

**SUBMISSIONS ON THE FSRA'S PROPOSED APPROACH TO STRENGTHENING
PROTECTION OF VULNERABLE CONSUMERS**

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1. ABOUT ACE

The Advocacy Centre for the Elderly (ACE) is a specialty legal clinic that was established to provide a range of legal services to low-income seniors in Ontario.

Its mission is to uphold the rights of low-income seniors, and its purpose is to improve the quality of life of seniors by providing legal services which include direct client assistance, public legal education, law reform, community development and community organizing.

ACE has been operating since 1984 and was the first legal clinic in Canada with a specific mandate to serve older adults and with expertise in elder-law issues. On average, ACE receives more than 4,000 client intake inquiries a year.

2. A MORTGAGE-FRAUD EPIDEMIC IN ONTARIO

Since the beginning of 2022, ACE has received hundreds of calls from seniors, concerned family members, and the police about an alleged private mortgage fraud scheme that involves the use of mortgage brokers and private mortgage lenders. The cases that have come to ACE's attention have the following similarities:

- The senior is a highly vulnerable individual with significant mental and/or physical disabilities;
- A flurry of highly unconscionable home service contracts with NOSIs precede the allegedly fraudulent mortgage. Often a "groomer" approaches the senior offering to help remove the NOSIs at no cost to the senior;
- Private mortgages are placed on the seniors' homes with extremely inequitable terms including high interest rates (up to 25%); high brokerage, referral, and lenders' fees; pre-taking of interest for the full one-year term (making the mortgage harder to discover until it becomes due);
- The mortgages are unaffordable on their face given the small, fixed pension income of the seniors and are setting the seniors up for foreclosure or power of sale proceedings;
- The mortgage proceeds are used to pay out the above-mentioned NOSIs (and often the private mortgage lenders are not at arms-length from the directors of the financing companies that have NOSIs);
- The terms and conditions of the mortgages are so oppressive that they represent an almost certain loss of the property at the end of the one-year mortgage term; and,
- The seniors are unable to afford private lawyers to remedy their situation.

In response to these actions, certain disciplinary steps have been taken against lawyers and mortgage brokers involved with these schemes, and some of the collaborators are now facing criminal charges in Ontario courts.

However, the devastating impact has been the loss of savings, equity, and real property rights of hundreds – if not thousands – of older adults through the loss of their homes. These circumstances point to the need for special attention towards the regulation, and the legal and ethical responsibilities, of Ontario mortgage brokers and private mortgage lenders in respect of vulnerable consumers.

3. STRENGTHENING PROTECTIONS FOR VULNERABLE CONSUMERS

ACE submits that there is not just an opportunity, but a dire need to strengthen protections for vulnerable consumers in respect of private mortgage lending.

It is almost unimaginable that Ontario mortgage brokers should be permitted to arrange such oppressive mortgage loans in respect of older adults on limited incomes, some of whom have marginal mental capacity or lack mental capacity entirely, that the placement of the mortgage fundamentally and inevitably threatens the ownership interest of the older adult's home – which in many cases is their only significant financial asset – and to do so with impunity.

There needs to be stronger enforcement mechanisms with respect to the legal and ethical obligations of mortgage brokers and private lenders. Even more importantly, there needs to be much broader public education and awareness of the position of trust and authority occupied by brokers and lenders, and a culture change within the mortgage brokerage and private lending industries to the extent that such abusive behaviour would not be tolerated.

ACE welcomes and supports the past and present efforts of the FSRA to research the nature and extent of consumer needs – including those of vulnerable consumers – and to strengthen protections for vulnerable consumers as outlined in its Winter 2024 policy consultation.

Our comments and submissions in respect of this consultation are focused on the mortgage brokering and private lending sectors. We understand that this segment of the FSRA's mandate comprises a very large contingent of businesses and professionals that of December 31, 2023, includes:¹

- 55 loan and trust corporations;
- 1,255 mortgage brokerages;
- 3,189 mortgage brokers;
- 6,850 mortgage agents level 1;
- 9,557 mortgage agents level 2; and,

¹ FSRA website – “About FSRA” -- <https://www.fsrao.ca/about-fsra> (accessed March 8, 2024)

- 265 mortgage administrators.

While unethical, unscrupulous, and illegal behaviour is most likely limited to a small segment of this large industry, the breadth and scope of the regulatory challenge is laid bare by the large size of the industry as well as the estimated 15,801,000-person population of Ontario,² roughly 18% of whom – more 2,800,000 persons – are older adults over 65 years of age.³

The regulation and oversight of such a large business sector, and the education and awareness of such large populations, are both extraordinary and necessary undertakings.

4. THE PROTECTION OF VULNERABLE CONSUMERS REQUIRES THE CONTINUING ATTENTION AND RESOURCES OF THE FSRA

ACE supports the extensive work already undertaken by the FSRA to strengthen protection for vulnerable consumers, such as its *2022 Consumer Research Study*, its *2023 Report on Mortgage Brokering* that followed the *2022 Consumer Research Study*, and its various policy consultations on a variety of topics including *Mortgage Agent and Mortgage Brokering Licensing Suitability Guidance*, *Proposed Mortgage Product Suitability Assessment Guidance*, *Proposed Guidance on Public Warning Notices*, and *Proposed Guidance on Detecting and Preventing Mortgage Fraud*.

However, despite this creditable and extensive work, our older adult clients continue to suffer the adverse effects of mortgage fraud involving the mortgage brokering and private mortgage lending industries, and yet more work to strengthen protections for vulnerable consumers is urgently required.

5. DEFINING VULNERABLE CONSUMERS

ACE supports the general approach of the FSRA in defining vulnerable consumers, which we submit is necessary for both research and consumer protection and enforcement purposes, with the following comments:

5.1. A Broad, Ambiguous Definition

The proposed definition that “[a] vulnerable consumer is someone who is at higher risk of experiencing financial mistreatment, hardship, or harm, due to various factors and personal circumstances,” is appropriately broad, but it lacks specificity to the point that it is ambiguous for the purpose of enforcement mechanisms .

² Statistics Canada, Population Estimates Quarterly for Q4 2023 -- Table: 17-10-0009-01 (formerly CANSIM 051-0005) -- <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000901> (accessed March 8, 2024).

³ Statistics Canada, Population Estimates by Age and Gender, Ontario, as of July 1, 2023 -- <https://www150.statcan.gc.ca/n1/pub/71-607-x/71-607-x2020018-eng.htm> (accessed March 8, 2024).

We suggest that specific indicia of vulnerability should be clearly stated, without limiting its generality and the relevance of other unspecified indicators of vulnerability.

5.2. Indicia of Vulnerability

ACE agrees with and supports the indicia of vulnerability provided in the consultation paper, as follows:

[A]n individual's age, poor health condition (mental and physical), lack of financial literacy, being a recent immigrant to Canada and/or having language barriers, experiencing major life-changing events, having low financial resilience, lack of accessibility and availability to financial products/ services, being a member of equity deserving groups (such as based on an individual's ethnic background), and experiencing natural disasters / catastrophes or other major environmental events.

However, we think that many of these factors are so very broadly stated that they are ambiguous and difficult to apply. For example, "an individual's age" could in the case of an older adult be more particularly stated as "an individual's advanced age," or with different age criteria in relation to other age groups.

Furthermore, with respect to the indicator "experiencing life-changing events", we think that the bereavement and grief suffered from the death or incapacity of a life partner or other immediate family member deserves special attention, because we find that so many of our older adult clients have been financially abused immediately following the death or incapacity of their life partner, child, grandchild, or other significant family member. In fact, over the course of decades, we have found that many of our clients require grief and bereavement counselling before they can once again make fully informed and capable financial decisions. This factor, among others, should be front and centre in assessing the vulnerability of financial consumers.

We would also note that this is not an exclusive condition. There are many other indicia of vulnerability that should be more clearly spelled out in connection with the definition, both for research and for consumer protection and enforcement purposes.

6. VULNERABLE CONSUMERS NEED TO KNOW MORE ABOUT THEIR RIGHTS AND ABOUT THE FSRA

In our experience, older adults, including vulnerable consumers, have very little knowledge of their consumer rights with respect to the mortgage brokerage and private lending industries, and they are almost completely unaware of the existence and the mandate of the FSRA.

As noted in section 3, above, promoting the education and awareness to such a large audience of more than 15 million people, including nearly three million older adults, is an extraordinary undertaking. However, the enormity of the task merely underlines the

importance of extensive public education and awareness programs to fulfil the consumer protection mandate of the FSRA.

7. VULNERABLE CONSUMERS NEED TRANSPARENT, EFFECTIVE AND PROACTIVE PROTECTION AND ENFORCEMENT MECHANISMS

Consumer rights without remedies are of no value in the marketplace.

Furthermore, vulnerable consumers should be empowered with transparent access to information about investigations and enforcement steps taken in respect of their complaints.

ACE submits that the FSRA and/or the government of Ontario should consider enacting and implementing the following protection and enforcement mechanisms for vulnerable consumers:

7.1.A Consumer Bill of Rights

ACE suggests that the FSRA implement a *Consumers Bill of Rights* that would include, among other things, timely access to information on matters related to their complaints, if such rights are not already enshrined in other policy documents.

7.2.Limits to Brokerage Fees and Other Private Lending Fees

Throughout the course of the current mortgage fraud epidemic, our older adult clients have been charged exorbitant mortgage brokerage and other mortgage lending fees – often numbering in the tens of thousands of dollars on residential mortgages of under \$500,000 – that in some cases have increased the principal amount of a mortgage loan by as much as 50%.

We feel these charges are excessive and should not be permitted. Rather, there should be some reasonable limits on the amount of brokerage fees and other mortgage lending fees that may be charged on residential mortgages.

7.3.Prohibition of Prepaid Mortgage Interest

One of the hallmarks of the fraudulent and oppressive mortgages that our older adult clients have endured is the condition one year's prepaid interest – often at a rate of 25% per annum. This adds tens of thousands, or sometimes more than \$100,000, to the mortgage debt.

Most importantly, the mechanism of prepaid mortgage interest causes the fraudulent mortgage to go undiscovered until its maturity date, because until then no payments have been due.

In most cases, when the mortgage matures, the older adult homeowner has absolutely no ability to repay or even refinance the mortgage debt, leading to the imminent loss of their home.

The use of prepaid mortgage interest in this way is abusive and it should be prohibited.

7.4. Assessment of Vulnerability and Mental Capacity

Mortgage brokers and private lenders should be required to perform, document and attest to an assessment of the vulnerability of individual borrowers of all ages.

Furthermore, where such an assessment indicates that a borrower is moderately or highly vulnerable, the mortgage broker and private lender should be required to take reasonable steps to confirm the mental capacity of the borrower.

Failure to follow these steps should both invalidate the mortgage and expose the broker and lender to severe administrative penalties.

7.5. Confirmation of Independent Legal Advice

Mortgage brokers and private lenders should be required to ensure and document that vulnerable borrowers have received independent legal advice, without which both the mortgage commitment and the mortgage loan should be null and void at the sole option of the borrower, without any time limitations on the exercise of this right.

7.6. A 30-Day Cooling off Period.

Moderately and highly vulnerable borrowers should have the benefit of a statutory 30-day cooling off period following registration of any private mortgage, during which time simple written notice may be given to cancel the mortgage loan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto, Ontario, this 8th day of March, 2024.

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