
HUMAN RIGHTS ISSUES IN INSURANCE

Consultation Report

ONTARIO
HUMAN RIGHTS
COMMISSION

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SUMMARY

In October 1999, the Ontario Human Rights Commission released a Discussion Paper for public consultation entitled *Human Rights Issues in Insurance*. The objective of the consultation was to promote dialogue on human rights issues in insurance raised in the Paper as well as issues raised by industry, government and consumer representatives. The Commission received 19 submissions and held two round-table discussions, one with representatives from the life/disability insurance sector and one with the auto/property insurance sector.

LIFE AND DISABILITY INSURANCE

Industry representatives maintain that the industry's use of *bona fide* and reasonable risk assessment criteria is thorough and current. Setting risk criteria requires flexibility, which is important for product availability, innovation and alternatives. Access to information on pre-existing conditions should not be limited and industry representatives also felt that employers have shared responsibility for employee insurance plans.

Consumer concerns include: reasonableness of exclusionary periods, denial on the basis of genetic information, and the fact that some claimants have little access to affordable dispute resolution mechanisms. Consumer representatives felt that there is a reciprocal duty on insurance companies to disclose material facts. Medical reporting requirements and related policy discontinuance harassment was also cited as an issue and claim-handling variations were reported for so-called "softer" conditions such as mental illness.

AUTO INSURANCE

Representatives of the auto insurance industry are of the view that age, sex and marital status continue to be *bona fide* and reasonable factors in assessing driver risk in accordance with the 1992 Supreme Court of Canada decision in *Zurich*.¹ Although other variables, like personal driving records, years of driving and average loss history of vehicles by make and model, are also used, the industry's review to date (confirmed in a June 2000 study) concludes that there are currently no suitable alternatives to replace age, sex and marital status. At the same time, there are other jurisdictions such as British Columbia and Massachusetts that do not rely on age, sex and marital status in risk assessment. The industry contends, however, that such public schemes have lead to rate dislocation (higher costs not proportionate with risk for certain groups) and product availability problems.

¹ *Zurich Insurance Co. v. Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/255 (S.C.C.) [Hereinafter *Zurich*]

WHERE DO WE GO FROM HERE?

- The Commission will communicate with various government, industry and consumer representatives and other jurisdictions with respect to issues raised in the research and consultation findings, including the Provincial Advisory Committee on Predictive Genetic Technologies as well as the Information and Privacy Commission of Ontario on the issue of genetic testing and discrimination in insurance, employment and other areas.
- The Commission will promote the principle that the insurance industry should strive to move away from using enumerated grounds of discrimination in risk assessment.
- The Commission will undertake to encourage the insurance industry, consumer representatives and government to establish a mechanism(s) to promote dialogue and review progress on issues related to human rights in insurance.

OVERVIEW²

As part of its mandate under Section 29 of the Ontario *Human Rights Code* (the “Code”) to promote awareness, understanding and advancement of human rights, the Ontario Human Rights Commission released a Discussion Paper in 1999 for the purpose of consultation in order to examine human rights issues in insurance. The Discussion Paper provides a review of insurance-related legislative authority, provisions of the *Code* and issues of discrimination in insurance.

The objective of the Discussion Paper was twofold: to promote dialogue in the insurance industry on protecting human rights and to examine alternatives to current practices by obtaining input from experts, regulators and consumers. Access to insurance in our society raises significant issues about distributive justice and fairness in the public sphere, issues that have received scant attention in Canada and in Ontario where rate setting has traditionally been viewed as a private sector matter.

The Commission initially distributed the Discussion Paper to approximately 125 organizations and individuals and met with or spoke with representatives from private, government and consumer sectors. The Discussion Paper was also made available on the Commission’s Web site.

This Consultation Report summarizes comments and viewpoints that were communicated to the Commission.³ The Report also examines possible directions to ensure human rights issues in insurance continue to receive attention in the future. A summary of relevant *Code* sections and selected case law is included in the appendices.

Finally, this particular discussion and consultation process is not a limited one-time effort. The Commission sees this initiative as a first step in revisiting human rights issues in insurance and would be pleased to receive further comment and insight from individuals and organizations at any time.

² A list of acronyms used in this report can be found at page 25.

³ Though the Commission received responses from a number of organizations and individuals, not all could be referenced in this report.

LIFE AND DISABILITY INSURANCE

The Canadian Life & Health Insurance Association (CLHIA) represents much of the life and disability insurance industry in Canada. CLHIA states that it has always believed that it is important to clarify the implications of human rights legislation for insurance practices and to create awareness of these issues.

The Commission met with representatives from CLHIA and several of their member organizations in December 1999 to discuss issues raised in CLHIA's response to the Commission's Discussion Paper. CLHIA indicated that it has had a long-standing commitment to dialogue with government and other public sector organizations in support of progressive change in the life and disability insurance industry. Early on, CLHIA provided comment on federal legislation regarding retirement age. CLHIA was involved in extensive consultations regarding the application of age, sex and marital status provisions of the Ontario *Code*, and gave input to a government task force that brought about changes to the employment standards legislation in the use of age, sex and marital status in employee benefit plans. CLHIA was also involved in consultations when the concept of "handicap" was introduced in the *Code*. More recently, CLHIA has worked with both the Canadian AIDS Society and the AIDS Committee of Toronto on insurance issues related to HIV-AIDS. One result of these efforts was the preparation of a booklet called HIV -AIDS: A Guide to Insurance Benefits. CLHIA also provides funding for some research in the area of HIV -AIDS and rehabilitation, and is supportive of workplace policies that provide accommodation for employees with HIV -AIDS needs. In addition, CLHIA has participated in focus groups on asthma and diabetes.

The HIV-AIDS Legal Clinic-Ontario (HALCO) and other advocacy organizations for persons with disabilities prepared comprehensive submissions regarding insurance issues and individuals with HIV-AIDS.

The Independent Financial Brokers of Canada-IFBC (formerly the Independent Life Insurance Brokers of Canada and the Independent Financial Services Brokers of Canada), in its response to the Commission's Discussion Paper, states that many of its issues are of a consumerist nature. IFBC is a voluntary, not-for-profit association representing independent insurance, mutual fund and other financial service brokers and other professionals.

The Commission received several other submissions from organizations including the Coalition for Fair and Just Treatment of Ontarians (CFJTO) which support the position and recommendations taken in the 1996 Marvin Baer study⁴ on the insurance industry. The Financial Services Commission of Ontario (FSCO) provided comments to the Commission as well.

⁴ Baer, Marvin. "Study Paper on the Legal Aspects of Long-Term Disability Insurance" (1996), prepared for the Ontario Law Reform Commission and submitted to the Attorney General for Ontario.

BONA FIDE AND REASONABLE RISK ASSESSMENT

CLHIA emphasizes that flexibility in risk classification and management practices is extremely important, not just in setting rates, but in providing access to insurance services for as broad a segment of the population as possible.

CLHIA admits that there is still confusion in the industry with respect to disability. CLHIA advocates looking at each individual case and not making assumptions about a diagnosis.

However, CLHIA contends that the assessment of risk in the industry is thorough and utilizes the latest information. For example, the assessment of risk associated with HIV - AIDS has changed significantly as additional information has become available. As well, with HIV -AIDS, the potential availability of any offsets, such as Canada Pension Plan benefits (though modest relative to long-term disability claims), is certainly considered in assessing the relevant risk. At the present time, CLHIA is not aware of any individual insurance company that has underwritten life insurance policies for persons with HIV -AIDS.

The industry would not agree that it treats all types of diabetes as a high-risk condition as suggested in the Commission's Discussion Paper. The type of diabetes, its duration, current status and the individual's age are used to assess risk and results in insurance being issued to many individuals with this condition. There is an organization in Chicago that provides limited underwriting in life insurance for individuals who have diabetes and for those with multiple sclerosis as well.

With respect to treatment of claims for mental disabilities versus physical disabilities, CLHIA states that any differentials in insurance contracts have been removed. At the same time, the evidence required to establish a claim and its continuance can differ between different types of physical disabilities and / or mental disabilities.

In contrast, IFBC contends that disability claims are processed and approved much more slowly for clients suffering from so-called "soft" problems such as chronic pain and mental health conditions. As well, in its submission to the Commission, CFJTO maintains that the insurance industry often places consumers in high-risk categories that are not warranted.

CLHIA acknowledges that there is considerable flexibility in establishing underwriting criteria, but believes this is beneficial for consumers, providing better access to insurance services and encouraging innovation including a search for alternative variables. An example would be smoking: 20 years ago insurers charged the same rate whether a person smoked or not. Now, that has changed, arguably, due to competition. The same can be said for blood pressure, exercise and general fitness, which were previously ignored as important determinants of health in risk assessment.

CLHIA admits, however, that there is an inherent conflict for the industry between a preferred underwriting approach to attract the most ideal low-risk consumer, and broadening a risk classification category as much as possible to avoid identifying individuals based on a *Code* ground.

PRE-EXISTING CONDITION AND EXCLUSIONARY PERIODS

With respect to pre-existing conditions, CLHIA explains that no one measure by itself, such as blood pressure tests from a regular visit to the doctor, determines degree of risk. Rather, it is a set of indicators and the amount of insurance being sought that determines the degree of risk. CLHIA emphasizes that pre-existing condition clauses are used in limited circumstances. They offer coverage immediately for all other losses and usually offer coverage of the pre-existing condition after a relatively brief period. Because of competition, CLHIA reports that exclusionary periods are rather short, at a standard six months. If the pool is big enough, as it would be with the Ontario Public Service for example, there is no need for exclusionary periods.

HALCO claims that under pre-existing condition limitations and the typical two-year post-hire exclusion period, persons with HIV -AIDS are denied benefits if found to be disabled in this post hire-period. HALCO explains that persons with HIV -AIDS will attempt to keep working through an exclusion period, even against the advice of their doctors, in order to be eligible for benefits. At the end of two years they then have to sue if insurers claim their condition pre-existed their employment. This is an inadequate strategy. Most people in this situation cannot access the necessary legal assistance in order to launch the kind of civil action required to address this problem. CLHIA reports that it is following up with HALCO on these matters.

Advances in genetic testing (including the Human Genome Project) to identify particular conditions, are making it more and more difficult to define "genetic information". For example, something as simple as blood test results can lead back to information about genetic makeup. CLHIA strongly believes that access to all relevant information should not be limited, and asserts that the industry protects the confidentiality of such information very carefully. IFBC and other groups are concerned that as affordable tests for tissue typing become more available, insurance companies might deny insurance to some healthy consumers on the basis of "bad genes."

In its 2000 Annual Report, the Information and Privacy Commission of Ontario acknowledged similar concerns, including unauthorized disclosure of genetic information. "An individual may consent to a particular test and the use of the resulting information by his or her doctor for certain defined purposes, but may not want that information shared with an employer or insurance company. This level of control by the data subject must be protected." The Annual Report further states that, "Having an identified genetic disability or predisposition to a disease could create a social stigma that adversely affects an individual's life. The concern is that an entire class of genetic "undesirables" might be created, with the resultant discrimination in the context of employment, housing and insurance."

CONFIDENTIALITY AND DISCLOSURE

The industry asserts it has a long history of protecting the personal information of consumers. An industry-wide privacy code was adopted in 1980. Recently the industry was involved in the development of a related Canadian Standards Association (C.S.A.) code, which forms the basis of federal privacy legislation.

Regarding disclosure of material facts, CLHIA points out that the *Insurance Act* requires both parties to a contract to act in utmost good faith. Access to relevant information by either party should not be limited, though it may be proper to ensure that such information is used appropriately.

HALCO reports that some employers do not provide necessary and appropriate information to employees about their health coverage and limitations. As a result, HALCO believes that the vast majority of employees have a poor understanding of their health benefits. The insurance industry refuses to provide detailed contracts to employees directly, referring them to their employers. Often, the employer does not have the complete or detailed contract either. HALCO reasons that it is to the industry's benefit to keep consumers unaware of their benefit entitlements making them less likely to make claims or succeed when they do. HALCO contends that this practice has adverse consequences for people with disabilities who are particularly vulnerable at the point where they need to access their benefits. HALCO recommends that insurers be required to disclose benefit contract details to employees.

It has been HALCO's experience that there is a huge variation among insurers as to how a claim is adjudicated and handled. Some insurers simply ask for medical information once and the claim is granted and the claimant is left alone. Other insurance companies are extremely aggressive and will demand new medical documents from persons with AIDS on a regular, if not monthly, basis. The submission of any new medical documents is an automatic excuse for some insurers to discontinue the claim on the grounds that the beneficiary is no longer disabled. HIV is a disease that is worsened by stress and as a result this practice is particularly harmful to persons with AIDS. In HALCO's opinion, the requests for new medical reports can amount to harassment in the delivery of services on the grounds of disability.

Because of concern by individuals with HIV -AIDS that they will be denied employment or face discrimination and harassment on the job if their status is revealed, HALCO is advocating for an option where health information for benefit plans can be exchanged directly with insurers rather than through employers. This same concern could arise with other disabilities as well.

IFBC also raises issues pertaining to confidentiality and disclosure. Since written disclosure to clients at time of sale is not the norm, the consumer should at least receive full disclosure from the insurer within the policy document itself. Unfortunately this is frequently not the case. Consumers should receive fair, written disclosure of the policy applied for, and a complete policy contract for review upon delivery.

IFBC further recommends that a life/disability policy should contain a "definitions" section, to clearly explain the meaning of important words within the policy. Finally, the policy delivered to the consumer must contain all the pages of the contract and should be properly numbered.

HALCO points to another inappropriate practice where some insurers share information about disabled employees in a manner that allows employers to identify high claim employees and their specific drugs.

EMPLOYERS

CLHIA emphasizes that some human rights issues are not only matters for insurers. There is a need to have similar dialogue and distribute better information to the employer sector where benefit plans provide substantial life and health insurance services to a large number of Ontarians. Insurers play a major role, but do not always control the services or features that are purchased.

For example, coverage of maternity leave absences under short-term disability insurance plans has received extensive discussion by the insurance industry. Insurers generally offer broader coverage. There are products in the market that pay benefits during maternity leave and some plan sponsors have chosen to offer such coverage. However, CLHIA explains, very few companies buy them. Broader coverage is far from universal.

CLHIA reports that insurers have generally issued coverage for same-sex partners since the requirements under the federal *Income Tax Act* have changed. Ontario's Bill 5⁵ and federal legislation have provided the legal authority required to implement coverage more broadly. CLHIA had been awaiting changes to the *Employment Standards Act* to provide more guidance. The new *Employment Standards Act, 2000* (ESA) came into effect on Sept. 4, 2001, and requires that benefit plans are provided to same-sex partners on the same basis as others.

CLHIA raises an issue of concern regarding employers who are looking for ways to control increasing drug costs. Employers may exclude certain high-cost drugs from employee benefit plans based on disability. HALCO elaborates on this issue and states that it is common for both insurers and employers to directly or adversely deny "expensive" claimants, such as persons with HIV -AIDS, extended drug and dental health benefits to new-hire, active or long-term disabled employees. Some employers offer off-side plans (e.g. pay the Ontario Trillium program user-fee cost); while others set up a tiered plan so that employees who require a certain category of expensive drugs (such as those for HIV -AIDS) pay a very large premium for their tier of the benefit; or, employers may stop paying benefits altogether for all employees because of the high cost related to few employees. This can have an adverse impact on some employees with disabilities who may have to turn down a job offer or quit their job because they

⁵ *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, S.O. 1999, c. 6.

cannot afford the high drug costs and must go on social assistance where drug benefits are provided.⁶

HALCO mentions another concern, namely that insurer practices do not foster graduated return to work. This would be helpful to employees with disabilities as gradual return to work is most successful where claimants initially remain on full or partial benefits.

Finally, IFBC raises a concern regarding the insurance industry as “employer” and the use of an “Application for Contract or Sponsorship”, usually required by the industry for independent brokers to obtain a contract to represent a life insurance company. The commonly used form contains questions regarding gender, marital status, place of origin, driver’s license and social insurance number that can lead to discrimination under the *Code*.

ADVOCACY

Auto insurance has an inexpensive alternative dispute resolution mechanism provided by the Financial Services Commission of Ontario (FSCO) in accordance with the *Insurance Act*. A similar legislated mechanism is not available to life and disability claimants who must go to court. HALCO believes that some insurers count on only a small fraction of those, who may have been wrongfully denied benefits, having the financial wherewithal to contest such decisions.⁷ Moreover, individuals with HIV-AIDS who have the resources may not live long enough to do so. It is HALCO’s opinion that some insurers deliberately use this strategy to shift the burden of dying individuals onto government income maintenance schemes in order to reduce their costs.

In its submission to the Commission, the CFJTO took a similar position with respect to access to affordable dispute resolution mechanisms as well as better contract disclosure requirements.

CLHIA assures the Commission that human rights issues are on the industry agenda, although admittedly not to an ideal degree. And, its long-standing Committee on Human Rights has been in place for this purpose. CLHIA also notes that the life and health insurance industry has made available consumer complaint resolution services for over 25 years through its Consumer Assistance Centre. In 2000, the Centre dealt with approximately 1,000 concerns or complaints. They also offer an OmbudService which provides informal conciliation between a consumer and an insurer company.

⁶ Evidence that insuring employees with HIV-AIDS might not be as costly as previously believed or experienced has come forth from Health Canada who commented at a presentation to the AIDS Committee of Windsor in October 1999 that increasingly, the health care system covers many of the related costs.

⁷ David Schulze, "The Industry of the Living Dead: A Critical Look at Disability Insurance" (1993) 9 *Journal of Law and Social Policy* 192

There are also other sectors and groups involved in advising and advocating on matters of insurance. For example, the University of Waterloo Statistics and Actuarial Science Program ⁸ and the affiliated independent Institute of Insurance and Pension Research (IIPR) might also be important sources of information and study.

AUTO INSURANCE

The Insurance Bureau of Canada (IBC) affirms that it represents 90 per cent of the auto insurance industry in Ontario. IBC provides a Consumer Information Centre service and has a mandate to coordinate industry views and present them at consultations such as the one conducted by the Commission. Data studies are also carried out to analyze what variables most effectively predict driver risk.

The Commission received a joint submission from IBC and the Association of Canadian Insurers and met with IBC representatives and several of their member organizations in February 2000 to discuss issues raised in IBC's response submission to the Commission's Discussion Paper. Other submissions and comments dealing with auto insurance were also provided to the Commission, including valuable input from FSCO.

BONA FIDE AND REASONABLE RISK ASSESSMENT

Auto insurance premiums are typically set prospectively. This means that certain drivers are charged higher rates because, as a group – classified by many variables but predominately by age, sex and/or marital status – they are statistically shown to be at higher risk for accidents and claims.

At the same time, industry representatives explain that an individual's driving accident record is used to fine-tune and individualize premium rates as much as possible within the general group. However, the problem is that the frequency rate of at-fault-accidents is not significant enough in order to use individual driving record as a decisive measure for risk classification. What is left are some variables that classify individuals, such as young drivers, not by criteria that have a causal relationship with the purpose of the insurance product, but rather, by personal characteristics identified by enumerated grounds of discrimination under human rights law that correlate strongly with accident risk and higher expected costs across an entire group.

Industry representatives argue that the use of such criteria is *bona fide* and reasonable and that the removal of any of the variables of sex, age or marital status without suitable alternatives would impede the viable delivery of auto insurance.

The industry believes that it has been diligent in its use of sound and reasonable business practices to gather data on age, sex and marital status and alternative

⁸ http://www.stats.uwaterloo.ca/Stats_Dept/homepage.html

variables. At the same time, it argues it has attempted to balance changes in government policy with ensuring a wide availability of affordable auto insurance products to consumers.

It is the position of IBC that the 1992 Supreme Court of Canada decision in *Zurich* clearly upholds the defence in Ontario's *Human Rights Code* for the industry's use of age, sex and marital status as *bona fide* and reasonable business practices for the purpose of setting premiums commensurate with risk.⁹ IBC comments that, at the same time, the industry is open to using new assessment methods and data. And though the 1992 *Zurich* decision is instructive as it encouraged the industry to look for alternatives, the research to date, according to IBC, seems to indicate that there may be no better alternatives.

LOOKING FOR ALTERNATIVES

There is some history in the Canadian insurance industry of attempting to use alternative risk classification variables.

In the late 1980s, the former Ontario Auto Insurance Board was given the responsibility by government to design an auto insurance rate classification plan that would not include use of age, sex and marital status. FSCO reports that the government of the day declined to implement the public policy scheme for several reasons: rate "dislocation"¹⁰ would occur without these variables; higher costs would be passed on to consumers; there would be costs to the industry associated with the research and implementation of a revised system; and, significant information technology resources would be required.

The government of the Yukon Territories tried to eliminate age, sex and marital status from rate setting as well, and abandoned the attempt because it was not successful.

One representative from a large insurer reported that their company also looked at eliminating age, sex and marital status from rate setting. The results showed that though young single males for example would achieve a modest reduction in their premiums, older married males would experience an increase of approximately 60%. This "dislocation" effect would result in higher costs that would not be commensurate with risk for certain groups.

Two jurisdictions that have chosen not to use age, sex or marital status for auto insurance rate setting, are British Columbia and Massachusetts. Both are held by the insurance industry as poor and unsuccessful examples of public policy that would have good drivers substantially and disproportionately subsidize bad drivers.

⁹ A 1993 decision by the Alberta Court of Appeal involving a similar case ruled in accordance with the Supreme Court in *Zurich [Co-Operators General Insurance Co. v. Alberta (Human Rights Commission)]*, [1993] A.J. No. 828, DRS 95-02920, Appeal No. 9103-0466-AC (Alta. C.A.)

¹⁰ Rate dislocation means that higher costs are not proportionate with identified risk for certain groups

Since 1974, all vehicle owners in British Columbia have been required to buy a package of basic auto insurance from the Insurance Corporation of British Columbia (ICBC). ICBC's Basic Autoplan coverage ensures that every B.C. motorist carries a minimum amount of liability insurance, as well as insurance to help if they are involved in a motor vehicle accident resulting in their injury or death.

ICBC does not use age, sex, or marital status to measure risk or set premiums. Instead, average claim, repair history, engine size and safety features of each car model are assessed. How the vehicle is used and the territory driven in is also considered. Most significant, ICBC uses a Claim-Rated Scale where all drivers start at a base rate and then cumulative discounts over time are provided to drivers who aren't responsible for motor vehicle crashes. It also raises the cost of insurance for drivers who cause crashes and have at-fault claims. As a result, "years of driving" accident-free becomes a significant risk factor for premium rate setting. Such a provision applies to all drivers equally, regardless of age, but will affect young drivers disproportionately since they account for most of the novice driver population. However, "years of driving" is a variable that appears to have a causal relationship with the purpose of auto insurance. Using *bona fide* and reasonable risk factors that are rationally connected to their intended purpose, even though an adverse impact might result, is preferable to directly classifying individuals on the basis of enumerated grounds of discrimination.

As a public corporation, ICBC does not turn people away and therefore cannot select risk. ICBC explains that private insurers can compete to offer consumers higher optional coverage for liability and collision but they can also "anti-select" bad risk drivers back over to ICBC for coverage.

IBC points out that the system in British Columbia is a government monopoly where good drivers end up cross subsidizing bad drivers, resulting in young males paying less. It remarks that private insurers in B.C. compete at great disadvantage to the government monopoly, which uses its dominant role to undercut the competitive marketplace. IBC also states that ICBC is not forthcoming in sharing data with private sector competitors. IBC reports it recently tried to measure B.C. variables and concluded that some could not be used in the competitive market place.

In addition, IBC contends that Massachusetts' non-discriminatory classification scheme has resulted in substantial dislocation and insurance availability problems for a large residual market of certain groups of drivers paying higher premiums. In any case, safe driver plans as used in B.C. and in Massachusetts are also used in other jurisdictions in Canada as well and are part of the mix in premium rate setting.

Another variable in the risk classification mix is the Canadian Loss Experience Rating System (CLEAR), a methodology approved by the former Ontario Insurance Commission in 1994. Most insurance companies introduce CLEAR into their classification systems to assess the loss history of vehicles by make and model for risk and premium rate setting.

Other variables such as years of driving or annual driving distance have also been put forward as a suitable alternative to age. However, actuarial data to date has not shown annual driving distance to be a useful indicator of risk. With this indicator, drivers more or less fall into two categories – those that drive a lot and those that don't. Two categories do not sufficiently split the population for risk classification. And, although data on annual driving distance is still tracked by some, most jurisdictions in Canada do not differentiate on this basis.

DATA REQUIREMENTS

IBC re-iterated that the industry continues to be interested in looking at different ways of alternative rating. However, this has been difficult because the insurance industry could be characterized as volatile over the last 15 years with four system changes legislated by government. IBC cautioned that it takes several years for the market to adapt to major changes before reliable statistics are available. At least three to five years are needed to capture measurable statistics for a new rating variable.

All insurance companies have to collect and submit data, such as driver accident record data, to the Insurance Information Division (IID) of IBC.¹¹ Although insurers' rating plans can vary, data submitted to IID must be uniform. FSCO sets the data plan for Ontario and approves new variables and rating systems. New variables were last added in 1985.

Some data going to IID is "scrubbed", such as driver vehicle class, because of inaccurate or ineffective company reporting. Other variables, like annual driving distance, even though a potential surrogate for age/sex/marital status, are not part of the data plan and therefore not coded.

FSCO does not permit the industry to use alternative variables such as income, credit history and housing accommodation status (e.g. asking whether you rent or own your own home) because of potential unfairness. Such variables might also correlate highly with the socio-economic status of individuals protected by certain grounds under the *Code* such as place of origin, citizenship, marital status, same-sex partnership status, gender, etc. IBC contends that FSCO's stance makes it difficult for the industry to develop alternative risk variables.

IBC Auto Insurance Rate Criteria Study 1995/2000

IBC stated that prior to and since the 1992 *Zurich* decision, the insurance industry has continuously collected data on alternate variables related to drivers and risk. In 1995, IBC conducted a study in several jurisdictions in Canada, based on 1991-93 data that looked at nine alternate variables for their effectiveness in predicting driver risk:

- Years licensed, principle operator

¹¹ The Insurance Information Centre of Canada merged with the Insurance Bureau of Canada as of July 1, 2001 and will henceforth be known as the Insurance Information Division (IID) of IBC.

- Gender, principle operator
- Vehicle use (e.g. pleasure, business)
- Number of years claims-free
- Years licensed, other operators
- Age range, principle operator
- Driver training, principle operator
- Number of claims in last 6 years
- Number of other operators

IBC concluded that while these criteria improved the measurement of risk, they were at least imperfect substitutes for age and sex, which correlate highly and significantly in the accurate determination of accident risk (though no “causal” relationship is demonstrated). Furthermore, elimination of age and sex would disrupt current pricing and result in significant “dislocation”, subsidizing younger male drivers at the expense of higher costs to older female drivers, for example, below the actual risk assumed. In IBC’s view, this would be fundamentally unfair and would contravene the Court’s direction in *Zurich* to accurately “reflect the disparate risks of different classes of drivers.”

In June 2000, IBC updated its 1995 study of alternative risk variables following the Commission’s Discussion Paper, *Human Rights in Insurance*, which urged the insurance industry to find alternatives. The updated study reaffirms IBC’s view that the use of age, sex and marital status as auto insurance rating criteria continue to be justified under the *Code*.

IBC points out that there are other variables available to the insurance industry. These include:

- Statistical Territory (except for the split to Urban/Rural)
- Annual Distance
- Commute Frequency and/or Distance
- “Driving Record” as traditionally used
- Conviction History
- Third Party Liability Limit
- Multiple Vehicles
- “Rate Group” through Vehicle Code

IBC notes that these variables are not used consistently across the insurance industry and therefore actuarial analysis could not be undertaken to prove or disprove their appropriateness as rating variables. As a result, the industry has continued to rely on age, sex and marital status as the most reliable variables to assess risk. At the same time, IBC states that it is committed to improving rating practices as new data and techniques become available.

INNOVATION AND MOVING FORWARD

Industry representatives stated that innovation in risk classification comes about through a competitive market. Competition means companies have an incentive to find data that accurately measures risk. And, competition keeps costs lower for consumers. At the same time, it is acknowledged that risk classification and innovation are expenses for companies.

The industry explains that there are no patents on rating variables and most companies use similar ones including age, sex and marital status. Companies have to do the research and produce the data themselves. Any other company can mimic the rating variables used. Yet at the same time, the industry acknowledges that there is a lot of variance between companies in how variables are used. However, one uniform practice is the industry-wide use of a rate differential at age 25.

Short of a mandated change in government social policy, to the extent of British Columbia or Massachusetts for example, the industry concludes that in order to ensure the availability of viable and affordable auto insurance products in a competitive private sector market, the use of age, sex and marital status is still necessary.

The last major change in government social policy was as a result of Bill 59, the *Automobile Insurance Rate Stability Act*¹², which went into effect on November 1, 1996. While data for 1999 is now available, industry experts note that a few years must pass after a change to the system before reliable and meaningful data can be assessed.

In 1998, the Ministry of Transportation released an interim report¹³ evaluating driver accident data under the *Graduated Licensing System*, which was implemented in 1995. The study reveals that accidents did decline as a result of the new graduated program. The data also confirms that males continue to be involved in proportionally more collisions than females, and that collision rates continue to decrease with age. However, graduated licensing resulted in greater age-based improvements for younger age groups for both males and females. In fact, the collision rate for novice women drivers mostly levels off at age 20 and beyond. In addition, collision and fatal collision rates fell dramatically for 16 year olds after the implementation of graduated licensing to levels comparable to that of the general driving population. The Ministry will be completing a full evaluation, with a report expected later in 2002. Data on the effectiveness of graduated licensing preventing driving accidents should be of assistance to IBC in any future study of the use of risk classification variables.

IBC concludes that the variables currently in use are those that most accurately measure risk. At the same time, the industry believes that it has been a leader in the

¹² *Automobile Insurance Rate Stability Act 1996* – requires insurers to offer “retiree” discounts; restores the right to sue for economic loss while preserving basic no-fault accident benefits; provides tools to control fraud and overcompensation; anticipated that drivers with good records and no claims will experience rate reductions.

¹³ *Graduated Licensing System Evaluation: Interim Report 1998*, Ministry of Transportation of Ontario.

past in looking for alternative risk classification variables and will continue to repeat its studies in this area.

WHERE DO WE GO FROM HERE?

INSURANCE INDUSTRY PRACTICES

Several insurance practices routinely distinguish between people based on, among other things, age, sex, marital status and disability. The exceptions or defences under the *Code* (see Appendix) justify many such practices if they can be shown to be for valid business reasons based on sound and accepted practices, such as actuarial evidence.

The insurance industry represented by both property/casualty and life/disability sector associations contends that its risk classification practices based on age, sex, marital status and disability are shown by studies and actuarial analysis to be sound, very effective and absolutely necessary. They further contend that efforts have been made by the insurance industry to avoid discriminatory practices and seek alternatives.

The Commission acknowledges that the insurance industry has the right to use sound and accepted insurance practices and to achieve the legitimate business objective of charging premiums commensurate with risk. The Commission also understands that a move away from age, sex and marital status or other enumerated grounds as rating factors might result in significant rate dislocation and a need for restructuring of the automobile insurance rating system, for example, and would require careful consideration and involvement of the insurance industry, consumer stakeholders and government.

Currently, actuarial science rarely establishes a causal relationship between the intended purpose of insurance products and certain risk classification variables such as age, sex, marital status and disability. The Supreme Court in the *Zurich* decision indicated that a causal relationship was not required in any case. However, if it were possible, the Commission submits that causal relationships would be preferable because they are a more *bona fide* and reasonable business practice. This means, though, that the insurance industry must at least continue to “strive” to find alternate variables to age, sex, marital status and disability that might effectively assess risk (also required by the Court in *Zurich*), and at least begin using any effective alternative criteria to ‘fine tune’ information about risk.

In addition to risk assessment and related *Code* defences, consumer groups consistently raised concerns about the human rights implications of many other insurance industry practices. These include reasonableness of exclusionary periods, frequency of requests for medical information, arbitrary distinctions between physical and mental disabilities, the duty to disclose material facts on the part of the insurer and sponsor through provision of detailed contracts and benefit plans, and access to affordable dispute resolution mechanisms.

GOVERNMENT INVOLVEMENT

The Commission encourages FSCO to offer its dispute resolution service, that it is currently mandated to provide under the *Insurance Act* only for auto insurance, to life and disability insurance as well. FSCO reports that it is now exploring offering dispute resolution services to life and disability insurance companies through pilot projects on a voluntary basis. Voluntary participation by companies would not require legislative amendment. As well, FSCO is considering expanding its Ombudsman complaint resolution process to other regulated areas and other FSCO operations. FSCO also pointed out that it has the capacity to issue Cease and Desist Orders where companies are engaging in inappropriate activity.

On the matter of clear and plain language wording for insurance contracts, FSCO recently commented that as a member of the Canadian Council of Insurance Regulators, it is developing a national consumer strategy on point-of-sale disclosure and policy contract wording in the life insurance industry which will see plain language insurance contracts as part of its finished product.

Other issues identified in this Report have also been recognized by the Insurance Ombudsman as areas of concern. For example, consumers under a group long-term disability insurance policy should receive full details of the policy in the event a claim is made.

The Insurance Ombudsman, in the course of receiving complaints about insurer practices, is developing standards for complaint handling in consultation with an industry and consumer working group. Once the standards are in place, the Insurance Ombudsman will be able to look more closely at practices among disability insurers.

Finally, FSCO reports that it engages in consultation with stakeholders via a broad range of mechanisms, depending on the subject matter, including the formation of a Consumer Advisory Committee announced in July. The mandate of the committee is to provide advice from the consumer's perspective on matters that affect FSCO's regulated sectors.

The Commission is supportive of these initiatives.

In April 2000, the Ministry of Health and Long Term Care announced the establishment of a Provincial Advisory Committee on New Predictive Genetic Technologies, a group that is studying issues related to genetic testing and patenting, particularly with regard to education of providers and the public, clinical practice, legal and ethical issues, evaluation of new tests, and individuals' requirements with respect to psycho social supports. The Advisory Committee is preparing guidelines, principles, broad criteria and advice to guide future decisions on how new genetic services should be incorporated into Ontario's health care system. The Committee is also working with other federal-provincial government and non-government agencies to ensure that Ontario's policies are consistent with other provincial and national initiatives.

STRATEGIC DIRECTIONS FOR THE ONTARIO HUMAN RIGHTS COMMISSION

As a result of the Supreme Court decision in *Zurich* that gave direction to the industry to strive for the use of non-discriminatory risk assessment criteria, and also because of the relative scarcity of human rights analysis on the insurance industry, the Commission is of the opinion that it is important to give renewed and ongoing consideration to human rights issues in insurance.

The Commission has already taken several steps to address human rights issues in insurance:

- Prepared and circulated the Discussion Paper *Human Rights Issues in Insurance* and undertook consultation with industry representatives, consumer groups and government. The Discussion Paper continues to be available at the Commission's Web site at www.ohrc.on.ca;
- Wrote to the Ministry of Labour requesting amendment to the *Employment Standards Act* with respect to sick and disability benefits under group insurance plans during pregnancy and parental leaves;
- Wrote to the Independent Life Insurance Brokers of Canada in response to their concern regarding the industry-wide use of the "Application for Contract or Sponsorship" for independent brokers and its contention that it contains questions that can lead to discrimination under the *Ontario Human Rights Code*.

The Commission will undertake to develop policy strategies and actions to promote the protection of human rights in insurance, including the following:

1. Distribute a copy of this Report to organizations and individuals who provided input to the Commission's consultation and make it publicly available on the Commission's Web site.
2. Encourage the insurance industry, consumer representatives and government to establish a mechanism(s) to promote dialogue and review progress on issues related to human rights in insurance. The mechanism to review human rights issues in auto insurance should also look at other jurisdictions in North America, including British Columbia and Massachusetts, and elsewhere, with respect to risk classification schemes that do not involve or that minimize reliance on the variables of age, sex or marital status.
3. Continue to monitor jurisprudence related to insurance and human rights law for implications relating to policy development and complaints before the Ontario Human Rights Commission.

4. Incorporate principles and rulings in case law (see Appendix) that promote protection from discrimination in insurance on prohibited grounds of the *Code* in the analysis of cases before the Commission.
5. Consider adopting a Commission policy position that all parties to insurance contracts, including the insured, insurers and sponsors of benefit plans have the responsibility to “disclose material facts”. Individual insurer as well as industry-wide standard contracts should be in clear, plain-language. Full details on conditions, exclusions and definitions of terms found in insurance contracts and benefit plans should be provided in accordance with the “utmost good faith” requirements of the *Insurance Act*.
6. Review current and future complaints in the context of the Supreme Court of Canada decision in *Zurich*. In that decision, the Court held, on the one hand, that it is reasonable to set premiums based on age, sex and marital status if there is no practical alternative, and that a causal relationship was not required. But the Court also made it clear that the insurance industry should not continue indefinitely to use discriminatory criteria for rate setting, and that “the insurance industry must strive to avoid setting premiums based on enumerated grounds”. This means that on the basis of assessing to what degree “practical alternatives” for determining risk are being sought or phased in, the Commission may pursue an inquiry or bring forth a case where alternative non-discriminatory criteria are likely to demonstrate a sufficient measure of risk on either a causal (preferably) or correlative basis.
7. Consider adopting a policy position that any newly proposed risk classification system, even if shown to be a better measure of risk, should not further contravene rights under the *Code* any more than any current classification system does. Any newly proposed system should strive to avoid determining risk based on enumerated grounds.
8. Consider adopting a policy position that genetic testing and related information should not be used to deny insurance or invoke exclusionary periods on the basis of “pre-existing condition”, in accordance with the principle that the current abilities of a person with a disability and the situation's current risks are to be taken into account, rather than abilities or risks which may arise in the future.
9. The Commission will communicate with the following authorities identifying human rights issues that may fall within their respective jurisdictions:
 - a) The Superintendent of Financial Services and the Minister of Finance recommending that the Financial Services Commission of Ontario further promote the protection of human rights in insurance based on the principles set out in the Discussion Paper and this Report; and specifically, supporting FSCO's initiative to explore offering dispute resolution services to life and disability insurance companies through pilot projects;

- b) The Attorney General of Ontario in support of the 1996 Study Paper on the Legal Aspects of Long-term Disability Insurance prepared for the Ontario Law Reform Commission, which recommended greater public control of underwriting criteria in insurance;
- c) The Financial Services Commission of Ontario and the Insurance Bureau of Canada regarding improving auto insurance data collection, reporting requirements and analysis of risk assessment, particularly with respect to the mix and relative “weighted” importance of major and minor risk assessment variables;
- d) The Canadian Life & Health Insurance Association with respect to specific concerns regarding variation among insurers in claims adjudication as well as inappropriate sharing of confidential information with employers leading to identification of employees with HIV-AIDS;
- e) The Provincial Advisory Committee on Predictive Genetic Technologies on the issue of genetic testing and denial of insurance and advise the Committee of the Commission’s position on the use of such testing;
- f) The Information and Privacy Commission of Ontario regarding concerns it has raised in its 2000 Annual Report including the need to protect against the discriminatory use of genetic information in insurance, employment and housing.

CONTACTING THE COMMISSION

For an electronic copy of this Consultation Report or for a copy of the *Human Rights Issues in Insurance Discussion Paper*, please visit the Commission's Web site at www.ohrc.on.ca. Alternative formats are also available upon request.

The Commission would be pleased to receive further input on this Report or the Discussion Paper or on any other matter related to human rights and insurance. You can contact the Commission in several ways:

Address Ontario Human Rights Commission
Policy and Education Branch
180 Dundas Street West, 8th Floor
Toronto ON, M7A 2R9
Attention: "Insurance Paper Consultation"

Fax: 416-314-4533

Phone: 416-314-4507

E-mail: info@ohrc.on.ca

APPENDICES

LIST OF ACRONYMS

Canadian Life and Health Insurance Association	(CLHIA)
Canadian Loss Experience Rating System	(CLEAR)
Canadian Standards Association	(CSA)
Coalition for Fair and Just Treatment of Ontarians	(CFJTO)
Financial Services Commission of Ontario	(FSCO)
HIV-AIDS Legal Clinic of Ontario	(HALCO)
Independent Financial Brokers of Canada (Formerly the Independent Life Insurance Brokers of Canada and the Independent Financial Services Brokers of Canada)	(IFBC)
Insurance Bureau of Canada	(IBC)
Insurance Information Division of IBC	(IID)
Insurance Corporation of British Columbia	(ICBC)
Institute of Insurance and Pension Research	(IIPR)

CODE RIGHTS AND EXCEPTIONS

The Ontario *Human Rights Code* provides for protections and exceptions to discrimination in insurance. Section 1 of the *Code* prohibits discrimination in services, while Section 3 prohibits discrimination in contracts, which would therefore prohibit discrimination in insurance services and contracts. Section 5 prohibits discrimination in employment which would include employee benefit plans that relate to insurance.

Section 10 defines the term "group insurance" as a single contract of life insurance or life and disability insurance, which insures a number of persons. The contract is between an insurer and an association, employer or other person.

Section 11 prohibits discrimination resulting from the use of a general rule or condition that, although applied to all individuals, might have an indirect or adverse impact on individuals identified by a prohibited ground.

Finally, there are four insurance-related defences (or exemptions) available to respondents under sections 22 and 25 of the *Code*. The Board of Inquiry in *Thornton*¹⁴ accepted that the *Code* sets out the following hierarchy of defences, each with an increasing number of pre-conditions:

- Section 22 provides that automobile, life, accident or sickness or disability insurance or group insurance or life annuity policies, not part of an employment situation, may make distinctions based on age, sex, marital status, same-sex partnership status and family status, or handicap, but these distinctions must be made on reasonable and *bona fide* grounds.
- Section 25(2) provides that employee pension or group insurance plans based on age, sex, marital status, same-sex partnership status or family status do not offend the *Code* if they comply with the regulations under the *Employment Standards Act*.
- Section 25(3)(a) provides that other employee disability or life insurance contracts may make distinctions based on disability provided the distinction is reasonable and *bona fide* and based on a pre-existing handicap that substantially increases the risk.
- Section 25(3)(b) provides that group insurance plans for employee groups with fewer than 25 members may make distinctions based on disability, provided that the distinction is reasonable and *bona fide* and made on the ground of a pre-existing handicap.

¹⁴*Thornton v. North American Life Assurance Co. (No.5)* (1992), 17 C.H.R.R. D/481 (Ont. B.O.I)

SELECTED CASE LAW

Brooks v. Canada Safeway Ltd. (1989), 10 C.H.R.R. D/6183 (S.C.C.)

Zurich Insurance Co. v. Ontario (Human Rights Comm.) (1992), 16 C.H.R.R. D/255 (S.C.C.)

Thornton v. North American Life Assurance Co. (No.5) (1992), 17 C.H.R.R. D/481 (Ont. B.O.I)

Co-Operators General Insurance Co. v. Alberta (Human Rights Commission), [1993] A.J. No. 828, DRS 95-02920, Appeal No. 9103-0466-AC (Alta. C.A.)

Ontario (Human Rights Comm.) v. North American Life Assurance Co. (1995), 23 C.H.R.R. D/1

Gibbs v. Battlefords and Dist. Co-operative Ltd. (1996), 27 C.H.R.R. D/87 (S.C.C.)

Kane v. Ontario (Attorney General) (1997), 152 D.L.R. (4th) 738.

OHRC INSURANCE CONSULTATION COVER LETTER

October 14, 1999

[Address]

Dear []

As part of its mandate under the Ontario *Human Rights Code* to promote awareness and understanding of human rights, the Ontario Human Rights Commission has initiated a research project to examine human rights issues in the insurance industry.

Insurance practices routinely make distinctions based on, among other things, gender, age, marital status and disability. While many of these distinctions are based on valid business practices, others raise questions and concerns. These concerns relate to the existence of non-discriminatory alternatives to current practices and about respect for human rights. These concerns are based, in part, on a 1992 ruling by the Supreme Court of Canada where the Court encouraged the industry to begin looking more closely at non-discriminatory alternatives to their current practices.

As a first step in initiating dialogue on this issue, the Commission is pleased to present the attached Discussion Paper on *Human Rights Issues in Insurance*. The Paper, along with an Executive Summary, is being sent to a range of experts, members of the insurance industry and government for feedback and comment.

The Paper is intended to be a point of departure for discussion from individuals, organizations and government with expertise or a particular interest in the intersection between various aspects of insurance law and practice and human rights. Through this document, it is hoped that the industry, consumers and regulators can reach a better understanding of this complex issue and explore ways to encourage the protection of human rights.

To this end, the Commission would like to be informed of your views on the issues raised in the Discussion Paper. We are especially interested in alternatives to current practices that would both respond to the need for reasonable and genuine business practices such as risk assessment on the one hand, and the consumer's right to access insurance products with dignity, free from discrimination, on the other.

While you are free to respond to these general issues alone, particular groups and individuals may have expertise on the following issues and questions, on which we would also appreciate your feedback.

1. Are you aware of insurance practices in Ontario, including risk assessment and underwriting, that may directly or adversely affect persons because of personal characteristics such as age, sex, sexual orientation, religion, marital status, being in a parent-child relationship or because of disability, race or ethnic background?

2. What examples exist, whether in Ontario or other jurisdictions, where criteria are used to measure risk that do not rely on these personal characteristics?
3. Are you aware of examples of risk assessment criteria that do not rely on a “correlation” alone but rather on a “causation” effect between the risk classification variable and the nature of the insurance product? For example, even though age may correlate highly with number of accidents, an insured motorist should be able to see the “causal” connection between how they are rated and the effect their driving ability has on their auto insurance premium.
4. What is the insurance industry currently doing to move away from practices, including risk assessment criteria, that may result in unequal treatment based on personal characteristics that is prohibited by the *Code*?
5. How could the insurance industry and other relevant organizations begin moving away from practices that may result in unequal treatment?
6. What mechanisms would you recommend be established to promote dialogue on issues related to human rights in insurance on an ongoing basis?
7. Are there any other matters related to human rights and insurance that you would like to raise?

I invite you or your designate to comment on the Discussion Paper as well as any of the questions above at your earliest convenience prior to November 22, 1999. The Commission will be using the outcome of this consultation on insurance issues to further promote understanding and acceptance of and compliance with the *Human Rights Code*.

Electronic text of the Discussion Paper can be found on the Commission Web site at www.ohrc.on.ca. All materials are available both in English and French, and alternative formats upon request.

You can forward your feedback to the Commission, attention “Insurance Paper Consultation”, in several ways:

Address Ontario Human Rights Commission
Policy and Education Branch
8th Floor
180 Dundas Street West
Toronto ON M7A 2R9
Attention: “Insurance Paper Consultation”

E-mail jeff.poirier@ohrc.on.ca

Fax: 416-314-4533

If you have any specific disability accommodation requirements or need to speak to someone about the Paper or the consultation process, or if you would be interested in participating in a focus group being planned for December 7, 1999, to discuss matters raised in the Paper, please contact Jeff Poirier, Senior Policy Analyst, by telephone at 416-314-4539 or by e-mail or fax as above.

Thank you in advance for your consideration of this matter.

Yours very truly,

Keith C. Norton, Q.C., B.A., LL.B.
Chief Commissioner

Enclosure