

- » Continue to investigate as required. Identify other means of obtaining evidence (e.g. production order, search warrant, other judicial orders of suspect's account(s), records from retirement home or long-term care facility, etc).
- » If there is adequate evidence, recommend or lay the appropriate theft charge, (e.g. theft over \$5,000 or theft under \$5,000) citing s. 331 and/or other relevant sections of the CC. Additional relevant sections of the CC with respect to theft by POA or other related planning tools include 328, 330, 331, 332, 334 and 336. Conduct your investigation and document evidence in a way that enables the Crown to recommend an increased penalty under appropriate sentencing provisions due to age-related vulnerability of the victim.
- » If a criminal charge is recommended or laid, consider having the accused resign as the attorney. Their resignation could also be a condition of release.

If Victim May Be Incapable

Use these strategies in addition to those already noted. Again they are not presented in any particular order.

- » Obtain the victim's financial particulars. Look for alternative sources to gather the victim's financial particulars (e.g. family members, friends, lawyer who represented victim when POA was signed, staff at facility). Obtain a copy of the POA.

- » Consider enlisting the aid of other agencies (e.g. home health, Public Guardian and or Trustee or Curator) to provide support to the victim.
- » Contact financial institution(s) immediately. Request disclosure of required financial information as per the relevant privacy legislation and the decision of Regina vs. Lillico. Financial institution staff can release general information without warrant under certain circumstances. Request that the financial institution exercise 'due diligence' in relation to the victim's account(s), from this point forward.
- » In some jurisdictions a Public Guardian/Trustee/Curator may have special asset freezing and/or investigative powers that apply to abuse. Consider notifying the office of the Public Guardian/Trustee/Curator.
- » Take a formal statement from victim.
- » Obtain consent from any person named as attorney in order to retrieve financial records. If consent is not attainable, consider other means to obtain this information (e.g. production order, search warrant, other judicial orders). Attend financial institution(s) to gather pertinent financial records/evidence.

This is one in a series of tools in the NICE tool kit designed to detect, intervene in, and/or prevent abuse of seniors. For more information about this, or any of the other tools and related training events, please visit www.nicenet.ca

September 30, 2011

This tool is considered to be a promising approach based on front-line practice experience. It is an adaptation of the original that was developed by the Ontario Provincial Police Seniors Assistance Team, the Halton Regional Police Service and the Hamilton Police Service.

Disclaimer

You should not rely on this pocket tool for financial or legal advice. It provides general information only. NICE is not responsible for any use of the information other than for general educational/informational purposes and no claim can be made against NICE or any of its personnel for any such use.

Canada

New Horizons for Seniors Program
Human Resources and Skills Development Canada

Programme Nouveaux horizons pour les aînés
Ressources humaines et Développement des compétences Canada



NCE RCE

Networks of Centres | Réseaux de centres
of Excellence of Canada | d'excellence du Canada
2005-2010

THEFT BY PERSON(S) HOLDING POWER OF ATTORNEY

OFFICERS INVESTIGATION GUIDE



NICE

National Initiative for the Care of the Elderly
Initiative nationale pour le soin des personnes âgées

We care together
Ensemble pour le bien-être des aînés

www.nicenet.ca

ABOUT POWERS OF ATTORNEY

Power of Attorney or “POA” is a legal planning tool that mentally capable adults can use to appoint someone else to make decisions for them. Older adults often use POAs to plan for a time, should it occur, that they become mentally incapable of making their own decisions.

Provincial laws govern Powers of Attorney and these laws differ from one province/territory to another throughout Canada. Depending on province/territory, the term Power of Attorney may have different meanings and limits on decision-making authority. For example, in British Columbia a Power of Attorney is limited to financial and legal decisions while health and personal care decisions are covered by Representation Agreements and other incapacity planning documents. Ontario, on the other hand, allows for a Power of Attorney for Property (legal and financial affairs) and a Power of Attorney for Personal Care (health and personal care).

Officers should refer to the relevant provincial/territorial legislation for details about the parameters of specific legal planning tools in each jurisdiction. Although not a substitute for reviewing the legislation, one starting point is the Practical Guide to Elder Abuse and Neglect Law in Canada at <http://www.bcli.org/ccel/projects/practical-guide-elderabuse-and-neglect-law-canada>.

This Theft by Person(s) Holding Power of Attorney Officers Investigation Guide deals with theft by a person holding a Power of Attorney pursuant to Section 331 of the Criminal Code of Canada. The information in this guide applies only to misuse of a POA for Property, not to a POA for health or personal care, although the generic term POA is used throughout.

THEFT BY PERSON HOLDING POWER OF ATTORNEY - SECTION 331 CC

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

MENTAL CAPACITY

Legislation outlining the definition of mental incapability varies from province/territory throughout Canada. In general, every adult is presumed to have capacity to make their own decisions unless proven otherwise. Capacity is decision and situation specific rather than global. This means that an adult may be legally capable of making some decisions but not others. Capability is about the decision-making process rather than the outcome. Generally speaking the question is: “Does the adult understand the information that is relevant to making a specific decision (i.e. about their property) and appreciate the consequences of making or not making that decision?”

KEY QUESTIONS

The first questions officers should ask themselves are:

- » Is there evidence of money or property missing or unaccounted for?
- » Does the alleged offender hold power of attorney for property (or whatever the equivalent of a POA is in your jurisdiction)?

If the answer is ‘yes’ to both of these questions, the investigator should presume the adult donor of the POA is mentally capable, but be aware while conducting the investigation of any signs that could indicate otherwise. Many factors such as certain health issues and the impact of long term abuse can be mistaken for a lack of mental capacity.

INVESTIGATION STRATEGIES

The following strategies for “If the Victim Is Capable”, or “If the Victim May Be Incapable” are in no particular order. While each investigation may evolve uniquely, the following suggestions are important to consider in every situation.

If Victim Is Capable

- » Visit the victim and obtain financial particulars (e.g. name of attorney on POA, name of bank, contact info at branch, account #s, Old Age Security (OAS) and Canada Pension Plan (CPP), etc. Once authorized by the victim, look for alternative sources of information (e.g. family members, friends, lawyer who represented victim when POA was signed).

- » Obtain from the victim, a completed consent form for the release of their financial records / bank information. Also obtain a copy of the POA for Property.
- » Let the victim know they have the right to revoke the POA. Suggest that the victim get legal advice about how to do so as soon as possible.
- » Refer the older adult to a local Victim Service Program and/or give the older adult numbers for support resources in your province/territory (see list at: <http://www.seniors.gc.ca/c.4nt.2nt@.jsp?lang=eng&geo=106&cid=160>).
- » Contact financial institution(s) immediately. Speak to an officer of the financial institution (e.g. branch manager, customer service manager) and advise them that you are conducting an investigation into the account(s) of (victim's name). Confirm with the banking officer, that the information you have been given by the older adult is accurate.
- » Take a formal statement from the victim. Obtain a KGB video statement (preferable), audio statement or written statement (be mobile - take a camera to the victim when resources allow. In some cases, a dying declaration may be required. Consult your local Crown for guidance).
- » Take the victim's consent form to their financial institution(s), government offices (OAS, CPP) and ask when you will be provided with the pertinent financial records/evidence.