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Backgrounder

Study Paper on Predatory Lending Issues in Canada

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Predatory lending is the practice whereby a lender deceptively persuades a borrower to agree to abusive loan terms. It is closely tied to the concept of subprime mortgage lending, which is the practice of making loans to borrowers who do not qualify for the best market interest rates (who tend to be people with poor or non-existent credit history or low income). A lender may be expected to require less favourable loan terms in exchange for dealing with a comparatively more risky borrower. But, if the surrounding circumstances include a vulnerable borrower easily taken advantage of due to their own desperate financial circumstances, the situation may be characterized as predatory. Although anyone could be a victim of predatory lending, older adults often fit the profile of having a scant (or even non-existent) credit history, low income, and financial need, all of which predatory lenders tend to seek out.

Predatory lending is a well-known phenomenon in the United States but it is much less known in Canada. The Canadian Centre for Elder Law has published a study paper that explores the reasons for its low profile, namely the underlying assumptions that the structure established by both the Canadian mortgage market and Canadian legislation are such that there is little cause for concern. The study paper's focus is primarily on how predatory lending may affect older homeowners, but similar issues may arise in connection with individuals who are purchasing a home and obtaining a new mortgage.

Although the study paper does touch upon options for reform from American jurisdictions, it does not provide in-depth evaluation or make recommendations for reform. Rather, the aim of the study paper is to provide a point of departure for further discussion, analysis, and investigation.

The Centre's study paper contains six parts. Following a brief introduction in part one, part two provides an analysis of the subprime mortgage market in opposition to the prime mortgage market. The myriad of definitions, legal and otherwise, of predatory lending is then examined. The issue is complicated by the fact that subprime loans provide a useful service in the market. Finally, this part deals with the relationship of predatory lending to elder law.

Part three is a discussion of how various aspects of the Canadian mortgage market can affect the suppression or the development of predatory lending. The primary factor facilitating this type of lending is the financial situation in which many older adults find themselves. Specifically, older adults are often in possession of considerable home equity yet their actual income is very low. Analysis reveals that the primary factor working to combat predatory lending is cautiousness on the part of typical Canadian borrowers and lenders. Interestingly, such a conservative approach is a result of social and cultural influences rather than any specific laws or financial constraints.

Part four examines existing statutory provisions, at both the federal and the provincial levels, which may provide aggrieved borrowers with remedies. Almost all Canadian regulatory legislation is aimed at traditional financial institutions such as banks, trust companies, and credit unions. By contrast, predatory lending practices are most often carried out by specialized finance companies that are not banks, trust companies, or credit unions.

At the federal level, part four traces the historical development and current relevance of the *Interest Act* as well as the criminal interest rate provision of the *Criminal Code*. Neither of these enactments was intended to address predatory lending and thus their usefulness is extremely limited in this context. Provincial legislation is broken down into four subject areas: cost of credit disclosure, unconscionable or deceptive acts or practices, mortgage brokers regulation, and unfair forms of contracts. The focus of the study paper is on the legislation of British Columbia. The provisions of British Columbia's omnibus *Business Practices and Consumer Protection Act* are looked at in detail, particularly those dealing with disclosure of cost of credit and unconscionable or deceptive acts. There is also an analysis of British Columbia's *Mortgage Brokers Act*, including its far-reaching definition of mortgage broker—a definition that may go so far as to encompass the elusive predatory lender.

Part five summarizes options for reform, pointing to some recent alternative models in the United States. These alternatives include legislation in force at both the federal and the state levels and proposals found in academic work. These options are not evaluated in a systematic way, and no recommendations are drawn from them. Instead, they are raised as ideas that may spur the development of the law in Canada.

The conclusion, in part six of the study paper, is that the extent to which predatory lending occurs in Canada is still largely unknown. Research in this area is necessary before the need for law reform can be properly assessed. Although the development of the Canadian sub-prime mortgage market is a cautious one, this may not hold true for much longer. Senior borrowers may increasingly find themselves victims of predatory lending without legal recourse or remedy.

The study paper is available on the Centre's website <<http://www.ccels.ca>>. The Centre welcomes comments on the study paper or on any experiences that readers may have had with predatory lending terms or practices. Comments may be made via the Centre's website.