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SEXUAL DISTINCTIONS IN PENSIONS

By Peter Bartlett*

I. OVERVIEW AND INTRODUCTION

The nature and extent of direct and constructive discrimination in the fields of private pensions, life insurance, and annuities2 discrimination can only be understood in the broader context of estate planning and income support for senior citizens. Canada has a three-tiered retirement

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1 Bill 170: A Post-Script — As this paper was in the final stages of editing prior to publication, a new Pension Benefits Act, Bill 170, became law in Ontario (Province of Ontario, 33rd Legislature, 3rd Session, Bill 170). The new legislation changes the existing law discussed in this paper in three respects.

Firstly, pensions now vest after a maximum of two years of employment (section 38). For the reasons discussed in this paper, this may be expected to be a key improvement for women in the long term.

Secondly, survivors' pensions are required to be at least sixty per cent of the base pension (section 45 (3)). For women, who are normally the survivors, this is also an important advance, although it remains questionable whether sixty per cent is high enough.

Finally, there is to be no discrimination on the basis of gender in setting either premiums paid by the plan member or the benefits paid out under the plan (section 53). Ontario is the first province to take this step. The Act does not render the gender-based tables completely obsolete, however, since the employer may be required to contribute different amounts depending on the sex of the employee (section 53(2)(b)).

These amendments render obsolete much of the tactical discussion of legal challenges in this paper, regarding Ontario pension plans. The Act does not cover privately purchased annuities, however, and the discussion above continues to be relevant in assessing those plans. Further, the pension legislation in other Canadian provinces is analogous to the former Ontario legislation, and it is hoped that the discussion contained in this paper may be of interest regarding those provinces.

In the long term, the Ontario Act can be expected to improve the pension structure for women. The transitional provisions delay the benefits of the new legislation, however. The revised vesting period applies only to the pension plan of which an individual is a member on or after the Act comes into force (section 38(2)(a)). The increased survivor pensions do not affect pensions now being received (section 45(4)(a)), and the prohibition of gender-based contributions and benefits applies only for contributions and benefits resulting from employment after December 31, 1986 (section 53(2)(b)).

Thus, a full generation of workers will pass before the benefits of this new Act are completely realized. For roughly the next forty years, therefore, elderly women will remain poor. The Act must not be perceived as a substitute for increased social assistance in this transitional period.

2 Under the Insurance Act, R.S.O. 1980, c. 218, s. 1 (35), 'life insurance' is a generic term for insurance policies where money is paid (a) on death, (b) on an event dependent on human life, (c) at a fixed or determinable future time, or (d) for a term dependent on human life. Pensions and annuities are thus a species of life insurance. It will be important to distinguish within this class. The term 'life insurance' will therefore be restricted to mean insurance policies where money is payable upon the death of the policyholder.
system. At the basic level is Old Age Security (OAS) and the Guaranteed Income Supplement (GIS). The OAS is payable to all Canadian citizens over the age of sixty-five. The pension stood at $251 per month in 1983 and is indexed to the cost of living. The GIS is available to persons receiving the OAS whose income is below a certain level, roughly $9,000 for singles and $15,000 for couples per annum including the OAS. In 1983, the GIS stood at a maximum $252 per month for singles and $194 each for spouses. Once again, the GIS is indexed to the cost of living. These are the only universal retirement income programmes in Canada.

The Canada Pension Plan and the Quebec Pension Plan (C/QPP) make up the second tier. These plans provide a retirement pension at age sixty-five equal to one quarter of average lifetime annual earnings, up to a maximum. In 1983, the maximum monthly C/QPP pension was $345. These pensions are also indexed to the cost of living and vest immediately. Survivor benefits are available to spouses to a maximum 60 percent of the deceased’s C/QPP pension. Because the plans do not use gender-based actuarial tables and because they vest immediately, implicit and explicit gender distinctions are minimal.

The third tier of the system consists of private pension plans, registered retirement savings plans (RRSPs), annuities, and other savings. Pension plans are usually terms of specific employment contracts. Presently, only 30.6 percent of the women and 44.8 percent of the men in the Canadian workforce are covered by these plans. This figure is, in fact, misleadingly

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3 National Action Committee on the Status of Women, “Pension Reform” (Toronto: NAC, 1983) at 3.
4 Ibid. at 4.
5 Ibid.
6 The National Action Committee on the Status of Women has pointed out that women remaining at home to raise children are likely to receive lower CPP benefits. In these years, their income is likely to be negligible. This lowers the average annual earnings of these women, reducing their CPP entitlement; see NAC, “Women and Pensions” (Toronto: NAC, 1982). This is remedied in the QPP by a “child-care drop-out” provision, whereby time spent at home with young children is excluded from calculation of lifetime average earnings. A similar issue exists in private pensions, where women raising children have smaller lifetime contributions to a money-purchase plan and smaller amounts of service under defined benefit plans, thereby entitling them to smaller pensions upon retirement.

The drop-out provisions are justified under the QPP as a matter of social policy. The issue is how widely the financial burden of raising children ought to be spread. There is a strong social argument that women should not suffer in their old age because they raised children at home. It is not a problem with which private insurance and pension plans can deal, however. The principles of insurance law applicable to private pensions are based on expected returns to specific contributions. Movements away from this principle may be justified in some cases, but the drop-out provision would be a large departure from the standard practice. In addition, the advantage to women would be limited, as it may be likely that they will return to the same pension plan when they return to the workforce.

7 Statistics Canada, Pension Plans in Canada, 1982, (Ottawa: Ministry of Supply and Services, 1984) at 13. Participation in Ontario is roughly 1.7 percent higher than the national average overall (ibid. at 18). No sexual breakdown is available for the Ontario figures.
high since vesting provisions reduce the actual number of persons who will receive any benefit from their plans. Because of employment patterns, a disproportionately low number of pensions held by women vest. Private pensions are normally not indexed to inflation. Persons who are not covered by pension plans may buy annuities, or they may live off their savings.

In this regard, the RRSP warrants special attention. This is a tax deferral scheme designed to encourage saving for retirement. Normally upon retirement, these savings will be rolled over into an annuity, again mainly for tax reasons. Individuals not involved in private pension plans may contribute 20 percent of their earned income to this scheme to a maximum $5,500 per annum. For participants in pension plans, the maximum is $3,500, less the amount of any employee contributions to that pension plan. Contributions are made disproportionately by high income earners.

The importance of pensions and annuities in providing retirement income is clear. The maximum combination of OAS, GIS, and maximum C/QPP for a single person yields a total monthly income of $675, which is already roughly 10 percent below the poverty line for persons living alone in cities. Persons living at or above the poverty line, therefore, are doing so on the basis of the third tier of the pension system.

For women, this presents particular problems. Because they may have spent their lives working primarily in the home, and because vesting provisions may also tend to work to their disadvantage, elderly women typically do not have a pension of their own. They may have survivor rights on their spouse's pension, but that is likely to give them only one-half of the spouse's former pension. The problem of private

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8 See section 3, infra.
9 In all, 68.9 percent of employees covered by pension plans were in plans which had no indexation. A further 10.9 percent were in plans with only partial indexation. Plans with total indexation were almost exclusively in the public sector: Statistics Canada, Pensions, supra, note 6 at 48.
11 This is partly because RRSPs are essentially tax deferral schemes, and persons in higher tax brackets have a greater incentive to participate. On the other hand, it is also a savings plan, and the relatively poor have less money available to save.
12 Again, 1983 figures are used.

<table>
<thead>
<tr>
<th>OAS</th>
<th>$251.</th>
</tr>
</thead>
<tbody>
<tr>
<td>maximum C/QPP</td>
<td>345.</td>
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<tr>
<td>GIS</td>
<td>$252.</td>
</tr>
<tr>
<td></td>
<td>–173. (1/2 income other than OAS)</td>
</tr>
<tr>
<td></td>
<td>$79.</td>
</tr>
<tr>
<td></td>
<td>79.</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$675.</td>
</tr>
</tbody>
</table>
pensions normally not being indexed to inflation is more important for women who tend to live longer than men.

Five factors work to the disadvantage of women in the field of pensions and annuities: base salaries, gender-based mortality tables, survivor benefits, vesting provisions, and the general lack of indexation of benefits.

Working men earn, on average, more than one and one-half times as much as working women. This means that pensions for women are correspondingly smaller. Similarly, women cannot afford to buy as large annuities on the private market as they have less disposable income than men. The problems of income disparity are beyond the scope of this paper, but they are very important in understanding the limitations of pensions for women.

Gender-based mortality tables are used to calculate premium rates or benefit rates for some pensions and almost all life insurance and annuity contracts. These tables increase premiums for women for similar monthly pension or annuity benefits and decrease monthly premiums for life insurance, relative to the rates paid by men. These tables have been the focus of most of the controversy concerning sexual discrimination in insurance and pensions. Particular controversy has erupted in the United States as a result of the Supreme Court holding the use of these tables to be in violation of the Civil Rights Act of 1964. An in-depth discussion of these tables appears below. While it is asserted that the use of gender-based tables is inconsistent with the principles of human rights law, it should be noted that the tables are relatively insignificant. They are not used for all pension plans; even when they are used, the difference in pension premiums or benefits is only 15 percent. While the size of the difference does not justify any distinction if it is inequitable, and while the lower rate is obviously felt more keenly by women who already have smaller pensions because of lower base salaries, the move away from gender-based tables will not of itself significantly reduce poverty among elderly women.

On the other hand, vesting provisions are much more significant but have received much less attention. While ostensibly gender-neutral, these provisions work to the disadvantage of women as a class. The requirement of a minimum number of years of service with the same

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13 In 1981, the average income of men working full-time in Canada was $21,441; for women working full-time it was $13,677. In Ontario, the differential was marginally greater. Men working full-time made an average $21,758, and women made an average $13,554. Statistics Canada, 1981 Census of Canada, Cat. 92-930 (Ottawa: Ministry of Supply and Services, March 1984) Table 1.

14 See infra, section IV.

15 Vesting provisions will be discussed in detail infra, in section III.
employer, usually ten years, means that people changing jobs more frequently do not acquire any rights to a pension. Similarly, a vesting provision may require the attainment of a certain age prior to vesting. Persons leaving the work force prior to that age, to stay at home with children, for example, forfeit the right to receive a pension from their prior employment. Consequently, vesting provisions are an important key to changing the pattern of poverty among the elderly, and particularly, elderly women.

Because of vesting provisions and the traditional pattern of women working in the home, many women never acquire rights to their own pension. Instead, they may acquire survivor rights to their spouse’s pension, but at generally only one-half of the original pension. It is a fallacy that one can live for half the price of two, and women tend to bear the brunt of that fallacy. Finally, the amount of the pension is set at the date employment is terminated with generally no increase allowed for inflation. Assuming a relatively modest inflation rate of six percent per annum, the real value of a fixed-dollar pension will have fallen to only 42 percent of its initial value after fifteen years.16 The value of pensions for persons enjoying long periods of retirement is thus drastically reduced.

The reason indexation and survival benefits are not more common is their contractual nature. Spousal benefits of more than 50 percent are now included for 4.6 percent of pension plan members,17 and there is no reason why that could not be increased. Also, annual increases tied to the cost of living could be included in a benefits scheme. The difficulty with these suggested remedies is that earlier benefits would have to be reduced to compensate for the increased benefits later on. From the insurance perspective, the premiums to a pension or annuity plan create a pool of money to be distributed following retirement. Increasing spousal benefits and introducing indexation means that a greater part of the pool will be disbursed later in the running of the benefits, making less money available early in the benefit period. The net average return on a policy to a pensioner or annuitant, however, would be roughly the same.18 Notwithstanding this problem, periodic increases in benefits and better spousal benefits ought to be included. Pension plan members and purchasers of annuities wish to purchase a

17 Statistics Canada, Pensions, supra, note 7 at 81.
18 In fact, total income could be marginally higher under an indexed plan, as deferring payment increases the interest the money in the pot produces, thus increasing the size of the pot. This is offset by the fact that the annuitant delays receiving the economic use of the money.
lifestyle for themselves and their spouses upon retirement. It is thus desirable that the annuity or pension be structured to provide basically the same lifestyle over time.

The combined factors of wage rates, vesting provisions, gender-based tables, survival benefits, and indexation create a large gap between the incomes of men and women from private pension plans. Of persons reporting pension income in 1981, men reported an average income of $5,613; women reported only $3,663.19

The result is that a disproportionately large number of elderly women are very poor. In 1980, 57 percent of women aged sixty-five or older had incomes of less than $5,000 per year; 71 percent had annual incomes of less than $6,000.20

In response to this, women's groups have lobbied for improvements to the C/QPP, OAS and GIS. The Women Workers Committee of the Canadian Labour Congress makes the point this way:

For most women, the Canadian pension system is a one-tiered system. It consists of public pension benefits. This is demonstrably true for women currently over 65 and is likely to be true for women for the foreseeable future. Thus the adequacy of women's incomes after age 65 will depend fundamentally on the adequacy of benefits provided by the OAS, GIS and C/QPP programs. Pension reform proposals that presume that people over 65 will derive substantial benefits from occupational pension plans and private savings do not reflect the experience of women.21

The focus of this paper on the third tier of the retirement income system should not be perceived as a dismissal of that approach. It is, nonetheless, important to examine how the current system of private pensions, annuities, and life insurance works to the disadvantage of women, in the hope that poverty among women may be reduced in the long term through reform of the third tier.

Focussing on this third tier presupposes a specific view of insurance law. In his 1961 article, "The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law,"22 Professor Spencer Kimball identifies a number of objectives particular to the insurance industry at which regulation should aim. The first of these is solidity.23 The successful and continued operation of the insurance enterprise itself is ensured by way of regulation of reserves, diversification of investments, protection against spurious claims and other matters intended to ensure

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19 Statistics Canada, Pensions, supra, note 7 at 90.
20 NAC, "Women and Pensions" supra, note 6 at 3.
21 Canadian Labour Congress, Women Workers Committee, "Submission to the Parliamentary Task Force on Pension Reform" (Ottawa: CLC, 1983) at i.
22 (1961) 45 Minnesota L. Rev. 471.
23 Ibid. at 478.
the long-term stability of the industry. Not only must the industry be trustworthy, it must be perceived to be trustworthy. Since the public is buying peace of mind, insurance regulation should see that this peace of mind continues. Kimball’s second broad criterion is equity.\textsuperscript{24} Insurance regulation aims at equity between the policyholders and the company, among classes of policyholders, and among individual policyholders. The requirement is one of fairness to all. All of this is beyond reproach, but one must recognize that equity is not definable simply with reference to the principles of insurance law. Concepts of equity result from a wide variety of social and legal sources, and may, in fact, conflict with other insurance aims such as solidity.\textsuperscript{25}

The insurance industry must be seen in its broader social and political context. Kimball’s article contains a second set of objectives, extrinsic to the insurance industry. This second set includes democracy, liberty, local protectionism, federalism, socialization of risk, and free enterprise.\textsuperscript{26} The objectives in this second set affect the objectives in the first set. Ideas of liberty and democracy, for example, colour concepts of equity. They may also affect the relative importance placed on solidity and equity. The second set of objectives must not be viewed as static. Kimball wrote in the United States during the “cold war,” and this may account at least in part for his emphasis on democracy, liberty, and free enterprise.

The Canadian situation in the 1980s emphasizes somewhat different values. It is not that democracy, liberty, and free enterprise are no longer laudable objectives, but rather our vision also addresses concerns about human and civil rights, and the welfare state. Social objectives have always been accorded a higher place on the Canadian agenda than on the American and are of much greater concern now than they were when Kimball wrote in 1961. These developments affect the Canadian concept of equity. Accepting the arguments below would entail significant changes

\textsuperscript{24} Ibid. at 486. Kimball calls this criterion \textit{aequum et bonum}.
\textsuperscript{25} Kimball himself recognizes this fact. See, for example, his comments concerning the use of race as a factor in rate-making:

The danger of inequity resulting from \textit{a priori} classification is easily illustrated. . . Negroses have often been “rated up” in life insurance, based on the undeniable fact that mortality experience for all Negroses is less favourable than experience for all whites. It requires little sophistication to appreciate the danger in using these categories, for such factors as a less favorable public health environment may well bias the statistics. While reliance on the race classification will protect the company, the classification is too crude, for it sweeps within the disfavoured class many who should receive more favorable treatment. A desire to eliminate this particular inequity as in conflict with fundamental moral notions about equal treatment of races has led to statutes forbidding the use of race as a classification. A more refined statistical apparatus which isolated and used the true causal factors would probably exclude it too.

Kimball, \textit{ibid.} at 496 [footnotes omitted].

\textsuperscript{26} Kimball, \textit{ibid.} at 501.
in the pension and insurance industry. That, in turn, would challenge traditional principles of solidity. The task is to find transitional approaches to attain equity with minimal compromise of solidity.

II. LEGISLATIVE OVERVIEW

Before discussing vesting provisions and gender-based mortality tables, it will be useful to identify the various statutes at play, and the general effects of each. Pension plans in Ontario are under the jurisdiction of the Pension Benefits Act. That Act provides for a system of registering pension plans with the Ministry of Consumer and Corporate Affairs. Plans are to be run by trustees or are to be funded through insurance companies. The Pension Benefits Act also contains legal restrictions on vesting provisions.

Pension plans are also governed by the Employment Standards Act. Section 34(2) of the Act prohibits distinctions, exclusions, or preferences based on age, sex, or marital status, subject to the regulations. Of primary importance in that regard is Regulation 282, which allows actuarially based distinctions in voluntary employee-pay-all pension and life insurance plans, money purchase plans, and pension conversion options. The regulation makes it clear, however, that a different rate of contribution by the employer does not offend the Act when that different rate is required to provide equal benefits in pensions or life insurance.

All pensions, annuities, and life insurance are contained under the definition of 'life insurance' in section 1(35) of the Insurance Act. A number of provisions protect against unfair discrimination in the industry. Under section 94(2), the Superintendent of Insurance has an obligation to report to the Minister of Consumer and Commercial Relations any policy which is “unfair, fraudulent, or not in the public interest,” and the Minister may prohibit the issuing of that policy. Section 117 provides a limited prohibition of class-based discrimination but makes no reference to gender discrimination:

117. Any insurer that discriminates unfairly between risks in Ontario because of the race or religion of the insured is guilty of an offence.

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27 R.S.O. 1980, c. 373.
28 Statistics Canada, Pensions, supra, note 6 at 21. The remaining groups and members were in government-sponsored plans.
29 R.S.O. 1980, c. 137.
31 Ibid., ss 2(e) (pensions), and 5(b) (life insurance).
Section 393(b) includes the following in the definition of “unfair or deceptive acts or practices in the business of insurance”:

393(b)(ii) any unfair discrimination between individuals of the same class and of the same expectation of life, in the amount or payment or return of premiums, or rates charged by it [presumably, the insurer] for contracts of life insurance or annuity contracts, or in the dividends or other benefits payable thereon or in the terms and conditions thereof . . .

are deemed “unfair or deceptive acts or practices.” These practices are made offences by section 394. No criteria are offered for defining classes.

The Ontario Human Rights Code provides specific protection from discrimination on the basis of sex in the areas of services, accommodation, contracts, and employment. Because the Supreme Court of Canada held insurance in British Columbia to be a “service . . . customarily available to the public,” it is arguable that insurance falls within the jurisdiction of the Ontario Human Rights Code. Insurance contracts are also covered by section 3, which provides the right to contract on equal terms. This protection from discrimination is restricted by section 21:

21. The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of . . . sex . . . is not infringed where a contract of . . . life . . . insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of . . . sex . . .

Similarly, pension plans, a term of employment, fall within the protection of section 4. This protection is limited by section 24(2):

24(2) The right under section 4 to equal treatment with respect to employment without discrimination because of . . . sex . . . is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the Employment Standards Act and the regulations thereunder.

The Canadian Charter of Rights and Freedoms is still a loose cannon on the deck of the Canadian legal system. It remains unclear whether the Charter even applies to private action, or at the very least how the

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33 S.O. 1981, c. 53.


courts will draw the line between private and governmental activity. No one can be quite sure yet how the courts will interpret section 15, the anti-discrimination section, and particularly how legislation relating to human rights will be dealt with.

The only thing which can be said with certainty at this time is that the Charter does cover the actions of government, both in its legislative capacity and in the day-to-day running of government agencies and Crown corporations. Possible challenges to legislation are problematic. Generally, the legislation at issue is of two types. First, it may be partially corrective. The vesting provisions of the Pension Benefits Act are an example. They partially correct a situation which was worse prior to their enactment. It shall be argued below that they continue to be discriminatory in their effect. Challenging the vesting provisions, however, can only result in their removal; it cannot result in the substitution of more progressive provisions. Other human rights legislation as a whole is progressive, but with important exceptions for pension or insurance plans. The Human Rights Code is perhaps the clearest example, where the provisions dealing

36 Arguments for the extension of the Charter into the private sector may be found in D. Gibson, "The Charter of Rights and the Private Sector" (1983) 12 Man. L.J. 213, and B. Slattery, "Charter of Rights and Freedoms: Does it Bind Private Persons" (1985) 63 Can. Bar Rev. 148. These scholars argue that the phrase "within the authority" of the federal or provincial legislature, as it appears in s. 32 of the Charter, is broad enough to encompass both governmental and private activity. A second argument is that the jurisdiction section of the Charter, s. 32, does not restrict the application of the Charter, but merely makes it clear that governments are bound by the Charter.

For the contrary view, see K. Swinton, "Application of the Canadian Charter or Rights and Freedoms" in W.S. Tarnopolsky and G.A. Beaudoin, ed., The Canadian Charter of Rights and Freedoms: Commentary (Toronto: Carswell, 1982) and P. Hogg, The Canada Act 1982 Annotated (Toronto: Carswell, 1982) at 77. Arguments that the application of the Charter is restricted to governmental activity tend to rely, implicitly or explicitly, on the Canadian legal tradition, whereby the constitution is fundamentally a regulator of government conduct. In addition, the maxim expressio unius est exclusio alterius is often said to require that the explicit inclusion of government action in s. 32 implicitly excludes non-government action from the scope of the Charter.

The preponderance of cases at this time would seem to limit in theory the effect of the Charter to government action. It remains to be seen how the line between government and private action will be drawn. American constitutional protection, for example, extends to all aspects of 'state action'. Thus purely private activity is beyond the scope of constitutional intervention, but should a dispute be brought before the court, the state becomes involved by virtue of enforcing the agreement and constitutional protections may apply: see, for example, Shelley v. Kramer, (1948) 334 U.S. 1 (S.Ct.). Notwithstanding this broad approach, the setting of auto insurance rates has been held not to involve state action: Murphy v. Harleysville Mutual Insurance Company 422 A.2d 1097 (P.A. Super.). The 'state action' approach has been held to be an inappropriate tool for interpreting the Charter at least once: see Bhindi v. British Columbia Projectionists Local 348 (1985), 63 B.C.L.R. 352, (1986) 29 D.L.R. (4th) 47 (B.C. S.C.). It remains to be seen if higher courts agree, and if not, whether the Murphy decision will be followed in this country.

37 For an expansive interpretation, see Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (Ont. C.A.). For a much more restrictive view of s. 15, see the trial judgment in Blainey at 52 O.R. (2d) 225, and the decision of the British Columbia Supreme Court in Harrison v. University of British Columbia (1986, unreported).
with insurance restrict the otherwise progressive thrust of the legislation. The judicial precedents in this area are to date so few that a consistent doctrine cannot be ascertained, and any discussion would be largely speculative.

At a minimum, the Charter's applicability will be limited to pension plans and employment-related life insurance plans for employees of governments, government agencies, and crown corporations. Even on this assumption, there may be limited indirect effects on the private sector, particularly in its dealings with the public sector. The American case of Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris\textsuperscript{38} will serve as an example. That case concerned a money-purchase pension plan in a government institution where the employee rolled over contributions to a private company which in turn provided the employee with a life annuity. There was a choice of private companies available, all of which offered lower periodic payments to women on the basis of gender-based mortality tables. The court found a violation of title VII of the American Civil Rights Act, notwithstanding that Act's jurisdictional limitation to government. The fact that the annuities were offered by private companies offered the employer no defence.\textsuperscript{39} Governments are covered by the non-discrimination provisions of the Charter, and, on the Norris precedent, pressure may be placed on the insurance and pension industry to adopt the Charter standard, at least in their dealings with government.

III. VESTING

Section 20(1)(a) of the Pension Benefits Act contains the most restrictive vesting provisions permitted under Ontario law. This provision holds that employees covered by a pension plan are entitled to receive a pension when (a) they have either worked for an employer for a continuous period of ten years or participated in the plan for a continuous period of ten years, whichever occurs first; and (b) they attain the age of forty-five years. Section 20(3)(a) permits pension plans to adopt a smaller number of years or a lower age requirement for vesting. In Canada, 16 percent of the plans had no vesting provisions other than the legislative standard of their province. Of the remainder, only 2.6 percent of members were required to meet age standards at all. Forty percent of members were required to serve for ten years in the plan prior to vesting; for

\textsuperscript{38} (1983) 103 S.Ct. 3492.

\textsuperscript{39} \textit{Ibid.} at 3500.
15 percent, five years of service was required, and for 8 percent, less than five years. Immediate vesting was available for an additional 5 percent of members, almost exclusively executives.

These vesting provisions work to the particular disadvantage of women. In the United States, only about 15 percent of women in pension plans are employed long enough to obtain vesting. While 58 percent of women between the ages of twenty and sixty-four are in the workforce, and 30.6 percent of these women are covered by pension plans, a much smaller number will ever collect anything. Those that do may collect a much smaller pension, as pension credits earned during previous employment count for nothing unless the pension vested during that employment period. The result is that women have pension credits paid on their behalf for much of their lives and yet may never receive any benefit. The contributions remain in the pension fund and subsidize those pensions which vest.

Given such a significant discrepancy in coverage, there is a disappointing lack of academic literature and statistics on the matter. We do know that in 1981, there were 2.3 million senior citizens in Canada, well over half of whom were women. Only 327,095 of these women reported any pension income on their tax returns, and this figure includes both women who are receiving pensions in their own right and women receiving survivor’s benefits from a spouse’s pension. The most recent statistics concerning termination of employment by gender, age, and length of service are American and are contained in Bernstein’s now somewhat dated book The Future of Private Pensions.

40 All these statistics are from Statistics Canada, Pensions, supra, note 7 at 42. Recall that these are Canadian statistics. Vesting at the level of five years and below may be higher in these statistics than it is in Ontario, reflecting the five year vesting provisions of the Manitoba Pension Benefits Act, S.M. 1975, c. 38, and the more complex vesting provisions in Saskatchewan.

41 Telephone interview with I. Nastajus, Assistant Superintendent (Operations), Ontario Pension Commission, 28 February 1986.

42 The Non-Discrimination in Insurance Act of 1983: Hearings into H.R 100 Before the SubComm. on Commerce, Transportation, and Tourism, 98th Cong., 1st Sess. (22 and 24 February 1983) at 113. A comparable figure was not given for men, although discussion indicates that such a figure would be significantly higher.


45 15% x 30.6% = 4.6% of women in the workforce will receive private pension income based on their own employment. This is an extremely rough estimate, as both the 30.6% and the 15% figures are open to change. The 15 percent figure may be particularly likely to change, given the changing role of women in the workforce.

46 Statistics Canada, Pensions, supra, note 7 at 89.

Table I: Utility Combine

<table>
<thead>
<tr>
<th>Age</th>
<th>% of Employees Terminated Before completing 10 Years of Service</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Women</td>
</tr>
<tr>
<td>17</td>
<td>90.1</td>
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<tr>
<td>22</td>
<td>86.6</td>
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<td>54.0</td>
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<td>47.0</td>
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Table II: Manufacturing Company

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These tables show that vesting provisions affect men and women very differently and illustrate a potential human rights issue. Two persons are hired to do identical jobs. The woman typically obtains a pay packet with some benefits. The man receives his pay packet, benefits, and a payment towards a pension he is likely to receive. Because she typically gets nothing, it is unreasonable to argue that the woman has equal access to this pension payment.

Legal remedies in this area are limited. The *Pension Benefits Act* specifically mandates the use of the vesting provisions and a *Charter* challenge to those provisions would be unproductive. Even if successful, it would merely void the existing provisions, but not force the government to introduce new legislation requiring vesting provisions more favourable to women. The *Ontario Human Rights Code* also is unlikely to provide

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48 *Ibid.* at 306. Age refers to 'central age', that is, 22 refers to ages 20 to 24, 27 to ages 25 to 29, *etc.* Age 17 refers to all ages below 20. Age refers to the age of the employee at the commencement of employment. For example, of employees commencing work at ages under 20, 90.1 per cent of the women and 42.9 per cent of the men do not complete ten years of service.

a remedy. While the vesting provisions do *prima facie* contravene the constructive discrimination provisions contained in section 10 of the *Code*, the vesting provisions are explicitly permitted by legislation. To find that these contravened the *Code* would, in effect, be using the *Code* to overrule the *Pension Benefits Act*. While the *Code* does in theory have the power to do this, there are no reported cases where this occurred. A challenge to the provisions of the *Employment Standards Act* faces the same limitations. Section 15 of the *Charter* might provide a legal attack for employees of governments and crown corporations.

The vesting provisions are gender-neutral on their face. Therefore, in order to mount a successful *Charter* challenge, it will be necessary to persuade the court to read constructive discrimination, or adverse effect discrimination, into section 15; the existing precedents suggest that the courts are prepared to make such a finding.

This conclusion is supported by *Ontario Human Rights Commission and O’Malley v. Simpsons Sears* in which the Supreme Court of Canada held that, notwithstanding that there was no intent to discriminate and notwithstanding that the employer’s requirement for employees to work on Saturdays was neutral on its face, the *Code* had been infringed. While *O’Malley* is not directly applicable, as it concerned conditions of employment rather than unequal benefits, it does indicate how the courts might approach the vesting issue.

In *O’Malley*, Mr. Justice McIntyre, speaking for a unanimous court, discussed constructive discrimination in the following terms:

[Adverse effect discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force... I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the *Code*. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

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50 *Supra*, note 33 at s. 46(2).

51 See, for example, *R. v. Big M. Drug Mart* [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 48 (S.C.C.), where the court held that a violation of s. 2(a) of the *Charter* could result from either a discriminatory purpose or a discriminatory effect. While that case was decided under s. 2, there is no obvious reason that the reasoning would be different under s. 15.


53 Ibid. at para. 24772.
On this analysis a strong argument can be made that the vesting provisions are discriminatory. The discriminatory effect results from a “special characteristic of the ... group,” specifically, the tendency of women not to stay in one job for long periods of time.

The only obvious stumbling block is whether the discriminatory effect is “upon a prohibited ground.” Does this mean that there must be an intrinsic connection between the effect and the prohibited ground? Nothing about being female compels women to leave their jobs. On the other hand, it is not arbitrary that women change jobs more frequently than men.

It is not clear how much weight ought to be placed on that single phrase. In O'Malley the complainant could not work Saturdays because of a concrete tenet of her religion, but such an intrinsic connection between the discriminatory category and the restrictive condition has not existed in other cases. Instructive in this regard is Griggs v. Duke Power,54 a leading American case in constructive discrimination referred to in O'Malley. In Griggs, a high school diploma or the passing of a standardized intelligence test was required for employment, although neither was shown to be significantly related to job performance. These requirements had the effect of screening out a disproportionate number of blacks from employment. The court held these requirements to be discriminatory without an explicit causal connection between being black and not meeting these requirements. The fact that black people tended to be affected differently was enough. In fact, the parallel with the vesting provisions is very close: no doubt many of the blacks in Griggs “chose” not to finish high school in much the same way as women “choose” not to remain with one employer for a long period of time.

Assuming a prima facie case of discrimination has been made out, a Charter challenge would have to meet the section 1 override provision. The onus would then be shifted to the person defending the vesting provisions to demonstrate on a balance of probabilities that they are reasonable limits to the Charter rights, prescribed by law, and demonstrably justified in a free and democratic society. There is no question that vesting provisions are prescribed by law, as they are contained in the Pension Benefits Act. The reasonableness criterion is less easy to satisfy. O'Malley and Griggs both refer to the business purpose of the discriminatory requirements. In Griggs, the issue was whether the employment requirements actually had a business purpose. In O'Malley, it was held that the employer should be required to make reasonable accommodation to solve the problem of discrimination, but that such a duty of accom-

54 (1971), 91 S.Ct. 849.
accommodation did not extend to the point where "undue hardship" is imposed on the employer in the conduct of the business.

The business purposes of longer vesting provisions are two-fold. To the pension industry, they are administratively convenient. To the employer, pensions provide an incentive for employees to continue on in the employment. Both of these legitimate business purposes distinguish this case from Griggs, where no business purpose was found. Both purposes, however, can be achieved through other means. Employment law already contains a number of mechanisms to create stability in a company workforce. The simplest of these is the long-term employment contract. Merit pay increases also induce employees to remain. In addition, in defined benefit plans, long-term employees would still do better than short-term employees, assuming the income level of the employee rises over time, as these plans are normally based on both years of service and highest income level reached over a period of time. Movement to defined benefit plans would also, therefore, assist in meeting the objectives of the employer.

The problems of the pension industry are not as easily solved. Some headway could be made by allowing companies to transfer pension credits. Thus, several companies, each with a small pension owed to an individual, could consolidate payment to that person in one company. This would facilitate the administration of these pension plans. The pension industry, moreover, does not need ten-year vesting periods to ensure that pensions are of significant size. Manitoba has recently amended its Pension Benefits Act such that the maximum vesting period will be two years by 1990. That is a reasonable vesting period, and it might well be an appropriate limit for the court to adopt in determining what is reasonable under section 1 of the Charter.

Under a Charter challenge, a finding that present vesting provisions violate section 15 rights would affect only government employees and employees of crown corporations. But the argument for constructive discrimination is as strong in the private sector as in the public, and the fact that there is no legal remedy for private sector employees does not justify the status quo. Maximum vesting periods ought to be sig-

56 That is, plans where the monthly benefit upon retirement is calculated as a function of salary upon retirement, years of service, and, sometimes, age. These are in contradistinction from money-purchase plans, where the monthly benefit upon retirement is calculated as a function of money contributed to by and on behalf of the employee and the employee's life expectancy.
57 It is arguable that this, too, creates a problem of constructive discrimination against women, but this problem is much more difficult to solve.
58 An Act to Amend the Pension Benefits Amendment Act, S.M. 1982-83-84, c. 79.
Sexual Distinctions in Pensions

Significantly reduced by legislation. A province-wide use of shortened vesting periods will make economically viable a large-scale system to deal with rights to small pensions. Bernstein advocates a centralized clearing house system, allowing payment of a number of small entitlements to be transferred to one company.59 Such a system might well require economies of scale to become viable. Changing vesting provisions is one way to make significant changes in the pattern of poverty in senior citizens and particularly senior women. The changes would be inexpensive to government,60 and on insurance and labour law principles would be more equitable as the benefits paid out of plans would be more likely to be received by the employee upon whose behalf the premiums were made.

IV. GENDER-BASED MORTALITY TABLES

A. Conflicting Theories on Gender-Based Tables

The use of gender-based mortality tables has been the focus of debate in the United States regarding sexual discrimination in pensions and annuities. The accuracy of these tables must be accepted. Actuarial tables demonstrate that on average, women live about six years longer than men. As a result, the average payout on an annuity policy is greater for women than for men, and women must pay greater premiums to receive the same monthly annuity. At this time, to receive an equal monthly annuity, women must pay premiums roughly 15 percent larger than men.61 In life insurance, the situation is reversed. As premiums are normally paid periodically up to the death of the policyholder, the average woman will make more payments than the average man, and the size of each premium is correspondingly reduced.62

59 Bernstein, supra, note 47, c. 10 at 265.

60 Amendments might even save the federal government money, by reducing the amount of GIS payable. Unfortunately, the federal government can only regulate concerning federal companies. The important amendments must be made in provincial legislatures, where there is no impetus to save federal money.

61 For a full discussion of how premiums are calculated from actuarial tables, see G. Benston, "The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited" (1982) 49 U. Chi. L. Rev. 489 at 497.

62 In the United States, mortality tables normally include men only. A woman applying for an annuity or for life insurance would be rated according to these tables, but she would have her life expectancy predicted as if she were a younger man. The difference between the ages is referred to as a 'set back'. There appears to be a practice in the United States whereby different set backs are used for women buying different policies. A woman buying a life insurance policy might be assessed with a set back of three years, while a woman buying an annuity might be assessed with a set back of six years. There is no indication that comparable distinctions are made on the type of policy purchased by men: see H.R. Hearings, supra, note 42, at 211, 212, 232; S. Kimball, "Reverse Sex Discrimination: Manhart" 1979 Am. Bar Foundation Research J. 83 at 109; P. Sharp, "Insurance as a Public Accommodation" (1984) 15 Colum. Human Rights L. R. 227 at 230.
In Ontario, gender-based tables are used pervasively in the private insurance market. The *Employment Standards Act* contains a general prohibition of gender-based distinctions in pension plans, subject to the regulations. In effect, the regulations restrict the prohibition in the *Act* to defined benefit plans which are either mandatory or non-contributory, and to mandatory or non-contributory life insurance plans. This is still very significant. In 1982, 93.7 percent of Canadians covered by pension plans had defined benefit plans. In addition, most members are in plans where participation is compulsory. In 1982, 81.3 percent of new employees of companies with pension plans were required to participate; only 14.7 percent were covered by voluntary plans.

The use of gender-based mortality tables has been closely scrutinized in the United States. The Supreme Court has held in two recent cases that the use of such tables constitutes a violation of the American *Civil Rights Act* of 1964. The first case, *City of Los Angeles, Department of Water and Power v. Manhart*,

However, Mr. Justice Stevens, speaking for the majority, found the disparity in this case to be a violation of Title VII of the *Act*, which

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63 Statistics Canada, *Pensions, supra*, note 7 at 27. The statistics concerning membership reflect the fact that larger plans tend to be defined benefit.

64 *Ibid.* at 26. Here, the disproportion with the number of plans is even greater. Only 37.1 percent of the plans were compulsory; 60.5 per cent were voluntary.

65 (1978), 98 S.Ct. 1370.

prohibits discrimination on the basis of sex. First, he held that Congress had made it clear, as a matter of policy, that classifications based on sex were illegal. Second, he held that, even if the statutory direction has been less clear, the thrust of the legislation directed the court’s attention to fairness to individuals, rather than fairness to groups. He held that most of the difference in mortality rates was the result of differences in social factors, specifically the prevalence of smoking among men, and not the result of innate differences between sexes. Consequently, the court found the association of these social factors with gender to be discriminatory. Five years after Manhart, in 1983, the Supreme Court extended this reasoning to plans where contributions were equal, but monthly benefits were smaller upon retirement.67

In the last few years, bills have been placed before both the American Senate and the House of Representatives which would have disallowed sexual discrimination in all insurance and pension plans. The most significant of these, the Non-Discrimination in Insurance Act of 1983,68 was defeated, primarily because of the costs of implementation.69 But it remains clear that gender-based actuarial tables discriminate on the basis of sex. The argument that gender-based actuarial tables are not discriminatory is premised upon the notion that germane distinctions which result in two classes being treated unequally are not discriminatory. Professor George Benston, makes the point this way:

First, I assume that the goal of both the Equal Pay Act and Title VII is to have individuals treated equally with regard to their race, color, religion, sex, and national

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68 Supra, note 42.

69 United States Department of Labor estimates the cost of implementation at $1.7 billion (U.S.) per year in the early years (supra, note 5 at 63). Industry representatives placed the costs much higher. Gender-based distinctions have been prohibited throughout the insurance industry in Montana, by s. 1 of Montana H. B. 358, 40th Leg., 2d Sess. (1983):
1. Discrimination in Insurance and retirement plans: It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

The following less ambitious provision, which applies only to pension plans, was adopted in Manitoba in 1983 (S.M. 1982-83-84, c. 79, section 14). It amends section 21 of the Manitoba Pension Benefits Act, supra, note 40:

21 (6.4) No pension plan shall provide for permit
(a) different rates or amounts of contributions by the members based on difference in sex; or
(b) different pensions, annuities or benefits based on differences in sex; or
(c) different options as to pensions, annuities or benefits based on differences in sex; or
(d) the inclusion in or exclusion from membership in the pension plan of employees on the basis of the sex of the employees.
origin in the sense that these personal attributes will not be treated invidiously. Thus the law does not prevent employers from distinguishing among individuals with respect to these attributes as long as the distinctions are demonstrably germane to the tasks for which a person is employed and do not mask otherwise illegal discrimination. I base this assumption on a recognition that individuals naturally differ and that some of these individual differences may be related to race, color, religion, sex, and national origin. If these differences are not taken into account in a noninvidious way, affected individuals may be harmed or benefited as unfairly as if the differences were considered invidiously.\textsuperscript{70}

The argument continues that actuarial tables show women live longer than men. As a result, women receive more payments from a pension plan or life annuity than men of a similar age. Plans providing equal monthly benefits to women and men are more valuable to women. On this argument, fairness requires that women either pay more into the plan or have monthly benefits reduced. In short, as long as the present values of the plans are equal, there is no discrimination.

The difficulty with this argument is that it is impossible to predict accurately when an individual will die. Consequently, the actual present value of the annuity is impossible to predict for a given individual. The present value argument assumes that gender is a major relevant consideration in assessing life expectancy. The fact that the individual is a woman does not necessarily affect present value for her plan. Admittedly, this problem will arise with whatever risk group is chosen. However, human rights law has singled out specific factors, including sex, as inappropriate criteria for distinction. Implicit in the present-value approach is that notwithstanding human rights law, gender is the appropriate criterion to ascertain present value. Even if it is defensible on practical grounds, it concerns the reasonableness of discrimination, not the fact that discrimination is occurring.

The broader question is whether in fact one ought to use a present value approach or a monthly benefit approach in ascertaining equality. At least in the pension arena, a monthly benefit approach is defensible. The terms of pension plans are settled in negotiations between employers and employees or unions. While cost is a major factor to the employer, what is really bargained about from the employee perspective is the lifestyle to be enjoyed upon retirement. This argument is reinforced by the fact that in at least one Ontario case, a union requested that unisex tables be used in calculating benefits. Their problem was not in convincing

\textsuperscript{70} Benston, supra, note 60 at 493. It is difficult to reconcile this principle with the principle enunciated by Steven J. above, that the thrust of Title VII is to treat individuals according to individual characteristics rather than group characteristics, a principle fundamental to human rights law. The two appear to be reconcilable only when the characteristic of the group applies of necessity to all or virtually all individual members of the group.
their members or their employer, but rather in finding an insurance company prepared to use those tables.\textsuperscript{71} On this basis, the appropriate criterion for judging equality is not present value, but monthly benefits.

The literature resulting from \textit{Manhart} focuses on the existence of discrimination based on present value assumptions, and the reasonableness of that discrimination. At least in the area of pensions, this has the implied premise that the insurance law framework rather than the labour law framework should apply. There is no obvious justification for such an implied premise.

The comparable argument is more difficult to make regarding individual life annuity contracts by insurance companies. While it is reasonable to view employee plans in a labour law context, the negotiation of a private contract between insurer and insured cannot reasonably be viewed in this light. It remains true that annuities may be bought in place of pensions by persons not covered by pensions, and those people are concerned about purchasing a lifestyle. However, the negotiation is with a private insurer, not with the employer, and persons providing any resulting cross-subsidy are not represented in those negotiations as they are in negotiation of a group plan. The analysis of the use of gender-based actuarial tables for these contracts must therefore be based strictly in the competing values of human rights and insurance principles. The principles of labour law cannot apply to these contracts.

Recognizing that even within this more limited framework an argument can be made that discrimination exists in the use of gender-based tables, it becomes necessary to consider the reasonableness of this discrimination. There are three basic arguments that the discrimination is reasonable: (1) it is based on sound actuarial practice; (2) the difference in mortality is intrinsic to gender, that is, longevity is biological and not environmental; (3) any discriminatory effect is justified by various social policy benefits. The first of these arguments is discussed in \textit{Manhart} in three distinct forms. In its basic form, it is similar to the argument that the tables do not discriminate at all because benefit packages are of equal present value. Women as a class, it is argued, are treated equally with men as a class. The court in \textit{Manhart} did not accept this argument:

\begin{quote}
In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice,
\end{quote}

\textsuperscript{71} Interview with F. Rahman and B. Newman, \textit{supra}. A company was eventually found that would handle the policy.
on its face, discriminated against every individual woman employed by the Department.\textsuperscript{72}

In its second form, it was argued that the distinction is not based on gender, but rather on longevity, that is, that the discrimination arises because they are members of classes which statistically live a relatively longer or shorter time.\textsuperscript{73} The court in \textit{Manhart} also rejected this submission:

The Department argues that the different contributions exacted from men and women were based on the factor of longevity rather than sex. It is plain, however, that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84\% differential between the respective contributions by men and women. We agree with Judge Duniway's observation that one cannot "say that an actuarial distinction based entirely on sex is 'based on any factor other than sex'. Sex is exactly what it is based on."\textsuperscript{74}

A final version is that the insurance industry by its very nature is different from other private enterprise institutions. Where normally it is possible and appropriate to consider individuals as individuals, insurance requires the prediction of future events. Insurance is thus of necessity based on probabilities ascertained from a group classification.\textsuperscript{75} This argument was also rejected in \textit{Manhart}, by the court's decision to focus on fairness to individuals rather than fairness to groups.\textsuperscript{76}

Was the court in \textit{Manhart} right? The counter-arguments presented above rely on the premise that actuarial considerations negate any discriminatory effect. Critics of \textit{Manhart} do not grasp that, notwithstanding the accuracy of actuarial tables, the tables may still be discriminatory in a human rights context. Assume, for example, that the differences in longevity were based exclusively on social habits more prevalent among men, such as smoking and the consumption of alcohol. A man who neither smoked nor drank would therefore have the same life expectancy as a woman, but mortality tables would give him an artificially short life expectancy. This would not be the result of his gender, but of the

\textsuperscript{72} \textit{Manhart}, supra, note 64 at 1379.

\textsuperscript{73} This argument is particularly important in the American context, where the so-called Bennett amendment to Title VII, allows sexual differentiations based on seniority systems, merit systems, productivity systems, or on "a differential based on any other factor other than sex." The comparable provision in the Canadian statutes to be referred to below is contained in s. 9(c) of the \textit{Ontario Human Rights Code} (supra, note 33), where 'equal' is defined as being "subject to all requirements, qualifications, and considerations that are not a prohibited ground of discrimination." The effect of the Code provision is probably very similar to the effect of the Bennett amendment.

\textsuperscript{74} \textit{Ibid.} at 1377. The quotation from Duniway J. is at (1976) 553 F. 2d 581 at 588.

\textsuperscript{75} For a particularly strong defense of this argument, see Kimball, supra, note 61 at 118.

\textsuperscript{76} \textit{Manhart}, supra, note 64 at 1376.
habits of other men. He has been discriminated against if he purchases a life insurance policy where the actuarial table works to his disadvantage. The conflict is that procedures which make sense in insurance are not reconcilable with the basic principle of human rights law, that is, that individuals are to be treated as individuals, unaffected by characteristics possessed by the group. We generally think of this in the context of stereotypes, for example, men smoke and drink more, and will therefore die sooner. This is a stereotype, notwithstanding its statistical basis, because it is not true for all men. Men for whom it is not true ought logically to be covered by the protection from gender-based discrimination accorded by human rights legislation. In short, the argument that the tables discriminate in a reasonable way because they are actuarially sound cannot stand because it fails to distinguish between causation and statistical correlation.

This leads directly to the second broad justification for the reasonableness of gender-based tables: that the difference in longevity is caused specifically by gender, rather than by some unrelated factor. Much has been written on the ‘biology or environment’ debate. It is submitted that social habits among men impact on the mortality tables. Much has been written on the ‘biology or environment’ debate. It is submitted that social habits among men impact on the mortality tables.78 The analysis of Brilmayer and her colleagues supports this view:

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77 I should note two arguments which appear in the literature, but which I find unconvincing. Both deal with the statistical accuracy of the mortality tables. The first is that the vast bulk of women who die may be ‘matched’ with a man who dies at the same age. This accounts for roughly eighty to eighty-four per cent of the American population. Thus, the argument goes, knowing a person’s gender tells very little about when they will die (See L. Brilmayer et al., “Sex Discrimination in Employer-Sponsored Insurance Plans” (1980) 47 U. of Chi. L. Rev. 505 at 530. And Bernstein and Williams, “Title VII and the Problem of Sex Classifications in Pension Programs” (1974) 74 Columbia L.R. 1203 at 1221.). This 80 or 84 percent figure is admittedly emotionally appealing; it is not clear to me, however, what it in fact proves. When one is dealing with things as unpredictable as human deaths, and a difference so small as a life expectancy of roughly eighteen years for men and twenty-three years for women at the age of sixty, [Canada, Statistics Canada, Canada Yearbook, 1985 (Ottawa, 1985) at 97] a significant overlap is to be expected. That does not somehow undermine the actuarial value of the statistics, nor does it prima facie suggest that those statistics are unreasonable. The second argument I find relatively unhelpful occurs in Benston, supra, note 60 at 513. Professor Benston discusses at some length the accuracy of the gender-based tables. This is in part in response to Brilmayer’s claim that gender is an inefficient criterion to be used in the prediction of longevity (ibid. at 511). The thrust of Benston’s argument is that gender-based tables have been accurate in predicting the number of people that will die in the various age groups. It is not clear what that proves, however. Note that so-called unisex tables might very well be able to predict the number of people that will die in the various age groups.

I submit that statistical correlations on their own may be of very limited use in arguing for ‘reasonableness’. If they are useful, the accuracy test which will be of interest is how probable it is that an individual will die relatively near to the longevity ascribed to him or her. It is clear on that basis that unisex tables are less accurate than gender-based tables. No one, however, in the literature that I have been able to locate, has discussed how much more inaccurate they would in fact be.

78 For a more complete discussion of this complex topic, see Brilmayer et al., supra, note 76 at 539, and the response in Benston, supra, note 60 at 512. On balance, I have found the Brilmayer article more convincing.
Recent studies confirm that the widening of SMDs [sexual mortality differences] up to 1970 may be traced principally to higher male mortality from arteriosclerotic heart disease ... motor vehicle and other accidents, cirrhosis of the liver, and suicide. These causes of death accounted for three-fourths of the SMD in the United States in 1967. Behavioral factors such as smoking, drinking alcohol, reckless driving, and the "coronary-prone" or "Type A" personality are implicated in the etiology of each.79

Available evidence suggests that more men smoke than women and more heavily.80 A thirty-year-old person smoking two packages of cigarettes per day has a life expectancy of approximately eight years shorter than a non-smoker.81 This affects the mortality tables of men and women.82 Similarly, 11 percent of the deaths in Canada in 1978 were alcohol-related.83 Since men drink an average of three times the alcohol women drink,84 it would seem reasonable that this would have an effect on the gender-based tables. Finally, one would expect that if the difference were entirely or primarily biological, the longer life expectancy for women would be uniform across the world. It is not. In some places, particularly in Asian countries, men have a higher life expectancy than women.85 Even the critics of Manhart have given some ground here. Kimball, in fact, in a 1980 sequel to his major critique of Manhart, abandons any claim to a biology-based theory, instead basing his argument on the fact that gender differentials are "significant, stable, and practical to use."86

This leads to the third and final set of arguments regarding the reasonableness of gender-based tables: that the advantages of using the

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79 Brilmayer et al., supra, note 76 at 552. Footnotes omitted.
80 See, for example, L. Bennett, Smoking and Morbidity in a Saskatchewan Sample (Saskatoon: University of Saskatchewan, 1973) at 8.
81 United States, Surgeon-General, Smoking and Health (Washington: GPO, 1979) c. 2. Note especially c. 2 at 23.
82 Apparently, a relatively large number of smokers die in their twenties and early thirties: Rahman and Newton, supra, note 60. It has been suggested that these deaths are not the result of smoking-related diseases, but rather that smoking correlates with a lifestyle which includes, for example, alcohol and fast cars. Some Ontario companies use smoking as a factor in setting rates. As a parallel to my earlier argument regarding the 'reasonableness' of actuarial practices per se, an argument could be made that screening according to smokers discriminates against those smokers who do not share that lifestyle. This would be an issue, of course, only on life insurance policies, as the suspect deaths occur prior to annuity payments commencing. This would not be a problem under the Ontario Human Rights Code, as smoking is not a prohibited ground of discrimination. The Superintendent of Insurance is unlikely to intervene, assuming the distinctions are actuarially sound. Any argument of this sort would meet the problem that discrimination against smokers does not have the social stigma of discrimination on sexual grounds.
83 Canada Year Book, 1985, supra, note 76 at 87.
85 Brilmayer et al., supra, note 76 at 542.
Sexual Distinctions in Pensions

It is argued that the gender-based distinctions are useful in the industry because they are statistically significant, easily verifiable, and remain constant over an individual’s life. Simply stated, they are administratively convenient. The class is easily definable and membership static.

The argument from convenience must be viewed with some skepticism. Even allowing that the use of other criteria will cause some problems, this is still not an argument for allowing sexual distinctions. The very rigidity which makes the distinctions convenient also makes them discriminatory. I have argued that biology is at most a partial explanation of the difference in the mortality rates, yet biology entirely determines the class into which an individual will be grouped. On a broader level, convenience should rarely be permitted to take precedence over human rights considerations.

The cross-subsidies argument states that the removal of gender-based distinctions will result in men as a class subsidizing the annuity policies of women as a class, as women would get more from the same contributions. Such cross-subsidies are considered unacceptable to the industry, the law being that each policy should pay its own way. This argument assumes that an alternative set of classifications could not be created. If alternative criteria were developed, cross-subsidies might not be increased significantly and might in fact be reduced.

Even if there is a resulting cross-subsidy, this is not necessarily unacceptable. Throughout human rights law, the benefit of one group must come at the cost of another. This is exemplified by the concept of equal pay for work of equal value, under which, in a company with limited resources, a pay equalization means a redistribution of the pie.

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87 This is in fact required by s. 85(6) of the Insurance Act, supra, note 2.

88 The precisely comparable issue exists, for example, in the issue of decreased vesting periods. Contributions are made on behalf of all employees, whether or not their pensions will vest. All the contributions normally stay in the pension fund, subsidizing those pensions that will vest. As a result, employees whose pensions vest, typically male, have been receiving a subsidy from those employees whose pensions do not vest, largely females: Newton and Rahman, supra, note 60 see also the remarks of Congresswoman Mikulski, supra, note 42 at 133. The shorter vesting provisions would mean that there would be a payout based on more of the contributions, thus reducing these subsidies. Higher contributions will have to be made to cover the loss of these subsidies. That will work to the disadvantage of people whose pensions now vest, primarily men.
Similarly, with the termination of gender-based distinctions, the increase in benefits will no doubt come partly from decreased corporate profits and smaller wage increases in the industry and partly from increasing the cost of the pension and annuity product to men and the life insurance product to women.

That leads to the argument that the competitive abilities of firms will be undercut by the removal of their right to make relevant actuarial distinctions. This argument overstates the case. It is not all actuarial distinctions which would be restricted, but only those based on gender. The competitive position of an individual company is unlikely to be severely undercut in any case, as long as the distinctions are abolished for all companies.

To conclude, the principles of human rights law are inconsistent with the use of gender-based mortality tables. A strong argument can thus be made for a prohibition of such tables.

B. Application of Statutes

One way to terminate the use of gender-based mortality tables would be through the intervention of the Superintendent of Insurance. Under section 94(2) of the Insurance Act, the superintendent must report to the Minister any policy which is “unfair . . . or not in the public interest.” Are the actuarial tables unfair in the sense meant by the Act? There is a tension between insurance principles and human rights principles running throughout the Act. On the one hand, there is to be no discrimination in rate-setting among people of the same life expectancy; yet, on the other hand, all policies are to be self-supporting. The Act prohibits discriminatory rates based on race or religion whether or not these different rates are actuarially justified. Some valid actuarial distinctions have thus already been restricted on the grounds of human rights. Black people have a shorter life expectancy than white people, but race cannot be considered.

89 Insurance Act, supra, note 2 at s. 393(b)(ii).
90 Ibid. at s. 117.
91 See Brilmayer et al., supra, note 76 at 512. Brilmayer presents the following table, reproduced from Greville, “Some Trends and Comparisons of United States Life-Table Data: 1900-1971” (1975) 1 National Centre for Health Statistics, (1975) No. 4 U.S. Decennial Life Tables for 1969-71, Table 4 at 4-10 (Rockville, Md.: U.S. Dept. of Health and Human Services, Public Health Service).

<table>
<thead>
<tr>
<th></th>
<th>Expectation of Life at Birth (Selected Categories 1969-1971)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All persons</td>
<td>70.75</td>
</tr>
<tr>
<td>All males</td>
<td>67.04</td>
</tr>
<tr>
<td>All non-whites</td>
<td>64.95</td>
</tr>
<tr>
<td>All males</td>
<td>60.98</td>
</tr>
</tbody>
</table>

From this table, it would appear that race is a statistically more important factor than sex in determining longevity.
however, between actuarial tables based on race and those based on gender.92

In the United States, courts have found a duty on the part of insurance commissioners to consider human rights legislation in assessing fairness in rate-setting. Hartford Accident and Indemnity Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania,93 involved "unfairly discriminatory" rate-setting in the auto insurance market resulting from gender-based distinctions. The Commissioner had disallowed the rates, and this decision was upheld by the Supreme Court of Pennsylvania:

The question presented, properly phrased, is whether the term "unfairly discriminatory" must be read in light of the Equal Rights Amendment to our Pennsylvania Constitution. Unquestionably, sex discrimination in this Commonwealth is now unfair discrimination. It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution. To read the term "unfairly discriminatory" as excluding sex discrimination would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania constitution. Therefore, we must affirm the decision of the Insurance Commissioner. We must do so because the statute must be interpreted to include sex discrimination as one type of unfair discrimination, and not because the Commissioner has the power to implement the public policy of this Commonwealth in the absence of legislative direction.94

The Pennsylvania human rights provisions are constitutionally enshrined. While section 15 of the Charter bars sexual discrimination the extent of that provision into the private sphere is hotly debated, as was discussed above. Nonetheless, the Commissioner in Ontario has received some legislative guidance in the Ontario Human Rights Code that sexual discrimination is unacceptable.

The Superintendent should work directly with the industry to eliminate the discriminatory tables. Up to this time, that office has taken a passive stance on the issue. While the chief actuary said he would like to see gender-neutral factors take a larger role in rate-setting, he nonetheless respects the right of the industry to consider actuarially sound distinctions and, until gender-neutral criteria are developed, believes gender-based tables ought to be permitted.95 Consultation with the Superintendent and development of criteria should begin as soon as

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92 Kimball tries to distinguish this as a valid parallel in his 1979 article (supra, note 61), but is largely forced in the face of Brilmayer's analysis, to concede that the parallel is fair in his 1980 article (supra, note 85). He also argues in the 1979 article that because races are not 'pure', race is not a practically usable category. I find that argument unconvincing. Benston takes the other approach: insurers ought to be permitted to use racially-based distinctions, if they are actuarially sound; see Benston, supra, note 61 at 511.

93 (1984) 482 A.2d. 542 (Pa.).

94 Ibid. at 549.

95 Newton and Rahman, supra, note 61. Mr. Rahman gives more credence to a biologically based theory.
possible. As more and more women enter the work force, become eligible for pensions, and have the disposable income to purchase annuities, transitional problems will only grow for the industry.

There are no immediately promising routes to litigate the issue of gender-based actuarial distinctions in pension plans in Ontario. Plans using such tables are specifically permitted to do so under the Employment Standards Act. The Ontario Human Rights Code further finds that the right to equal treatment in employment is not infringed by plans conforming with the Employment Standards Act, thus limiting the availability of a remedy under the Code. Eliminating tables in the pension field probably requires regulatory amendments.

The bulk of the debate in Ontario and elsewhere has centred on the use of gender-based tables in pension plans, not in private insurance. The case against gender-based tables is equally applicable to the private insurance industry, however, so the possible success of an attack on private insurance through the Ontario Human Rights Code must be seriously considered. Gender-based tables give rise to a prima facie case of discrimination under the Code, although the effect of section 21 of the Code, which allows gender-based distinctions based on "reasonable and bona fide grounds" in insurance, remains an open question.

Section 21 was recently considered by an Ontario Board of Inquiry, in Bates v. Zurich Insurance Company of Canada. Although currently under appeal, this decision provides some guidance as to the scope and meaning of section 21. The board held that there were two parts to

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96 See s. 24(2) of the Code, discussed supra.

97 There is a slight chance for an alternative route. A complainant might allege a violation of ss 1 or 3 of the Code, regarding equal access to services and the right to contract on equal terms respectively. That would have the effect of displacing s. 24(2), which applies only to employment-related discrimination. Instead, the reasonable and bona fide test of s. 21 would apply. Support for this position comes from the specific reference to 'group insurance' in s. 21. That term is defined under s. 9(e) of the Code as "insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person." Pension plans would appear to fit this definition. The counter-argument is that pensions are essentially employment-related, and any discrimination implied is essentially discrimination in a term or condition of employment, not in services or contracts. That argument is intuitively appealing, as to hold otherwise would significantly restrict the application of s. 24(2). On the other hand, s. 24(2) could arguably still have the effect of protecting the employer from a human rights complaint about the policy, as the remedy under s. 1 or 3 would presumably be against the underwriting insurance company. That might be an important restriction in a labour law context, to protect the employer from a collateral attack on a collective agreement through the Code. Whatever the merit of this argument, it would be tactically better for persons wishing to challenge the use of the tables in pension plans to see how the boards and courts deal with the insurance issue, where the jurisdictional wrangle does not exist.

98 (1985), 6 C.H.R.R. D/2948 (Ont. Bd. of Inq.). Currently under appeal. This is apparently the first case to consider the scope of the Ontario provisions: see 2961 of the decision, and also J. Keene, Human Rights Law in Ontario (Toronto: Carswell, 1983).
the test.\textsuperscript{99} Regarding \textit{bona fides}, the test is subjective: the allegedly discriminatory ground must be imposed "honestly, in good faith, and in the sincerely held belief that the limitation is imposed in the interests of adequate performance" of the task.\textsuperscript{100} A serious allegation of bad faith against insurers in a case dealing with gender-based mortality tables is unlikely, so this part of the test poses no problem to the industry.

The second "reasonableness" part of the test is objective. The first test is the use of the criterion "reasonably necessary to assure the objectives" of the industry;\textsuperscript{101} the second is whether there are reasonable grounds for believing that all or substantially all of the persons in the class would \textit{not} be adversely affected by the classification?\textsuperscript{102} To meet the second part of the test, the insurer was required to show that "[i]n narrow terms... the very essence of its business would be undermined if it could no longer rely on discriminatory group characteristics for its rate classification system."\textsuperscript{103} \textit{Manhart} was quoted with approval.\textsuperscript{104}

The board did not accept the statistical significance of the car insurance gender-based risk groups as proof of reasonableness. Instead, the board required that it be "scientifically proven that there is a direct causal relationship between the discriminatory group factors used — age, sex and marital status and high risk."\textsuperscript{105} If a board were to make the same causally based requirement of the life insurance industry regarding gender-based mortality tables, a stronger case could be made out than was put forth in \textit{Bates}. At the very least, it would be difficult to convince the board on a balance of probabilities that sexual differences are entirely, or perhaps even predominantly, biologically based.

Finally, the board held that the insurer must show that it would be impossible to use any other set of criteria to determine premiums.\textsuperscript{106} In the life insurance and annuities field, the unisex tables provide one possible option. The difference in premiums between men and women is about 15 percent. The use of unisex tables for annuities would therefore

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\textsuperscript{100} \textit{Bates}, supra, note 97 at D/2961.

\textsuperscript{101} \textit{Ibid.} at D/2962.

\textsuperscript{102} \textit{Ibid.} at D/2963.

\textsuperscript{103} \textit{Ibid.} at D/2965.

\textsuperscript{104} \textit{Ibid.} at D/2963.

\textsuperscript{105} \textit{Ibid.} at D/2965.

\textsuperscript{106} \textit{Ibid.} at D/2965.
result in premiums changing by roughly half that, 7.5 percent. It might be difficult to argue that this was not a viable option.

The ability of the private insurance industry to function would not be severely undermined by a move to gender-neutral tables. Annuities and pensions are an essential part of planning for retirement and life insurance is important risk protection for survivors. The need for these services is great to individuals. The movement to unisex tables will not significantly change the number of policyholders in the private marketplace.

The Code also prohibits constructive discrimination, that is, any “requirement, qualification, or consideration” which, while seemingly neutral, would result in disparate impact upon an identified group according to the prohibited grounds. Such discrimination would obviously occur in a move to a unisex table: men would be charged more for annuities, and women more for life insurance. The issue then becomes which discrimination is to take precedence. Prima facie discrimination ought to be remedied before constructive discrimination. The purpose of the Act was to combat discrimination against individuals. The constructive discrimination section was added in 1981, presumably to extend the same purposes of the Code. To use that extension to restrict the original purpose of the Code or to effectively permit discrimination against individuals would be counter-productive.

The nature of pension, annuity, and life insurance contracts makes effecting a remedy difficult. Where in auto insurance, for example, eliminating gender-based distinctions could be accomplished effectively through re-negotiation of contracts on non-discriminatory terms when they come up for renewal, individual contracts for pensions, life insurance, and annuities may last for the lifetime of the individual. As a result,

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107 This is at the very best a loose approximation, and would of course need to be adapted to the actual class of people buying annuities and life insurance. At this time, purchasers of both life insurance and annuities are predominantly male, although this is gradually changing: Rahman, supra, note 61. As a result, assuming the present mixture of men and women, the life expectancy of the entire class would be closer to the male life expectancy than the female. The result would be that in annuities, premiums for men would rise by less than the 7.5 percent, and premiums for women would fall by more than 7.5 percent. In life insurance, premiums for men would fall by a relatively small amount.

108 Ontario Human Rights Code, supra, note 33 at s. 10.

109 Limited support for this position may be gleaned from the Code itself. Constructive discrimination does not offend part I of the Code if “it is declared in this Act that to discriminate because of such ground is not an infringement of a right”: ibid. at s. 10(b). Section 13(1) holds that a right is not infringed by the “implementation of a special programme . . . that is likely to contribute to the elimination of the infringement of rights under Part I.” The combined effect of these provisions is that constructive discrimination is to give way to direct discrimination, at least in this limited range of cases. A finding of discrimination under the Code is not a “special program” within the meaning of s. 13. Nonetheless, boards of inquiry ought to take their lead from this principle.
one must either change existing contractual rights, or make the non-discriminatory criteria apply to new contracts, and leave in effect discriminatory contracts which may have decades to run.

The Code restricts remedies to matters “in respect of the complaint and in respect of future practices.”\(^{110}\) Apart from changing the contract of the individual complainant, no other changes to existing contracts seems to be within the scope of the Code. Relief under the Code could not, therefore, be retroactive in any systematic sense.

Legislative redress is not so restricted. The proposed Non-Discrimination in Insurance Act of 1983, for example, would have required ‘topping up’ of insurance plans, that is, increasing benefits to the higher of the levels received by the two sexual classes. Men’s life insurance benefits would have been re-calculated based on the life expectancy of women, and women’s annuity benefits would have been re-calculated on the life expectancy of men. This would have placed policyholders in a better position than they would have been in under unisex tables, entirely at the expense of the industry. This would have been inappropriately generous. There is a need for stability in the insurance industry, and the topping up provisions would have been very difficult for the industry to absorb.\(^{111}\) Equalizing payments to future retirees at the level of the unisex rates would be significantly less expensive.\(^{112}\) This approach, however, has its drawbacks. Men have been making contributions to money purchase plans and RRSPs on the expectation that these will purchase a specific lifestyle on retirement. The move to unisex tables will reduce the amount these individuals will receive. Pensioners making retirement plans would find that they had less income on retirement than they had anticipated. If they retire soon, they will not have a chance to correct this by increasing contributions. The vast majority of pensions presently vesting belong to men. As a result, the unisex table for persons about to retire would be very close to the present male mortality table, making the prejudice to these men relatively small. Therefore, a move to unisex tables might be acceptable.

Decreased vesting periods as suggested above could significantly increase women’s share of the pension pie in a short time, however, perhaps prejudicing men about to retire. A third option should be considered. Under this option, benefits relating to contributions to RRSPs

\(^{110}\) Ibid. at s. 40(1)(a).

\(^{111}\) The cost of H.R. 100 to the pension industry alone would have been $1.7 billion (U.S.) per annum in the short term, according the United States Department of Labour: Hearings at 63.

\(^{112}\) The United States Department of Labour estimated that the cost of using unisex tables for future retirees only to be twenty per cent of the cost of the universal topping up provisions: ibid. at 64.
and money-purchase plans made prior to the enactment of remedial legislation could be calculated using gender-based tables, but benefits resulting from subsequent contributions would be based on gender-neutral tables. Under such a scheme, men would be given the option of increasing their contributions to the plan to maintain their benefit level, or accepting a lower benefit level with the same premiums. This approach would also minimize disruption within the insurance industry. The difficulty with this approach is that full equality would not be attained for decades. Still, it is a workable long-term solution to the inequality problem.

C. Actuarial Tables in Context

In all the talk of theoretical justifications and technical law, the larger context tends to get lost in the shuffle. This has been unavoidable in this discussion, as happens in most of the secondary literature dealing with the mortality tables. This paper began by discussing the poverty of elderly women. While the issue of gender-based mortality tables is theoretically interesting and important for human rights law, the amendments and remedies discussed above will not affect persons now retired. In fact the benefits of abolishing gender-based distinctions may take decades to phase in.

The argument may in fact extend a step further. If alternative criteria are developed, the bulk of the gain made by women in the prohibition of gender-based tables may disappear. As an example, assume once again that the entire difference between women and men in life expectancy is the result of heavier smoking and drinking among men. A move to tables based on smoking and drinking would eliminate the unfairness. On the other hand, as women would tend to be the non-smokers and non-drinkers, their premiums and benefits would be very much as they are now. While the legal and theoretical problems will be solved, no significant effect will be made on the practical problem of ensuring adequate pensions for women.

More importantly, the issue of gender-based actuarial tables must be placed in their context in the pension system. In 1981, there were approximately 2.3 million senior citizens in Canada. Well over half were women, yet only 327,095 of these women reported any pension

113 In the areas of pensions and annuities, on this specific point, it is conceivable that the tables might be void as against public policy. The argument would be that excessive smoking and drinking are to be discouraged, and that the effect of using them in the calculation of rates for pensions and annuities is to benefit smokers and drinkers, thus encouraging these vices. I have reservations as to whether such an argument would be successful. In addition, note that other possible classification systems such as occupation-based systems do not have this problem.

114 Statistics Canada, Pensions, supra, note 7 at 89.
income on their tax returns. Women have not traditionally acquired pension rights of their own. The desegregation of mortality tables will assist those who do receive pensions, either as a result of their own employment or as survivors, but by only approximately 15 percent. A significant change in the pattern of poverty will occur if more women acquire pensions. The vesting changes discussed above should thus be accorded a higher priority than the elimination of gender-based mortality tables.

V. CONCLUSIONS

The notions of equality for women that have developed in the last twenty years place a strain on the insurance industry. The industry is being called upon to change some of its ground rules. Understandable concern has been shown about the effects of these proposed changes on the solidity of the industry. On the other hand, women are not receiving equitable treatment. Few receive pensions, and those who do receive smaller pensions than their male counterparts. Actuarial tables work to the disadvantage of women in the purchase of annuities in the private insurance market.

Admittedly, some of the problems faced by women can only be remedied through improved social programmes, particularly in the short term. However, that is not an argument for the private insurance and pension industry to ignore inequities in that industry, and it is not an argument against long-term solutions. On the contrary, insurers should work to introduce equitable treatment while minimizing the adverse effects on the solidity of the insurance industry.