



Happy
Holidays!

November Update

The Holiday Season is upon us! This month we are featuring a fantastic article by Reid Lester, Partner, Laishley Reed LLP about Power of Attorney fraud. Also, make sure you keep an eye on our website and newsletter as we are working on some great training opportunities for the new year.

As always we are looking for your input and feedback for our newsletter. If you have any feedback or would like to contribute a written piece of work to be featured in our newsletter email us at acfe.toronto@sympatico.ca.

Connect on LinkedIn

Did you know the ACFE Toronto Chapter has a new LinkedIn group?

Find lots of great connections, articles, discussions, postings. Just go to LinkedIn ACFE Toronto Chapter page by clicking [here](#) and ask to be connected to be a part of this lively site.

About the ACFE

The ACFE is the world's largest anti-fraud organization and premier provider of anti-fraud training and education. Together with more than 70,000 members, the ACFE is reducing business fraud world-wide and inspiring public confidence in the integrity and objectivity within the profession. Visit www.acfe.com for more details.

Community Partner Update

At the ACFE Toronto Chapter, we like to keep up-to-date on what our Community Partners are doing. If any of our members know of anything new taking place with any of our Community Partners please send email us acfe.toronto@sympatico.ca.

Career Corner

If you have a position you would like to have added please email us at acfe.toronto@sympatico.ca.

Dinner Meetings Update

The ACFE Toronto Chapter hosted our November dinner meeting on November 24th at The Royal Canadian Military Institute.

The chapter would like to thank Stephen McClyment, Investigation Counsel, Law Society of Upper Canada for his presentation "Fraud and Money Laundering From a Legal Perspective".

We would like to congratulate Mona-Lisa Petreanu, who was the winner in our draw for a certificate for free admission to an ACFE dinner meeting.



The names of all attendees are entered for the draw at the end of each meeting.

Our next two dinner meetings will feature Alexander Fishbein, a recently retired police detective with thirty eight years of policing experience. On January 26th he will present "Contemporary Fraudulent Schemes" and then on February 24th he will present "Digital Evidence and Data Security – How to protect against the types of Fraudulent Schemes learned in Part 1".



Friendly Fraud: Financial Abuse of the Elderly

Reid Lester, Partner, Laishley Reed LLP

An elderly man and his son attend at a bank with a document identifying the son as a power of attorney (POA). Several months later, the son attends at the bank asking the bank to provide a draft in the amount of \$89,500, drawn on the father's account, and made payable to JetSet Marine Ltd. When he is questioned about the transaction, he tells the bank that it is none of their business.

A young man shows up at a credit union and asks that the accounts of his elderly mother be transferred into a joint account with himself. He advises that his mother is bed-ridden and unable to attend. He produces a power of attorney document which is dated earlier in the week, and which contains a shaky, illegible signature on the bottom.

Should the bank or the credit union respond to these requests? If they refuse to respond, they may be in breach of their contractual obligations to follow the instructions of their customers. On the other hand, if they do respond, they may be facilitating a fraud against the elderly customers.

These scenarios could become more common in the years ahead. Studies have suggested that the incidence of elder abuse has been rising over the past twenty years. Studies have also suggested that a very large percentage of known perpetrators of financial abuse against elders are family members. Many other abusers are so-called "trusted caregivers". The reasons are not difficult to ascertain: today's elderly people grew up when economic times were tight. They have tended to save and they have enjoyed tremendous appreciation of property values. Now, they can be vulnerable and easy to exploit. Their children often endure weak economic times, high housing prices and plenty of consumer goods to tempt them. Opportunity meets motive!

Unfortunately, the legislative framework for POAs provides few safeguard against the financial exploitation of the elderly. The relevant legislation in Ontario is *The Substituted Decisions Act*. Among other things, the Act sets out that a POA must be signed in front of two disinterested witnesses, and can be made contingent upon future occurrences. In order for the POA to be legally valid, the grantor (or donor) must have the proper mental capacity. While POAs can be for limited purposes (i.e., selling a property), with the elderly, we are generally concerned with "continuing" POAs.

Fraud with respect to a POA can arise in two main ways. First, a fraudster can utilize a forged or invalid POA and hope to induce a third party to act on it. Second, and perhaps more likely, an attorney can utilize a valid POA to carry out the fraud. An attorney acting under a POA is a fiduciary and owes an obligation to the donor to act in his or her best interest. If an attorney uses the POA in a manner that is not in the best interests of the donor, then this is a breach of fiduciary duty. Anyone who assists an attorney in such an endeavor can be said to be acting in assistance of the breach of fiduciary duty. Liability on the third party would then depend on the extent of that party's knowledge of the breach.

There are (at least) two significant features of the Act that allow opportunities for fraud, or exploitation. The Act provides that while a continuing POA can be in "prescribed form", it need not be. This means that anyone who wants to, can pull a form off the internet, or buy a POA kit at a drug store and prepare a simple POA without the involvement of a lawyer or some other legal or governmental official. If the person can then induce the elderly grantor to sign off (in front of two witnesses), the person can then procure a legally valid POA. Moreover, if the grantor does not possess full and proper mental capacity, the POA may not be valid at law, but no one in receipt of such a document is necessarily going to be aware of that.

Second, the Act provides that an existing (continuing) POA will be automatically terminated if the grantor executes a new continuing POA (unless the grantor provides that there should be multiple POAs). Further, in the event of such a termination of a previous POA, there is no requirement that the previous attorney be notified.

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Friendly Fraud: Financial Abuse of the Elderly

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These rules create opportunity for unscrupulous family members (or “trusted” caregivers) to exploit their elderly relatives or charges. Further, the rules can also create uncertainty for banks and credit unions. Banks and credit unions are contractually obliged to honour the instructions of their customers. Under a valid POA, the attorney is legally the same as the customer. However, a bank can be held liable (to an estate or a defrauded elderly person) for acting upon an invalid POA, which would include a POA executed by an elderly person who lacks proper mental capacity at the time of execution. The problem is, of course, that the bank or credit union may not have knowledge in each particular circumstance as to whether a particular grantor had such capacity at the time of execution.

But what about the case where there is valid POA which is used in a way to defraud the donor? Financial institutions are also exposed to this danger. The law provides that banks and credit unions are not normally obliged to monitor transactions in their customers’ accounts. However, if there are “suspicious circumstances” of a type that would put a “reasonable banker” on notice, then they are obliged make “reasonable inquiries”, failing which they could be held liable for any resulting losses.

It is not always clear what circumstances should be considered to be “suspicious” or as to what inquiries should be made in a given set of facts. Sometimes, there are privacy concerns. Set out below is a list of some potential “red flags” for a financial institution:

- abrupt change in attorney;
- evidence of physical abuse;
- significant withdrawals of funds or significant change in account behaviour;
- inclusion of a new names on signature card;
- creation of joint accounts;

Unfortunately, there is no registry of POAs in Ontario. There are certain common-sense steps that can be taken, however, in an effort to determine the validity of a POA or the bona fides of particular transactions. The following is non-exclusive list of certain preventative steps that a bank/credit union might take in the face of a new POA or “suspicious circumstances”:

- read the entire POA and take legal advice if necessary
- contact and visit the elderly customer and meet in private
- compare signatures on POA with signatures on other bank documents
- contact the lawyer who prepared the POA, and/or the listed witnesses
- institute a policy of encouraging any existing POA to require that the bank/credit union contact him/her in the event of any change
- contact the office of the Provincial Guardian and Trustee (“PGT”).

The PGT in particular can be a valuable resource in a number of ways. Among other things, the PGT can act as an attorney for an incapable person (where there is no other appropriate person who can or will agree to act in this role), it can undertake legal proceedings to protect such a person’s property, and it can undertake investigations in cases of suspected fraud. Further information can be found at the PGT’s website: <https://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/overview.php>

Reid Lester is a partner at Lashley Reed LLP in Toronto where he practices in the areas of Fidelity Insurance Law, Commercial Fraud, Banking and Bills of Exchange, E & O, and recovery actions of all kinds. He has extensive experience in commercial fraud matters relating to strategic guidance and to recovery claims, including Mareva injunctions, Anton Pillar Orders, and tracing orders. He also has an extensive background in matters relating to financial institutions concerning bills of exchange issues, breach of trust matters, Canadian Payments Association Rules and bank-related errors and omissions claims. Mr. Lester can be reached at rl Lester@lashleyreed.com or at (416) 981-9415.





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Upcoming Events

-  January 26, 2016 – ACFE – Toronto Chapter presents – Dinner Meeting Part 1: “Contemporary Fraudulent Schemes”
 Speaker: Alex Fishbein, Retired Police Detective
 Venue: Royal Canadian Military Institute (RCMI), 426 University Avenue, Toronto
 5:30 – 6:15 pm registration, networking and dinner
 6:15 – 7:15 pm presentation and Q&A
[More Information and Registration](#)
-  February 24, 2016 – ACFE – Toronto Chapter presents – Dinner Meeting Part 2: “Digital Evidence and Data Security-How to protect against the types of Fraudulent Schemes learned in Part 1”
 Speaker: Alex Fishbein, Retired Police Detective
 Venue: Royal Canadian Military Institute (RCMI), 426 University Avenue, Toronto
 5:30 – 6:15 pm registration, networking and dinner
 6:15 – 7:15 pm presentation and Q&A
[More Information and Registration](#)



Four more TTC staff fired as fraud probe continues

Manulife “completely lax,” TTC chair says, as number of transit workers dismissed hits five. [Read more](#)

Michelle Gushue implicated in 2 more fraud cases

A woman who has already pleaded guilty to fraud, Michelle Gushue, is now facing additional charges. [Read more](#)

Dozens more charges laid in fraud case

Dozens more charges have been laid in an extensive fraud investigation against a Bonnyville resident. [Read more](#)