

OTLA Submission to Financial Services Regulatory Authority (FSRA)

Proposed Approach to Strengthening Protection of Vulnerable Consumers

March 8, 2024

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Financial Services Regulatory Authority of Ontario (FSRA) regarding its Proposed Approach to Strengthening Protection of Vulnerable Consumers.

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others while, at the same time, advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

INTRODUCTION

As a plaintiff trial lawyers organization, OTLA promotes the rights and interests of some of the most vulnerable consumers in Ontario – auto collision victims. Auto collision victims are dealing with physical and psychological disabilities and financial losses and strain which render them part of the vulnerable population FSRA should be protecting. Children and youth are often overlooked consumers of the auto insurance system who are impacted by choices made by their parents and guardians even before and after a motor vehicle collision occurs.

As OTLA stated in its 2024 Pre-Budget submission¹ to the Ontario government, Ontario's auto insurance system is fundamentally broken. It is out of balance and no longer meets the needs or expectations of Ontario drivers and crash victims. The basic principles and goals underlying an effective automobile insurance system must include transparency, simplicity and certainty for the consumer. Increasing transparency, simplicity and certainty can only enhance the protection of the vulnerable consumer.

In these submissions, OTLA has addressed the questions put forth by FSRA in Section C of FSRA's Proposed Approach to Strengthening Protection of Vulnerable Consumers ("FSRA's Proposed Approach").

RESPONSES TO QUESTIONS

1. To what extent does this topic require more attention from FSRA?

OTLA agrees with FSRA that the rights and interests of vulnerable consumers require increased protection. As FSRA has noted, vulnerable consumers are at an increased risk of receiving inappropriate products and services and of experiencing poorer outcomes when engaging directly with the insurance industry.

2. In addition to the activities proposed in the chart under Section A, are there any additional activities, such as outlining a set of expectations or defining specific requirements for entities across all of its regulated sectors, that FSRA should consider for its approach to strengthening protection of vulnerable consumers?

OTLA commends FSRA's effort to mend the gap between vulnerable consumers and those industries it regulates, including the insurance industry. To expand upon what FSRA has proposed

¹ OTLA, 2024 Pre-Budget Submission, <https://www.otla.com/docDownload/2337324>

in terms of action-based models with guidelines, OTLA would recommend the following under each heading:

- 1. *Promote inclusive and fair treatment of vulnerable consumers and prevent targeted financial mistreatment.***

Dialogues with Regulated Entities:

FSRA has proposed that there be engagement with the regulated entities. OTLA agrees there should be engagement, but also education, on best practices when interacting with the vulnerable consumer. FSRA should set expectations out for how the regulated entities ought to communicate and interact with the vulnerable consumer to ensure they are treated fairly.

OTLA also proposes that engagement should not stop at just the regulated entities, it should include the industries that are also impacted by the decisions of the regulated entity.

In the context of insurance, insurance companies pay treatment providers on behalf of their consumers for treatment being received. Over the years, there has been a disconnect with what the true cost of the treatment is versus what the insurer is required to pay. It is not consistent with inflation, which as we know, is significant at this point in our economy in Ontario. What this does is leave a gap between what the treatment provider is being paid by the insurer and the value of the services. It falls to the consumer to make up that difference or choose to not receive the services at all. It also results in treatment providers refusing to provide treatment covered by auto policies. The consumer either has to pay directly or not receive the treatment from the provider. This is a problem as it adds to the potential vulnerability of consumers in situations where their income has been reduced because of a car collision and/or where they do not have family or friends who can bridge the financial gap.

Similarly, often the tasks associated with administering the treatment are overly scrutinized by the insurers and the insurers refuse to pay for these tasks. This poses an issue for the treatment provider because they must make notes, draft reports, and travel to the client to provide their treatment services. Again, when the insurer is refusing to pay for all of the necessary corollary steps of providing the treatment, this leaves that gap in payment to the consumer, which creates a further financial burden. This is particularly burdensome for consumers who live in remote areas where access to appropriate care is extremely limited. Travel to the home of the consumer is required so that the specialized services are provided for rehabilitation. The consumer should not be burdened with that cost.

OTLA proposes that FSRA open the dialogue to not only the regulated entities, but the entities that are impacted by the decisions of those regulated entities, such as the treatment provider community. This will provide FSRA a better understanding of how to protect the vulnerable sector and ensure consumers are being serviced at the highest standards.

Research:

OTLA encourages FSRA to complete independent research about the consumers and the products that are being offered by the regulated entity.

For example, since 1990 the *Statutory Accident Benefits Schedule (SABS)*², provide standard weekly income replacement benefit that an insurer is required to pay is a maximum of \$400 per week, which is \$20,800 on an annual basis. This is what most Ontarians will receive because they only purchase the standard auto policy. This weekly benefit amount has not been increased for inflation and it falls well below the needs and expectations of most consumers. OTLA encourages FSRA to conduct research into this area to better serve consumers. Research could include why consumers do not purchase optional enhanced benefits and whether the low weekly income replacement benefit is being chosen by the most financially vulnerable consumers in exchange for reduced premiums.

Ontarians pay some of the highest premiums in North America for insurance. They are not aware that these premiums do not adequately cover them should they fall victim to injuries from a car collision. OTLA also encourages FSRA to critically examine why Ontario auto insurance premiums are so high and demand greater financial transparency from the insurers that it regulates.

OTLA also encourages FSRA to conduct independent research into the “choice based” model that insurers have proposed and implemented for the purchase of auto insurance. The insurers have advised the regulator that the reasoning behind offering a lower base amount for insurance is to keep premiums down and to promote choice of consumers to purchase more insurance. However, it is not clear what is being communicated to the consumer about the choices they are making and the impact that this may have should they find themselves, or their children, in the unfortunate situation of being involved in a motor vehicle collision. Research should be conducted into whether optional benefits are offered, whether they are appropriately explained and whether the consumer is provided with the premium difference when making that decision at the time of purchase. Research should focus on whether consumers are being provided with appropriate information to make an informed decision about optional benefits for their particular situation. Are consumer tools needed, such as an income calculator which would show pre-MVC income, post-MVC income from all sources if no optional benefits and post-MVC income with optional benefits? Are consumers being asked the correct questions to determine if optional benefits should be recommended? Is the current process appropriate for the vulnerable consumer?

Strengthen Supervision:

OTLA encourages ongoing supervision of the regulated entities, including the insurance industry. Publicly announcing what measures are being put in place to protect consumers will strengthen the public’s perception of the insurance industry as well as FSRA’s role in holding the insurers accountable.

Informed Policy Decision Making & Data Analysis:

OTLA welcomes data analysis to help inform policy and decision making within FSRA’s regulated industries. Data analysis helps in identifying potential opportunities, challenges, and areas for improvement, ultimately leading to more effective and efficient policies and strategies.

Policies can serve as a mechanism for addressing specific challenges faced by vulnerable consumers, such as transparency in the insurance product being purchased, as well as the

² O. Reg. 34/10: Statutory Accident Benefits Schedule - Effective September 1, 2010, <https://www.ontario.ca/laws/regulation/100034>

administration of the insurance product and claims. By establishing clear policies, governments and regulatory bodies can create a framework for addressing the unique needs of vulnerable consumers and ultimately contribute to a more equitable system.

Complaints Analysis:

OTLA endorses a thorough and robust complaints process that is designed to promote engagement from the public. The complaints process plays a crucial role in protecting the rights of vulnerable consumers. Here are some key reasons why it's important:

- **Protection:** A complaints process provides a formal channel for vulnerable consumers to report any mistreatment, exploitation, or unfair practices they may encounter. It allows them to seek resolution and protection from potential harm.
- **Empowerment:** Having a complaints process gives vulnerable consumers a voice and helps empower them to assert their rights. It provides an avenue for them to raise their concerns and seek redress, which can be empowering and reassuring.
- **Accountability:** A well-functioning complaints process holds businesses and service providers accountable for their actions. It encourages them to address legitimate grievances and make necessary changes to prevent future issues.
- **Improvement:** By receiving and addressing complaints from vulnerable consumers, businesses can gain valuable insights into areas where they need to improve their services and practices. This can lead to better, more inclusive services in the long run.
- **Legal Compliance:** In many jurisdictions, businesses are required by law to have a complaints process in place to handle consumer grievances. Ensuring that vulnerable consumers have access to this process is essential for legal compliance and adherence to consumer protection regulations.

Overall, a clear, user-friendly complaints process is crucial for protecting and supporting vulnerable consumers, ensuring that their voices are heard, and facilitating fair and safe relationships in the insurance industry.

In keeping with the initiatives as outlined in Section B, it will be important for FRSA to inform the public that there is a complaints process available and that complaints will be investigated and dealt with appropriately.

2. Improve consumer education, engagement, and awareness building efforts.

- Community outreach & engagement
- Global engagement
- Publish and promote research
- Partnerships with other regulators
- Focused Campaigns
- Better communication/disclosure

OTLA encourages the use of information campaigns targeted at vulnerable consumers. Informing the public about FSRA's role in regulating the insurance industry is crucial for several reasons. Firstly, these campaigns can help empower vulnerable individuals by equipping them with the knowledge and understanding necessary to make informed decisions about their purchases, finances, and overall well-being. By providing relevant information, such campaigns can enable

individuals to better protect themselves against fraudulent schemes, misleading marketing tactics, and other exploitative practices that may disproportionately affect vulnerable populations.

Information campaigns can raise awareness about available support, resources, and rights, ensuring that vulnerable consumers are informed about avenues for seeking assistance and redress in case of unfair treatment by insurers.

3. Do you have any comments on FSRA's proposed approach to defining vulnerable consumers in Section B? Do you think it is useful to have a definition of vulnerable consumers? Are there any other factors that FSRA should consider in better understanding vulnerability in its sectors?

OTLA agrees that before moving ahead with a proposed approach to strengthening protection of vulnerable consumers, there needs to be clarity around the definition of vulnerable consumers. Vulnerable consumers face potential challenges in understanding complex financial or legal matters, making it easier for them to be misled or coerced into making decisions that are not in their best interest. It is important for businesses and regulators to recognize and protect the rights of vulnerable consumers to ensure fair and safe transactions for all Ontarians.

The definition proposed by FSRA is: "A vulnerable consumer is someone who is at higher risk of experiencing financial mistreatment, hardship, or harm, due to various factors and personal circumstances."

The definition proposed is broad, which allows for liberal interpretation. This broad approach is prudent but there should be some further guidance and clarification. Examples of factors which may lead to vulnerability may include language barriers, cultural issues, low socio-economic status, literacy barriers, access to technology, access to clear and concise information from the insurer, brain injuries, physical disabilities and psychological disabilities. It is also important to factor in that the person interacting with an insurer and making decisions may not be the vulnerable consumer themselves, but decisions made by that individual may impact someone who is vulnerable. It is our experience that consumers who are guardians and parents of children, youth and disabled children, are given little guidance or information regarding how their decisions will impact these vulnerable groups. Better education needs to be provided to brokers and insurers on not just dealing with a vulnerable consumer, but also dealing with someone who is making decisions for the vulnerable.

4. If you are a consumer or consumer advocate, what should FSRA know about the experiences of vulnerable consumers?

Preamble:

As discussed above, vulnerable consumers may be socially or economically disadvantaged or they may suffer from injuries and disabilities that make them vulnerable. Most vulnerable consumers will not independently seek out and pay for optional benefits. Others may not even be properly informed about the availability of optional benefits. It is our members' experience that the majority of clients who come to lawyers after a collision have no idea that optional benefits were available. They are often not provided with information about what is available, the costs, or the consequence of rejecting the benefit. Greater warnings and greater education need to be provided to all consumers, particularly to consumers with language barriers, new immigrants, those with injuries or illnesses that cause a processing delay or those with mental health concerns. Specific

warnings need to be provided to consumers purchasing insurance that may impact children and youth.

OTLA is also increasingly concerned about the treatment of injured Ontarians who have been in a motor vehicle collision and who rely on the SABS and Licence Appeal Tribunal (“LAT”) system. Their injuries alone may make them vulnerable. The SABS is intended to be consumer protection legislation. This has been confirmed by the Ontario Court of Appeal. The appellate court has stated the goal of the SABS is to “reduce the economic dislocation and hardship” of victims of motor vehicle accidents.³ Sadly, there are barriers in the present system, which do not align with this stated goal.

Attendant Care Benefits

Attendant care benefits are intended to help injured victims of motor vehicle accidents access providers who perform self-care tasks, such as bathing, dressing, and personal hygiene. It is typically the most seriously injured and catastrophically injured who require this benefit. The regulation of attendant care benefits, and its interpretation by insurers, has become increasingly problematic. OTLA is seeing a greater number of insurers implementing practices to reduce or eliminate attendant care benefits for vulnerable claimants.

The SABS and FSRA’s Guidelines have created confusion and have allowed for inconsistent practices to be used across the industry. While the SABS require attendant care to be “incurred”, some insurers interpret this as meaning the consumer should pre-pay their personal support worker (PSW) directly and seek reimbursement from the insurer. Others agree to pay the insurer directly, but then later refuse to pay the full amount of the Form 1. These practices add a financial burden to a disabled, vulnerable consumer. These practices have resulted in vulnerable consumers becoming indebted to treatment providers and/or being unable to access treatment. Even more concerning is that it prevents vulnerable consumers, who cannot afford to pay up-front for a professional caregiver, from accessing attendant care services. Further it is driving treatment providers out of the industry and consumers will not be able to find treatment providers willing to provide services under the auto insurance regime.

The result is essentially a windfall for the insurers engaging in the practices described above.

Requiring an injured party to pay out-of-pocket to a professional caregiver is entirely inconsistent with the stated intention of the SABS – to function as consumer protection legislation. Requiring up-front payment to a professional caregiver presents an obvious barrier, for injured parties who lack the economic resources to make such pay. Allowing the continued misinterpretation of Guidelines to limit payments to the Form 1 rates instead of the Form 1 totals, directly impacts the most vulnerable consumer and leaves them without proper care and in harms way. The recent insurer practices are indebting consumers to treatment providers, despite approved Form 1’s. OTLA encourages FSRA to take immediate steps to rectify this problem.

³ *Tomec v. Economical Mutual Insurance Co.*, 2019 ONCA 882, at para 42

5. What additional information, (such as leading practices, tools, opportunities or risks) should FSRA be considering to inform its approach?

OTLA's members report that during legal consultations following an accident, insureds are often surprised both by the low level of coverage available to them and the fact they did not purchase all available coverage. Consumers are also surprised to learn that many of the therapies they need fall outside the OHIP scheme. Vulnerable consumers do not generally understand their auto coverage until they need to access it. Without appreciating the potential consequences, these consumers are more likely to opt for basic coverage to save a few dollars in premiums.

Consumers' approach to purchasing auto insurance is further impacted by the current trend in insurer marketing suggesting that auto insurance can be purchased "instantly." For example, in 2023 Sonnet Insurance launched a multi-media campaign in Ontario with the tagline: "Go online and in minutes you are covered." The campaign shows young consumers lying down looking at their phone buying insurance. This approach undermines OTLA and FSRA's shared belief that buying auto insurance is a serious undertaking that requires careful consideration given that vital coverage is currently only provided as an option.

The reduction of mandatory coverage under the guise of increasing consumer choice has eliminated important protections that are integral to the auto insurance product. OTLA's strong recommendation is that mandatory SABS coverage be returned to its pre-2010 levels, particularly related to benefits available to people deemed catastrophically impaired. The government committed to return medical – rehabilitation benefits from \$1 million to \$2 million in 2019, but has yet to implement this commitment.

Given the current SABS scheme where important coverage is optional, OTLA recommends the following steps to improve consumer education and encourage the purchase of optional coverage:

- Require insurers to provide real life examples of how an insurance shortfall could have a material impact on the consumer in the event of a significant accident in plain language when selling their auto policies.
 - For example, the Praxis Institute has conducted an economic analysis of the lifetime cost burden per individual following a spinal cord injury. Presenting this type of information to consumers in plain language at the time when they are making their insurance purchase may help rationalize the purchase of the optional benefits.
- Introduce plain language to FSRA's own website to make it more consumer-friendly and ensure important content is accessible to vulnerable consumers:⁴
 - For example, the opening sentence on the "Purchasing your policy page" reads as follows: "You may purchase higher liability limits under your third-party liability coverage, as well as increased accident benefits coverages." Vulnerable consumers are unlikely to understand the meaning of "liability limits", "third party liability coverage" or "coverages".
 - Consider offering consumer protection webpages in languages in addition to English and French when the information is aimed at consumer protection.

⁴ FSRA, *Increasing your liability and accident benefit coverage* - <https://www.fsrao.ca/consumers/auto-insurance/purchasing-your-policy/increasing-your-liability-and-accident-benefits-coverage>

- Add explainer videos to your webpages to eliminate literacy barriers and to assist visual or aural learners.
- Include an income calculator to help a consumer decide if they should purchase optional income replacement benefits.
- Increase the number of public interest advocates on FSRA's committees, including FSRA's Consumer Advisory Panel. Although the Panel currently includes a representative from FAIR, there is no other public interest representative who brings the experience of vulnerable consumers in the auto insurance context.

OTLA's members report that prospective clients often first request a legal consultation because they do not understand the Application for Benefits (OCF1). OTLA is involved in providing submissions on the OCF-1 as part of a separate consultation.⁵

The current LAT system is not conducive to self representation, particularly by vulnerable consumers. To address this concern OTLA recommends:

- Adopt a navigator service at the License Appeal Tribunal to assist claimants without representation to make their way through the claim process at the LAT, modeled on the approach taken by the federal Social Security Tribunal.
- Research should be undertaken to better understand the consumer's experience in dealing with the LAT.

6. Do you have suggestions for particular vulnerable communities or public interest groups representing vulnerable consumers that FSRA should directly engage with?

In addition to OTLA, we would recommend consultation with the following groups to ensure that FSRA's processes meet their accessibility needs:

- Spinal Cord Injury Ontario
- Ontario Brain Injury Association
- Canadian National Institute for the Blind
- Reach Canada
- Citizens with Disabilities
- ARCH Disability Law Centre
- FAIR
- Roundtable of Diversity Association
- Plain Canada
- Ontario Society of Occupational Therapists

CONCLUSION

OTLA supports FSRA's initiative to strengthen protection of vulnerable consumers. The protection of vulnerable consumers must be a top priority when considering compulsory automobile insurance.

⁵ OTLA, *Submission to FSRA regarding the OCF1 Semi-Final Draft*, <https://www.otla.com/docDownload/2337330>

OTLA appreciates the opportunity to provide feedback with respect to FSRA's Proposed Approach to Strengthening Protection of Vulnerable Consumers and looks forward to continuing to work together with FSRA to protect and empower vulnerable populations. OTLA would be pleased to discuss these submissions if questions arise, if clarification is required or if OTLA can be of any further assistance.