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Economics Should Play a Greater Role in the Adjudication of Human Rights Claims

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Today the Ottawa-based Centre for the Study of Living Standards (CSLS), a non-profit economic research organization, released a study by Research Associates David Lewis and Ian Currie entitled *Should Economics Play a Greater Role in the Adjudication of Human Rights Claims?* They focus on two issues. First, how to establish the magnitude of monetary awards for injury to dignity due to discrimination, including racial discrimination and sexual harassment. Second, how to ensure against the loss of societal benefits that may arise from successful claims by service providers that their duty to accommodate people with disabilities (and others) would constitute an undue hardship on their organizations.

The authors find that economic analysis has a key role to play in relation to both issues. It can help counter what some legal scholars have found to be “inconsistency, incoherence and unfairness” in the granting of awards for injury to dignity. Here, economic analysis could provide an objective and independent evidentiary baseline for monetary awards. They also find that the application of Cost-Benefit Analysis, together with government assistance in some cases, could help ensure against the loss of societal benefits arising from successful claims of undue hardship.

The study concludes that the wider application of evidence from a program of economic analysis and the use of Cost-Benefit Analysis could result in an increase in the magnitude of dignity

awards and fewer successful undue hardship cases.

Dignity

As a case study, the authors examined public data pertaining to the British Columbia Human Rights Tribunal (BCHRT) over a 23-year period, 1998 to 2020. They find that:

- growth in dignity awards kept pace with or exceeded inflation in each area of discrimination examined over the period of the study;
- growth has been concentrated in six of fourteen areas of discrimination, namely: racial discrimination, disability, gender, gender identity or expression, sexual harassment, and pregnancy; and,
- average awards for injury to dignity varied markedly by area of discrimination over the period.

Although some grounds for discrimination are drawing higher average monetary awards for injury to dignity than others, the authors find some evidence that, over the long term, awards for dignity appear to converge, regardless of the kind of discrimination causing the injury. In the case of BCHRT awards the size of average awards for injury to dignity due to discrimination on the basis of disability, racial discrimination, and sexual harassment (together representing about 68 percent of total awards over the study period) are strikingly similar over the study period.

Should such convergence hold in the case of the BCHRT, and also other Canadian human rights tribunals, then it might suggest that “dignity is *dignity*” regardless of the kind of discrimination causing the injury. This would not foreclose different award amounts based on case-specific factors such as the extent and severity of the discriminatory practice. Economic research could shed further light on this possibility.

The Duty to Accommodate

Under federal and provincial human rights codes, employers and service providers have a duty to accommodate employees and members of the public through the removal of discriminatory barriers. This duty applies “up to point of undue hardship” for the entity providing the accommodation.

Where employers and service providers claim that undue hardship makes it impossible to make the accommodation in question, the authors conclude that the use of Cost-Benefit Analysis would help prevent undervaluation of accommodation and that this would help avoid what the Supreme Court of Canada has called an unreasonable focus on costs in such cases.

In situations where Cost-Benefit Analysis indicates that the accommodation in question is worthwhile to society as a whole but not to the service provider, then the authors indicate that federal or provincial funds should be available to ensure that the accommodation is made. They suggest that federal and provincial human rights tribunals may wish to consider the incorporation

of Cost-Benefit Analysis, along with the necessary governance requirements into their administration of undue hardship cases.

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The **Centre for the Study of Living Standards (CSLS)** is a national, independent, Ottawa-based not-for-profit research organization. Its primary objective is to contribute to a better understanding of trends and determinants of productivity, living standards, and economic wellbeing in Canadians through research.
