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Bill C-36: An Act to amend the Criminal Code (Elder Abuse)

Publication No. 41-1-C36-E
26 April 2012
Revised 3 December 2012

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Legislative Summary of Bill C-36

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-36: AN ACT TO AMEND THE CRIMINAL CODE (ELDER ABUSE)

1 BACKGROUND

Bill C-36, An Act to amend the Criminal Code (elder abuse) (short title: Protecting Canada's Seniors Act), was introduced in the House of Commons on 15 March 2012 by the Honourable Gordon O'Connor, for the Minister of Justice, the Honourable Rob Nicholson. The bill specifies that "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation" is an aggravating factor to be taken into account during sentencing for a crime. According to the news release that accompanied the introduction of Bill C-36, this amendment "will help ensure that sentencing for crimes against elderly Canadians reflects the significant impact that crime has on their lives."¹

On 6 June 2012, after second reading in the House of Commons, Bill C-36 was referred to the Standing Committee on Justice and Human Rights for study. Following clause-by-clause consideration, the bill was reported back to the House on 22 October 2012, with one amendment to the French version of the short title: the reference to "personnes âgées" was amended to "personnes aînées."² Bill C-36 subsequently received third reading in the House of Commons on 6 November 2012, and first reading in the Senate on 7 November 2012. The bill received second reading in the Senate and was referred to the Standing Senate Committee on Legal and Constitutional Affairs on 27 November 2012.

1.1 SOCIAL CONTEXT

1.1.1 FORMS OF ELDER ABUSE

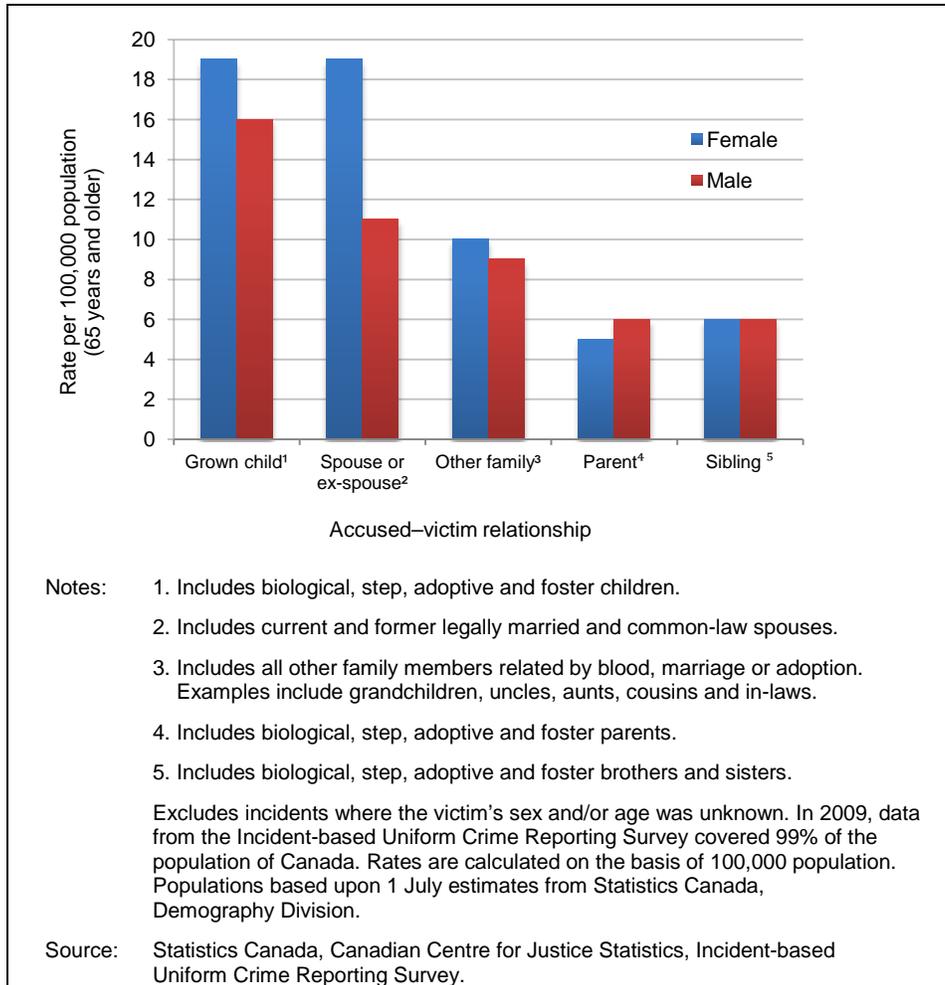
There is no common definition across jurisdictions in Canada of elder abuse; different government departments, laws, and programs use different language to describe the issue. However, most definitions are based on the World Health Organization definition of "elder maltreatment" as "physical, sexual, mental and/or financial abuse and/or neglect of people aged 60 years and older."³

The National Seniors Council, appointed by the federal government to advise on issues related to older Canadians, noted in 2007 that "[e]lder abuse may take many forms: financial, physical, emotional or psychological, sexual, systemic (e.g., ageism), spiritual and neglect (either self-neglect by seniors or neglect by others)."⁴

In its report on the abuse of older women in Canada, the House of Commons Standing Committee on the Status of Women noted that many witnesses testified that financial abuse is the most prevalent form of elder abuse.⁵

However, most of the available data pertain to physical abuse. Many perpetrators abuse elderly people who trust them; in fact, most are family members. A recent report by Statistics Canada indicated that the rate of police-reported family violence against seniors had risen by 14% between 2004 and 2009.⁶ This violence against seniors is not necessarily perpetrated by a younger relative, however; as Statistics Canada also noted, “[s]enior women were almost equally likely to be victimized by their spouse as [by] their grown child.”⁷ Figure 1 illustrates the differential rates of victimization by sex, and by the relationship of the victim to the accused.

Figure 1 – Senior Victims (65 Years and Older) of Family Violence, 2009



Source: Figure and notes adapted from Statistics Canada, [Family Violence in Canada: A Statistical Profile](#), Catalogue No. 85-224-X, Ottawa, January 2011, pp. 28 and 30.

1.1.2 SCOPE

In its 2007 report, the National Seniors Council summarized the current state of knowledge about elder abuse:

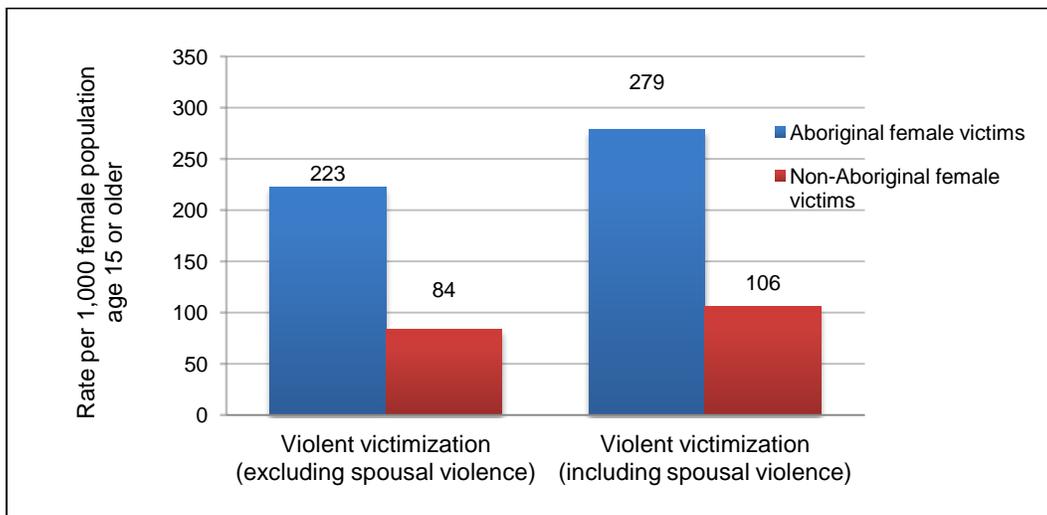
It is difficult to estimate the prevalence and incidence of elder abuse in Canada due to factors such as under-reporting, confusion about what constitutes abuse, limitations in victimization surveys and police statistics, or a general lack of awareness about the issue. Nonetheless, based on available Canadian data, it is estimated that between 4 percent and 10 percent of older adults in Canada experience some type of abuse.⁸

It has also been suggested that, relative to rates in the general population of elderly people in Canada, rates of abuse are likely higher among older Aboriginal people and may also be higher among older newcomers to Canada, although data are not available to determine the precise numbers of victims.⁹

An early analysis (2002) of abuse of older Aboriginal people defined “elders” as people 55 and over, taking into account the fact that, compared with the general population, Aboriginal Canadians have a shorter life expectancy and tend to become dependent at a younger age.¹⁰ Earlier studies are cited that make the case that Aboriginal elders and Aboriginal women were more likely to have experienced abuse than their counterparts in the Canadian population as a whole, because there are higher levels of violence on-reserve than off-reserve and the greater proportion of Aboriginal seniors live on-reserve rather than off-reserve.¹¹

Statistics Canada data also indicate that Aboriginal women in the 10 Canadian provinces are about three times more likely than non-Aboriginal women to be victims of violence,¹² as shown in Figure 2.

Figure 2 – Self-reported Violent Victimization of Females by Aboriginal Identity, Canada’s Provinces, 2009



Source: Adapted from Shannon Brennan, “[Violent victimization of Aboriginal women in the Canadian provinces, 2009](#),” *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, Ottawa, 17 May 2011, p. 7.

With respect to immigrant elders, limited research has meant limited hard data. However, we do know that immigrants are overrepresented among those over 65 years of age – approximately 15% of the total Canadian population and more than 20% of immigrants are in that age group (2006 data)¹³ – and one researcher has noted that “in immigrant communities ... the elderly and caregivers are under enormous stress from isolation due to language and socio-economic barriers.”¹⁴

A summary of research dating back to 1995 concluded that:

language barriers, social isolation, financial and emotional dependency, sociocultural factors, dysfunctional family dynamics, caregiver stress, and the personal characteristics of the victim and the perpetrator may lead to elder abuse, or prolong it in ethnocultural communities. Abused ethnocultural older people often do not know about their legal and human rights or about community resources.¹⁵

Just as elder abuse is likely more common among Aboriginal and ethnocultural communities, women are generally more likely to be victimized than men. As the Canadian Network for the Prevention of Elder Abuse (the Network) pointed out, one reason for this is simply the fact that “[t]here are more older women than older men, especially after about age 75 or 80. That means that number-wise, we would expect to see more abused older women than abused older men, because there are more older women.”¹⁶

However, the Network offered additional reasons why women may be disproportionately affected by elder abuse. For example, with respect to financial abuse, women may be affected more than men because they “tend to have fewer financial resources to begin with, a greater proportion of older women are already living below the poverty line, and older women live longer than older men so that any loss of income or assets through financial abuse will hurt them more and for longer.”¹⁷ With respect to physical abuse, the Network pointed out that “a woman, on average, tends to be smaller than a man, and may have less ability to defend herself, and older women are more likely than older men to have disabling conditions.”¹⁸

1.1.3 LAW ENFORCEMENT AND ELDER ABUSE

A review of the literature on elder abuse noted that “[c]riminal law is used less frequently to address abuse and neglect of older persons than abuse of other persons,” and offered the following explanation:

Reasons for this include: (1) the fact that prosecutions are often difficult, as the victim may be reluctant to cooperate in a prosecution against the loved one; (2) the victim may have poor health and possible present or impending mental incapacity; (3) the prosecution may take so long that the victim dies before the case goes to court; and (4) the perpetrator may be the only significant person in the victim’s life and to report and testify against them would result in loneliness and pain from the perceived consequences of the intervention.¹⁹

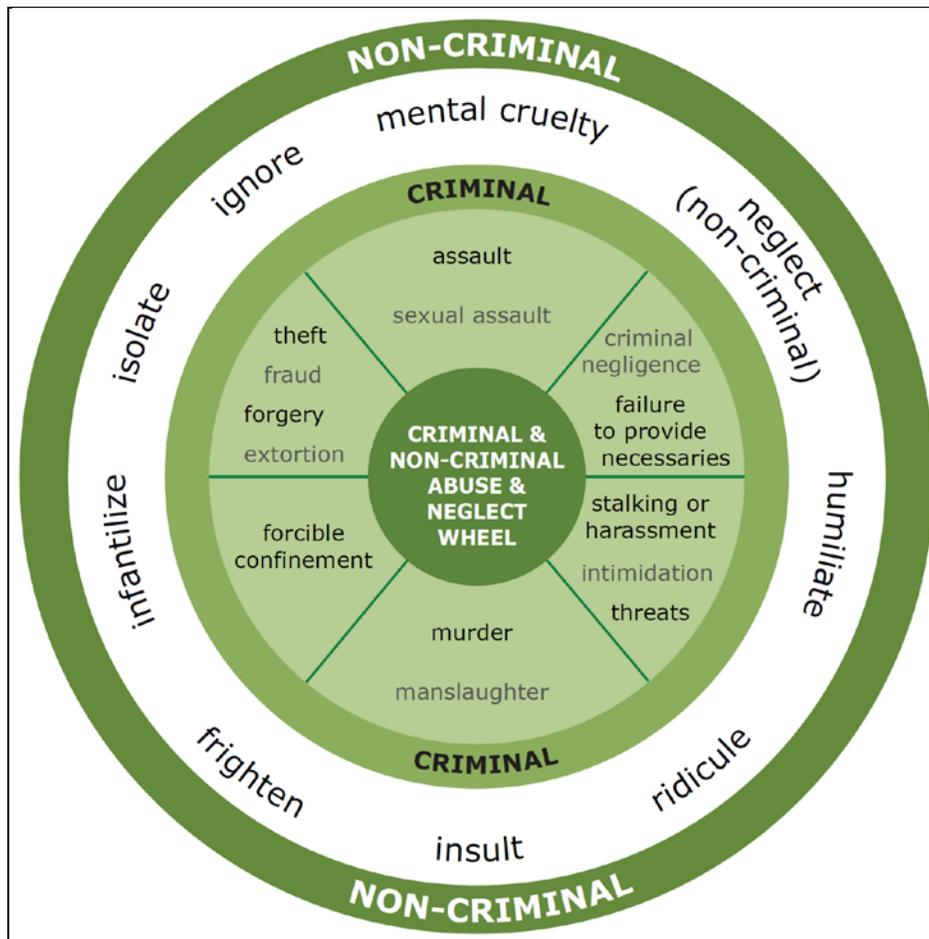
As reported by the Status of Women Committee in its final report on abuse of older women,

[C]ompeting demands for resources combined with officers who may not be familiar with all the complexities of elder abuse could contribute to the low level of prosecution of elder abuse cases. One police officer said that officers often fail to see a crime in elder abuse. In addition, witnesses said that the time required of officers in such prosecutions was a deterrent to proceeding, particularly with complex cases

[P]olice witnesses at the national, provincial and local level all described the unwillingness of many victims to press charges against the perpetrators of abuse, particularly when that person is a trusted family member.²⁰

Further, not all conduct that may be perceived by the general public as elder abuse will be treated as criminal conduct by the justice system. The following figure, developed by the BC Coalition to Eliminate Abuse of Seniors, delineates criminal and non-criminal forms of elder abuse.

Figure 3 – Criminal and Non-criminal Forms of Elder Abuse



Source: BC Coalition to Eliminate Abuse of Seniors, [Abuse and Neglect of Seniors: Is it a Crime?](#), 2006, p. 2.

1.2 AGGRAVATING FACTORS IN SECTION 718.2(A) OF THE *CRIMINAL CODE*

As noted above, Bill C-36 would add a new aggravating factor to be taken into account on sentencing. The aggravating factors enumerated in section 718.2(a) of the *Criminal Code*²¹ were introduced in 1995 as part of a lengthy process of sentencing reform that also resulted in the codification of the purpose and fundamental principle of sentencing and the creation of “conditional sentences” (sentences of imprisonment to be served in the community), among other developments.²² Generally speaking, when aggravating factors, or aggravating circumstances, are present in a particular case, the judge will impose a lengthier sentence to better reflect the gravity of the offence.

When section 718.2 was introduced into the Code in 1995, it read as follows:

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender’s spouse or child, or

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The list of aggravating factors in section 718.2(a) is not exhaustive; courts may also consider other aggravating circumstances during sentencing. Nonetheless, additional enumerated factors have been added to this section since 1995.²³

In 1997, a bill relating to criminal organizations added a fourth aggravating factor to section 718.2(a) of the Code, namely, “evidence that the offence was committed for the benefit of, at the direction of, or in association with a criminal organization.”²⁴

Through the 2001 *Anti-terrorism Act*, section 718.2(a)(v) was added to the Code, making “evidence that the offence was a terrorism offence” the fifth specified aggravating circumstance in section 718.2(a).²⁵

Finally, in 2005, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act* brought the number of enumerated aggravating circumstances in section 718.2(a) to six by dividing section 718.2(a)(ii) into two separate aggravating factors.²⁶ Evidence that the offender abused his or her spouse or common-law partner was one of the resulting enumerated factors;²⁷ the other was evidence that the offender “abused a person under the age of eighteen years,” irrespective of whether that person was the offender’s child.

1.3 ELDER ABUSE AS AN AGGRAVATING CIRCUMSTANCE IN SENTENCING

Although there is no specific *Criminal Code* offence of elder abuse, some courts have held that it may be treated as an aggravating factor under section 718.2(a) of the Code when offences are committed against elderly victims.

In *R. v. Kralik*, for example, which involved a contractor defrauding an elderly woman of approximately \$200,000 over a three-year period, Justice Wedge of the Supreme Court of British Columbia made the following observations in imposing a sentence of four-and-a-half years in prison:

I must also bear in mind, as I am directed by s. 718.2 of the *Criminal Code*, that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Certain factors are deemed to be aggravating factors, but the factors listed in s. 718.2 are only examples of aggravating factors. In my view, abuse of a frail, isolated elderly person, particularly an elderly person who was “not as sharp as she once was,” can be considered an aggravating factor. I will not go so far as to say that Mr. Kralik was in a position of trust. It is enough, in my view, that he deliberately took advantage of Ms. Loftus’ vulnerability, isolation and reduced mental capacity.²⁸

Similarly, *R. v. Banks* involved a financial advisor who defrauded eighteen of his clients of almost \$1.4 million. Justice West of the Ontario Court of Justice noted that “[t]he large majority of these victims (clients) were senior citizens, who in some instances invested their life savings with Mr. Banks,” some to supplement meagre incomes, others to increase their retirement savings. Among the aggravating circumstances Justice West noted in imposing a four-year sentence were that the frauds involved a serious breach of trust by a financial advisor (section 718.2(a)(iii) of the Code); that the majority of the victims were “elderly and particularly vulnerable having regard to their financial circumstances”; and that the financial consequences for the victims were devastating.²⁹

Some courts also appear to have considered the extra vulnerability attributable to the elderly victim’s age and health as an aggravating circumstance in cases involving sexual assault and/or failing to provide the necessities of life.³⁰ This aggravating factor may not currently be considered in all cases of elder abuse in all provinces, however.

2 DESCRIPTION AND ANALYSIS

Bill C-36 consists of three clauses, including the short title (clause 1) and the provision indicating that the bill will come into force 30 days after Royal Assent (clause 3).

The only substantive provision is clause 2, which would add a seventh enumerated aggravating factor to section 718.2(a) of the Code. In particular, section 718.2(a)(iii.1) would specify that “evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation” is deemed to be an aggravating circumstance to be taken into consideration during sentencing.

The term “elder abuse” does not appear in the text of the bill, nor does the bill indicate that the aggravating circumstance will apply only if the victim has reached a specified age.³¹ As a result, it is possible that the aggravating factor could be applied in cases that would not generally be perceived as cases of “elder abuse.”

3 COMMENTARY

Response to the bill has generally been positive, although with the caveat that more needs to be done to address the problem of elder abuse in Canada.

The *Toronto Star*, for example, argued that “[p]unishing more severely the very few abusers who will ever be charged is all well and good,” but that “it will take more than a tweaking of the *Criminal Code*” to protect vulnerable seniors. The newspaper called for the federal government to work with the provinces to develop a comprehensive strategy, noting that “[p]reventing abuse will always be preferable to punishing abusers.”³²

An editorial in the *Chronicle Herald* stated that the bill is a “welcome improvement,” noting that “sending a clear message through the courts that abusing the elderly will be dealt with harshly – as this bill seeks – is the right thing to do.” The same editorial also described a private member’s bill introduced by the New Democratic Party that would make enrolment in the federal Guaranteed Income Supplement automatic for eligible seniors as “both sensible and timely,” since “financial vulnerability can force seniors into situations where they are more at risk for abuse.”³³

CARP, a national non-profit organization committed to a “New Vision of Aging for Canada,” welcomed the introduction of Bill C-36, and called for a comprehensive strategy aimed at ending elder abuse, including added caregiver support and the expedited passage of the bill.³⁴ Seniors’ advocate Susan Eng of CARP is reported as having said that such legislation will help deter what has historically been a hidden crime, but also that only a small portion of elder abuse is reported.³⁵

NOTES

1. Department of Justice Canada, “[Government Introduces Legislation to Better Protect Canada’s Seniors](#),” News release, Toronto, 15 March 2012.

2. **House of Commons, Standing Committee on Justice and Human Rights, [Thirteenth Report](#), 1st Session, 41st Parliament.**
3. World Health Organization [WHO] Regional Office for Europe, [European report on preventing elder maltreatment](#), 2011, Copenhagen, p. viii.
4. The National Seniors Council, [Report of the National Seniors Council on Elder Abuse](#), November 2007, p. 5.
5. House of Commons, Standing Committee on the Status of Women, Third Report, [Abuse of Older Women](#), 1st Session, 41st Parliament, May 2012, p. 10.
6. Statistics Canada, [Family Violence in Canada: A Statistical Profile](#), Catalogue no. 85-224-X, Ottawa, January 2011, p. 27.
7. *Ibid.*, p. 28.
8. The National Seniors Council (2007), p. 5.
9. Stephanie Hayman, "Older People in Canada: Their Victimization and Fear of Crime," *Canadian Journal on Aging*, Vol. 30, Issue 3, September 2011, pp. 430–433.
10. Claudette Dumont-Smith, "[Aboriginal Elder Abuse in Canada](#)," 2002, p. 6.
11. *Ibid.*, p. 8.
12. Shannon Brennan, "[Violent victimization of Aboriginal women in the Canadian provinces, 2009](#)," *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, Ottawa, 17 May 2011, p. 7.
13. Samuel Perreault, "[Immigrants and Victimization, 2004](#)," Canadian Centre for Justice Statistics Profile Series, Statistics Canada, Catalogue no. 85F0033M, No. 18, Ottawa, 2008, p. 8.
14. Elizabeth Podnieks, "[Raising Awareness of Abuse of Older Persons – An Issue for Faith Communities?](#)," *McMaster Journal of Theology and Ministry*, 25 January 2002.
15. Elizabeth Podnieks, "Elder Abuse: The Canadian Experience," *Journal of Elder Abuse & Neglect*, Vol. 20, No. 2, September 2008, p. 142.
16. Canadian Network for the Prevention of Elder Abuse, [Abuse of Older Women](#).
17. *Ibid.*
18. *Ibid.*
19. Podnieks (2008), p. 129.
20. House of Commons, Standing Committee on the Status of Women (2012), p. 14.
21. [Criminal Code](#), R.S.C. 1985, c. C-46.
22. *An Act to Amend the Criminal Code (sentencing)*, S.C. 1995, c. 22, s. 6. For more on that bill, see Marilyn Pilon, *Bill C-41: An Act to amend the Criminal Code (sentencing)*, Publication no. LS-210-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 22 June 1995.
23. Note that some provisions of the Code also set out aggravating factors specific to certain offences, such as section 255.1 (aggravating circumstances for offences committed by means of a motor vehicle) and section 380.1 (aggravating circumstances in relation to fraud, including that "the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation").
24. *An Act to amend the Criminal Code (criminal organizations) and to amend other acts in consequence*, S.C. 1997, c. 23, s. 17. The French section originally referred to "*un gang*" rather than to "*une organisation criminelle*"; this was amended to align with the English in *An Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c. 32, s. 44.

25. [Anti-terrorism Act](#), S.C. 2001, c. 41, s. 20.
26. [An Act to amend the Criminal Code \(protection of children and other vulnerable persons\) and the Canada Evidence Act](#), S.C. 2005, c. 32, s. 25; Robin MacKay, [Bill C-2: An Act to amend the Criminal Code \(protection of children and other vulnerable persons\) and the Canada Evidence Act](#), Publication no. LS 480-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 June 2005.
27. The term “spouse” was changed to “spouse and common-law partner” by the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 95.
28. [R. v. Kralik](#), 2006 BCSC 1322, para. 24.
29. *R. v. Banks*, 2010 ONCJ 339. Note that this predates recent amendments that added, as an aggravating factor for fraud, that “the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation” ([Standing up for Victims of White Collar Crime Act](#), S.C. 2011, c. 6, s. 3; see also Cynthia Kirkby and Dominique Valiquet, [Bill C-21: An Act to amend the Criminal Code \(sentencing for fraud\)](#), Publication no. LS 40-3-C21-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 February 2011).
30. *R. v. Poupard*, 2010 QCCA 1956 ([application for leave to appeal to SCC dismissed](#)); [R. v. Peterson](#) (2005), 203 O.A.C. 364 ([application for leave to appeal to SCC dismissed](#)).
31. Compare current section 718.2(a)(ii.1): “evidence that the offender, in committing the offence, abused a person *under the age of eighteen years*” [emphasis added].
32. [“Protecting seniors from elder abuse takes more than justice legislation,”](#) *The Toronto Star*, 18 March 2012.
33. [“Elder abuse,”](#) *The Chronicle Herald* [Halifax], 19 March 2012. This appears to refer to [Bill C-409, An Act to amend the Old Age Security Act \(application for supplement\)](#).
34. CARP, [“CARP welcomes Stiffer Sentencing for Elder Abuse: Bill Introduced by Minister of Justice,”](#) News release, 15 March 2012.
35. Terry Davidson, [“Feds toughen sentences for elderly abuse,”](#) *The Toronto Sun*, 15 March 2012.