally competent. Rather, voluntary reporting should be emphasized with client consent.

¹⁶ BRITISH COLUMBIA MINISTRY OF ATTORNEY GENERAL, *available at* http://www.ag.gov.bc.ca/courts/civil/info/wills_estates.htm (last visited Jan. 12, 2006).

residents who die without a will, intestate succession laws guide the administration of their estate in each jurisdiction. A *power of attorney* allows a person (donor) to grant legal authority to persons receiving such power (donee) to deal with the property of the donor.¹⁷

Typically, the donor must be mentally competent to give a power of attorney. In the context of elder care, a power of attorney becomes crucial when an elder becomes incapacitated after executing a power of attorney. This is because a power of attorney becomes void once the donor becomes mentally incompetent, thus rendering no legal authority for the donee to further act for the donor. Various types of powers of attorney include an ‘enduring power of attorney’, which allows representative powers to continue beyond the mental incapacity of the donor.¹⁸ This is particularly useful to handle financial matters for the older adult succumbing to mental incapacity. In this way, a power of attorney helps deal with financial abuse issues by appointing specific duties to the donee to manage the finances of the older adult. *Health care directives* (also known as living wills) represent another means of granting decision-making authority to persons for health care affairs of the older adult. A directive gives clear instructions to a doctor or other health care provider as to how key health care decisions should be made during treatment when the older adult may not be capable of communicating their views.

Guardianships allow persons who face mental incapacity to allow others to manage financial and health care decisions on their behalf.¹⁹ The potential for abusing such authority exists in that the guardian may unnecessarily dispose of financial assets or make inappropriate health decisions without the consent of the elder. *Trusteeships* are similar to guardianships whereby a representative (trustee) is chosen to make financial decisions on behalf of a testator (older adult) under various circumstances. As such, a trustee acts as a fiduciary for the best interests of the older adult by safeguarding and preserving assets.²⁰ Each of these legal arrangements forms part of the adult protection format in providing for financial and health care representation for the benefit of elder

¹⁷ ALBERTA JUSTICE, *available at* http://www.justice.gov.ab.ca/dependent_adults/enduring_powers_of_attorney.aspx?id=2593 (last visited Jan. 12, 2006).

¹⁸ *See id.*

¹⁹ GOV'T OF ALBERTA, *available at* http://www.seniors.gov.ab.ca/services_resources/opg/index.asp (last visited Jan. 12, 2006).

²⁰ Eileen E. Gillese, *Essentials of Canadian Law: The Law of Trusts* (Irwin Law Inc. 1997), at 130-31.

residents. Some jurisdictions draft legislation by combining aspects of guardianships and trusteeships with formal adult protection principles.

C. Adult Protection Legislation and the Federal Framework

An overview of adult protection legislation in Canada is not complete without a brief discussion of the role of federal agencies and related federal statutes. The Public Health Agency of Canada is an agency that produces literature and other materials on the protection of older adults. Other agencies attached to the Public Health Agency such as the National Clearinghouse on Family Violence are instrumental in raising awareness across the nation.²¹ An affiliated body of the Public Health Agency known as the National Advisory Council on Aging releases materials such as with a bulletin entitled “Hidden Harm: The Abuse of Seniors”.²² The Council is a multidisciplinary body composed of up to eighteen members whose function is to advise the federal Minister of Health on timely elder issues.²³ Another federal agency known as Social Development Canada provides funding for community-based projects called New Horizons for Seniors by promoting the ongoing involvement of seniors in their communities.²⁴ This federal program grants funding to non-profit organizations who encourage seniors to volunteer and provide leadership. New partnerships are constantly being formed between federal agencies and community-based programs to ensure more streamlined adult protection measures, while educating the general public about elder law issues that affect the general welfare of elder persons.

The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms (Charter), a federal document comprising the first thirty-four sections of the Canadian Constitution Act of 1982, forms

²¹ PUBLIC HEALTH AGENCY OF CANADA, National Clearinghouse on Family Violence, *available at* http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/age_e.html (last visited Jan. 12, 2006).

²² NAT'L ADVISORY COUNCIL ON AGING, *available at* http://www.naca-ccnta.ca/expression/17-1/exp117-1_toc_e.htm (last visited Jan. 12, 2006).

²³ *See id.*

²⁴ SOC. DEV. CANADA, *available at* <http://www.sdc.gc.ca/en/isp/horizons/nhfaq.shtml> (last visited Jan. 12, 2006). The Department of Social Development is a federal agency that seeks to strengthen Canada's social foundation by helping people with disabilities, families with children, and seniors to fully participate in their communities. This assistance may be provided as income security programs such as the Canada Pension Plan, Old Age Security, and Guaranteed Income Supplement.

the guiding principles of adult protection.²⁵ The Charter provides numerous protections for older adults such as: (1) the right to freedom of thought, belief, opinion, or expression, and freedom of peaceful assembly and association (known as fundamental freedoms)²⁶; (2) the right to life, liberty, and security of the person²⁷; (3) the right to be secure against unreasonable search and seizure²⁸; (4) the right not to be arbitrarily detained or imprisoned²⁹; (4) the right not to be subjected to cruel and unusual treatment or punishment³⁰; and (5) the right to be treated equally and without discrimination based on physical or mental disability or age (equality rights).³¹ In particular, freedom of expression and freedom of association are fully immersed as procedural rights within local regulations followed by institutional care facilities. The provision of rights involving the security of the person, security against unreasonable search and seizure, avoidance of arbitrary detention, prevention against cruel and unusual treatment, and freedom from age and disability discrimination, all find its way in adult protection statutes in guarding against various forms of abuse.

The Criminal Code

Criminal law in Canada is administered exclusively under federal jurisdiction. Crimes in Canada are punishable either as indictable offences (which are serious criminal matters such as murder), and summary conviction offences (which are less serious criminal matters such as mischief).³² The Criminal Code of Canada (Code) is a set of

²⁵ DEPARTMENT OF CANADIAN HERITAGE, available at http://www.canadianheritage.gc.ca/progs/pdp-hrp/canada/guide/overview_e.cfm (last visited Jan. 12, 2006). The Department of Canadian Heritage is a federal agency that seeks to create, disseminate, and preserve Canadian cultural works, stories, and symbols that foster Canadian values.

²⁶ Canadian Charter of Rights and Freedoms, R.S.1982, section 2. The Canadian constitution was repatriated on April 17, 1982. The Constitution Act of 1867 (known as the British North America Act) created the Dominion of Canada and established the rules of federalism. Canadian laws were subject to amendment and approval by the Parliament of the United Kingdom through royal assent. The 1982 repatriation of Canada's constitution, in effect, severed this administrative requirement to allow Canada's Parliament to enact legislation without U.K. approval. Under this new arrangement, the first thirty-four sections of what later became the Constitution Act of 1982 emerged as the Canadian Charter of Rights and Freedoms. Under the Charter, section 2 covers 'Fundamental Freedoms'.

²⁷ *Id.* § 7.

²⁸ *Id.* § 8.

²⁹ *Id.* § 9.

³⁰ *Id.* § 12.

³¹ *Id.* § 15.

³² LEG. CANADIAN FAQ'S - ALBERTA L. FOUND., available at <http://www.law-faqs.org/nat/crim-06.htm> (last visited Jan.21, 2006). Indictable offences may involve trials by a judge alone or judge and jury. There may be held a pre-trial hearing known as a preliminary inquiry, whereby the prosecutor presents

federal laws that outlines crimes that may be applicable in situations adversely affecting older adults.³³ Therefore, many abusive acts against older adults occurring within institutional settings are crimes under the Code. Generally, the Code provides legal protections for older adults from physical abuse, assault or sexual assault, harassment relating to fear of safety, financial abuse involving theft or fraud, unlawful confinement, and neglect. More specifically, various sections of the Code for abuse and neglect are enforceable under: (1) Sections 265, 267, and 269 (covering assault, bodily harm); (2) Section 271 (covering sexual abuse); (3) Sections 322, 331, 345, 346, 366, and 380 (covering financial abuse); (4) Section 215 (covering neglect) and (5) Sections 264-I and 423 (covering mental abuse).³⁴

Drawing from these sections of the Code, domestic adult protection legislation imposes a legal duty on the part of persons working in institutional care facilities to respond to incidences of elder abuse and neglect.³⁵ This duty applies even if the information on which the suspicious activity is based is delivered in confidence, save the solicitor-client privilege. Many jurisdictions clearly stipulate how privileged information (especially personal health data) is to be treated in adult protection legislation. Although various forms of abuse are covered under the Code, there is always the distinct possibility that abusive incidents against vulnerable elder residents will go unnoticed or never be reported, making elder abuse and neglect one of many hidden crimes. Hence, adult protection legislation establishes mandatory reporting provisions, and in some jurisdictions permits law enforcement agencies to directly intervene on behalf of elder residents.

evidence against the accused to a judge who determines whether or not the matter should proceed to trial. A third means of handling criminal matters is through hybrid offences. Hybrid offences are matters that may be handled as either indictable or summary conviction crimes.

³³ Criminal Code of Canada, R.S.C. 1985, c. C-46. In Canada, criminal law is exclusively under federal jurisdiction. As such, federal law applies in all provinces and territories. This means that although the federal government has authority to enact criminal law, the provinces and territories must administer such laws through their own law enforcement agencies, or with the Royal Canadian Mounted Police (R.C.M.P.). However, the provinces and territories have power to enact quasi-criminal laws. The Criminal Code of Canada contains most of Canada's criminal law, while other federal statutes cover the rest.

³⁴ *Id.* §§ 264-I, 265, 267, 269, 271, 322, 331, 345, 346, 366, 380, 423.

³⁵ Pellatt, *supra* note 9, at 31.

III. ADULT PROTECTION LEGISLATION

A. History of Adult Protection Legislation in Canada

Over the last thirty years Canada's adult protection regimes are being continuously shaped, with virtually every jurisdiction adopting protectionist policies from each other. However, much of Canada's adult protection legislation draws from modern initiatives in the United States, which draw extensively from child welfare legislation. From this, the Atlantic provinces in Canada were among the first to introduce comprehensive adult protection legislation to deal with abuse and neglect among older adults. In 1973, Newfoundland introduced its first adult protection legislation in its Neglected Adults Welfare Act.³⁶ Shortly thereafter, New Brunswick enacted its Child and Family Services and Family Relations Act in 1980.³⁷ Nova Scotia followed suit in 1989 by introducing the Adult Protection Act.³⁸ In 1973, Newfoundland also introduced legislation which imposed the first mandatory reporting obligations for protecting persons subjected to abuse and neglect. Drawing from these early initiatives, Canadian jurisdictions are building upon legislative principles and practices in addressing elder abuse and neglect issues. In Canada, responses to abuse and neglect among older adults generally occur in five ways:

- (1) Adult Protection Legislation (and Regulations)
- (2) Domestic Violence Statutes
- (3) Criminal Law (Criminal Code of Canada)
- (4) Adult Guardianship (and Trusteeship)
- (5) Human Rights Law in Québec³⁹

Direct intervention strategies arising from adult protection legislation are applied primarily through domestic regional health authorities or related agencies, usually under

³⁶ Lynn P. McDonald, et al. *Elder Abuse and Neglect in Canada* (Butterworths Canada Ltd. 1991), at 49.

³⁷ *Id.*

³⁸ *Id.*

³⁹ CANADIAN NETWORK FOR THE PREVENTION OF ELDER ABUSE, *available at* <http://www.cnpea.ca/> (last visited Jan. 12, 2006). This network is a national, non-profit body that began in the late 1990s, and was federally incorporated in 2000. The network is dedicated to preventing abuse of older persons throughout Canada. The primary goals of this body are to raise awareness of issues affecting the elderly, to educate the public about recognizing abuse, and to facilitate a review of public policy.

the advice of the local government minister. As such, the intervention process is heavily guided by local statute and regulations. Most jurisdictions provide adult protection by delegating responsibility to a government ministry or agency. The only exception is in Québec, where a human rights commission body is responsible for administering adult protection. The history of adult protection legislation thus has its roots in response management from the Atlantic region, a process that still resonates today in adult protection regimes across Canada.

B. List of Adult Protection Legislation Across Canada

In Canada, adult protection is guided by domestic legislation among the provinces and territories, which provide the basic framework in dealing with abuse and neglect. Some jurisdictions have multiple forms of adult protection legislation, while others have only one statute. Nevertheless, there is tremendous overlap between them in relation to the widespread application of protectionist measures. Below, Table 1 provides a summary of adult protection legislation across Canada. See Appendix 1 for distinguishing features of each jurisdiction.

Table 1: Adult Protection Legislation across Canada

<u>Province</u>	<u>Adult Protection Legislation</u>	<u>Year Enacted</u>
Alberta	Protection for Persons in Care Act	1998
	Nursing Homes Act	2000
	Dependent Adults Act (guardianship/trusteeship)	2000
	Health Facilities Review Committee Act	1980
British Columbia	Adult Guardianship Act	1996
	Community Care and Assisted Living Act	2002
Manitoba	Protection for Persons in Care Act	2001
	Vulnerable Persons Living with a Disability Act	1998
New Brunswick	Nursing Homes Act	1982
	Family Services Act	1983
Newfoundland	Neglected Adults Welfare Act	1990

Northwest Territories	Mental Health Act	1988
Nova Scotia	Adult Protection Act	1989
	Homes for Special Care Act	1989
Nunavut	None (but, Mental Health Act is most relevant)	1988
Ontario	Nursing Homes Act	1990
	Homes for the Aged and Rest Homes Act	1990
	Charitable Institutions Act	1990
	Long-Term Care Act	1994
Prince Edward Island	Adult Protection Act	1988
Québec	None (instead, Québec Charter of Human Rights and Freedoms)	1975
Saskatchewan	The Housing and Special-care Homes Act	1979
	Personal Care Homes Act	1991
Yukon	Decision-Making , Support, and Protection of Adults Act	2003

C. Mandatory Reporting of Abuse and Neglect

Mandatory reporting refers to the legal obligation of reporting abuse and neglect occurring against vulnerable persons to relevant authorities, if the information comes to the attention of persons within a care facility.⁴⁰ This type of reporting normally occurs upon ‘reasonable and probable’ grounds, and applies to *anyone* becoming suspicious of any wrongdoing or identifying marked changes in the behavior of elder residents. Several jurisdictions, including Alberta, Manitoba, Newfoundland, Nova Scotia, and Ontario have mandatory reporting requirements when instances of elder abuse and neglect occur. Proponents of mandatory reporting argue that it enables persons working closely with

⁴⁰ Darla Rettie, *Underneath the Golden Boy: A Rreview of recent Manitoba laws and how they came to be The Protection for Persons in Care Act*, 28 Man. L.J. (2001), at 250.

older adults in care facilities to communicate to outside authorities about the deteriorated conditions of the elder resident. Mandatory reporting implies that an older adult is in serious need of protection, in some cases from impending death. Typically, persons must report the wrongdoing to ministers of local government agencies, or to other authorities prescribed by statute or regulation. Upon adequate findings of fact, government officials then proceed to investigate through formal procedures. Aside from the need for transparency, proponents also argue that mandatory reporting helps coordinate efforts between agencies that formally gather information about the abuse or neglect.

In contrast, opponents of mandatory reporting express concerns over due process rights of the elder resident. First, some commentators argue that mandatory reporting leads to invasion of privacy and loss of control over release of personal health information.⁴¹ This view recognizes that while personal health information of the elder is normally protected under privacy statutes, it is nonetheless disclosed to officials during an investigation when it is relevant to the investigation. In this way, individual consent of the elder resident is overridden by the duty to protect the best interests of the elder resident by relevant authorities. Here, some jurisdictions prohibit disclosure of personal health information to investigators, while others require such information to be divulged if it is relevant to the investigation in progress.

Second, disclosure of personal information may affect the doctor-client confidentiality relationship. Elder residents confide in health care providers with the reasonable expectation that the information will be kept between the parties, and that it will not be used for any other purpose. Third, the investigatory process may not permit an elder resident to make their own decisions in shaping future remedial action. This loss of control restricts one's right to self-determination by providing few choices to the elder resident when remedial efforts are underway (such as when protective court orders are being issued). Regardless of the viewpoint, mandatory reporting is an integral part of adult protection legislation in some jurisdictions. Below, Table 2 provides a description of some jurisdictions with mandatory reporting provisions.

⁴¹ See Inions, *supra* note 15, at 28.

Table 2: Canadian Jurisdictions with Mandatory Reporting of Abuse and Neglect

<u>Province</u>	<u>Mandatory Reporting Provision</u>
Alberta	Section 2(1) of the Protection for Persons in Care Act
Manitoba	Section 3(1) of the Protection for Persons in Care Act
Newfoundland	Section 4 of the Neglected Adults Welfare Act
Nova Scotia	Section 5(1) of the Adult Protection Act
Ontario	Section 25(1) of the Nursing Homes Act

D. Common Adult Protection Concepts Across Canada

Administrative Powers

In every jurisdiction, local ministers or directors of provincial or territorial governments are directed by statute to intervene in responding to elder abuse and neglect. Part of this fiduciary duty includes the power to modify, revoke or refuse a license for operators of institutional care facilities if the operator violates any provision of the adult protection legislation. This is known as a “summary action” under various adult protection statutes. Other administrative powers include the right to investigate allegations of complaints against operators of care facilities, and to produce detailed reports regarding the nature of abuse or neglect. The Lieutenant Governor of each jurisdiction has authority to make regulations that conform to the spirit of adult protection statutes.

Investigation of Abuse and Neglect

After receiving a formal complaint upon ‘reasonable and probable’ grounds, the government official (investigator) or medical practitioner has authority to conduct a full investigation of the institutional care facility suspected of abusing or neglecting an older

adult. This generally includes a right of entry to the facility, and access to documents and records relevant to the investigation. Each jurisdiction allows for certain types of documents and records to be made available for the purpose of investigation. If an operator of a care facility refuses to cooperate during the investigation, the investigator may apply to a local court of jurisdiction for an order granting authority to enter the facility and obtain documents and records. After an investigation is complete, the investigator usually produces a detailed report relating to the allegations of abuse and neglect.

Whistleblower Protection - Special Immunity when Reporting Abuse and Neglect

Every jurisdiction in Canada provides for special immunity for those persons reporting abuse and neglect against older adults in institutional settings. Normally, this type of immunity is granted when a person reports in good faith that a vulnerable person is or is likely to be abused or neglected, or furnishes information or produces any record that detects wrongdoing against an older adult resident. Every form of adult protection legislation contains specific provisions devoted to protecting these ‘whistleblowers’, while also preventing employers from taking any adverse action against employees. Such initiatives thus encourage those working in institutional care facilities to come forward with confidence in reporting potential abuse or neglect.

Protective Services - Removal from Institution

In most Canadian jurisdictions, a formal assessment is done by a government minister or medical practitioner to determine whether or not the affected older adult should be removed from the institutional care facility. If the Minister is convinced on reasonable and probable grounds that an elder resident faces abuse and neglect, the Minister has authority to immediately remove the victimized elder to a safer location. Other pertinent medical and social services are also provided to the elder resident, depending on the circumstances of abuse or neglect. Here, law enforcement agencies play a crucial role in providing protective services.

The Role of Public Trustee or Guardian

Upon a finding of abuse and neglect, some jurisdictions in Canada prescribe that a Public Trustee or Guardian should replace a negligent operator of a care facility in handling the affairs of elder residents. In the context of preventing such wrongdoing, the duties of the Public Trustee or Guardian normally include handling all property, finances, and other liabilities of the care facility in question. Financial duties include the managing of bank accounts, safety deposit boxes, trust funds, and entering into contracts on behalf of the care facility.⁴² Other legal duties include acting in the best interests of beneficiaries by initiating action against an institutional care facility operator through the provincial or territorial ministry. These representative functions are designed to prevent any misuse of the financial well-being of an older adult, and serve to protect against financial abuse.

Rights of the Elderly Resident

The general rule for adult protection is that elder residents living in institutional care facilities have the same rights as elderly persons living in the community. Adult protection legislation provides for basic rights to be afforded to older adults such as: (1) permitting private visits from families, friends, and health care providers; (2) security of the person; (3) self-determination; (4) confidentiality; and (5) mobility rights. The concept of the security of the person is taken from section 7 of Canada's Charter of Rights and Freedoms. Virtually every jurisdiction provides for a 'bill of rights' for elder residents living in institutional care facilities. Part of this concept includes the right of elder residents to live in a safe and clean environment, and to fully participate in social or recreational activities with others that strengthen their mental health and help avoid isolation.

The Use of Multidisciplinary Approaches

Recent changes to adult protection regimes are involving more comprehensive and multidisciplinary teams. This is predicated on the view that input from various disciplines will contribute to better information in helping detect and respond to abuse and neglect. Health Canada reiterates this observation by stating; "Protective service

⁴² See Gillese, *supra* note 20, at 140.

programs usually combine legal, health and social services to allow for the widest array of interventions. They require considerable coordination and interdisciplinary team work.”⁴³ None of the adult protection regimes would function properly without a coordinated and disciplined network of agencies in responding to cases of elder abuse and neglect. As part of this effort, various communities are applying technological tools such as the Internet and telehealth programs to help communicate between agencies that are responsible for front-line response management.

E. Overview of Adult Protection Legislation in Canada’s Provinces and Territories

Alberta

In 2000, Alberta enacted the Protection for Persons in Care Act (PPCA) as its main adult protection legislation.⁴⁴ The Act generally outlines responsibilities on the part of agencies to investigate, prepare reports, and take disciplinary action against any abuser within care facilities. As such, institutional care facilities such as hospitals, lodges, nursing homes, and publicly-funded facilities are covered by PPCA.⁴⁵ What distinguishes the PPCA from other jurisdictions is that it applies only to intentional harms committed by individuals. Thus, the definition of abuse is somewhat narrowed in that only intentional harms must be proven to attach liability to wrongdoers. Apart from this, the PPCA designates certain responsibilities on the part of care providers. A notable feature of the PPCA is its mandatory reporting provision under section 2(1):

Every individual or service provider who has reasonable and probable grounds to believe and believes that there is or has been abuse against a client *shall* report that abuse to the Minister or a police service or a committee, body or person authorized under another enactment to investigate such an abuse.⁴⁶

From this, there is a clear duty to report abuse and neglect by anyone who has ‘reasonable and probable’ grounds to suspect such behavior against an older adult

⁴³ HEALTH CANADA PAPER, *supra* note 6, at 43.

⁴⁴ The Protection for Persons in Care Act, c. P-29, R.S.A. 2000 (Alberta) [hereinafter PERSONS IN CARE ACT]. The Act came into effect on January 5, 1998, and is administered by Alberta’s Department of Health and Wellness. A legislative review of this Act was conducted in 2002 with the appointment of a Legislative Review Committee. In the fall of 2003, a questionnaire was developed to receive public comments on the recommendations of this committee.

⁴⁵ See Inions, *supra* note 15, at 22.

⁴⁶ See PERSONS IN CARE ACT, *supra* note 44, § 2(1).

resident. The ‘reasonable and probable’ standard is so fundamental that it is applied in every Canadian jurisdiction dealing with adult protection. A careful reading of the provision also reveals that an ‘individual’ or ‘service provider’ are the types of persons who must report the abuse and neglect. This means that health care providers working at institutional care facilities (including doctors, nurses, psychologists, and pharmacists) are obligated to identify and report any abuse and neglect, a procedure providing the first line of defense within the care facility. Failure to comply with this mandatory reporting provision may result in an offence punishable by not more than \$2,000.⁴⁷

Alberta Nursing Home Regulations: The Assessment Committee and Protection Against Financial Abuse

To gain more insight into some of the problems associated with elder abuse and neglect, a brief discussion of Alberta’s nursing home regulations relating to admission policies of institutional care facilities and protections against financial abuse may be noteworthy. In Alberta, prior to admitting an older adult resident to a facility, an *assessment committee* must conduct a thorough screening of each adult resident.⁴⁸ This assessment committee is created by a district board comprised of not less than three persons, one of whom must be a physician.⁴⁹ The involvement of a physician is significant in that no person shall be admitted to a nursing home unless a “complete medical examination” is conducted.⁵⁰ Subject to the approval of the provincial Minister of Health and Wellness (Minister), the assessment committee recommends formal procedures for admission, discharge or transfer of adult residents to and from an institutional care facility. Operators of institutional care facilities apply these recommendations to admit prospective elder applicants. Where an operator of facility is denied approval for admitting a resident, the applicant may appeal to the district board.⁵¹ The criteria for admitting elder residents are helpful in identifying specific needs in

⁴⁷ *Id.* at § 2(5).

⁴⁸ NURSING HOMES OPERATION REG., Alberta Regulation 258/1985, Nursing Homes Act, *available at* http://www.qp.gov.ab.ca/catalogue/catalog_results.cfm?frm_isbn=0779706846&search_by=link (last visited Jan. 12, 2006 [hereinafter NURSING HOME REGULATIONS]). This Regulation supplements Alberta’s Nursing Home Act by specifying regulations as to adult protection principles such as licensing, funding, health management, investigation, and direct intervention.

⁴⁹ *Id.* § 6(1).

⁵⁰ *Id.* § 5(1).

⁵¹ NURSING HOME REGULATIONS, *supra* note 48, at § 6(6).

determining the nature of care. This assessment may be particularly relevant in detecting symptoms or signs of abuse or neglect.

Alberta's nursing home regulations also protect elder residents against financial abuse. For instance, section 8(1) of Alberta's nursing home regulations of the Nursing Homes Act states that:

When a resident is admitted to a nursing home, the operator *shall* prepare an inventory, in duplicate, of the resident's personal property at the nursing home including any *money* in the resident's possession.⁵²

The same section goes on to provide that an operator of a facility shall furnish a record showing all transactions or occurrences on behalf of a resident. In fact, section 8(6) of Alberta's nursing home regulations imposes liability on the part of a facility operator where: (1) the property has been deposited with the operator for safe keeping; (2) the property is a pension check from the Government of Canada or Government of Alberta; (3) the property comes in possession of the operator; and (4) the property is in jeopardy of loss of damage and the operator or employee has a reasonable opportunity to safeguard the property.⁵³ Protection against financial abuse is further enhanced by requiring a facility operator to open and maintain a trust account in the district where the nursing home is located.⁵⁴ Interest earned on money deposited in this trust account shall accrue for the benefit of the resident only, and no part of the interest may be used by an operator.⁵⁵

An operator of an care facility must also maintain adequate resident records, including; (1) admission forms approved by an assessment committee; (2) admission records containing personal data of the resident (3) property records; (4) physician's notes and orders; (5) a record of all visits and all telephone calls made by a physician to the resident; (6) dentist's notes; and (7) notes from persons evaluating the resident's condition at least once a month, incidents of "unusual occurrences", and drugs and medication administered to a resident.⁵⁶

⁵² *Id.* § 8(1).

⁵³ *Id.* § 8(6).

⁵⁴ *Id.* § 9(1).

⁵⁵ *Id.* § 9(6)(a)-(b).

⁵⁶ *Id.* § 11(1)(a)-(k).

The scope of Alberta’s nursing home regulations follows the spirit of Ontario’s resident’s bill of rights concept in that such provisions grant both the right to be informed of the medical condition and treatment, and the right to communicate in confidence between health care providers and the adult resident. In conjunction with these rights, Alberta requires an operator of a care facility to provide “life enrichment services”, including the maintenance of organized activities on a regular basis, as well as encouraging residents to attend religious and community activities.⁵⁷

Administration of drugs and medications to an adult resident is carefully monitored by both physicians and pharmacists. Here, the operator of a care facility must make arrangements with physicians to conduct medical examinations during every twelve-month period.⁵⁸ Each nursing home operator must also utilize the services of pharmacists to provide emergency pharmacy care, replace outdated medications, and train nursing home staff in the administration of drugs to residents.⁵⁹ These measures safeguard against over-medicating elder residents, while providing routine medical examinations. The use of physicians and pharmacists highlights the role of a multidisciplinary team in serving the needs of elder residents..

Furthering this concept of an interdisciplinary response, Alberta’s nursing home regulations for staffing procedures under section 12(1) requires an operator to obtain the services of: (1) an administrator; (2) director of nursing; (3) life enrichment coordinator; (3) in-service educator for nursing home staff; (4) registered dietitian; (5) a medical advisor; (6) a pharmacist; and (7) other persons needed for maintenance and safe-keeping of the nursing home.⁶⁰ This multidisciplinary network provides a safety net for elder residents by involving several persons from various disciplines to participate in actively monitoring the condition of an elder resident.

Any contravention of the nursing home regulations requires an operator to provide a ‘correction plan’ under Alberta’s Nursing Homes Act.⁶¹ The Nursing Homes Act provides an opportunity for the Minister by order to cancel or suspend a nursing home contract if the Minister believes the operator violates any provision or regulation of

⁵⁷ *Id.* § 16(3).

⁵⁸ *Id.* § 19(4).

⁵⁹ *Id.* § 21(2)(a)-(c).

⁶⁰ *Id.* § 12(1).

⁶¹ Nursing Homes Act, R.S.A. 2000, c. N-7, § 13. This Act is administered by Alberta’s Department of Health and Wellness, and mainly covers nursing home contracts, operation of nursing homes, and general regulations covering termination of contracts, the use of records, and making regulations.

the Act or “prejudicially affects” the health, well-being, or safety of the residents of the nursing home.⁶² Upon the Minister’s cancellation, suspension, or termination of a nursing home contract, the Minister may remove the residents of a nursing home to another nursing home or facility.⁶³ Moreover, the operator of a nursing home must deliver all records in respect of the elder resident.⁶⁴ If a nursing home contract is affected in any way, an operator of a nursing home may request the Minister to conduct a hearing with a board of review.⁶⁵ The board of review must include a nominee from the regional health authority where the nursing home is located. If the Minister’s order still remains in effect, an operator may apply by originating notice to the Court of Queen’s Bench within 60 days of being served of the order.⁶⁶

Complaint Procedure for Abuse and Neglect

In Alberta, the procedure for responding to abuse and neglect of older adults involves a “complainant” (individual, client, or service provider) filing action with the provincial Minister to launch an investigation against the institutional care facility housing the elder resident. If the Minister has reasonable and probable grounds to believe that an investigation is necessary to reveal any potential wrongdoing, he or she may appoint an investigator to enter a facility.⁶⁷ Thereafter, the investigator may access records for the purpose of conducting a formal investigation.⁶⁸ If the institution denies entry to the investigator, the Minister may apply for a court order from the Court of Queen’s Bench (trial court of general jurisdiction) to enter the premises of the institution at any reasonable hour and to produce records of the facility.⁶⁹ Under appropriate circumstances, an ex parte order may also be granted for the same purpose.⁷⁰

An investigator must prepare an interim report to the Minister updating the progress of the investigation within 30 days of being appointed to the case of abuse and

⁶² *Id.* § 14(1)(b).

⁶³ *Id.* § 18(1)(a).

⁶⁴ *Id.* § 18(1)(c).

⁶⁵ *Id.* § 15(1).

⁶⁶ *Id.* § 17(1).

⁶⁷ See PERSONS IN CARE ACT, *supra* note 44, at § 7(1).

⁶⁸ *Id.* § 7(2).

⁶⁹ *Id.* § 7(3).

⁷⁰ *Id.* § 7(4).

neglect.⁷¹ A follow-up procedure of another 30 days is also required until the investigation is complete. Section 8(2) of the PPCA provides an interesting remedial mechanism in that the Minister or investigator may refer the instant case to the police if they believe the Criminal Code of Canada applies under the circumstances.⁷² This is an instance where law enforcement officials meaningfully participate in the adult protection process. The remedial provision also highlights how provincial legislation directly incorporates federal law into its protectionist scheme by allowing relevant authorities to refer to the Criminal Code.

The interplay between government and law enforcement illustrates the nature of multidisciplinary assistance. Upon completing the investigation, the investigator must prepare a final report to the Minister and may recommend: (1) whether or not the institution should continue receiving funding; (2) whether disciplinary action should be taken against an employee or service provider; or (3) whether the complaint should be dismissed due to maliciousness, lack of reasonable and probable grounds, or insufficient evidence.⁷³ After reviewing the final report, the Minister may approve or reject the investigator's recommendations, order a further investigation, or take "any other action" where appropriate under the circumstances.⁷⁴

Alberta's adult protective legislation also reveals 'whistleblower' protection in that a complainant can be shielded from their employer by reporting abuse and neglect. For instance, section 4(1) of the PPCA prohibits any action against the complainant unless the reporting of abuse and neglect is made "maliciously" or without "reasonable and probable" grounds.⁷⁵ Section 4(2) adds another feature by requiring agencies not to take any adverse employment action against a service provider or an employee of an agency because that person is a complainant.⁷⁶ This feature of Alberta's legislation encourages those working closely with elder residents to come forward with complaints when unusual occurrences may cause deterioration in the overall livelihood of elder residents.

⁷¹ *Id.* § 8(1).

⁷² *Id.* § 8(2).

⁷³ *Id.* § 8(3).

⁷⁴ *Id.* § 8(4).

⁷⁵ *Id.* § 4(1).

⁷⁶ *Id.* § 4(2).

The most unique feature of Alberta's adult protection legislation is the requirement of a "criminal records check" in an institutional care setting.⁷⁷ This procedure requires an agency to conduct a criminal records background check on successful applicants for employment and any new volunteer.⁷⁸ This screening requirement is found in very few adult protection statutes in Canada, although similar requirements exist for day care settings, volunteerism, and license renewals (as in Saskatchewan).⁷⁹ The criminal records check component is important since one of the risk factors in identifying potential abusers involves the personality of the abuser. As such, a criminal record check procedure may safeguard against poor screening methods, which may contribute to unnecessary abuse and neglect in care facilities.

A related statute to the PPCA is Alberta's Health Facilities Review Committee Act, which grants authority to a 12-member Committee that may include Members of the Legislative Assembly (MLAs), to investigate complaints against a health care facility and to make subsequent recommendations.⁸⁰ Under this Act, a Committee has an obligation to review and investigate hospitals and nursing homes from 'time to time'.⁸¹ When a complaint for abuse and neglect is received, the Committee shall investigate the quality of care and treatment, and the standards of accommodation received by that patient.⁸² The Act also affords the Committee to appoint a member of its body or a government employee as a 'complaint officer', whose function is to make preliminary inquiries or make investigations.⁸³ Under this complaint process, the Committee is entitled to inspect a facility's records, save financial records.

Aside from government intervention methods, the Dependent Adults Act is Alberta's third adult protection statute that outlines broad duties of both guardianships and trusteeships.⁸⁴ More specifically, this legislation points to specific duties that Public Guardian and Public Trustees must perform as 'interested persons' on behalf of older adults.⁸⁵ The government of Alberta normally encourages family and friends of older

⁷⁷ See PERSONS IN CARE ACT, *supra* note 44, § 5(3).

⁷⁸ *Id.*

⁷⁹ See Inions, *supra* note 15, at 28.

⁸⁰ Health Facilities Review Committee Act, R.S.A. 2000, c.H-3, § 2(2). This Act is administered by Alberta's Department of Health and Wellness.

⁸¹ *Id.* § 7(1).

⁸² *Id.* § 8.

⁸³ *Id.* § 13.

⁸⁴ Dependent Adults Act, R.S.A.2000, c.D-11.

⁸⁵ *Id.* § 1(1).

adults to apply for private guardianships under the Dependent Adults Act. What is obvious in Alberta's adult protection statutes is the degree of cooperation between government agencies (Ministers and MLAs), health care providers (physicians and pharmacists), and law enforcement officials in protecting the needs of elder residents during situations of abuse or neglect. Each agency seemingly adopts recommendations and measures from each other that serve the best interests of the elder resident in both financial and health care terms.

Recent Initiatives

Under a recent bill, the Standing Committee on Continuing Care Standards Act stated it may make regulations for establishing minimum staff training requirements, ensuring legislative standards for accommodation, medication, diet, nutrition, safety, and security, creating a bill of rights for residents, and setting procedures for complaints.⁸⁶ The Standing Committee's main function is to review the ongoing state of care in long-term care facilities and supportive living settings, and to report to the Alberta legislature on compliance levels with current standards. On other matters, the Dependent Adults Act is presently under formal review. The government of Alberta conducted eleven public consultation sessions throughout the province for reviewing provisions of the Dependent Adults Act and Personal Directives Act.⁸⁷ These sessions provide an opportunity for persons having experience with these statutes to express their concerns over the complexity and cost of applying for guardianships and trusteeship orders. The meetings involve health care providers, private guardians and trustees, social workers, legal professionals, financial groups, and professional organizations, once again illustrating the multi-sectoral involvement of various groups. One of the issues discussed involved the need for more education for private guardians and trustees in handling delicate matters for dependent adults.⁸⁸

⁸⁶ BILL 213 (2005) STANDING COMM. ON CONTINUING CARE STANDARDS ACT, FIRST SESSION, 26TH LEGIS., 54 ELIZABETH II, THE LEG. ASSEMBLY OF ALBERTA, *available at* http://www.assembly.ab.ca/net/index.aspx?p=bills_bill&selectbill=213 (last visited January 21, 2006).

⁸⁷ GOV'T OF ALBERTA SENIORS AND COMMUNITY SUPPORTS, *available at* http://www.seniors.gov.ab.ca/services_resources/opg/leg_review/index.asp (last visited Jan. 13, 2006) [hereinafter ALBERTA SENIORS AND COMMUNITY SUPPORTS].

⁸⁸ *Id.*

Other initiatives involving multidisciplinary efforts include municipal programs set up for the benefit of seniors. For instance, Edmonton's Elder Abuse Intervention Team consists of a social worker, a police detective, and a service community representative to assess and develop a safety plan for seniors.⁸⁹ Alberta also has a toll-free reporting line (1-888-357-9339) known as the Protection for Persons in Care reporting line to assist seniors in communicating their concerns.⁹⁰ The Alberta Elder Abuse Awareness Network is a group composed of professionals, municipal representatives and agencies, and police services.⁹¹ This network helps create community awareness for elder abuse and neglect by promoting training videos for front-line responders such as the police.

British Columbia

Adult Guardianship Act and The Role of Designated Agencies

Adult protection legislation in British Columbia is guided by the Adult Guardianship Act (AGA) in dealing with abuse and neglect of the elderly. The Ministry of Health Services (Community Care Branch) is responsible for administering adult protection in the province. A distinguishing feature of the AGA is its provision for a 'support and assistance' plan, whereby a designated agency must provide a detailed plan for proposed services to an adult.⁹² This plan provides that an agency must comply with associated legislation (known as the Health Care Consent and Care Facility Admission Act) when health services or admission to a care facility is given on behalf of an adult resident.⁹³ Here, the agency must communicate the nature of the support and assistance plan to the adult, or have relatives or friends assist in explaining the significance of the plan to the older adult. An adult may refuse such support and assistance plans, but if the agency feels that the adult is incapable of making this decision, it may consult the Public

⁸⁹ See BULLETIN, *supra* note 5, at 6.

⁹⁰ See ALBERTA SENIORS AND COMMUNITY SUPPORTS, *supra* note 87.

⁹¹ ALBERTA ELDER ABUSE AWARENESS NETWORK, *available at* http://www.child.gov.ab.ca/whatwedo/familyviolence/pdf/AEAAAN_website_revised.pdf (last visited Jan. 19, 2006), at 1. This network works closely with the Alberta Children's Services' Office for the Prevention of Family Violence and Health Canada's National Clearinghouse on Family Violence. The promotional materials and the training video were funded in part by the Government of Canada's National Crime Prevention Strategy.

⁹² Adult Guardianship Act, R.S.B.C. 1996, c.6, § 53 [hereinafter AGA].

⁹³ *Id.* § 53(2).

Guardian and Trustee to assess the mental health of such adult.⁹⁴ This arrangement displays how different agencies cooperate in providing for the most appropriate health plan for assisted living.

Designated agencies responsible for reporting abuses to the Minister of Health include the five Regional Health Authorities, and a community-based group called British Columbia Association for Community Living.⁹⁵ These groups must work in close association with the affected adult to shape daily assistance plans. The traditional method allowed designated agencies to provide informal support from family and friends. Today, the AGA provides more tools to designated agencies by granting them legal authority to enter the premises of a care facility under question.⁹⁶ Additionally, the AGA provides for the issuance of restraining orders against abusers.

Under section 56 of the AGA, support and assistance orders are granted by courts upon a finding that an elder resident is mentally incapable of receiving support and assistance.⁹⁷ Much like Manitoba and Ontario, B.C.'s legislation provides no-contact provisions that prevent an abuser from continually residing at the premises where the adult lives, or communicating, harassing, or interfering with the elder adult.⁹⁸ As with granting any protective order, the court must consider the least restrictive and intrusive way of providing support and assistance.⁹⁹ This means that assistance given to an elder resident must not violate their basic rights of influencing how that support should be provided. This keeps in line with the presumptive right of self-determination, which refers to an elder resident being capable of making their own health and personal care decisions, commonly known as 'presumption of capability' provisions.¹⁰⁰ The least intrusive measures language is replicated in many other adult protection statutes in Canada.

As for guardianship, a major principle espoused under the AGA is that a court should not appoint a guardian unless the support and assistance plan works. Here, an

⁹⁴ *Id.* § 53(5).

⁹⁵ Public Guardian and Trustee of British Columbia, *B.C.'s Adult Guardianship Laws: Supporting Self-Determination for Adults in British Columbia*, July 2005, available at <http://www.trustee.bc.ca/pdfs/STA/Protecting%20Adults%20from%20Abuse%20and%20Neglect.pdf> (last visited Jan. 13, 2006) [hereinafter PUBLIC GUARDIAN AND TRUSTEE].

⁹⁶ AGA, *supra* note 92, § 59(2)(a).

⁹⁷ *Id.* § 56(b).

⁹⁸ *Id.* § 56(3)(c)(i)-(iii).

⁹⁹ *Id.* § 56(5).

¹⁰⁰ *Id.* § 3.

incapacitated elder resident may appoint someone to make health care and financial decisions on their behalf, using what is known as representation agreements.¹⁰¹ Administered by the Office of Public Guardian and Trustee, representation agreements become crucial during times of incapacity by guarding against financial abuse through the efforts of a trusted representative to preserve and safeguard financial assets. Representation agreements may also be customized by the older adult to assign duties to be exercised by the representative under specified conditions, performing much like an enduring power of attorney.¹⁰²

The AGA provides specific remedies to abused or neglected elder residents of institutional care facilities. For instance, section 47(1) of the Act requires agencies to investigate when it (1) receives a report of abuse and neglect, (2) suspects abuse and neglect to exist, or (3) receives notification that an elder's representative has been hindered.¹⁰³ The Act allows the abused elder resident to be removed immediately while the agency continues its investigation of the facility. If the elder resident is unable to protect themselves, a justice of the peace may issue a warrant authorizing entry to the facility in order to interview the resident.¹⁰⁴ If the agency suspects any criminal activity against the elder resident, it must report this activity to the police. This emergency measure is similar to Alberta's legislation by involving law enforcement into the response management.

Once any form of abuse or neglect is suspected in a care facility, an elder resident may contact the Chief Licensing Officer, who responds to complaints alleging that a facility is committing health and safety violations.¹⁰⁵ If an elder resident is dissatisfied with the response from the care facility, he or she may contact a Community Liaison

¹⁰¹ SIMON FRASER UNIVERSITY, *Respecting Your Rights: A Guide to the Rights of People Living in British Columbia Long Term Care Facilities* (2003), available at <http://www.canadianelderlaw.ca/myweb/booklet2.pdf> (last visited Jan. 13, 2006) [hereinafter SIMON FRASER UNIVERSITY]. This guide was written by Charmaine Spencer at the Gerontology Research Centre at Simon Fraser University, and by Mary Beck at Health Sciences, Douglas College. Funding for this project was given by the Law Foundation of British Columbia.

¹⁰² B.C. INST. AGAINST FAMILY VIOLENCE, available at <http://www.bcifv.org/hottopics/elders/6.shtml> (last visited Jan. 17, 2006). This website defines representation agreements under Fact #6, as part of its series of fact sheets on elder abuse. The Institute's goal is to eliminate family violence through research and information.

¹⁰³ Manitoba Law Reform Commission Report #103, *Adult Protection and Elder Abuse* (Dec. 1999), at 35.

¹⁰⁴ *Id.* at 36.

¹⁰⁵ SIMON FRASER UNIVERSITY, *supra* note 101.

Officer for that particular facility.¹⁰⁶ Every regional health authority in B.C. has ‘community care liaison officers’ who respond to concerns from government-funded care facilities.¹⁰⁷ This joint effort of the Chief Licensing Officer and Community Liaison Officer reflects B.C.’s integrated approach by involving persons other than care facility operators to respond to allegations of wrongdoing, while promoting inter-departmental coordination.

The AGA legislation also highlights the controversial practice of using restraints against elder residents.¹⁰⁸ Restraints are any equipment or device that limits the movement of seniors, such as lap belts in wheelchairs, bed rails, locked areas, any drug or medication (given to control one’s behavior), and electronic devices.¹⁰⁹ The purpose of including the issue of restraints in legislation is to protect against unnecessary punishment of vulnerable persons. Often times, a staff member of facility may become frustrated in dealing with an elder resident, and may utilize restraints as a means of controlling the resident’s behavior in some manner. The use of physical restraints on elder residents is prominently featured in adult protection legislation in many jurisdictions. Such provisions address physical abuse. Physical and medical restraints are permitted for providing safety of other residents or staff members. B.C. encourages operators of care facilities to use other less intrusive means initially, and use restraints as a last resort.¹¹⁰

Providing adult protection in a multidisciplinary fashion lies in the administration of designated agencies and community agencies. Section 61(b) of the AGA states: “The Public Guardian and Trustee may...(b) organize networks of public bodies, organizations or persons for the provision of support and assistance to abused or neglected adults.”¹¹¹ The emphasis on relying upon a *network* of agencies is clear in providing an effective support and assistance plan to an affected adult.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 13.

¹⁰⁸ *See* AGA, *supra* note 92, § 44(a).

¹⁰⁹ *See* SIMON FRASER UNIVERSITY, *supra* note 101.

¹¹⁰ *Id.* at 25.

¹¹¹ *See* AGA, *supra* note 92, § 61(b).

Community Care and Assisted Living Act

British Columbia's Community Care and Assisted Living Act (CCALA) supplements the adult protectionist measures offered by the Adult Guardianship Act.¹¹² Administered by the office of the Public Guardian and Trustee within B.C.'s government, the legislation generally deals with licensing, inspection, and the role of medical health officers. The CCALA does not apply to hospitals or facilities under its Hospital Act or Mental Health Act, respectively.¹¹³

A striking feature of CCALA is the role of medical health officers in responding to abuse and neglect of older adults. Unlike other Canadian jurisdictions, B.C.'s medical health officer has broad licensing and investigatory powers. To begin with, a director (provincial Minister of Health) may delegate "any power or duty" to a medical health officer.¹¹⁴ Pursuant to this power, a medical health officer may issue a license and specify the types of care within an institutional care facility.¹¹⁵ Furthermore, a medical health officer may not issue a license unless the applicant is of 'good character', has training, experience, and personality and temperament necessary to operate a community care facility.¹¹⁶ The medical health officer may also suspend or cancel a license, or may add or vary terms and conditions of a license to any community care operator.¹¹⁷ Here, the background of licensees operating a community care facility is brought into question in order to ensure adequate care of community care residents in the future. The involvement of a health care professional in the decision-making process of an elder resident's care highlights B.C.'s commitment to a multidisciplinary approach rather than a segmented approach.

Another interesting facet of CCALA is its overlapping with Alberta's method of conducting background checks of persons seeking employment in institutional care facilities. As section 7(1) of the CCALA states:

¹¹² Community Care and Assisted Act, S.B.C. 2002, c.75 [hereinafter COMMUNITY CARE ACT]. This Act is administered by B.C.'s Department of Health, and was enacted on Nov. 26, 2002. This Act effectively replaced the Community Care Facility Act which was introduced in 1969, and resulted from a consultation process involving operators of care facilities, client groups, and the public.

¹¹³ *Id.* § 2(d) and (h).

¹¹⁴ *Id.* § 3(2)(b).

¹¹⁵ *Id.* § 11(1).

¹¹⁶ *Id.* § 11(2)(a)(i)-(iii).

¹¹⁷ *Id.* § 13(1).

A licensee must do all of the following:

(a) employ at a community care facility only *persons of good character* who meet the standards for employees specified in the regulations.¹¹⁸

However, British Columbia's legislation goes further in that a medical health officer must not issue a license to an applicant for institutional care unless that applicant is of: (1) good character; (2) has training, experience and other qualifications; and (3) has the "personality, ability and temperament" necessary to operate a community care facility.¹¹⁹ The added qualification requirement suggests that operators of care facilities need to demonstrate, at minimum, that they are capable of dealing with elder residents in variety of circumstances, and avoid negligent behavior.

Touching upon financial abuse, the CCALA prescribes that a licensed operator of a facility may not persuade an adult resident from making or altering a will, make a gift, or provide a benefit for the licensee.¹²⁰ In cases of financial exploitation, any provision of a will that confers a benefit to a licensee of a community care facility will be void.¹²¹ The CCALA legislation thus serves as another example of how domestic legislation covers many legal recourses, including adult protection principles, guardianship, trusteeship, and mental health.

Inspection of Institutional Care Facility

The director or medical health officer carries out the duties of investigating complaints against an institutional care facility suspected of abuse and neglect against older adults. The general duties of a medical health officer include: (1) investigating every application for a license; (2) investigating every complaint against unlicensed or community care facilities contravening legislation; and (3) carrying out inspections of any community care facility.¹²² The nature of inspection of records and documents in a B.C. institutional care facility follows that of most other Canadian jurisdictions in that a director or medical health officer may require a community care facility to produce

¹¹⁸ *Id.* § 7(1).

¹¹⁹ *Id.* § 11(2).

¹²⁰ *Id.* § 18(3).

¹²¹ *Id.* § 18(4)(a).

¹²² *Id.* § 15(1)(a)-(d).

financial and other records that can “reasonably be presumed to contain information relevant to the administration of this Act.”¹²³

The dual role served by a director (government) and medical health officer (health professional) is another indication that adult protection legislation incorporates other disciplines in responding to abuse and neglect. B.C. also permits an applicant to appeal to an administrative agency (known as the Community Care and Assisted Living Appeal Board) to review decisions of the director or medical health officer in acting against the licensee. This appeals mechanism is found in every jurisdiction, keeping in line with affording basic due process rights for operators of a facility. This appellate procedure is also important in streamlining and ensuring the provision of care for elder residents searching for a place in care facilities by avoiding unnecessary delays.

Both the Adult Guardianship Act and the Community Care and Assisted Living Act complement each other in terms of establishing a multidisciplinary framework that responds to the immediate needs of older adults experiencing abuse and neglect. Where the AGA lays the foundation for reporting and investigating abuse and neglect by a government agency, the CCALA goes further by including health professionals to participate in the same process. British Columbia’s approach to abuse and neglect among older adults highlights the modern trend in Canadian jurisdictions in seeking assistance from various disciplines, and by combining adult protection legislation with guardianship statutes.¹²⁴

Recent Initiatives

Many new developments address issues such as the right to self-determination. For instance, a guide published by Simon Fraser University provides a comprehensive description of rights for seniors planning to enter an institutional care facility.¹²⁵ Such materials are available as an instructional guide for those seniors intending to seek care in a facility, and provides a package of legal rights similar to what Ontario promotes in its ‘bill of rights’ legislation. By way of the federal government’s Seniors Independence Program (SIP), B.C. integrates health, social services and legal services into what is

¹²³ *Id.* § 9(1)(b).

¹²⁴ See HEALTH CANADA PAPER, *supra* note 6.

¹²⁵ See SIMON FRASER UNIVERSITY, *supra* note 99.

known as Community Resource Networks (CRNs) in approximately fifty communities.¹²⁶ The CRNs serve to raise awareness, promote coordinated efforts, develop protocols, and foster prevention for seniors victimized by abuse, neglect, and self-neglect.¹²⁷ The CRNs provide a continuum of services to victimized older adults by streamlining health, social, and legal needs. The CRNs typically involve community-based groups, police, religious groups, and financial institutions. The B.C. approach clearly represents the modern trend in utilizing a multidisciplinary approach in responding to abuse and neglect.

Manitoba

Early initiatives in Canada to reform adult protection legislation have much to do with Manitoba's adult protection regime. Modern adult protection statutes in Canada draw from Manitoba's Health Care Directives Act in 1992 to empower individuals who depend on health care services.¹²⁸ In 1993, the Vulnerable Persons Living with a Mental Disability Act (Vulnerable Persons Act) was introduced and later amended in 1998, dealing with the role of supervision of dependent adults. Manitoba's Vulnerable Persons Act serves as a means of empowering those residents who had little control in the direction of their treatment.¹²⁹ Relative to other jurisdictions, Manitoba's adult protection legislation clearly emphasizes the issue of empowerment of elder residents.

The Role of the Vulnerable Persons' Commissioner and the Substitute Decision-Maker

The Vulnerable Persons Act provides for mandatory reporting, powers of investigation, protective action, and a mechanism of appeal. Like Alberta, the Vulnerable Persons Act allows law enforcement agencies to be involved during an investigation upon a request by the provincial Minister.¹³⁰ The Vulnerable Persons Act also provides an extensive framework for substitute decision-making on behalf of elder residents. A special hearing panel comprised of at least twenty individuals, including parents of vulnerable persons and lawyers, conducts hearings to make written recommendations as to whether or not a substitute decision-maker may provide personal care to an older

¹²⁶ See HEALTH CANADA PAPER, *supra* note 6.

¹²⁷ See PUBLIC GUARDIAN AND TRUSTEE, *supra* note 95.

¹²⁸ Health Care Directives Act, C.C.S.M. 1992, c. H27.

¹²⁹ Vulnerable Persons Living with a Mental Disability Act, C.C.S.M. 1993, c. V-90.

¹³⁰ *Id.* § 25(b).

adult.¹³¹ The recommendations, in turn, allows the provincial commissioner (known as the *Vulnerable Persons' Commissioner*) to formally appoint a substitute decision-maker only when the older adult is deemed incapable of making decisions on their own behalf.

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A substitute decision-maker is granted broad powers by the commissioner that “relate to the areas of incapacity for only as long as appropriate” (not longer than five years), and under very strict conditions such as determining the nature of social and recreational programming of the vulnerable person.¹³³ The substitute decision-maker must act in good faith and in the best interests of the elder resident by making key health care decisions, including where the vulnerable person should reside. Here, the substitute decision-maker may apply for an apprehension order from a justice when a vulnerable person refuses to live in a facility designated by the substitute decision-maker.¹³⁴

Separate provisions also permit a substitute decision-maker to handle an elderly resident’s property by imposing fiduciary duties on the substitute decision-maker.¹³⁵ Part of this duty includes a proper accounting of all transactions involving the vulnerable person’s property, and a ‘true inventory and account’ of the vulnerable person’s property, debts, and liabilities after six months of being appointed.¹³⁶ At any time, the Vulnerable Person’s Commissioner may vary the duties of the substitute decision-maker, as well as the duration of its supervisory powers.¹³⁷ These measures signify the importance of preventing against financial abuse from those persons acting as substitute decision-makers within a specified period of time. Furthermore, the legislation encourages the elder resident to participate in activities that avoids becoming isolated or reclusive, thus guarding against potential abuse.

Following this tradition of protecting vulnerable persons, Manitoba also has the Protection for Persons in Care Act (PPCA).¹³⁸ This statute arose from instances of abuse that captured the attention of legislators in response to a Winnipeg senior’s death in a

¹³¹ *Id.* § 34(1).

¹³² *Id.* §§ 53(1), 29.

¹³³ *Id.* §§ 57(1)(b), 57(2)(e), 57(4).

¹³⁴ *Id.* § 62(1).

¹³⁵ *Id.* §§ 82(1), 99.

¹³⁶ *Id.* §§ 100, 108(1).

¹³⁷ *Id.* § 139(1)(a)-(c).

¹³⁸ Protection for Persons in Care Act, C.C.S.M. 2000, c.P-144 [hereinafter PROTECTION ACT].

personal care facility.¹³⁹ Types of abuse and neglect may include residents sitting in wet and soiled clothing, being physically restrained to toilets for extended periods of time, and being roughly handled. The PPCA applies only to adult residents in a health facility, but does not include a vulnerable person within the meaning of the Vulnerable Persons Living with a Mental Disability Act.¹⁴⁰ Thus, both adult protection statutes are separate but interrelated.

Manitoba clearly designates the term “abuse” in three provisions of its adult protection legislation.¹⁴¹ The heading under section 2(1) of the PPCA is entitled “Duty to Protect Patients from Abuse” and states:

The operator of a health facility has a duty to protect the patients of the facility from abuse and to maintain a reasonable level of safety for them.¹⁴²

Manitoba’s definition of abuse differs markedly from Alberta, where abuse includes only intentional actions. In contrast, Manitoba’s defines abuse in broader language by stating:

“**abuse**” means mistreatment, whether physical, sexual, mental, emotional, financial or a combination of any of them, that is *reasonably likely to cause death* or that causes or is reasonably likely to cause serious physical or psychological harm to a person, or significant loss to the person’s property;¹⁴³

A careful reading of this provision reveals how Manitoba inserts language about the likelihood of causing death. This language is missing from many other jurisdictions’ legislation. The provision implies a sense of urgency in detecting abuse and neglect, and that any situation likely to cause death to an elder resident requires immediate intervention.

The PPCA provides for mandatory reporting of elder abuse, drawing from adult protection legislation in Alberta, Newfoundland, Nova Scotia, and Ontario. Moreover,

¹³⁹ Rettie, Darla, *Underneath the Golden Boy: A review of recent Manitoba laws and how they came to be* The Protection for Persons in Care Act, 28 Man. L.J. at 245. (2001). The author describes Manitoba’s approach in developing adult protection procedures for older adults. The author also compares Manitoba’s adult protection legislation with that of Alberta’s legislation.

¹⁴⁰ See PROTECTION ACT, *supra* note 138, § 1.

¹⁴¹ *Id.* §§ 2, 3, 5.

¹⁴² *Id.* § 2(1).

¹⁴³ *Id.* § 1.

protection is provided for nursing home employees who act as whistleblowers.¹⁴⁴ The PPCA provides this special immunity for those reporting abuse since employees of nursing homes have previously been reluctant to report abuse or neglect for fear of retribution. This is why virtually every jurisdiction discourages adverse employment action against persons reporting suspected cases of abuse and neglect, particularly for employees of institutional care facilities. Once an operator of a care facility is charged, the onus is on the Crown (government) to show that the abuse or neglect occurred on a balance of probabilities. Under Canadian civil law, a balance of probabilities refers to the standard of proof that a certain event occurring is more than fifty percent (or, more probable than not).¹⁴⁵

Allaying concerns that mandatory reporting provides little input from the elder resident during an investigation, Manitoba explicitly provides for patient autonomy under section 7(2) of the PPCA:

When making a report, the investigator shall try, to the fullest extent, to involve the patient and to determine and accommodate the patient's wishes.¹⁴⁶

A notable difference between Manitoba and Alberta lies in the treatment of privacy matters. In Manitoba, access to documents and records requires personal health information of the elder resident to be disclosed to an investigator if it relates to the matter being investigated.¹⁴⁷ In contrast, Alberta's legislation clearly prohibits a person's health information from being accessed during an investigation unless the elder resident consents.¹⁴⁸ But like Alberta and other jurisdictions, Manitoba does not require information to be divulged during an investigation that is covered by solicitor-client privilege.¹⁴⁹ Reviewing Manitoba's two main adult protection statutes indicates how the province goes a bit further in empowering the rights of elder residents.

¹⁴⁴ *Id.* § 3(1).

¹⁴⁵ Dictionary of Canadian Law, *supra* note 8, at 36.

¹⁴⁶ See PROTECTION ACT, *supra* note 138, § 7(2).

¹⁴⁷ *Id.* § 6(2).

¹⁴⁸ See PERSONS IN CARE ACT, *supra* note 44, § 7(5).

¹⁴⁹ See PROTECTION ACT, *supra* note 138, § 6(5).

Recent Initiatives

Along with legislative efforts, Manitoba created a specialized court system known as the Family Violence Court on September 17, 1990 in the capital city of Winnipeg.¹⁵⁰ The purpose of the Family Violence Court is to hear cases of abuse and neglect against the elderly, handling first appearances, remands, guilty pleas and trials for spouses and children. The Family Violence Court is an example of how the Canadian legal system is creating innovative strategies in dealing with the emerging area of elder law. Since 1998, the government of Manitoba operates a complaint system, whereby relatives of elderly patients could report cases of abuse or neglect.¹⁵¹ However, the service is limited to relatives or friends of victimized elder residents who may report such incidences. In 2005, Manitoba announced that all private and not-for-profit personal care homes are required to develop a bill of rights for nursing home residents.¹⁵² Here, operators must set up a resident's council to discuss any care-related issues, while addressing how physical restraints should be used on older adults. Indeed, this proposal is true to the principle of preserving adult autonomy in the decision-making process. This initiative draws from Ontario's bill of rights concept which was introduced in 1990.

Newfoundland and Labrador

In 1973, Newfoundland and Labrador was one of the first provinces in Canada to enact adult protection legislation.¹⁵³ Till today, the main adult protection statute in Newfoundland and Labrador is the Neglected Adults Welfare Act (NAWA).¹⁵⁴ Initially focusing on neglect, NAWA now includes both neglect and abuse, owing to several amendments of relevant provisions in 1990. Newfoundland and Labrador designates slightly different administrative positions to implement adult protection legislation. Rather than appointing a Minister as in other provinces and territories, Newfoundland

¹⁵⁰ See Rettie, *supra* note 127, at 246.

¹⁵¹ *Id.*

¹⁵² CANADIAN NETWORK FOR THE PREVENTION OF ELDER ABUSE NEWSLETTER, *available at* http://www.cnpea.ca/July_%202005_7.pdf (last visited Jan. 19, 2006).

¹⁵³ CANADIAN NETWORK FOR THE PREVENTION OF ELDER ABUSE, *supra* note 39, *available at* http://www.cnpea.ca/canadian_accomplishments_milestones.htm (last visited Jan. 13, 2006).

¹⁵⁴ Neglected Adults Welfare Act, R.S.N.L.1990, c.N-3 [hereinafter NEGLECTED ADULTS ACT].

and Labrador designates a ‘Director of Neglected Adults’.¹⁵⁵ The Director is part of Newfoundland and Labrador’s Department of Health and Community Services.

Newfoundland is also the first province to introduce mandatory reporting of older adults. Section 4(1) of NAWA provides that “a person who has information which leads him or her to believe that an adult is a neglected adult *shall* give the information, together with the name and address of the adult, to the director or to a social worker who shall report the matter to the director.”¹⁵⁶ Under NAWA, a “neglected adult” is defined as an adult that is incapable of caring for himself due to physical or mental infirmity, is not covered by mental health legislation, not receiving care or attention, and refuses care for himself.¹⁵⁷ An interesting feature of Newfoundland and Labrador’s adult protection legislation is the legal recourse option in the form of an application for declaring that an adult is a neglected adult. Here, a director, social worker or other person may apply to a judge for a declaration of neglect after the investigation phase.¹⁵⁸ This legislation differs from other Canadian jurisdictions by permitting social workers to assist a victimized older adult. Typically, the Department Minister or a representative of the provincial government will conduct a full investigation, while also pursuing appropriate legal actions to safeguard the interests of the affected older adult.

Such measures may include an application to courts of local jurisdiction (the Court of Queen’s Bench) to permit forcible entry during an investigation upon the refusal of both an operator of a care facility and an older adult.¹⁵⁹ Other measures include seeking a declaration for immediate removal of an older adult to the home of a suitable person.¹⁶⁰ At any time pending the determination of this application, a medical practitioner may certify that an elder resident requires temporary custody.¹⁶¹ Moreover, section 6(10) of NAWA allows a judge to order hospitalization on behalf of the affected elder resident where medical evidence clearly reveals the need for special care.¹⁶² Here, the role of the health care provider becomes prominent much like in other jurisdictions,

¹⁵⁵ *Id.* § 3.

¹⁵⁶ *Id.* § 4(1).

¹⁵⁷ *Id.* § 2(h)(i)-(iv).

¹⁵⁸ *Id.* § 6(1).

¹⁵⁹ *Id.* § 5(2)(b).

¹⁶⁰ *Id.* § 6(4)(b).

¹⁶¹ *Id.* § 8.

¹⁶² *Id.* § 6(10).

where the medical assessment step ultimately determines the nature of care required for the elder resident.

NAWA also permits a judge to act in the “best interests” of the neglected adult by making an order: (1) that the adult should remain in the facility; (2) be removed to a home of “some suitable person”; (3) that the adult be committed to the care of the director or be transferred to an approved facility; and (4) that the adult be declared a neglected adult subject to an order for support under part III of the Family Law Act.¹⁶³ Any of these court orders may be varied or rescinded after four weeks from the making of the order under expedient circumstances.¹⁶⁴ Newfoundland and Labrador’s legislation highlights the distinct role that courts play in providing for alternative care arrangements for elder residents who are abused or neglected. The legislation thus serves as a good example of adult protection in its earliest forms. It can be seen that such jurisdictions utilizing early versions of adult protection legislation involve the legal system to a large extent. On the other hand, modern adult protection moves away from this traditional scheme by involving other disciplines and agencies to provide care for older adults.

Recent Initiatives

As of January 2005, the demographic picture of Newfoundland and Labrador suggests that seniors comprise approximately 13.1% of the province’s population.¹⁶⁵ Statistics Canada projects that by 2021 Newfoundland and Labrador will have the highest population of older adults over the age of 65 in Canada.¹⁶⁶ At present, the provincial government is investing \$14.5 million (Canadian dollars) to upgrade long-term care facilities, personal care homes, and community care homes.¹⁶⁷ Like other Canadian jurisdictions, Newfoundland and Labrador operates under a regional health authority in order to create an accessible and sustainable health care system. As of 2004, Newfoundland and Labrador combined fourteen regional health boards under four

¹⁶³ *Id.* § 6(4).

¹⁶⁴ *Id.* § 9.

¹⁶⁵ GOV’T OF NEWFOUNDLAND AND LABRADOR ANNUAL REP. 2004-05 (DEP’T OF HEALTH AND COMMUNITY SERVICES), *available at* <http://www.health.gov.nl.ca/health/publications/pdffiles/ANNUAL%20REPORT%20HCS%202004-2005%20.pdf> (last visited Jan. 14, 2006) [hereinafter NFLD AND LABRADOR REPORT].

¹⁶⁶ *See id.*

¹⁶⁷ GOV’T OF NEWFOUNDLAND AND LABRADOR News Release, *available at* <http://www.releases.gov.nl.ca/releases/2005/health/0321n11.htm> (last visited Jan. 13, 2006).

Regional Integrated Health Authorities.¹⁶⁸ As part of this plan, the provincial government works in close association with health care professionals and providers, as well as community-based groups. This integrated network of organizations serves as a foundation for responding to potential cases of wrongdoing against vulnerable persons in institutional settings.

In May 2004, a conference entitled ‘The Faces of Elder Abuse Conference’ involved over two hundred service providers, seniors, educators, community, and government representatives.¹⁶⁹ In association with this conference, the Senior Resource Centre Association, along with over sixty community and government representatives (and professional groups), held a series of workshops entitled ‘Seniors Speak Out on Elder Abuse in rural Newfoundland’.¹⁷⁰ Such workshops focus on early identification of potential abuse and neglect among the elderly. A guide entitled ‘Looking Beyond the Hurt: A Service Provider’s Guide to Elder Abuse’ was also published by the Senior Resource Centre with full support from the R.C.M.P. (Royal Canadian Mounted Police) and thirteen professional organizations and schools.¹⁷¹ The culmination of these efforts resulted in Strategic Plans, a project funded directly by the federal government, including the Public Health Agency of Canada and the Department of Justice.¹⁷² Monitoring this Strategic Plan is the Interagency Elder Abuse Committee (IEAC).¹⁷³ Here, community-based groups, the province, and the federal government form an integrated partnership to address elder law issues.

In November 2004, the government of Newfoundland and Labrador set up a Division of Aging and Seniors, along with a Ministerial Council for Aging and Seniors.¹⁷⁴ This council is a collaboration of several ministers from other departments such as finance, justice, human resources, labor and employment, rural development, transportation, and aboriginal affairs.¹⁷⁵ A five-year plan from 2005 to 2010 is currently

¹⁶⁸ NFLD AND LABRADOR REPORT, *supra* note 165, at 5.

¹⁶⁹ SENIORS RESOURCE CTR ASS’N OF NEWFOUNDLAND AND LABRADOR, *available at* <http://www.seniorsresource.ca/conference.htm> (last visited Jan. 14, 2006) [hereinafter SENIORS RESOURCE CTR].

¹⁷⁰ *Id.*

¹⁷¹ *See* CANADIAN NETWORK FOR THE PREVENTION OF ELDER ABUSE NEWSLETTER, *supra* note 152, at 3.

¹⁷² *See* SENIORS RESOURCE CTR, *supra* note 169.

¹⁷³ *Id.*

¹⁷⁴ *See* NFLD AND LABRADOR REPORT, *supra* note 165.

¹⁷⁵ *Id.*

underway to address several forms of abuse experienced by the elderly, particularly in institutional care settings. Like other jurisdictions, a toll-free information line is set up for the benefit of seniors or others.¹⁷⁶

New Brunswick

The Nursing Homes Act and the Role of the Trustee

The Nursing Homes Act is the main adult protection statute in New Brunswick.¹⁷⁷ The Nursing Homes Act provides that a ‘comprehensive care plan’ be established for the benefit of older adult residents in a nursing home.¹⁷⁸ What separates New Brunswick’s adult protection legislation from other jurisdictions is its special emphasis on the role of the trustee. New Brunswick’s legislation confers broad powers to the trustee in handling abuse and neglect cases.¹⁷⁹ For instance, section 10(3) permits a trustee to have access to all books, records, or other documents relating to the operation of a nursing home in all matters.¹⁸⁰ In contrast, most other jurisdictions in Canada allow a government minister or designated investigator to have access to relevant documents and records during investigations. The trustee is usually appointed for a term not exceeding twelve months.¹⁸¹

Whereas other jurisdictions have provincial government ministers intervene in suspected cases of abuse and neglect, New Brunswick allows the Lieutenant-Governor in Council to be directly involved in the investigation of nursing homes suspected of abuse and neglect. Normally, the Lieutenant-Governor in any province or territory acts as the symbolic representative of the Queen by ensuring that domestic legislation is carried out by way of making necessary regulations. Here, New Brunswick’s Lieutenant-Governor in Council plays an active role in adult protection by having the discretion to appoint and oversee the duties of trustees acting on behalf of abused and neglected older adults. However, granting such broad discretionary powers to a trustee is only permitted where

¹⁷⁶ SENIORS RESOURCE CTR, *supra* note 169.

¹⁷⁷ Nursing Homes Act, 1982, c N-11 [hereinafter NHA].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* § 10(1).

¹⁸⁰ *Id.* § 10(3).

¹⁸¹ *Id.* § 10(1).

reasonable grounds exist that an institutional care facility is not functioning properly or fails to meet the basic requirements of care within the scope of adult protection.¹⁸²

The trustee may also operate a nursing home by managing employees of the facility, purchasing goods and supplies, and entering into contracts for the proper functioning of the nursing home.¹⁸³ Moreover, the trustee may take action against the facility's operator on behalf of beneficiaries of any trusts held by the operator.¹⁸⁴ Upon completion of its duties, the trustee must report to the Lieutenant-Governor in Council as to the status of the nursing home, and the Lieutenant-Governor may choose to make the trustee's report public.¹⁸⁵ This distinct procedure highlights the importance of creating transparency within the investigatory process. Along lines the trustee's report, an operator of an institutional care facility must provide a written statement of services and policies to a resident upon admission to a nursing home.¹⁸⁶ Apart from the trustee provisions, New Brunswick's legislation also allows a government Minister to appoint an inspector to explore a nursing home facility.¹⁸⁷ The designated inspector is entitled to free access of all books of account, documents, bank accounts, vouchers, correspondence, and medical and drug records.¹⁸⁸

A striking similarity exists between Ontario's concept of a resident's council and New Brunswick's requirement that an operator of a facility shall provide a procedure for hearing the concerns of residents of a nursing home.¹⁸⁹ Although no formal legislative procedures exist for establishing a resident's council within a care facility, New Brunswick allows older adult residents to provide input in the daily operations of the care facility. Aside from allowing adequate input from residents, operators of nursing homes must provide complete and up-to-date records of each resident from the time of admission to discharge.¹⁹⁰ These records, akin to other jurisdictions' plan of care concept, include a comprehensive care plan with reports from physicians, nurses, and dentists, along with progress reports from rehabilitation programs.¹⁹¹ Unique to these

¹⁸² *Id.*

¹⁸³ *Id.* § 10(4).

¹⁸⁴ *Id.* § 10(6).

¹⁸⁵ *Id.* § 10(9).

¹⁸⁶ *Id.* § 13(a)(i)-(ii).

¹⁸⁷ *Id.* § 25(1).

¹⁸⁸ *Id.* § 25(5).

¹⁸⁹ *Id.* § 13(d).

¹⁹⁰ *Id.* § 14(1).

¹⁹¹ *Id.* § 14(1)(c)-(g).

procedures is the requirement that a nursing home operator must provide the “type and amount of drugs” that accompany a resident. Such an initiative addresses the issue of over-medication of elder residents. This is a particularly useful remedy given that part of abuse includes the unnecessary administration of medication that may cause disorientation for the elder resident.

The Family Services Act is another of New Brunswick’s legislation.¹⁹² The Family Services Act, like other jurisdictions, combines guardianship duties with adult protection services. The legislation prescribes general protective care provisions on behalf of older adult residents living in institutional care facilities. Analogous to the “adult in need of protection” standard in Nova Scotia and Prince Edward Island, New Brunswick defines neglect. Section 34(1) of the Family Services Act states:

Where an adult is a disabled person or an elderly person, or is within a group prescribed by regulation, and

(a) is incapable of caring properly for himself by reason of physical or mental infirmity and is not receiving *proper care and attention*; or

(b) refuses, delays or is unable to make provision for his *proper care and attention*,

that person is a neglected adult for purposes of sections 35 to 42. ¹⁹³

This statutory language covering ‘proper care and attention’ of an adult is identical to legislation in both Nova Scotia and P.E.I. An interesting aspect of this legislation is that there is a mandatory reporting requirement for persons suspecting abuse and neglect against children, but not for adults.¹⁹⁴ Yet, any person having reason to believe that an adult is abused or neglected shall require the Minister to cause an investigation to be made. Even a professional worker believing that an adult is abused or neglected *may* disclose information to the Minister, suggesting that reporting wrongdoing is voluntary in nature.

After completing an investigation and upon a showing of actual harm, the Minister may provide social services to the older adult, or refer to: (1) a community social services agency; (2) another government department or agency; (3) a law enforcement agency with jurisdiction in the matter; (4) a regional health authority; or (5)

¹⁹² Family Services Act, 1983, c. F-2.2 [hereinafter FAMILY SERVICES ACT].

¹⁹³ *Id.* § 34(1).

¹⁹⁴ *Id.* § 30(1).

any other appropriate service.¹⁹⁵ Involving these groups suggests the preference for governments to work in close association with others to alleviate harm against vulnerable persons. Like Alberta and Manitoba, adult protection in New Brunswick permits law enforcement agencies to participate in response management.

The concept of ‘security of the person’ (deriving from the Canadian Charter of Rights and Freedoms) finds its way into adult protection legislation. New Brunswick is no exception, and the Family Services Act eloquently describes the circumstances of abuse and neglect by couching language in the form of security of a person. The relevant provision states:

...the **security of a person** may be in danger when:

- (a) the person is without adequate care or supervision;
- (b) the person is living in unfit or improper circumstances;
- (c) the person is in the care of someone who is unable or unwilling to provide adequate care or supervision of the person;
- (d) the person is in the care of someone whose conduct endangers the life, health or emotional well-being of the person;
- (e) the person is physically or sexually abused, physically or emotionally neglected, sexually exploited or in danger of such treatment;
- (f) the person is living in a situation where there is severe domestic violence;
- (g) the person is in the care of someone who neglects or refuses to provide or obtain proper medical, surgical, or other remedial care or treatment necessary for the health or well-being of the person or refuses to permit such care or treatment to be supplied to the person; or
- (h) the person by his or her behaviour, condition, environment or association, is likely to injure himself or herself or others¹⁹⁶

The legislation covers a wide variety of circumstances of self-neglect, both intentional and unintentional conduct by providers, and sexually exploitative behavior. However, apart from this wide coverage, the Family Services Act does not recognize financial exploitation as a form of abuse.¹⁹⁷ This means that any person acting on behalf of the Minister does not have authority to intervene in situations of financial abuse unless it occurs under the rubric of abuse and neglect as defined in the Act. With regard to criminal records check of those working in institutional care facilities, New Brunswick has no formal legislative requirements under its Nursing Homes Act. Yet, New

¹⁹⁵ *Id.* § 37(1).

¹⁹⁶ *Id.* § 37.1(1).

¹⁹⁷ DEP’T OF FAMILY AND COMMUNITY SERVICES (GOV’T OF NEW BRUNSWICK), *available at* <http://www.gnb.ca/0017/Protection/adult-e.asp> (last visited Jan. 14, 2006).

Brunswick's Regulation 83-77 under the Family Services Act does require an operator of a community placement residential facility to provide a criminal records check for each staff member or prospective staff member.¹⁹⁸ The role of the trustee and the administration of the adult in protection standard thus serve as the main elements of New Brunswick's adult protection scheme, one in which numerous agencies cooperate to serve the best interests of abuse or neglected elders.

Recent Initiatives

In 2002, New Brunswick embarked on a project known as the Nursing Home Services Resident Care Needs Project (DMR Report) with a view to improve care in nursing homes.¹⁹⁹ In recent years, the Department of Family and Community Services under the government of New Brunswick, is pledging \$120 million (Canadian dollars) to construct, replace, and renovate twelve nursing homes across the province.²⁰⁰ Given that there are sixty-one nursing homes offering services to over 4,000 adults and seniors throughout the province, such efforts indicate a fairly committed response to care for older adults. As part of this initiative, the New Brunswick Advisory Council on Seniors operates an online survey known as the Survey on the Status and Roles of Seniors in Our Province, which covers topics such as the role of seniors in society and government policies that affect them.²⁰¹ The council also holds one-day conferences on protection and abuse of older adults on an annual basis. For instance, in April 2005, residents of the city of Edmundston were invited to attend a conference entitled "Hidden Harm: the Abuse of Seniors" in cooperation with the Université du Troisième Age du Nor-Ouest (UTANO).²⁰²

¹⁹⁸ New Brunswick Reg. 83-77 under the Family Services Act (O.C. 83-412), c.F-2.2, § 19.1(1).

¹⁹⁹ DEP'T OF FAMILY AND COMMUNITY SERVICES (GOV'T OF NEW BRUNSWICK) NEWS RELEASE, *available at* <http://www.gnb.ca/cnb/news/fcs/2005e1424fc.htm> (last visited Jan. 14, 2006).

²⁰⁰ DEP'T OF FAMILY AND COMMUNITY SERVICES (GOV'T OF NEW BRUNSWICK) NEWS RELEASE, *available at* <http://www.gnb.ca/cnb/news/fcs/2005e1086fc.htm> (last visited Jan. 14, 2006).

²⁰¹ DEP'T OF FAMILY AND COMMUNITY SERVICES (GOV'T OF NEW BRUNSWICK) NEWS RELEASE, *available at* <http://www.gnb.ca/cnb/news/acs/2004e1358ac.htm> (last visited Jan. 14, 2006).

²⁰² DEP'T OF FAMILY AND COMMUNITY SERVICES (GOV'T OF NEW BRUNSWICK) NEWS RELEASE, *available at* <http://www.gnb.ca/cnb/news/acs/2005e0413ac.htm> (last visited Jan. 14, 2006).

The Department of Family and Community Services also carries out its Adult Victims of Abuse Protocols.²⁰³ In its most recent protocols initiative, the government of New Brunswick comments on the importance of integrated networks:

A cooperative effort is essential. Therefore, to ensure that clear linkages are in place, representatives from the following departments worked together to develop these protocols for their employees: Health and Community Services; Human Resources Development; Justice; Municipalities and Housing; and Solicitor General.²⁰⁴

Viewed collectively, the type of response in dealing with elder abuse and neglect involves a multidisciplinary approach in fashioning practical remedies. It appears that more cooperation between government agencies translates into better implementation strategies by gathering appropriate data and input and applying preventative measures.

Northwest Territories

The concept of using a multidisciplinary network to combat elder abuse and neglect is no more apparent than in the Northwest Territories. Recent demographic trends reveal that the province's seniors' population is growing at three times the national rate,²⁰⁵ and that the province's population over the age of 60 has increased by 48 percent between 1991 and 2000.²⁰⁶ Additionally, the prevalence of Aboriginal seniors (First Nations) in the Northwest Territories is over 62 percent.²⁰⁷ The Northwest Territories adult service program is thus divided into home care and long-term care due to their co-relationship.²⁰⁸ Among these, nine long-term care facilities operate throughout the province.²⁰⁹ The province's Department of Health and Social Services is the main agency responsible for monitoring abuse and neglect of elder residents. Due to its small population and vast distances separating communities, the Northwest Territories applies a

²⁰³ DEP'T OF FAMILY AND COMMUNITY SERVICES, *Adult Victims of Abuse Protocols* (June 15, 1998), available at <http://www.gnb.ca/0017/Protection/Adult/adultpro.pdf> (last visited Jan. 14, 2006).

²⁰⁴ See *id.*

²⁰⁵ A PROFILE OF N.W.T. SENIORS, available at <http://www.hlthss.gov.nt.ca/content/Publications/Reports/Seniors/NWTSeniorsProfile.pdf> (last visited Jan. 19, 2006).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 53.

²⁰⁹ *Id.* at 54.

highly integrated network of services for its residents under its “core services” program.²¹⁰ As part of this initiative, the Continuing Care Services body provides long-term care assistance and development of specialized assessments to create ‘plans of care’ for the benefit of elder residents, similar to other jurisdictions.²¹¹ Another initiative under the program of Protection Services also provides needed assistance to those facing domestic violence in community settings. These programs are administered by regional Health and Social Services regional Authorities.

In the Northwest Territories, the Mental Health Act (MHA) represents the main adult protection legislation covering abuse and rights of elder residents.²¹² Relative to other jurisdictions, the MHA provides a broad cross-section of traditional adult protection principles, guardianship, trusteeship, and mental health principles. Medical practitioners, psychiatrists, and psychologists all participate in lending assistance to elderly patients under this legislation. Section 40(2) of the MHA clearly defines abuse in the scope of security of the adult resident:

An involuntary or voluntary patient has a right to *security of the person* and shall not be subject to any abuse at any time during observation, examination, care or treatment.²¹³

Like New Brunswick’s legislation, this MHA provision draws from the concept of ‘security of the person’ under section 7 of the Canadian Charter of Rights and Freedoms. This is another example of how adult protection incorporates fundamental Charter rights into its scheme of protecting older adults. The MHA provides a unique administrative provision by permitting both the Minister and the Commissioner to exercise a joint appointment of those responsible for applying adult protection programs. Much like Manitoba’s substitute decision-maker, the Northwest Territories focus on ‘substitute consent givers’ to make health care decisions for elder residents deemed incapacitated.²¹⁴

²¹⁰ THE DEP’T OF HEALTH AND SOCIAL SERVICES (GOV’T OF THE NORTHWEST TERRITORIES), *Core Health and Social Services in the Northwest Territories* (Jan. 2003), available at <http://www.hlthss.gov.nt.ca/content/Publications/Brochures/PDF/tobacco/coreservices.pdf> (last visited Jan. 14, 2006).

²¹¹ *Id.*

²¹² Mental Health Act, R.S.N.W.T. 1988, c. M-10.

²¹³ *Id.* § 40(2).

²¹⁴ *Id.* § 19.2(1).

The use of restraints is also highlighted in the MHA provisions. The MHA allows for the use of physical and chemical restraints as is reasonable having regard to the physical and mental condition of the elder.²¹⁵ However, the person ordering the restraint must “clearly document” the use of the restraint in the patient’s health record by: (1) entering a statement in the record that a patient is being restrained; (2) a description of the behavior of the patient; (3) a description of the means of restraint; and (4) for chemical restraints, a statement of the chemical used, the method of administration, and dosage.²¹⁶ This provision clearly accounts for the possibility of abusing elders by way of over-medication. Such health records may be used by medical practitioners, psychiatrists, and psychologists to assess elder patients in tailoring specific medical treatment plans.

The treatment of financial matters is covered under the MHA through the formal appointment of a Public Trustee.²¹⁷ Upon a finding of mental incompetence, the Public Trustee serves as the trustee of the older adult’s estate. But if a medical practitioner is of the opinion that the elder resident is of sound mind to manage their own estate, the certificate of mental incompetence may be cancelled. The doctor must then forward this certificate to the Public Trustee for verification purposes.²¹⁸ The MHA provides stiff penalties for those who contravene any provision of the Act by imposing a fine not exceeding \$10,000, or to a term of not more than six months in prison.²¹⁹

Recent Initiatives

In 2002, a Seniors Action Plan promoted the integration and coordination of seniors programs, while improving communication between seniors and the public at large.²²⁰ In August 2005, the Northwest Territories Seniors’ Society, a non-profit group, drafted a Charter of Rights and Freedoms of Older Adults.²²¹ One of the rights espoused

²¹⁵ *Id.* § 36.1(1).

²¹⁶ *Id.* § 36.1(2).

²¹⁷ *Id.* § 52.

²¹⁸ *Id.* § 54.

²¹⁹ *Id.* § 58.

²²⁰ SENIORS’ ACTION PLAN STATUS REPORT – MINISTER RESPONSIBLE FOR SENIORS (GOV’T OF NORTHWEST TERRITORIES (June 2003), *available at* http://www.hlthss.gov.nt.ca/content/Publications/Reports/Seniors/Status_Report_2003.pdf (last visited Jan. 14, 2006).

²²¹ N.W.T. SENIORS SOCIETY – DRAFT FOR DISCUSSION, *available at* <http://www.nwtseniorssociety.ca/pdf/CharterofRights&FreedomsofOlderAdults.pdf> (last visited Jan. 14, 2006). This draft is an effort to recognize the ‘bill of rights’ concept that was introduced in Ontario in 1990.

under this charter is the right to safety and security of persons and possessions. This group provides an Advisory Committee, and distributes publications to seniors throughout the province.²²² A toll-free information line (1-800-661-0878) is also set up for the benefit of seniors.²²³

Nova Scotia

Nova Scotia is one of the first jurisdictions in Canada to formally enact adult protection legislation, along with the other Atlantic provinces. Under its regime, the Minister of Community Services (Minister) is charged with administering its adult protection, and may appoint a Coordinator to exercise any of the powers and functions of the provincial government. Nova Scotia's prominent adult protection statute is the Adult Protection Act (APA).²²⁴ This legislation places considerable weight on the concept of an "adult in need of protection". As section 3 of the APA states:

"adult in need of protection" means an adult who, in the premises where he resides,

(i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and *refuses, delays or is unable* to make provision for his protection therefrom, or

(ii) is not receiving *adequate care and attention*, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention;²²⁵

With the exception of Prince Edward Island, no comparable legislation is found with such broad language related to defining protection of adults in care. The APA provides extensive coverage to elder residents against physical, mental, and sexual abuses, while providing a mechanism to assist those who refuse or delay necessary care. The provision reveals that the latter form of assistance is identical to Newfoundland's definition of a 'neglected adult' (one "who refuses, delays, or is unable to make provision

²²² NWT SENIORS' SOCIETY, available at <http://www.nwtseiorsociety.ca/whoarewe.htm> (last visited Jan. 14, 2006).

²²³ DEP'T OF HEALTH AND SOCIAL SERVICES (GOV'T OF THE NORTHWEST TERRITORIES), available at http://www.hlthss.gov.nt.ca/seniors/abuse/elder_abuse.asp (last visited Jan. 14, 2006).

²²⁴ Adult Protection Act, R.S. 1989, c.2, s.1 [hereinafter NOVA SCOTIA ADULT PROTECTION ACT].

²²⁵ *Id.* § 3.

for proper care and attention”).²²⁶ The APA also provides for ‘adequate care and attention’, closely following Newfoundland’s description of a neglected adult “who is not receiving proper care and attention”.²²⁷ The adult in need of protection standard is so fundamental that it triggers multiple procedures, including a formal inquiry, assessment (including an evaluation by a qualified medical practitioner), and removal for protection.²²⁸

With respect to emergency intervention responses, the APA permits the Minister to apply to a court for a protective intervention order.²²⁹ Tied to the adult in need of protection standard, this protective intervention order is granted upon a finding by the Minister that there are reasonable and probable grounds that an adult is in need of protection. That is, upon a declaration that an adult is need of protection, a protection intervention order will be granted. While issuing such orders, a court or judge must consider the adult to be in need of protection as its ‘paramount’ consideration.²³⁰ Both sections 9(7) and 12 state that the ultimate factor evaluated by a family court in granting protection of an adult is the ‘best interest of the adult’, similar to the best interest of the child standard in maintenance orders.²³¹ By way of this protective intervention order, a Nova Scotia court may apply no-contact provisions, which prohibit contact or association between the older adult and the abuser.²³² This provision parallels that of Prince Edward Island, one of the other jurisdictions to adopt the adult in need of protection standard. The standard of proof under the APA is conducted on a balance of probabilities.²³³

Another adult protection statute in Nova Scotia is the Homes for Special Care Act.²³⁴ This Act consolidates other related statutes (including the Boarding Homes Act, Nursing Homes Act, and Social Assistance Act), thus indicating how provinces are integrating social assistance and health care legislation under one umbrella.²³⁵ Like other adult protection statutes, the Homes for Special Care Act requires the Minister to cancel

²²⁶ NEGLECTED ADULTS ACT, *supra* note 154, § 2(1)(iv).

²²⁷ NOVA SCOTIA ADULT PROTECTION ACT, *supra* note 224, § 2(1)(iii).

²²⁸ *Id.* § 6(a)-(b).

²²⁹ *Id.* § 9(1).

²³⁰ *Id.* § 12.

²³¹ *Id.* §§ 9(7), 12.

²³² *Id.* § 9(3)(d).

²³³ *Id.* § 9(9).

²³⁴ *Homes for Special Care Act*, R.S. 1989, c.203, s.1 [hereinafter HOMES FOR CARE ACT].

²³⁵ *See id.* Both the *Boarding Homes Act* and the *Nursing Homes Act* are repealed. The *Homes for Special Care Act* is intended to revise and consolidate three statutes – the *Boarding Homes Act*, the *Nursing Homes Act*, and the *Social Assistance Act*. However, the *Social Assistance Act* remains in effect.

or suspend a license from a facility that fails to provide adequate care or is unsuitable for an elder resident.²³⁶ Under this legislation, Nova Scotia focuses on “supervisory care” as a means of providing room, board, and supervision for daily living activities, as well as surveillance of the physical well-being of ambulatory or semi-ambulatory residents.²³⁷ As part of this care, the daily living activities include personal hygiene, dressing, grooming, meal preparation, and administration of medication.²³⁸

As such, these activities are prescribed to create healthy living standards for elder residents by fostering communication with other residents and improve their overall mental health. The inspection procedures in Nova Scotia mirror that of other jurisdictions by allowing the Minister to inspect a residential care facility or nursing home upon reasonable grounds.²³⁹ During inspection, an operator of a facility must permit entry to a medical practitioner or registered nurse both of whom are appointed by the chief inspector.²⁴⁰ Furthermore, the Minister may inspect the premises, equipment, facilities, books, and records, while requiring an adult resident to be examined by a qualified medical practitioner or registered nurse.²⁴¹

Under this scheme, a board of management may be established by the Governor in Council (equivalent to Lieutenant Governor in Council in other jurisdictions) to oversee the conditions of the care facility.²⁴² Following within the ambit of administrative guidance in other jurisdictions, the Governor in Council may make regulations respecting all matters to the care and well-being of residents, including the regulation of licensing requirements, admission and discharge policies, keeping of records at a facility, ensuring adequate staff qualifications, the maintenance of sanitation standards (in keeping with a safe and clean environment), and the granting of funds for municipal care facilities.²⁴³ Municipal unit care facilities may enter into agreements to “erect, acquire, purchase, alter, add to, improve, furnish, and equip” homes for accommodating aged or disabled

²³⁶ *Id.* § 7(a)-(b).

²³⁷ *Id.* § 2(o)(i)-(ii). The term ‘ambulatory’ refers to the ability of a person to move around the facility without the assistance of mechanical aids, devices, or persons, while the term ‘semi-ambulatory’ refers to a person moving without the assistance of persons, but requires mechanical aids or devices.

²³⁸ *Id.* § 2(1)(a).

²³⁹ *Id.* § 10(2)-(3).

²⁴⁰ *Id.* § 10(4).

²⁴¹ *See id.*

²⁴² *Id.* § 16.

²⁴³ *Id.* § 19(1)(a)-(n).

persons.²⁴⁴ These municipal units must operate care facilities with the approval of the Minister. The penalties imposed on wrongdoers for violating this Act involve a summary conviction (which are less serious offences with smaller penalties) and a fine of not more than 100 dollars (Canadian).²⁴⁵

Recent Initiatives

Following the enactment of the Adult Protection Act, Nova Scotia's social services department introduced an Adult Protective Services Unit to provide protection from physical abuse, sexual abuse, mental cruelty and neglect for those 16 years and older who are incapable of caring for themselves.²⁴⁶ In 2004, Nova Scotia's Department of Health released a discussion paper response booklet for Nova Scotians to consider for on the Adult Protection Act. The booklet sought input on whether Nova Scotia should adopt adult protection principles applied in other jurisdictions. For instance, one of the questions asked whether or not the Saskatchewan definition of mental incompetence should be utilized.²⁴⁷

Each year, there are approximately 1,300 cases investigated under adult protection legislation, with 75 percent of those cases involving self-neglect.²⁴⁸ Health Minister Angus MacIsaac notes: "The abuse and neglect of older persons is a serious social problem that deserves a great deal of public discussion and dialogue in Nova Scotia, particularly given the rapid aging of our population and the projected increased incidence

²⁴⁴ *Id.* § 15(1).

²⁴⁵ *Id.* § 18. This penalty is one of the weakest in Canada. In default of this payment, a person in Nova Scotia may be imprisoned for not more than 30 days. Compare with fines from other adult protection jurisdictions: (1) Alberta: \$2,000 per individual, or not more than 6 months in prison, (2) British Columbia: \$10,000 per individual (the highest in Canada); (3) Saskatchewan: \$1,000 per individual, or \$5,000 for corporation; (4) Manitoba: \$2,000 per individual, or 6 months in prison, or \$30,000 for corporation, (5) Newfoundland: \$200 per individual or 2 months in prison, (6) P.E.I.: \$1,000 or 6 months in prison. All dollar amounts in Canadian currency.

²⁴⁶ See HEALTH CANADA PAPER, *supra* note 6.

²⁴⁷ ADULT PROTECTION ACT DISCUSSION PAPER RESPONSE BOOKLET (Sept. 2004), *available at* <http://www.gov.ns.ca/health/ccs/response.pdf> (last visited Jan. 14, 2006). This booklet was distributed by the Nova Scotia Department of Health (Adult Protection Services) to citizens of Nova Scotia as a means to seek public input on improving adult protection legislation. The booklet contains questions that encourage comments from the general public to address various issues such as operational and procedural matters, the efficacy of legislative definitions, financial abuse, self-neglect, physical disability, mandatory and voluntary reporting, and confidentiality.

²⁴⁸ DEP'T OF HEALTH (GOV'T OF NOVA SCOTIA) NEWS RELEASE, *available at* <http://www.gov.ns.ca/news/details.asp?id=20040902003> (last visited Jan. 14, 2006).

of elder abuse.”²⁴⁹ Thus, Nova Scotia’s approach to targeting abuse and neglect among older adults invites public opinion to help improve the quality of adult protective services.

Nunavut

Nunavut is a province with no specific adult protection legislation due to its unique demographics. Situated in the far northern regions of Canada, Nunavut became a province on April 1, 1999, after being part of the Northwest Territories for many years.²⁵⁰ Today, the extremely low population of 29,000 people,²⁵¹ and the vast distances separating its communities force Nunavut to apply specialized health programs through its Telehealth Units in collaboration of all of its twenty-five communities.²⁵² A single-level trial court system characterizes the structure of the legal community in Nunavut.²⁵³ The Department of Culture, Language, Elders, and Youth is responsible for monitoring elder issues. The most relevant statute is the Mental Health Act, which duplicates the Northwest Territories’ legislation by concentrating on issues such as mental incapacity and appointment of representatives.²⁵⁴ In fact, much of Nunavut’s statutes are closely aligned with the Northwest Territories, given that Nunavut was formerly part of the Northwest Territories. The mostly distinct Inuit culture of Nunavut sees its elders living in traditional households, as opposed to institutional care. Despite this, a workshop entitled “Promoting Elder Needs” was held in March 2005 to address elder issues.

²⁴⁹ *See id.*

²⁵⁰ GOV’T OF NUNAVUT FACT SHEET, *available at* <http://www.gov.nu.ca/Nunavut/English/about/ourland.pdf> (last visited Jan. 20, 2006). Both the *Nunavut Land Claims Agreement Act* and the *Nunavut Act* were passed in 1993 by the Canadian Parliament, creating the province of Nunavut out of the Northwest Territories. Nunavut covers approximately two million square kilometers, extending north and west of Hudson’s Bay to the North Pole. There are approximately 26 communities, ranging in size from Bathurst Inlet (population 25) to the capital city of Iqaluit (population almost 6,000). There is a population density of one person per 70 square kilometers.

²⁵¹ GOV’T OF NUNAVUT FACT SHEET, *available at* <http://www.gov.nu.ca/Nunavut/English/about/build.pdf> (last visited Jan. 20, 2006).

²⁵² DEP’T OF HEALTH AND SOCIAL SERVICES (GOV’T OF NUNAVUT) NEWS RELEASE (Feb. 2005, *available at* <http://www.gov.nu.ca/Nunavut/English/news/2005/feb/feb1.pdf> (last visited Jan. 14, 2006).

²⁵³ GOV’T OF CANADA DEP’T OF JUSTICE, *available at* <http://canada.justice.gc.ca/en/news/nr/1998/nunavubck.html> (last visited Jan. 20, 2006). Community representatives and members of the legal community in Nunavut both supported the creation of this single-level trial. Here, the Nunavut Court of Justice combines the jurisdiction of the Territorial and Supreme Courts into a single-level trial court. As is the case with all superior courts in Canada, this trial court will have the federal government appoint judges.

²⁵⁴ Consolidation of Mental Health Act (Nunavut), R.S.N.W.T. 1988, c. M-10.

Ontario

Ontario is one of the earliest provinces to establish well-settled principles of adult protection legislation for older adults living in institutional care facilities. In 1984, the Minister of Health for the Ontario government established a Nursing Home Residents Complaints Committee to review unresolved complaints by elderly residents not covered by the Nursing Homes Act and Regulations.²⁵⁵ Thereafter, Ontario enacted its main adult protection statute, the Nursing Homes Act, to include important reforms.²⁵⁶ Three separate but interdependent statutes, including the Nursing Homes Act, the Charitable Institutions Act, and the Homes for the Aged and Rest Homes Act, represent Ontario's plan to provide adult protection. This means that provisions governing institutional care facilities under the Nursing Homes Act do not apply to other facilities under the Charitable Institutions Act or Homes for the Aged and Rest Homes Act.

Investigation of Institutional Care Facility

Ontario's provincial Minister may appoint an inspector who may at all reasonable times enter and inspect a nursing home.²⁵⁷ The powers of inspection allow the inspector to examine any records relevant to the inspection in readable form, including data storage, processing or retrieval devices.²⁵⁸ A record includes any financial materials, including accounts, bank books, vouchers, contracts, receipts, and payroll records.²⁵⁹ Additionally, personal health information may be accessed within the meaning of Ontario's Personal Health Information Protection Act.²⁶⁰

Unlike other jurisdictions, Ontario permits an inspector to call upon experts for assisting in the investigation of the nursing home as necessary.²⁶¹ Once the investigation is complete, the inspector must return the records to the nursing home within a reasonable time.²⁶² Moreover, an inspection report must be prepared to be delivered to the operator

²⁵⁵ Judith Wahl and Joanne Preston, *A Community Training Manual for those who want to address the Issue of the Abuse of Older Adults in their Community* (Advocacy Centre for the Elderly – Ontario), available at <http://www.advocacycentreelderly.org/elder/pubs.htm> (last visited Jan. 14, 2006).

²⁵⁶ Nursing Homes Act, R.S.O. 1990, c. N-7 [hereinafter ONTARIO NURSING HOMES ACT].

²⁵⁷ *Id.* § 24(a).

²⁵⁸ *Id.* § 24(a)-(i).

²⁵⁹ *Id.* § 24(1).

²⁶⁰ *Id.*

²⁶¹ *Id.* § 24(4)(j).

²⁶² *Id.* § 24(6).

(licensee) of the nursing home.²⁶³ Thus, Ontario's Nursing Homes Act deviates somewhat from Alberta's method of investigation by allowing greater access to financial information and personal health information. However, like Alberta, Ontario does recognize the importance of seeking consent from an adult resident. In fact, accessing one's health information under Ontario's Personal Health Information Protection Act requires knowledgeable consent of the adult resident without obtaining the information through deception or coercion. An inspector may also question any person (subject to their right to counsel).

The Elder Resident's Bill of Rights

Generally, a nursing home's bill of rights is a package of comprehensive rules arising out of the need to protect vulnerable persons in settings away from domestic environments. In the context of adult protection, Ontario places considerable weight on an elderly resident's 'bill of rights'.²⁶⁴ The bill of rights recognizes that older adults living in institutional settings have as much rights as anyone else in the community, and are entitled to remedies normally available under contract law, tort law, or criminal law. As previously shown, Ontario's bill of rights concept is a precedent-setting value that recognizes individual autonomy and transparency on the part of institutional decision-making. The bill of rights thus serves as a foundation in all adult protection statutes recognizing that older adults have the right to contribute to the nature of their care.

Generally, an older adult's bill of rights includes the right to: (1) accept or refuse medical treatment; (2) meet with legal representatives as often as necessary; (4) privacy of personal health information; (5) communicating in confidence with family or friends; (6) lifestyle preferences, including recreational activities, social, cultural and religious programs; (7) mobility issues such as transfer and discharge from the facility; and (8) protected areas outside the facility.²⁶⁵ The special concern over the use of personal health care information is similarly portrayed in Alberta's legislation, whereby an adult resident must give their individual consent prior to disseminating the relevant personal health information.²⁶⁶ In complying with the spirit of self-determination, every operator of a

²⁶³ *Id.* § 24(13).

²⁶⁴ *Id.* § 1.

²⁶⁵ *Id.* § 2(2).

²⁶⁶ See PERSONS IN CARE ACT, *supra* note 44, § 7(5)(b).

nursing home (licensee) must ensure that rights outlined in the bill of rights are fully respected and promoted.²⁶⁷ Most of these rights allow an adult resident to be fully informed about his or her medical condition and treatment (including the use of physical or medical restraints), while giving them the right to refuse medication.

Despite other jurisdictions prescribing a bill of rights to its seniors, Ontario's bill of rights stresses the importance of giving a voice to an adult resident in the operations of a care facility. Section 12 of the Nursing Homes Act states:

Every resident has the right to exercise the rights of a citizen and to raise concerns or recommend changes in policies and services on behalf of himself or herself or others to the residents' council, nursing home staff, government officials or any other person inside or outside the nursing home, without fear of restraint, interference, coercion, discrimination or reprisal.²⁶⁸

This provision thus grants exclusive rights to the adult resident in communicating their opinions to change the overall functionality of the care facility. Coupled with these rights is the right of every adult resident to be informed of any law, rule or policy affecting the nursing home's operations, and procedures for launching complaints against the facility.²⁶⁹ Thus, an elder resident is encouraged to communicate their thoughts and opinions about the quality of care and other pertinent issues.

Two other pieces of adult protection legislation in Ontario also recognize the bill of rights concept. First, the Homes for the Aged and Rest Homes Act formally recognizes a resident's bill of rights, but applies such rights to facilities owned primarily by municipalities in the province.²⁷⁰ Similar to Manitoba, this legislation involves a substitute decision-maker who acts on behalf of an adult resident incapable of making decisions for medical treatment and personal assistance services.²⁷¹ Second, the Charitable Institutions Act essentially duplicates all of the bill of rights from the Nursing Homes Act. However, this statute applies only to facilities for persons requiring specialized or group care facilities operated by corporations.

²⁶⁷ See ONTARIO NURSING HOMES ACT, *supra* note 256, § 1.

²⁶⁸ *Id.* § 12.

²⁶⁹ *Id.* § 16.

²⁷⁰ Homes for the Aged and Rest Homes Act, R.S.O. 1990, c. H-13, § 1.1.

²⁷¹ *Id.* § 1.

The Role of the Resident's Council

Aside from influencing the daily operations of a facility, Ontario's legislation provides added protections for an adult resident by having its bill of rights recognize the concept of resident's council. The council has numerous powers that facilitate the daily lives of adult residents in nursing homes. Some of these powers include: (1) advising residents of their rights; (2) meeting regularly with the nursing home operator (licensee) to review inspection reports and financial reports; (3) mediate any disputes between the licensee and resident; and (4) report to the Minister on any concerns and recommendations.²⁷² If a nursing home does not have a resident's council, the operator (licensee) of the facility must arrange a meeting, at least once a year, to advise residents of their right to form a resident's council.²⁷³ Within thirty days of this meeting, the licensee must notify the Director (under the provincial Ministry) of the results of the meeting.²⁷⁴

The role of the resident's council highlights the growing recognition that the multidisciplinary approach is the one of the best ways to respond to elder abuse and neglect. Here, the resident's council serves as an intermediate link between the adult resident and outside agencies capable of assisting the adult in times of crisis. The council also acts as a substitute in a role normally designated for a guardian. This arrangement shows how jurisdictions are relying less upon the courts to monitor activities for vulnerable persons by designating community-based groups to act on behalf of an older adult resident.

Recent Initiatives

In its 2003 business plan, the government of Ontario noted its plan to deliver specialized services for decision-making for mentally incapable persons. Recognizing that financial abuse is the most common form of abuse among seniors, new strategies are constantly being revised to respond to approximately 4 to 10 percent of abused seniors in

²⁷² See ONTARIO NURSING HOMES ACT, *supra* note 256, § 30.

²⁷³ *Id.* § 29.1(1).

²⁷⁴ *Id.* § 29.1(2).

the province.²⁷⁵ The Victim Services Division under the Ministry of the Attorney General provides awareness education for elder abuse to front-line police officers, similar to the approach in Newfoundland/Labrador and Québec. These workshops intend to provide better tools for police officers to respond to abuse and neglect cases, while strengthening relationships with other domestic agencies involved in response management. Additionally, a partnership known as the Seniors Offering Support (SOS) provides a service network using telephone support system in the city of Guelph, Ontario, as well as surrounding rural areas.²⁷⁶ Other initiatives involve the Waterloo Region Committee on Elder Abuse (WRCEA), which contributes to building new programs and partnerships, including with police agencies.²⁷⁷

Prince Edward Island

In the wake of sweeping reforms of adult protection in the Atlantic provinces, Prince Edward Island (P.E.I.) enacted the Adult Protection Act as its version of adult protection. In several respects, this legislation resembles Nova Scotia's Adult Protection Act, but differs from it in that P.E.I. does not have mandatory reporting. Rather, there is a 68-step implementation plan in a multi-disciplinary fashion that responds to reported cases of abuse and neglect. Because of its small size, the province's protectionist resources are limited to community-based support services.²⁷⁸

Nature of Investigation and Supervisory Responsibility

The government of P.E.I. promotes what is known as a *supervisory responsibility* upon any institutional care facility housing older adults.²⁷⁹ Supervisory responsibility refers to the general duty of providing legal or contractual care, aid, management, or guidance for older adults having diminished capacities but who require a routine of daily

²⁷⁵ MINISTRY OF THE ATTORNEY GENERAL (2002-2003 Business Plan), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/ag/mag2002-3.pdf> (last visited Jan. 14, 2006). The Ministry of the Attorney General works with the Ministry of Public Safety and Security to protect communities. From this business plan, the government of Ontario launched an elder abuse strategy.

²⁷⁶ See BULLETIN, *supra* note 5.

²⁷⁷ Arlene Groh, *A Healing Approach to Elder Abuse and Mistreatment: The Restorative Justice Approaches to Elder Abuse Project* (May 2003), Community Care Access Centre of Waterloo Region, *available at* <http://www.sfu.ca/cfrj/fulltext/groh.pdf> (last visited Jan. 14, 2006).

²⁷⁸ See HEALTH CANADA PAPER, *supra* note 6.

²⁷⁹ Adult Protection Act, R.S. 1988, c. A-5, § 1(o) [hereinafter PEI APA].

living.²⁸⁰ This concept closely relates to daily planning activities in other jurisdictions often under ‘plan of care’ services.

Prince Edward Island’s procedure for investigating cases of abuse and neglect in institutional care facilities follows the reasonable grounds standard as applied across Canada.²⁸¹ P.E.I. also provides liability protection for those reporting abuse and neglect as long as it is not done “maliciously or without reasonable and probable cause.”²⁸² This form of protection is identical to language in section 4(1) of Alberta’s Protection for Persons in Care Act, but differs somewhat from the standard in B.C.’s Community Care and Assisted Living Act that affords protection to a whistleblower only on a good faith basis.²⁸³ As with Nova Scotia, section 12 of P.E.I.’s Adult Protection Act grants the issuance of a protective intervention order when a person is assessed to be “in need of protection”.²⁸⁴

Here, one of four actions may be taken: (1) the Minister may apply for a protective intervention order upon assessment; (2) if an order is granted, a court may direct supervisory services for the affected resident; (3) a court may order the affected resident be removed and placed elsewhere; and (4) a court may apply no-contact conditions against persons who are the source of danger to the adult.²⁸⁵ If granted, the protective intervention order enforces no-contact provisions by having a court (in this case, the Family Section of P.E.I.’s Supreme Court) remove the source of danger to the adult in need of protection, and prevent the abuser from communicating, harassing, or interfering with the concerned older adult.²⁸⁶ These no-contact provisions once again correspond to the immediate necessity of removing abusers from the surrounding of the victimized elder adult.

Every jurisdiction in Canada offers an informed consent provision in that an older adult must give their permission prior to a Minister providing some form of assistance or care. Section 9 of the Adult Protection Act requires informed consent from an older adult who is capable of making reasonable judgment in such matters.²⁸⁷ However, like other

²⁸⁰ *See id.*

²⁸¹ *Id.* § 4(1).

²⁸² *Id.* § 4(3).

²⁸³ *See* COMMUNITY CARE ACT, *supra* note 112, § 22(1).

²⁸⁴ *See* PEI APA, *supra* note 279, § 12.

²⁸⁵ *Id.*

²⁸⁶ *Id.* § 12(4).

²⁸⁷ *Id.* § 9.

jurisdictions, P.E.I.'s adult protection legislation provides emergency intervention without prior consent of an adult under certain conditions. For example, if the Minister of Health is convinced that an 'emergency condition' poses an immediate danger of death or harm to the physical and mental well-being of an older adult, the Minister may remove the adult from the source of danger or harm even without a court order or older adult's consent.²⁸⁸ Like Manitoba, there is a clear emphasis on preventing against death.

Here, an "emergency trusteeship" is established whereby a Minister involves the Public Trustee only where the affected adult is unable to manage his or her own affairs or protect estate interests.²⁸⁹ As in any jurisdiction, the Public Trustee is a person appointed by the provincial government to assist people who are unable to manage their own financial affairs, particularly when they are declared incapacitated. Similarly, the Minister may make an application for guardianship to have a Public Guardian manage the day-to-day affairs of an affected older adult. Such plans of assistance from both the Public Trustee and Public Guardian are instrumental in ensuring that older adults' health and financial affairs are managed. Thus, P.E.I. is a jurisdiction that combines adult protection regimes with trusteeship and guardianship provisions under one statute, while other provinces separate adult protection with trusteeship and guardianship.

The adult protection legislation in P.E.I. follows other jurisdictions by providing basic due process rights for any licensee (operator) of a care facility exercising supervisory responsibility. Due process requires advance notice and an opportunity to be heard for the benefit of an operator of a care facility. Here, advance notice of fourteen-days is required, along with an opportunity to be heard with legal counsel.²⁹⁰ During the appeals process, the onus is on the provincial Minister of Health to show that an older adult is in need of assistance or protection. Furthermore, the Minister of Health must demonstrate that the affected older adult needs protection other than a court order, and that such intervention is in the best interests of that adult.²⁹¹

²⁸⁸ *Id.* § 23.

²⁸⁹ *Id.*

²⁹⁰ *Id.* § 20(1).

²⁹¹ *Id.* § 21.

Recent Initiatives

In its sixth annual report, the Seniors Advisory Council of P.E.I. notes how changes in public administration now provide an opportunity to appoint both a Minister Responsible for Seniors and a Seniors Secretariat.²⁹² By studying organizational models in other provinces, P.E.I. set up a Seniors Secretariat that answers to the Minister. Between 2003 and 2004, a series of meetings at the Atlantic Seniors Health Promotion Network saw the creation of a Seniors United Network (SUN), an organization devoted to issues affecting the elderly.²⁹³ The Seniors Advisory Council is unique in that future vacancies on the council are appointed through a public nomination process.²⁹⁴ Community-based and health-based events such as the Seniors Mental Health Workshop, as well as meetings of the Chairs of Canadian Seniors' Advisory Councils, are held in conjunction with the Canadian Association on Gerontology.²⁹⁵

Québec

The province of Québec is a civil law jurisdiction, unlike the common law jurisdictions throughout the rest of Canada. With a different legal environment, the province approaches adult protection from a unique perspective, and there is no specific piece of adult protection legislation. Three types of institutional care facilities exist in Québec: (1) public residential facilities; (2) private residential facilities licensed by the provincial health and social services department; and (3) unlicensed private residential facilities.²⁹⁶ As of March 2004, there are approximately 2,519 residential care facilities in Québec.²⁹⁷ Of these, 2,191 are private for-profit residences.²⁹⁸

²⁹² PRINCE EDWARD ISLAND SENIORS ADVISORY COUNCIL - SIXTH ANNUAL REPORT (P.E.I. Health and Social Services), July 1, 2003 – June 30, 2004, *available at* http://www.gov.pe.ca/photos/original/hss_sen_ar_e_04.pdf (last visited Jan. 14, 2006).

²⁹³ *See id.* at 4.

²⁹⁴ *Id.* at 2.

²⁹⁵ *See id.* at 4.

²⁹⁶ Marie Beaulieu and Marie-Josée Tremblay, *Abuse and Neglect of Older Adults in Institutional Settings: Discussion Paper – Building from French Language Resources* (March 1995), at 6 [hereinafter ABUSE DISCUSSION PAPER].

²⁹⁷ Commission des droits de la personne et des droits de la jeunesse, *The Exploitation of the Elderly: Report on the Implementation of the Recommendations made in the Report – Towards a Tightened Safety Net* (May 2005), at 8 [hereinafter COMM'N REPORT].

²⁹⁸ *Id.* at 25.

Despite having no specific adult protection legislation, Québec adopts a fairly sophisticated multidisciplinary approach in responding to reported cases of elder abuse and neglect. In particular, Québec places investigation and monitoring of abuse and neglect in the hands of its Québec Human Rights and Youth Commission (Commission des droits de la personne et des droits de la jeunesse, or Commission).²⁹⁹ The function of the Commission is to investigate complaints lodged by anyone suspecting abuse and neglect, and determine whether any institutional care facility violates the provisions of Québec's Charter of Human Rights and Freedoms (Charte des Droites et Libertés de la Personne), of these which section 48 states:

Every aged person and every handicapped person has a right to protection against any form of exploitation.³⁰⁰

Section 48 of Québec's Human Rights Charter thus serves as the foundation for providing rights to older adults facing abuse and neglect. The Human Rights Tribunal, a body created by Québec's Charter of Human Rights and Freedoms, may receive input from the Commission to apply appropriate measures or legal remedies against any abuser at fault. Both the Commission and the Human Rights Tribunal explore allegations of abuse and neglect, and take necessary action similar to government ministries in other jurisdictions. This special arrangement of investigatory agencies draws from the Québec Charter of Human Rights and Freedoms much like other provinces and territories that draw from the Canadian Charter of Rights and Freedoms.

In 1991, Québec amended its Act respecting local health and social services, requiring each institutional care facility to adopt a code of ethics, set up resident committees to give older adults and their families a say, and provide grievance committees to which older adults and their families can lodge complaints.³⁰¹ This aspect of legislation bears a striking resemblance to Ontario's requirement of establishing resident's councils in institutional care facilities for older adults. Such measures are designed to improve transparency, while providing access to complaint procedures for affected persons. In the context of adult protection, transparency refers to exposing the daily operations (and ultimately the quality of care and attention) within a care facility. In

²⁹⁹ *Id.* at 1.

³⁰⁰ The Quebec Charter of Human Rights and Freedoms, R.S.Q. 1975, c.-12.

³⁰¹ An Act respecting local health and social services network development agencies, R.S.Q., c.A-8.1.

Québec, this can be achieved by involving an elder resident (or someone acting on their behalf) to lodge a complaint with the Québec Human Rights Commission to investigate potential wrongdoing.

Bill 83

Drawing from earlier legislation, the National Assembly (Québec's provincial legislature) passed the Act Respecting Local Health and Social Services Network Development Agencies (Bill 83) in December 2003 as a new form of a multidisciplinary response to challenges within its health care industry.³⁰² This Act created regional local authorities known as "health and social services centres" (centres de santé et de services sociaux, or agencies), which included medical clinics, pharmacists, community organizations, social economy enterprises, and residential services.³⁰³

In its May 2005 consultation report to the Minister of Health and Social Services (Ministère de la Santé et des Services Sociaux), the Commission recommended a mandatory accreditation procedure for private residential facilities in order to provide more accountability.³⁰⁴ The Commission also recommended such private facilities to sign basic service contracts, while providing a code of ethics as part of the contract.³⁰⁵ The Commission stresses the importance of training staff members of residential care facilities in identifying abuse and neglect, and the need to seek appropriate recourse. This emphasis on accreditation, contracting, and training of staff within institutional care facilities signifies important reforms to detect future abuse and neglect.

In response to the Commission's consultation report, the Minister of Health and Social Services now requires agencies to create an annually-updated register of private residential facilities for older adults in accordance with section 346.01 of Bill 83.³⁰⁶ Under this provision, each private residential facility must file a declaration with an agency containing specific information about the facility.³⁰⁷ This registry process is in place as a response to traditional calls for more government oversight of private care facilities not subject to licensing standards, making it extremely difficult for intervention

³⁰² See COMM'N REPORT, *supra* note 297, at 3.

³⁰³ *Id.*

³⁰⁴ *Id.* at 7.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 8.

³⁰⁷ *Id.*

groups to detect health and environmental issues in care facilities. Given that institutional care facilities in Canada operate under both public and private arrangements, virtually every jurisdiction sets detailed licensing requirements for each care facility in their adult protection legislation.

Bill 83 proposes that agencies issue ‘certificates of compliance’ to institutional care facilities on two conditions: (1) when the facility complies with health and social criteria determined by regulation; and (2) when the facility holds an assessment certificate issued by an organization recognized by the Minister, with which the agency has entered into an agreement.³⁰⁸ These certificates of compliance are issued for two years, and may be suspended or revoked.³⁰⁹ Bill 83 also sets out new supervision powers for agencies and the Health and Social Services Ombudsman.³¹⁰ Such powers include the ability to receive complaints, conduct formal inspections, and intervene with the affected institution housing the elderly.³¹¹ Bill 83 adds several provisions to the complaints procedure by establishing: (1) a watchdog committee in every institution and provincial agency; (2) a users’ committee; (3) an in-patients’ committee; and (4) a complaints commissioner, who is a local or regional commissioner reporting to the board of directors of the institution or agency. The complaints commissioner will have the power to take action when it is “sufficiently serious” to do so.

Bill 83 also addresses the controversial practice of using restraints upon elder residents in care facilities. The Minister of Health and Social Services published a plan of action with clear guidelines stating that restraints should be used only as a safety measure in conditions of imminent danger.³¹² Moreover, restraints should be used as a last resort, and be applied under close supervision in conjunction with control procedures in a manner that is dignified and respectful of person’s comfort. These measures must be discussed with the adult resident or their representative, and subsequently recorded in the intervention plan or service plan. Every effort must be made to involve the adult resident when applying restraints, circumstances permitting. Bill 83 serves to illustrate how a province without core adult protection legislation manages to address concerns over adult protective methods.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

Recent Initiatives

A few years ago, the Minister of Health and Social Services explained the role of “high-quality intervention” in adult protection, and that it “must result in an approach that is global, adapted, positive, personalized, participatory and *inter-disciplinary*”.³¹³ This goal captures the essence of modern intervention techniques in curbing elder abuse and neglect. The Barreau du Québec (provincial bar association) regularly hosts training and development days for its members on elder law. Like other provinces, Québec’s branch of the Canadian Bar Association set up a National Elder Law Section to deal with emerging legal matters affecting the elderly.³¹⁴ Both the Collège des médecins du Québec (College of Physicians and Surgeons) and the Ordre des psychologues du Québec (Order of Psychologists) encourage awareness of elder law issues such as abuse and loss of autonomy by holding various workshops and professional development seminars.³¹⁵ Even financial institutions have joined forces by organizing sessions with the Commission on detecting issues of exploitation of elderly persons, particularly with financial abuse. As Beaulieu notes, “Detection in institutional settings depends on shared collective responsibility by all caregivers.”³¹⁶

Police forces are also actively involved in Québec’s adult protection regime. In May 2002, the Minister of Public Security issued a press release asking police officers to learn about elder abuse and neglect, and inform them of resources available to them.³¹⁷ The Minister of Public Security set up an *ad hoc* committee, bringing together several police services from around the province to suggest awareness-raising tools for preventing, detecting, and tackling exploitation of the elderly.³¹⁸ For instance, a pilot project in the county of Bellechasse provides an action plan designed to draft a memorandum of agreement by various organizations dealing with abuse and neglect, while creating an inter-sectorial intervention group.³¹⁹ At present, the Minister of Public Security is considering setting up an in-house website to inform police forces on elder

³¹³ *Id.* (quoting a document published in October 2003 by the Ministère de la Santé et des Services sociaux).

³¹⁴ *Id.* at 20.

³¹⁵ *Id.* at 21.

³¹⁶ See ABUSE DISCUSSION PAPER, *supra* note 296, at 16.

³¹⁷ See COMM’N REPORT, *supra* note 297, at 23.

³¹⁸ See *id.*

³¹⁹ See *id.*

abuse and neglect. Meanwhile, training projects are regularly provided by seniors to assist volunteers, nurses, orderlies, social workers, and police officers working with older adults.

Current attempts to circulate information about elder abuse and neglect involve the Québec Network against Elder Abuse (ROCAA) and the French-language Internet Network Vieillir et liberté (RIFVEL).³²⁰ The latter is a unique web-based initiative involving other nations such as France, Belgium, and Switzerland, in providing assistance for researchers and other recourses for elder victims and their families. Following this approach, the Minister of Culture and Communications (Ministère de la Culture et des Communications) will set up an Internet portal to give access to information about issues affecting the elderly.³²¹ Such responses in Québec clearly illustrate the province's emphasis on integrating a network of disciplines in promoting adult protection. Although no adult protection legislation exists in Québec, the province chooses to involve its human rights commission in coordinating a multidisciplinary response similar to other jurisdictions.

Saskatchewan

In Saskatchewan, institutional care of older adults involves publicly-funded care facilities, privately delivered personal care homes, and special care homes. Personal care homes are licensed facilities that provide adults with accommodation, meals and assistance, but are not nursing homes. Prior to moving into a personal care home, a thorough assessment is made by the provincial Department of Health (Saskatchewan Health) in terms of forming living care arrangements. In every case, an admission agreement (contract) is signed between the personal care home and the elderly resident.

The Personal Care Homes Act (PCHA) is Saskatchewan's primary adult protection legislation.³²² Like many other jurisdictions in Canada, the PCHA grants authority to Saskatchewan Health to remove, suspend, or modify licenses from those institutional care facilities that fail to comply with adult protection standards prescribed under statute. Under the PCHA, Saskatchewan follows the precedent reasonable and

³²⁰ *Id.* at 34.

³²¹ *Id.* at 33.

³²² The Personal Care Homes Act, R.S.S. 1991, c. P-6.01 [hereinafter SASK. PERSONAL CARE ACT].

probable standard with regards to the nature of investigation and inspection of suspect institutions. For instance, section 11(3) of the PCHA states:

Where a person appointed pursuant to subsection (1) believes on *reasonable and probable grounds* that an offence against this Act or the regulations has occurred, that person may apply to a justice of the peace or a judge for a warrant to be issued.³²³

The reasonable and probable standard is applied in emergency situations by allowing the provincial Minister of Health or authorized agent of the Minister to forcibly enter a care facility for examination purposes without a warrant.³²⁴

Complaint Procedure and Inspection in Personal Care Homes

In Saskatchewan, personal care home consultants normally conduct inspections and receive all complaints. When a complaint is launched, these consultants will personally interview residents within the facility. Various “resident records” (including care plans, assessments, medications, progress notes, and specialized care training) are chosen at random and then rigorously examined to identify whether or not the personal care home is meeting the resident’s current state of health.³²⁵ As part of this inspection process, the personal care home consultants may interview personal care home staff, health district assessors, and interested parties supporting older adults.

Much like Alberta and British Columbia, Saskatchewan requires a criminal records background check when a licensee applies for a personal care home license under the Personal Homes Care Program. Unlike Alberta, however, Saskatchewan includes a requirement for the licensee to include three character references, and submit evidence of attendance at a Personal Care Homes orientation.³²⁶ Application of such a provision is important in that the personality traits of an abuser can be a significant risk factor in identifying a potential abuser. As one commentator notes:

³²³ *Id.* § 11(3).

³²⁴ *Id.* § 11(6).

³²⁵ DEP’T OF HEALTH (GOV’T OF SASK.), FREQUENTLY ASKED QUESTIONS PERSONAL CARE HOMES, available at http://www.health.gov.sk.ca/ps_personal_care_faq.html (last visited Jan. 15, 2006).

³²⁶ *See id.*

Personality traits of staff, volunteers, administration or other persons in the environment may lead to abuse or neglect. Like any other setting, some people working or volunteering in a nursing home, personal care home, assisted living or other institutional setting may not have the personality best suited for helping frail older adults.³²⁷

The Saskatchewan legislation follows Manitoba, Alberta, and Prince Edward Island in that all provide virtually the same remedial actions by offering immediate access to emergency protection orders in extenuating circumstances. Moreover, in less urgent situations an affected person may apply for other forms of protection orders from the Court of Queen's Bench (trial court), which may include monetary compensation for victims.

Another piece of adult protective legislation in Saskatchewan, the Housing and Special-care Homes Act, relates to special care homes.³²⁸ This statute clearly outlines how a provincial governing authority can regulate the operations of institutional care facilities in cases of abuse and neglect. Section 25 of the Act states:

The minister may revoke or suspend a license if the licensee, or an employee or agent of the licensee, violates any provision of this Act or the regulations, or if the licensee or an employee or agent of the licensee is, in the opinion of the minister, guilty of improper or careless conduct with respect to the care of persons who are unable to fully care for themselves and who require prolonged care, or if, in the opinion of the minister, the premises....become unsuitable for use as a special-care home.³²⁹

This provision echoes many other Canadian jurisdictions that regulate institutional care facilities. As part of this licensing initiative is the notion that institutional care facilities should be open to inspection and visitation.

A crucial difference between Saskatchewan and Alberta in terms of accessing documents or records during an investigation of institutions is that Saskatchewan allows relevant authorities "unfettered access to the computer or system" for the purpose of obtaining relevant records during an investigation.³³⁰ This applies to any information relating to the personal care home that is stored in a computer or other electronic system. Similarly, in the Housing and Special-care Homes Act, section 26 requires all special

³²⁷ CANADIAN NETWORK FOR THE PREVENTION OF ELDER ABUSE, *available at* http://www.cnpea.ca/abuse_in_institutions.pdf (last visited Jan. 15, 2006).

³²⁸ The Housing and Special-care Homes Act, R.S.S. 1979, c H-13 [hereinafter HOUSING ACT].

³²⁹ *Id.* § 25.

³³⁰ See SASK. PERSONAL CARE ACT, *supra* note 322, § 12(3).

care homes to allow authorized persons to “examine *all* records relating to the operation of the home, whether they are of a *financial* or any other nature”.³³¹ In contrast, section 7(5) of Alberta’s Protection for Persons in Care Act does not allow “financial records of the agency” or “a person’s health information records” to be disclosed during an investigation.³³² Therefore, it appears that Saskatchewan allows for greater latitude in accessing both financial and other records, while Alberta places more privacy protections for personal health information and financial records.

The two adult protection statutes in Saskatchewan allow the Lieutenant Governor in Council (acting as representative for the province) to enforce and make such regulations in carrying out the spirit of adult protective regimes. For instance, section 46(1)(c) of the Housing and Special-care Homes Act allows the Lieutenant Governor in Council to make regulations covering licensing and inspection of special care homes.³³³ Similarly, under section 19 of the Personal Care Homes Act, the Lieutenant Governor in Council may make regulations respecting “protecting the rights and privileges of persons who reside in personal care homes.”³³⁴ Such provisions are enumerated in all adult protection statutes across Canada, granting broad powers to the Lieutenant Governor in Council in amending regulations. Accordingly, there is some flexibility in reforming existing protocols responding to cases of abuse and neglect.

Recent Initiatives

Recent efforts on the part of Saskatchewan Health include plans to further its role in developing a highly integrated health care delivery system, similar to Québec. In 2005, Saskatchewan Health reported that a new administrative body, known as the Health Quality Council, will conduct future inspections and reporting across the province.³³⁵ In its recent budget plan, Saskatchewan Health also proposes \$20 million to be invested in health care services relating to long-term care facilities, including the promotion of worker safety.³³⁶

³³¹ *Id.* § 26.

³³² PERSONS IN CARE ACT, *supra* note 44, § 7(5).

³³³ *See* HOUSING ACT, *supra* note 328, § 46(1)(c).

³³⁴ SASK. PERSONAL CARE ACT, *supra* note 322, § 19(j).

³³⁵ SASK. HEALTH, 2005-06 PROVINCIAL BUDGET PERFORMANCE PLAN, *available at* <http://www.gov.sk.ca/finance/budget/budget05/budgetsummary.pdf> (last visited Jan. 15, 2006), at 9.

³³⁶ *Id.* at 17.

Yukon Territory

The Yukon Territory is the most recent jurisdiction to formally introduce adult protection legislation with an emphasis on guardianship-related provisions. In 2003, the Yukon Legislature enacted the Decision-Making, Support and Protection to Adults Act in order to address mental incapacity and disability issues among older adults.³³⁷ The purpose of this Act is to provide assistance to older adults who have mental disabilities, brain injuries, and other degenerative diseases, in allowing others to make critical financial or health care decisions on their behalf. This legislation is part of three separate and interdependent Acts comprising: (1) the Adult Protection and Decision-Making Act; (2) the Care Consent Act; and (3) the Public Guardian and Trustee Act.³³⁸ In this manner, issues of adult protection, consent, guardianship, and trusteeship are neatly packaged into robust legislation. Yukon's legislation focuses on three areas where a legally-appointed decision-maker is required: (1) Health care decisions; (2) Personal care decisions; and (3) Financial and Property decisions.³³⁹

The Adult Protection and Decision-Making Act comprises guardianship-related procedures in four parts to assist mentally incapacitated adults have others make decisions on their behalf. Part 1 deals with Supported Decision-Making Agreements, which is discussed below. Part 2 deals with Representation Agreements. These agreements, much like British Columbia, serve to appoint persons for incapacitated adults who can make day-to-day decisions for personal or financial reasons. The representation agreement is only valid up until an adult no longer understands the nature and effect of the agreement. Part 3 deals with court-appointed guardianship, whereby application for a guardianship order is made to the Yukon Supreme Court.³⁴⁰ Generally, a guardianship order is made for adults who are not capable of making their own decisions in a number of different areas. This order is useful for adults suffering from mental illnesses because these adults are vulnerable and require oversight by others to ensure their well-being.

³³⁷ Decision Making, Support and Protection to Adults Act, R.S. 2003, c. 21[hereinafter DECISION MAKING ACT]. Most of the legislation came into force on May 2, 2005. The adult protection provisions came into force on Sept. 1, 2005. The legislation primarily deals with adults, age 19 and older.

³³⁸ YUKON GOV'T NEWS RELEASE, available at <http://www.gov.yk.ca/news/2005/05-120.html> (last visited Jan. 15, 2006). The Yukon Bill is composed of three schedules: Schedule A represents the Adult Protection and Decision-Making Act, Schedule B represents the Care Consent Act, and Schedule C represents the Public Guardian and Trustee Act.

³³⁹ *See id.*

³⁴⁰ *See id.*

Part 4 deals with adult abuse and neglect, which requires an agency under the Department of Health and Social Services to investigate reports of abuse or neglect, and take necessary action to protect elder residents. Here, orders of entry and restraining orders provide assistance to elders, while reports of financial abuse will be reported to the Public Guardian and Trustee (PGT).

The Care Consent Act section also has four parts: (1) Consent and Substitute Consent; (2) Advance Directives; (3) Capability and Consent Board; and (4) Temporary Financial Protection.³⁴¹ The first part requires that an adult resident who is capable to give their consent, has the right to give or refuse consent to care on any grounds. However, consent is not required for all health care decisions – emergency, preliminary examinations and procedures in progress. Outside these exceptions, the care provider must turn to a list of substitute decision-makers (relatives or friends) who will act for the incapacitated adult. This is where advance directives (living wills) come into play, whereby a substitute decisions-maker (proxy) helps determine future health care decisions for the adult only when the care provider is convinced the adult is mentally incapacitated. The Capability and Consent Board is a body comprised of health care providers, lawyers, and community representatives who work with disabled adults.³⁴² This Board reviews consent matters, and provides legal recourse for those wishing to appeal to the Yukon Supreme Court. The Mental Health Act Board works in close association with the Capability and Consent Board on matters touching upon disputes between proxies and complaints about proxy decision-making.

The fourth part, temporary financial protection, deals exclusively with financial abuse. Here, a certificate can be issued and sent to the Public Guardian and Trustee for handling the adult's finances for up to 60 days.³⁴³ The Public Guardian and Trustee Act covers financial abuse by investigating instances of financial abuse and protection of estates. The PGT also acts as a guardian of last resort if there is no other person who can serve the adult's interest. In these ways, Yukon's legislation provides a very comprehensive and modern package of adult protection principles applied elsewhere in Canada. A remarkably cohesive network of care providers and government agencies works together to protect older adults from various forms of abuse and neglect.

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See id.*

Supported Decision-Making Agreements and Associate Decision-Makers

A hallmark of Yukon’s legislation is its focus on supported decision-making agreements.³⁴⁴ Supported decision-making agreements are an interesting type of arrangement that lies in the middle between full guardianship and the presumption of an adult making capable decisions. As section 4 of the Act states:

The purpose of the Part is

- (a) to enable trusted friends and relatives to help adults who do not need guardianship and are substantially able to manage their affairs, but whose ability to make or communicate decisions with respect to some or all of those affairs is impaired; and
- (b) to give persons providing support to adults under paragraph (a) legal status to be with the adult and participate in discussion with others when the adult is making decisions or attempting to obtain information³⁴⁵

A formal requirement is that the supported decision-making agreement must be fully understood by the adult in question.³⁴⁶ The representative acting on behalf of an adult is known as an ‘associate decision-maker’, and may not include an employer or employee working for an adult.³⁴⁷ The associate decision-maker must make a declaration of their willingness to act on behalf of an adult, and acknowledge the duties associated with this obligation.³⁴⁸ An associate decision-maker is not liable for any injury, death, or financial abuse of an adult as long as they act honestly, in good faith, and in the best interests of the adult, while exercising the diligence and skill of a reasonably prudent person.³⁴⁹ Moreover, the agreement must be signed and executed by the adult and associate decision-maker, along with two witnesses.³⁵⁰ The contents of the agreement must include a description of the difficulties faced by an adult, along with the duties to be performed by the associate decision-maker.³⁵¹ This arrangement, as in other jurisdictions like B.C., allow for representation agreements to be signed between an adult and two or more “trusted” persons to make limited daily living decisions without

³⁴⁴ See DECISION MAKING ACT, *supra* note 337, §§ 4-13.

³⁴⁵ *Id.* §4.

³⁴⁶ *Id.* § 6.

³⁴⁷ *Id.* §§ 5(1), 7(a).

³⁴⁸ *Id.* § 8(3).

³⁴⁹ *Id.* § 13(1)(a)-(b).

³⁵⁰ *Id.* § 8(1).

³⁵¹ *Id.* § 9(1).

requiring a guardianship, and usually when the adult is capable on most occasions to make decisions.³⁵²

The guiding principles of Yukon's legislation encompass the 'bill of rights' concept in institutional care settings. For instance, Yukon's legislation covers rights such as self-determination of the types of care, ability to participate in the management of their affairs, and the right to receive the least intrusive care. Like most jurisdictions, Yukon's legislation has a 'presumption of capability' provision recognizing that older adults have inherent rights in self-determining their care.³⁵³ Rather than imposing a mandatory reporting requirement, a voluntary reporting provision allows a person to report abuse or neglect of adult to a designated agency.³⁵⁴ As with other jurisdictions, the reporting of any abuse or neglect must be done in good faith. Any subsequent legal action may be brought against a person reporting the incident falsely or maliciously.³⁵⁵

Investigation of Institutional Care Facility

Investigating suspicious activities within an institutional care facility is triggered in two ways. First, a designated agency must inspect a care facility to make an inquiry as to whether or not abuse or neglect is occurring on reasonable and probable grounds.³⁵⁶ Second, the Public Guardian and Trustee may investigate under the Public Guardian and Trustee Act.³⁵⁷ In turn, the Public Guardian and Trustee Act affords protective services against financial abuse, including investigation and financial protection. What makes Yukon's inspection regime different from other jurisdictions is its permitting a full investigation upon a showing that an adult's guardian, associate decision-maker, or representative being hindered from visiting or speaking with the adult.³⁵⁸ Other jurisdictions normally do not grant such investigatory authority based on this circumstance. In situations where application for court order may cause delay and

³⁵² *Id.* § 14.

³⁵³ *Id.* § 3.

³⁵⁴ *Id.* § 61(1)(a).

³⁵⁵ *Id.* § 61(4).

³⁵⁶ *Id.* § 62(1).

³⁵⁷ *Id.* § 10(3)(b).

³⁵⁸ *Id.* § 62(2)(c).

ultimately contribute to harm of an adult resident, pre-emptive provisions are also available to permit entry upon premises of a care facility by a designated agency.³⁵⁹

Like Manitoba, Yukon emphasizes the role of an adult resident in the decision-making process. Section 66 of the Decision-Making, Support and Protection to Adults Act states:

A designated agency must involve the adult, to the greatest extent possible, in decisions about how to

- (a) stop the abuse or neglect; and
- (b) provide the support and assistance necessary to prevent abuse or neglect in the future³⁶⁰

However, privacy matters for personal health information are treated somewhat differently for adult residents. Yukon's legislation allows a designated agency to override confidential or privileged information, save the solicitor-client privilege.³⁶¹ The legislation goes further by adding that a designated agency is considered a public body for purposes of the Access to Information and Protection of Privacy Act.³⁶²

Accordingly, the intervention strategy strives for transparency over confidentiality in the interests of exposing potential wrongdoing. This situation poses a delicate balance between respecting personal health information of an adult resident with a good faith obligation to detect and prevent abuse and neglect among vulnerable persons. The Yukon legislation is another example of a scheme that links multiple legal issues such as power of attorney, guardianship, trusteeship, and mental health. What sets apart this legislation from other Canadian jurisdictions is its focus

IV. INFLUENCE OF U.S. ADULT PROTECTION LEGISLATION ON CANADA

Much of the adult protection legislation found in Canada is derived from legislation in the United States, which traces its roots in child welfare legislation.³⁶³ Title 20 of the federal Social Security Act laid the essential groundwork for future state

³⁵⁹ *Id.* § 64(5).

³⁶⁰ *Id.* § 66.

³⁶¹ *Id.* § 67(3)(a).

³⁶² *Id.* § 67(4).

³⁶³ Michael J. MacLean, *Abuse and Neglect of Older Canadians: Strategies for Change*, (Canadian Association of Gerontology, Thompson Educational Publishing, Inc. 1995), at 58.

legislative efforts in dealing with adult protection.³⁶⁴ Since the late 1970's, most jurisdictions in the United States have enacted adult protection legislation for elderly persons in both domestic and institutional settings.³⁶⁵ The issue of mandatory reporting of elderly persons was first recommended in a 1981 report by the U.S. House Select Committee on Aging.³⁶⁶ This led to the enforcement of legal obligations on the part of institutional care facilities to detect and guard against future wrongdoing against vulnerable elder residents.

Adult protection laws in the U.S. are well developed due in part to the longer history of abuse and neglect faced by elder residents in institutional care facilities. Academic materials continue to address elder abuse and neglect in institutional facilities. Over the years, individual states have modeled adult protection legislation with precedent guidelines that have found its way into Canadian legislation. For instance, the mid-1990's saw the U.S. government introduce tough enforcement regulations to curb elder abuse and neglect by introducing fines, reducing funds for Medicare and Medicaid, canceling provider agreements, conducting on-site inspections, and regulating licensing procedures. Such measures are enforced by state government officials to force compliance with state health laws. Adult protection measures in Canadian jurisdictions follow a similar pattern. Many jurisdictions reduce funding for public residential care facilities for violating adult protection legislation, while others may cancel or change provider agreements, or apply strict inspection criteria. The power to modify, revoke, or refuse a license for an institutional care facility is another means to punish operators for wrongdoing against elder residents.

Distribution of posters to nursing home residents, their families, and staff members helps raise awareness about abuse and neglect to nursing home residents, while providing relevant contact information during suspected cases of abuse. Such abuse-prevention educational campaigns also include training videos given by state ombudsmen, survey agencies, and consumer advocates. Numerous statewide conferences, regional workshops, and local training programs also provide efforts to raise awareness of vulnerable persons. As shown, such measures are duplicated in Canada in various

³⁶⁴ McDonald, *supra* note 36, at 68.

³⁶⁵ *Id.* at 49.

³⁶⁶ *Id.* at 53.

ways, and there is no question that the Canadian version of adult protection has much to do with past initiatives in the United States.

CONCLUSION

The need to protect vulnerable persons is always of paramount concern in any society. This is especially true when older adults experience abuse and neglect within institutional settings. In Canada, adult protection legislation continues to be shaped by integrating government, social, and health services into an elaborate multidisciplinary network. The provinces and territories draw similar protocols from one another, influencing the means to counteract abuse and neglect among older adults. By adopting enforcement measures from adult protection legislation, institutional care facilities are forced to improve delivery of basic care-giving functions to elder residents, while applying more multidisciplinary-drive schemes as a part of the intervention response.

This process allows for greater transparency in monitoring quality of care and daily operations of institutional care facilities. This becomes particularly crucial for investigation and intervention purposes. Some provinces and territories apply more rigorous standards of maintaining adequate care and intervention measures than others. But much depends on the ethical standards and practices of care facility staff and operators, highlighting the importance of screening procedures. Seeking more integrated approaches by including reporting provisions allows employees in care facilities to react in a timely fashion when instances of abuse and neglect occur. An aging population, changes in attitudes, and trends to integrate network responses are some of the factors responsible for shaping adult protection regimes in Canada.

Current reforms to adult protection also reflect the need to modernize the justice system for vulnerable persons by placing less emphasis on traditional legal tools (such as power of attorneys, guardianships or trusteeships) utilized by government, and inviting community-based groups, health care providers, and law enforcement agencies to detect abuse and neglect more effectively. In this way, the traditional legal mechanisms of protecting older adults are slowly giving way to more comprehensive initiatives provided by this multidisciplinary network. While the courts remain active in securing protective services for vulnerable older adults, this new partnership between government, health

care providers, and community groups serves as a remarkable function in protecting the best interest of elder residents.

The evolution of adult protection legislation in Canada owes much to U.S. legislative efforts in tackling abuse and neglect among older adults. While it is recognized that various jurisdictions employ different techniques in responding to elder abuse and neglect, consistent use of key statutory language and principles between the jurisdictions lends support in developing a national trend of health care delivery within a multidisciplinary fashion. Progress and meaningful change are essential in developing better strategies to curbing abuse and neglect in Canada. Moreover, raising awareness of abuse and neglect through national prevention efforts within various jurisdictions may force legislators to take more proactive measures in protecting our older adults, particularly in institutional settings. Fine-tuning legislation and social programs fulfills a moral responsibility to preserve basic human rights and dignity. There is no question that institutional care facilities have improved existing standards of care for elderly residents, but abuse and neglect is not a static phenomenon. Rather, constant vigilance is required of institutional care operations to ensure that adequate care and attention are given to elder residents.

Canadian jurisdictions are thus willing to integrate a variety of disciplines in helping monitor, investigate, and intervene when instances of abuse and neglect affect older adults. Modeling such efforts requires a balance of individual rights to self-determination with the need to act in the best interest of older adults from abuse and neglect. However, achieving this balance depends upon the nature of inter-agency cooperation and the persistent drive to apply new and innovative strategies. The application of a multidisciplinary network in adult protection gives serious thought to the means by which modern public policy formulation helps protect vulnerable persons deserving dignity and respect.

APPENDIX 1

ADULT PROTECTION LEGISLATION IN CANADA – DISTINGUISHING FEATURES AMONG JURISDICTIONS

