



Elder Abuse Prevention (ON)

Stop Abuse - Restore Respect

Prévention de la maltraitance envers les aînés (ON)

Arrêtez les mauvais traitements - Restaurez le respect

## EAPO WEBINAR SERIES

# Balancing Seniors' Rights

## Preventing Abuse by an Attorney Acting Under a Power of Attorney Document

**May 13, 2020**

*Hosted in Partnership with:*



The information and opinions expressed here today are not necessarily those of the Government of Ontario

# Welcome to our Webinar!

- All **attendees** will microphones/video will be turned off during the webinar.
- **ASL Interpreters:** will be viewed by video during the webinar and identified as ASL Interpreter under their pictures.
- **Speakers:** presenting will be visible only when speaking. Once the presentation is completed, all speakers will show their videos for the Question /Answer period.
- **Adjusting Video Size of Speakers/Interpreters:** drag the line between the video frame and slides to the left. (adjust at beginning of the webinar)

# Welcome to our Webinar!

- **Questions or experiencing issues** : Participants can type their questions in the Question/Answer box. Raeann Rideout will respond with typed messages during the webinar. At the end, questions will be responded by Speakers with ASL interpreter.  
CHAT Box
- **Question in ASL**: please type “I would like to ask a question in ASL” at the end of the presentation, I will promote you to be a panelist and you will be able to show turn on your video. Once the question has been responded to, you be asked to stop sharing your video and I will add you back as an attendee.

# Welcome to our Webinar!

- **Evaluation** : After the session, you will be asked to complete a short evaluation, posted on Survey Monkey, to provide your feedback and ideas for future webinars.
- **Contact information** will be provide at the end of presentation.
- **Recording**: Webinar will be recorded and posted on EAPO's and/or partner organization's website

ASL interpreting provided by:



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# Webinar Overview

- Understanding Elder Abuse and Exploitation;
- New Financial Scams During This Pandemic;
- The Remedies Available To Combat Abuse;
- The Legal Capacity Required To Execute POAs & Wills;
- Factors To Consider When Appointing An Attorney;
- Legal Duties Of An Attorney & The Issues/Risks That May Arise;
- Executing Valid POAs and Wills During This Pandemic & Acceptance Of Such Documents By Financial Institutions;
- Guardianships & Incapacity;
- Living At Risk Interventions;
- Where & How To Access Legal Supports/Services During This Pandemic.

# Elder Abuse Prevention Ontario (EAPO)

## EAPO Envisions an Ontario where....

**ALL seniors are free from abuse, have a strong voice, feel safe and respected.**

Building that requires raising awareness, delivering education and training, working collaboratively with like-minded organizations and assisting with service co-ordination and advocacy.

- Not-for-profit, provincial charitable organization established in 2002 as ONPEA
- Funded by the ON Government, under the Ministry of Seniors and Accessibility (MSAA), **EAPO is mandated to support the implementation of Ontario's Strategy to Combat Elder Abuse**

**“STOP ABUSE – RESTORE RESPECT”**

# Priorities of the Strategy

Community  
Coordination &  
Response

Training

Public  
Awareness



**Elder Abuse Prevention (ON)**

Stop Abuse - Restore Respect

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Arrêtez les mauvais traitements - Restaurez le respect





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Kimberly is the Founding Partner, (litigation firm in Toronto, practicing throughout Ontario and repeatedly ranked by Canadian Lawyer as one of Canada's Top 5 & 10 Boutique Trusts & Estates Firms), practicing in the areas of Estate, Trust, Fiduciary Litigation including Power of Attorney Disputes, Fiduciary Accounting Applications, Guardianship, Applications for Dependents' Support, and Elder Law.

Kimberly is designated as a Certified Specialist in Estates and Trusts Law by the Law Society of Ontario; and is repeatedly recognized as a leading practitioner by Chambers, Lexpert, Lawday, Best Lawyers, Martindale-Hubbell and Canadian Lawyer.



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Daniel joined WEL Partners as an Associate lawyer in September of 2018. Prior to joining WEL Partners, Daniel practised estate litigation at a large law firm in downtown Vancouver, BC where his practice focused on estate litigation, commercial litigation and insurance litigation. Daniel has appeared at the BC Supreme Court, the BC Court of Appeal and the BC Provincial Court.

Daniel received his Bachelor of Arts from the University of Toronto with an Honours and Specialization degree in History and Political Science. He obtained his Juris Doctor from the University of British Columbia in Vancouver in 2014.

Daniel was called to the British Columbia Bar in September of 2015 and called to the Ontario Bar in September of 2018.

# **Balancing Seniors' Rights: Identifying & *Preventing Abuse by an Attorney Acting Under a Power of Attorney Document***

Wednesday, May 13, 2020  
Kimberly Whaley & Daniel Paperny



# Introduction

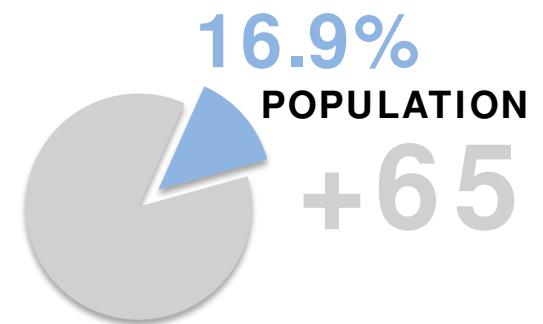


1. Overview of Elder Abuse
2. Powers of Attorney
3. Guardianships & Incapacity
4. Living at Risk
5. Access to Legal Support Services

# Demographics and Statistics

- Rapidly aging population
- Adults living longer, increased propensity to developing physical and cognitive impairments that make them vulnerable and more susceptible to abuse, including in the nature of financial exploitation, and neglect

**12** million  
**SENIORS**  
BY 2061



# Elder Abuse

## A Definition:

*“A single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”*

- World Health Organization

# Examples of Elder Abuse

- Abuse of powers granted under power of attorney
- Theft, fraud, forgery, extortion, appropriation
- Undue pressure on older adult to do something does not want to do, etc.
- Domestic abuse, physical, mental, or sexual
- Predatory marriages
- Withholding access to grandchildren
- Neglect and, failure to provide necessities of life

# Perpetrators

- Adult children (who may have their own issues)
- Service providers
- Spouses
- Strangers





# Pandemic Related Scams

- According to the CAFC, Canadians have been defrauded out of at least \$1.2 million in COVID-19 related scams
- Between March 6 - May 1, the centre has received 766 fraud reports related to the pandemic, with 188 of those fraud attempts succeeding

# Pandemic Related Scams

## Fraudsters posing as:

- Loan and financial service companies offering loans, and other financial assistance services
- Cleaning or heating companies offering duct cleaning services to protect from COVID-19
- Local and provincial hydro/electrical power companies threatening to disconnect your power for non-payment



# Pandemic Related Scams

## **Fraudsters posing as:**

- The Public Health Agency of Canada giving false results saying you have been tested positive for COVID-19 or tricking you into confirming your health card and credit card numbers for a prescription
- Known charities offering free medical products (e.g. masks) for a donation
- Government departments sending out coronavirus-themed phishing emails, tricking you into opening malicious attachments, or tricking you to reveal sensitive personal and financial details

# Pandemic Related Scams

## **Fraudsters posing as:**

- Selling fraudulent products that claim to treat or prevent the disease such as unapproved drugs that threaten public health and violate federal laws.
- Friends asking for financial aid alleging they have COVID-19 and require funds for medical assistance.
- Think before providing your personal information!
- Visit CAFC website for the list of scams.

# POWERS OF ATTORNEY

An Overview

# Types of Power of Attorney Documents

- 1) General POA
- 2) Continuing POA for Property
- 3) Power of Attorney for Personal Care

# Capacity in General

- No single legal definition for “capacity”
- No single “test” for capacity, not really a test
- Certain factors are to be considered in an assessment of requisite mental capacity to make a certain decision/undertake a certain task at a particular time



# Capacity is:

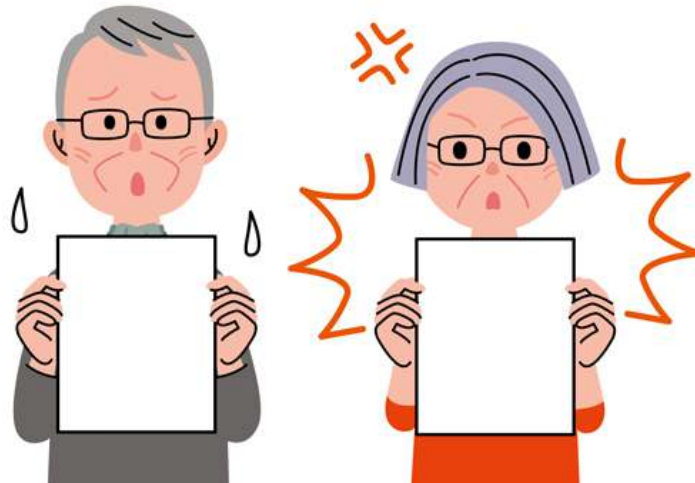
- **DECISION** specific
- **TIME** specific
- **SITUATION** specific
- Capacity may **FLUCTUATE**





# Capacity in General

- Understand all the information that is *relevant to the decision being made and possible implications* of the decision in question



# Capacity to Grant/Revoke a CPOAP

- Knowledge of property
- Obligations to dependants
- Knows attorney's extensive powers
- Knows attorney must account
- If capable may revoke CPOAP
- Appreciate that attorney may mismanage \$, values may decrease or may misuse authority

# Capacity to Manage Property

## Section 6 - *Substitute Decisions Act*

- a) Understand information relevant to making decision in management of property; **and**
- b) Appreciate the reasonably foreseeable consequences of a decision or lack of decision

# Capacity to Grant/Revoke a POAPC

Section 47(1) &(3) of *Substitute Decisions Act*

Must have ability to:

- 1) Understand whether the proposed attorney has a genuine concern for person's welfare; **and**
- 2) Appreciate that the person may need to have attorney make personal care decisions for them

# Capacity to Make Personal Care Decisions

## Section 45 - *Substitute Decisions Act*

- a) Ability to understand the information that is relevant to making a decision re health care, nutrition, shelter, clothing, hygiene or safety,  
**and**
- b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision

# Executing Valid POA'S / Wills

- Sections 10 (1) & 48 (1) require that a CPOAP and POAPC shall be executed in the presence of 2 witnesses, each of whom shall sign the power of attorney document as witness
- It also lists individuals that cannot witness the document
- **How does one comply with the provisions while practicing Covid-19 social distancing?**

# Emergency Order During Pandemic

- A new temporary emergency order in council permitting audio–visual communication technology to be used for the witnessing of both Wills and POAS
- Best Practices must still be observed



# Checklist: Virtual Meetings

- Is there an individual with your client in the same room during the video conference?
- Try to interview the client alone.
- Ask if client able to do so that the potential client/client do a 360 view of the room that he/she is participating in the meeting from.
- Request that the potential client/client not mute the meeting for the duration.
- Request that any doors if applicable be closed during the meeting.





# Checklist: Virtual Meetings (cont.)

- Observe body language closely.
- Listen for rustling of papers, or other distractions and make inquiries if any.
- If someone insists on being present in the room, establish who they are- And why are they there?
- What is the relationship between this individual and your client?
- Who is your client living with during the pandemic?
- How is your client dressed?
- Does it raise any red flags about personal care?

# Checklist: Virtual Meetings (cont.)

- Is your client looking at the camera or looking off camera for answers?
- Is someone writing down and holding up written answers for your client to read?
- Try to make sure your client is the one answering the questions and if on video, that you see all of the person as much as possible.

# Executing POA's

Will Banks accept POA Documents that have been witnessed using audio–visual communication technology ?

# Appointing an Attorney for Property

- Is the proposed grantee willing to act as attorney?
- Does proposed grantee have any financial troubles?
- Does proposed grantee understand the responsibilities of an attorney?
- Can the proposed grantee be trusted not to misuse property, and make prudent financial decisions?

# POA Issues & Risks

## *McMaster v. McMaster*

- 80 yr. old mother in good health
- Appoints 2 sons jointly as attorneys, BUT failed to tell one of them
- Son (who knew he was attorney) managed her affairs after Alzheimer's diagnosis & lost over **\$2 M of her assets** investing in go-kart business



# Appointing Attorney for Personal Care

- Is proposed grantee willing to talk about personal care issues and understand grantor's goals, values, and beliefs?
- Is proposed grantee willing to honour wishes as much as possible?
- Is this proposed grantee comfortable and willing to ask questions of treating medical professionals?
- Is the proposed grantee prepared to make tough decisions in accordance with grantor's wishes?

# Attorney Duties

- The *Substitute Decisions Act* sets out all of the obligations and duties of an attorney for property, it also includes the court procedure for holding an attorney for property accountable.
- An attorney is a fiduciary whose powers and duties shall be performed diligently, with honesty and integrity and in good faith, for the benefit of the Donor.

# Do's and Don'ts for an Attorney

## Do's

- Stay within scope of authority granted
- Cease to exercise authority if POA is revoked or upon the death of the grantor
- Consider if a decision made that will have an effect on the grantor's personal comfort or well-being is for the grantor's benefit.

## Don'ts

- DO NOT make secret profits
- DO Not exercise POA for personal benefit
- DO NOT place the grantor's assets into joint ownership or comingle bank accounts.



# Do's and Don'ts (cont.)

## Do's

- Manage a grantor's property in a manner consistent with decisions concerning the person's personal care
- Explain the duties of the attorney and encourage the grantor's participation
- Foster contact between the grantor and relatives or friends

## Don'ts

- DO NOT sub-delegate responsibility as attorney
- DO NOT attempt to change the Donor's Will or any other testamentary designations
- DO NOT take a fee/compensation for service as an attorney if the power of attorney prohibits same

# Do's and Don'ts (cont.)

## Do's

- Consult with relatives, friends and other attorneys on behalf of the grantor
- Keep detailed record and accounts of all transactions involving the property
- Exercise reasonable care & skill (ordinary diligence v professional diligence)

## Don'ts

- DO NOT disclose information contained in the grantor's accounts and records. Exceptions apply

# Do's (cont.)

- Determine whether the grantor has a Will
- Make expenditures deemed reasonably necessary for the grantor or the grantor's dependants, for support, education and care
- Formally pass accounts, if required
- Take compensation from the property in accordance with the prescribed fee scale

# Do's (cont.)

- Seek the advice of a Professional when needed
- Respect the Donor's confidentiality
- Act in accordance with the known wishes or instructions of the grantor on the grantor's behalf
- Keep records of all decisions made regarding the health care
- Make decisions which are the least restrictive and intrusive to the grantor
- Maintain comprehensive records

# REMEDIES WHEN ABUSE BY AN ATTORNEY IS DETECTED

Civil vs. Criminal



# Remedies: Civil or Criminal?

## Civil

- Private parties
- Anyone can start claim
- Costly and lengthy
- Restitution / Repayment
- “Balance of Probabilities”

## Criminal

- Crown and accused
- Crown initiates
- Funded by government
- Incarceration
- “Beyond Reasonable Doubt”

# Civil Remedies

- Removal of attorney
- Order to “Account” - produce evidence how money was spent
- Repay money improperly taken
- “Set aside” transfers of title or bank account, gifts etc..

# Civil Remedies

- Restitution, Unjust Enrichment, Constructive Trust, Resulting Trust
- Breach of Contract, Breach of Fiduciary duty & obligation, Tort of Civil Fraud
- Damages/Costs



# Court Decisions

## “Son Who Tried to Steal his Mom’s House”

- After father died, took mother to registry office
- Transferred title into joint names
- Mother thought she was signing a CPOAP
- Mother’s English was limited
- Son refused to transfer house back
- No ILA



# Court Decisions

- Court held:
  - Transfer set aside
  - A “textbook example” of child unduly influencing parent
  - Mother required independent legal advice

# Alternative Dispute Resolution

- Mediation
- Arbitration
- Family meetings (with or without counsel)

# Criminal Remedies - The Criminal Code

- Failure to provide the necessaries of life (s.215)
- Criminal Negligence(s.219) Causing Death (s.220)
- Uttering Threats (s.264.1)
- Physical or Sexual Assault (ss.265 & 27
- Unlawful Confinement (s.279)
- Theft by a person holding a power of attorney (s.331)
- Theft (s.332)



# Criminal Remedies - The Criminal Code

- Criminal Breach of Trust (s.336)
- Forgery (s.366)
- Theft or forgery (credit card) (s.342)
- Extortion (s.346)
- Forgery (s.366)
- Fraud (s.386-388), Intimidation (s.423)

# Criminal Remedies - The Criminal Code

## Sentencing Principals:

- S.718
- Age and/or disability
- Abuse of position of trust
- Lengthier sentence

# Court Decisions

## ***R v Kaziuk 2011 (Oakville, ON) (Fraud, Theft)***

- Used a CPOAP granted by mother to take out mortgages on her properties
- Defaulted and left her penniless and homeless
- 10 years reduced on appeal to 8 years



***“he would rip off the wings of angels in heaven and sell them to the devil for his own gain”***

# GUARDIANSHIPS



# Guardianships

- Fiduciaries – substitute decision makers for incapable individuals
- Different than an attorney under a POA – appointed by a Court (after a person becomes incapable) rather than chosen by the grantor (while grantor still capable), or statutory

# Guardianships

- Guardian of the Person
- Guardian of Property
- Wishes of incapable person play important role in who shall be appointed guardian: *Lazaroff v Lazaroff*
- Appointment of last resort

# LIVING AT RISK

## Interventions

# Risks

## Internal Factors

- Increasing age
- Cognitive impairment
- Sensory impairment
- Any disability
- Daily activity impairment
- Malnutrition, etc.

## External Factors

- Lack of social network
- Dependence on another/care provider/living alone
- Lack of community resources
- Poverty, etc.

# Risk & Intervention

- Willingness to accept intervention?
- *Public policy*: individual's fundamental rights, autonomy delicately balanced with societal demands to protect vulnerable & intervene

# What Can We Do?

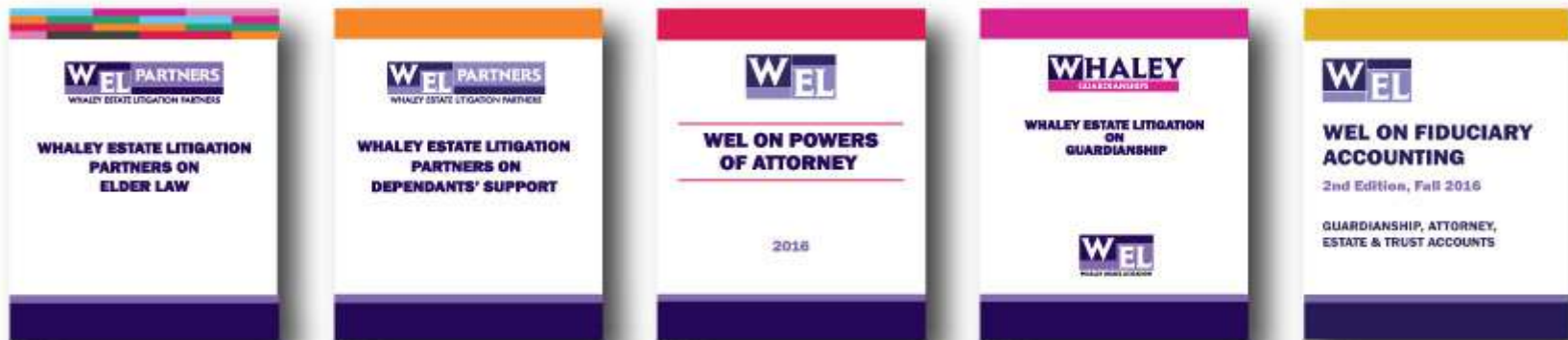
- Raise awareness
- Improve dissemination of knowledge
- Develop best practices, research, intervention strategies
- Education & training, protocol, legal action
- Action plans, increase resources & community response, review laws, etc.

# Access to Legal Services

- Courts continue to operate and hear urgent matters via telephone and video conferencing
- Law offices are for the most part operating remotely-deemed an essential service
- Legal Aid Ontario offering free legal services via telephone despite their offices being closed
- Institutions working to combat elder abuse continue to work virtually to provide services, information updates and trainings

# WEL Partners Resources

WEL resource books are available to download in PDF format.



Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

Guardianship: <http://welpartners.com/resources/WEL-on-guardianship.pdf>

Powers of Attorney: <http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

Dependants' Support: <http://welpartners.com/resources/WEL-on-dependants-support.pdf>

Elder Law: <http://welpartners.com/resources/WEL-on-elder-law.pdf>



# Internet Resources

- CBA Elder Law Section: [http://www.cba.org/cba/sections\\_Elder/main/](http://www.cba.org/cba/sections_Elder/main/)
- Advocacy Centre for the Elderly: <http://www.advocacycentreelderly.org>
- National Initiative for the Care of the Elderly (NICE): <http://www.nicenet.ca/>
- BC Law Institute's Canadian Centre for Elder Law: <http://www.bcli.org>
- Law Commission of Ontario, A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice <http://www.lco-cdo.org/en/older-adults-final-report>
- Canadian Network for the Prevention of Elder Abuse: <http://cnpea.ca>

THANK YOU!



# Provincial Information and Support POLICE

## RCMP

[www.rcmp.gc.ca](http://www.rcmp.gc.ca)

## Call local Police Service

LEAPS/Seniors Support Officers

## Ontario Provincial Police

[www.opp.ca](http://www.opp.ca)

## Senior Crime Stoppers

[www.canadiancrimestoppers.org](http://www.canadiancrimestoppers.org)

1-800-222-TIPS (8477)

## Canadian Anti-Fraud Centre

[www.antifraudcentre-centreantifraude.ca/index-eng.htm](http://www.antifraudcentre-centreantifraude.ca/index-eng.htm)

1-888-495-8501



**SENIORS  
CRIME   
STOPPERS**



**To anonymously report  
crimes against seniors.**

**1-800-222-TIPS (8477)**

# Provincial Information and Support REPORTING

## Retirement Homes Regulatory Authority

[www.rhra.ca](http://www.rhra.ca)

1-855-ASK-RHRA 1-855-275-7472

RHRA is a *not-for-profit organization* that oversees retirement homes, processes retirement home license applications.

Respond to calls about harm/abuses to residents and inspect homes to ensure they meet the standards.

Reporting: If anyone sees or suspect harm or risk of harm to a resident resulting from: Improper or incompetent treatment or care, abuse of a resident by anyone or neglect of a resident by staff of the retirement home, unlawful conduct, misuse or misappropriation of a resident's money.

## Ministry of Health and LTC ACTION Line

[www.ontario.ca/page/long-term-care-home-complaint-process](http://www.ontario.ca/page/long-term-care-home-complaint-process)

1-866-434-0144

A service to hear concerns and complaints from persons receiving service from Long-Term Care Homes and Local Health Integration Networks (LHINs).

## Office of the Public Guardian and Trustee - Investigations Unit

[www.attorneygeneral.jus.gov.on.ca](http://www.attorneygeneral.jus.gov.on.ca)

1-800-366-0335

## Consent and Capacity Board

[www.ccboard.on.ca](http://www.ccboard.on.ca)

1-866-777-7391

# Support Line

## Seniors Safety Line

Provide assistance to abused seniors and their families across the province

**24/7**



### Highlights:

- Trained, experienced staff answers the phone
- Service in over 150 languages
- One toll free number for the entire province
- Instant access to provincial database listing regional resources
- Instant referral information provided

### Benefits for local resources

- No more missed calls when your service is closed
- Immediate service in a crises situation
- Seniors and family members will be directed to local services and agencies
- Detail the services you provide and be part of the provincial database
- Database information is kept current
- Regional statistical information will be available.

**Stop Abuse. Restore Respect.**

**1-866-299-1011**

# Provincial Information and Support CRISIS/HELP LINES

## **Assaulted Women's Helpline**

[www.awhl.org](http://www.awhl.org)

1-866-863-0511 (24 hours)

## **Ontario Network of Sexual Assault/ Domestic Violence Treatment Centres**

[www.satcontario.com/en/home.php](http://www.satcontario.com/en/home.php)

416-323-7518

## **Ontario Coalition of Rape Crisis Centres**

[www.sexualassaultsupport.ca](http://www.sexualassaultsupport.ca)

## **Victim Support Line**

[www.attorneygeneral.jus.gov.on.ca/english/about/vw/vsl.asp](http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/vsl.asp)

1-888-579-2888 (24hrs)

## **Fem'aide**

[www.femaide.ca/](http://www.femaide.ca/)

1-877-336-2433 (24 hours)

## **TALK4HEALING**

[www.talk4healing.com/](http://www.talk4healing.com/)

1-855-554-HEAL (4325)

## **Support Services for Male Survivors of Sexual Abuse**

[www.attorneygeneral.jus.gov.on.ca/english/ovss/male\\_support\\_services/](http://www.attorneygeneral.jus.gov.on.ca/english/ovss/male_support_services/)

1-866-887-0015

# Provincial Information and Support- FINANCIAL SERVICES

## **Ontario Securities Commission**

[www.osc.gov.on.ca/](http://www.osc.gov.on.ca/)

## **Ombudsman for Banking Services and Investments**

[www.obsi.ca](http://www.obsi.ca)

1-888-451-4519

## **Ministry of Consumer Services**

1-877-665-0662

[sse.gov.on.ca](http://sse.gov.on.ca)

## **Financial Consumer Agency of Canada**

1-866-461-FCAC (3222)

## **Competition Bureau of Canada**

1-800-348-5358

[www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home)

# Stay in touch with us!



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[linkedin.com/in/elder-abuse-ontario/](https://linkedin.com/in/elder-abuse-ontario/)

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# Questions?

