1995

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Robert L. Brown
University of Waterloo, rlbrown@jeeves.uwaterloo.ca

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Recent Canadian Human Rights Decisions Having an Impact on Gender-Based Risk Classification Systems

Robert L. Brown*

Abstract

With the passage of the Canadian Charter of Rights and Freedoms on April 17, 1982, all previous court precedents using gender in risk classification systems became obsolete. Three cases involving issues of discrimination in the use of age and gender now clarify the position of the Canadian judiciary. Based on the decisions in these three cases, this paper presents arguments that can be used in any jurisdiction to defend successfully the use of gender in a property/casualty risk classification system.

Key words and phrases: Canadian Charter of Rights and Freedoms, human rights, gender discrimination, risk selection, automobile insurance, mandatory retirement

1 Introduction

The existence of the new Canadian Charter of Rights and Freedoms (April 17, 1982) brings challenges to many of the present risk classification parameters used by the Canadian automobile insurance industry.¹ Individual insurance contracts are generally subject to the sections of

*Robert L. Brown, F.C.I.A., F.S.A., A.C.A.S., is professor of statistics and actuarial science and director of the Institute of Insurance and Pension Research at the University of Waterloo. He is a past president of the Canadian Institute of Actuaries and is currently on the Society of Actuaries' Board of Governors and Executive Committee. He was an elected Councillor in the City of Waterloo from 1988 to 1994. Professor Brown has authored several articles and books.

1See Brown (1988) for a discussion of some of the actuarial implications of the Charter.
provincial human rights codes prohibiting certain types of discrimination. These codes often provide special provisions for insurance. For example, the Ontario Human Rights code provides for limited exemptions for insurance "on reasonable and bona fide grounds because of age, sex, marital status, family status, or handicap." What is reasonable and bona fide has become the issue.

This paper reviews three recent court cases in Canada that have made the application of these human rights provisions much clearer for insurance risk classification systems. While the cases are Canadian, the reasoning and logic used by the courts are universal.  

2 Dickason v. University of Alberta

At issue in this case is the fact that the University of Alberta has an age 65 mandatory retirement clause that had forced Professor Olive Dickason to retire. The Individual's Rights Protection Act of Alberta (Revised Statute of Alberta (RSA) 1980) prohibits discrimination on the basis of age but includes the phrase: "except where reasonable and justifiable in the circumstances".

A board of inquiry appointed to hear the appellant's complaint decided in her favor and ordered that she be reinstated. The Court of Queen's Bench (Alberta), upon appeal from the university, upheld the decision of the board of inquiry. Upon further appeal, however, the Alberta Court of Appeal overturned the lower court decision. Finally, the case was appealed to the Supreme Court of Canada.

The Supreme Court of Canada (September 24, 1992), on a 4-3 vote, supported the Court of Appeal of Alberta and found in favor of the University of Alberta. In writing the majority opinion, Justice J. Cory stated:

The University has shown that the impugned practice of mandatory retirement is reasonable and justifiable within the meaning of section 11.1 of the Individual's Rights Protection Act.

In the construction of human rights legislation, the rights enunciated must be given their full recognition and effect, while defenses to the exercises of those rights should be interpreted narrowly.

2Copies of all of the cases and court opinions discussed in this paper are available from the Insurance Bureau of Canada (IBC), 181 University Avenue, Toronto ON M5H 3M7, Canada.
The nurturing of academic freedom and the ensuring of faculty renewal are most delicate matters that do not lend themselves to a single clear-cut answer as to the proportionality between the burden of the discrimination complained of and the objectives sought.

... the terms of the collective agreement relating to compulsory retirement will apply to every member of the faculty association. Moreover, the union did not negotiate the term in a vacuum, but rather in the context of a system of tenure which protects all members of faculty from dismissal without just cause, and provides a pension scheme assuring the financial security of all retiring members of faculty.

The objectives of mandatory retirement were stated to be the preservation of tenure, the promotion of academic renewal, the facilitation of planning and resource management, and the protection of "retirement with dignity" for faculty members.

(These objectives) are of sufficient significance to justify the limitation of a constitutional right to equality. The impugned retirement practice is rationally connected to the objectives cited. The retirement of faculty members at the age of 65 ensures that the university may readily predict the rate at which employees will leave the institution and that positions are opened for new faculty. Mandatory retirement also allows the university to renew its faculty by means of remedying the twofold problem of limited funding and a "bulge" in the age distribution of professors. As well, the policy supports the existence of a tenure system which creates barriers to the dismissal of faculty members thereby enhancing academic independence. In the university setting, mandatory retirement also withstands the minimal impairment test. No obvious alternative policy exists which would achieve the same results without restricting the individual rights of faculty members. Finally, the effects of the prima facie discrimination are proportional to the legitimate objectives served.

While the Dickason case does not deal with property/casualty insurance matters, it is the first of a series of important human rights cases. Hence, an understanding of the two other cases, which impact auto insurance risk classification systems directly, is enhanced by this summary of the Dickason decision.
3 Zurich Insurance Company v. Ontario (Human Rights Commission) and Bates

A young male driver, Michael Bates, complained to the Ontario Human Rights Commission in 1983 that he was paying higher rates for his auto insurance because of his gender. The Human Rights Commission appointed a board of inquiry that concluded that the driver classification for unmarried male drivers contravened the Human Rights Code. Zurich Insurance appealed this decision, and the Divisional Court allowed the appeal (i.e., found in favor of Zurich). This judgment was appealed by the Human Rights Commission and Bates to the Ontario Court of Appeal, which dismissed the appeal. The case finally went to the Supreme Court of Canada which found in favor of the Zurich Insurance Company (5-2).

Justice John Sopinka, writing for the majority on the Supreme Court, stated that the issue to be determined in the appeal is whether the method by which Zurich set its rates, which admittedly discriminates on the basis of age, sex, and marital status, nonetheless satisfies the reasonable and bona fide grounds exemption provided by section 21 of the Ontario Code. Noting that the board of inquiry had determined that the section 21 exemption has the same meaning as the bona fide occupational qualification or requirement when applied in employment cases, the court decided that while individual testing is often feasible in the case of an employee, individualized assessment is not possible in the case of insurance. That is, the court agreed that some form of grouping is an essential element of the insuring process.

The court also noted that single males under the age of 25 have the highest claim frequency, the highest loss per car insured, and the highest average claim cost of any of the categories for which statistics are kept. The insurer's rate classification system (as even the board of inquiry had conceded) is based on credible actuarial statistics, is sound and accepted business practice, and therefore is reasonable. The court, however, stated that the statistical application would not be considered reasonable if there were an alternative which in all the circumstances was practicable. The board of inquiry had decided that Zurich had not proved that the very essence of its business would be undermined if it no longer could use its rate classification system using age, sex, and marital status. The Supreme Court believed that this decision sets a standard higher than that required by section 21 of the Human Rights Code and that the board of inquiry had given insufficient weight to the difficulties inherent in attempting to adopt new criteria in the absence
of an adequate statistical base.

Although it could be that an alternative statistical base might exist in 1992 (the time of the Supreme Court decision), the Supreme Court had to judge the situation as it existed in 1983. The Supreme Court said that the insurance industry must be allowed time to determine whether it could restructure its classification system in a manner that would eliminate discrimination based on enumerated group characteristics and still reflect the disparate risks of different classes of drivers and concluded that it would be inappropriate for the court to find a particular practice to be unreasonable when no reasonable alternative existed.

4 Watters (Alberta Human Rights Commission) v. Co-operators General Insurance Company

This case again involves a young male driver who claimed discrimination based on the grounds that auto insurance rates used gender as a rating factor for persons under age 25. As this case was in Alberta, the act that defines prohibited discrimination is again the Individual's Rights Protection Act (RSA 1980) previously seen in the Dickason case.

Using the wording of section 11.1 of the act, the Co-operators General Insurance Company stated that the practice of using gender as a risk classification parameter is reasonable and justifiable in the circumstances.

In a decision dated February 22, 1990, the Alberta board of inquiry found:

... that the complaint of the complainant under section 3(b) of the Individual’s Rights Protection Act is justified and that the respondent has failed to establish under section 11.1 of the act that the contravention is reasonable and justifiable in the circumstances.

The board ordered Co-operators to cease the contravention complained of and to refrain in the future from committing the same or similar contraventions. The board's decision was appealed by Co-operators to the Court of Queen's Bench which dismissed the appeal (i.e., Co-operators lost again).

Co-operators appealed to the Court of Appeal of Alberta. The findings of the Court of Appeal of Alberta, dated November 9, 1993, were in favor of Co-operators. Watters (and the Alberta Human Rights Commission) appealed to the Supreme Court of Canada. On June 2, 1994,
the Supreme Court of Canada stated that it would not hear this case, which means that the decision of the Court of Appeal of Alberta (in favor of Co-operators) stands. This normally implies that the Supreme Court could not find fault with the lower court decision, but that is not stated explicitly. It is worthwhile analyzing the decision of the Court of Appeal of Alberta.

In summary, the Court of Appeal found that the gender-based classification system used by Co-operators in setting rates constituted discrimination, but that the practice is excused as being reasonable and justifiable in the circumstances (section 11.1). In deciding that the gender-based classification system was discriminatory, the court stated that:

... if a discrimination prohibited by law exists it is no less prohibited discrimination because it is supported by statistics.

Thus, the existence of actuarial data to support distinguishing two risk classes, using demographic parameters, does not, by itself, counter the charge of discrimination.

The court, having decided that the action of Co-operators was discriminatory, as laid out in section 3(b) of the act, then proceeded to section 11.1 to determine if the practice was excused by being reasonable and justifiable in the circumstances.

The Court of Appeal referred to the precedents set by the Supreme Court of Canada in both the Dickason and the Bates cases for what is reasonable and justified. The judgment refers to guidelines established in the Dickason case:

That familiar test directs the party raising a s. 1 defense to demonstrate; (i) that the restriction of a right is undertaken in the pursuit of a pressing and substantial objective and (ii) that the impugned restrictive measure is proportional to the enacted measure as evidenced by the fact that it is (a) rationally connected, (b) constitutes a minimal impairment to the right and (c) is proportional in its effects. In its application, the Court has adopted a flexible standard of proof which responds to the varying contexts in which the state seeks to invoke s. 1 justification for the impugned legislation.

3Author's note: The "s. 1" referred to here is section 1 of the Canadian Charter of Rights and Freedoms, which is the guideline used to determine if any government legislation is discriminatory.
The Alberta Court of Appeal agreed with certain statements of the Supreme Court in the Bates, in particular:

... in the insurance industry it is impractical in the extreme to individually assess the risk that each person brings to the system and that therefore grouping into risk classifications is necessary. It follows that this factor distinguishes it from most other human rights cases which call for an individual to be dealt with on his or her own merits.

The Court of Appeal also felt bound to take into account the Supreme Court's concept of reasonableness, defined in the Bates case:

In my opinion, a discriminatory practice is reasonable within the meaning of s. 21 of the Code if (a) it is based on a sound and accepted insurance practice; and (b) there is no practical alternative. Under (a), a practice is sound if it is one which it is desirable to adopt for the purpose of achieving the legitimate business objective of charging premiums that are commensurate with risk. Under (b), the availability of a practical alternative is a question of fact to be determined having regard to all of the facts of the case.

Watters (and the Human Rights Commission of Alberta) did not object to risk classification per se. They also accepted that gender is a sound actuarial rating variable correlated with loss. They did argue, however, that gender-based auto insurance rating was not minimally intrusive because reasonable, nondiscriminatory alternatives to the practice existed. In that matter the court directed that any practical alternative must meet three objectives: it must lead to a financially viable insurance industry; it must result in wide availability of insurance; and it must be fair, but it need not replicate the results of the impugned practice.

The court decided that a financially viable insurance industry and wide availability of insurance would exist even if gender were prohibited as a rating factor. The annual mileage driven is a rating variable that could offset, to some extent, the loss of gender as a rating variable. The court also noted that genderless systems exist in Michigan, Montana, and Pennsylvania where insurance is still widely available.

The Court of Appeal decided that fairness must take into account the interests of all significantly affected parties, not just young males. In that regard, the court noted the following statistics:

- In Alberta if gender were removed as a rating variable, rates for young female drivers were expected to rise between 24 percent
and 29 percent and rates for young male drivers were expected to fall between 15 percent and 17 percent.

- A British Columbia study revealed that 40 percent to 50 percent of crashes resulting in death that were not due to alcohol (about 1/2 of all crashes overall) involved young male drivers.

- Young men also account for approximately 40 percent of all road accidents resulting in death or injury.

- Young men are seriously overrepresented in traffic crashes of any severity compared to females.

- Studies have established that young male drivers pose a greater risk of loss and are the most at risk in the system, more so than more experienced drivers (be they male or female).

Further, the court stated that:

It is clear from the evidence that alternatives to the current gender-based classification system would result in significant unfairness to young females in that they would be asked to pay rates disproportionate to their driving record. Specifically, the evidence demonstrates that the insurance premiums of young female drivers would rise by between 24 percent and 29 percent if the gender rating classification were eliminated. This is a significant increase which would impose an unwarranted financial impact on that group. It could even prevent members of that group from enjoying the privilege of driving. The fact that young females would pay the same rate as young males, despite their far superior driving record, (both as to number and seriousness of accidents) would not in my view, fairly reflect the disparate risks of different classes of drivers.

The next significant group one must consider is young males. I conclude that the gender-based rating classification is not unfair to that group as the rates charged to them would be an attempt to fairly reflect the number and severity of accidents involving young males.

The decision also notes the impact on drivers over the age of 25 and concludes that it is not unfair to older male and female drivers to pay rates based on factors other than gender because gender is relatively less important after the age of 25.
The court concludes:

Looked at from the perspective of equity, it is inequitable to give a significantly higher risk group—young males—an undeserved break by, in effect, transferring the burden of their driving record to other lower risk groups.

The Court of Appeal therefore found that Co-operators had demonstrated that the discriminatory practice was reasonable and justified in the circumstances and ruled in their favor.

5 Conclusion

Canadian actuaries now have a clear indication of how a gender-based risk classification system will be adjudicated by the courts in a post-Charter environment. While these cases are based on Canadian case law, the arguments should be universally applicable.

In this regard, and given the author's personal experience in the Watters case, I now offer what I believe is a sound defense of a gender-based risk classification system for automobile insurance.

First, insurance companies do not manufacture insurance policies and then price them for retail sale. The insurance industry is not a part of the manufacturing sector. Rather, it is part of the service sector.

The service that an insurance company offers is one of facilitation of an age-old process called risk sharing or risk pooling. For a set premium, the insurance company allows a policyholder to share his or her economic risk (i.e., variance from an expected value) with a large number of other independent policyholders. This risk-pooling concept was available before insurance companies through community risk sharing and through fraternals and other non-insurance associations. The premium that a policyholder pays the insurance company is commensurate with the expected value of the cost that the policyholder brings to the risk pool.

Thus, the insurance process, once clearly understood, is not discriminatory. Service is provided equally regardless of the policyholder's age, gender, religion, and race. The cost of insurance is the expected cost the policyholder brings to the risk pool—nothing more and nothing less.

A useful analogy would be a restaurant that allows any customer to eat in the establishment regardless of age, gender, etc., but that charges a different price for Souvlaki than it does for Tandoori chicken, and a lower price for children's meals. This is not a discriminatory practice as defined in the human rights legislation.
Using the arguments outlined so succinctly in the Watters case, one can argue successfully that the manner in which rates are set (i.e., using gender-based risk classifications) is reasonable and justifiable in the circumstances. No superior alternative exists, either in fact or in theory.

I hope that the summary review of these three important cases will assist in future cases where gender-based risk classification systems are brought into question.

References