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Should Economics Play a Greater Role in the Adjudication of Human Rights Claims? The Examples of Injury to Dignity and the Duty to Accommodate

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ABSTRACT

This paper examines whether economic analysis can help provide firmer foundations for the adjudication of human rights claims in establishing monetary awards for injury to dignity and, in accommodation cases, better capturing benefits for society. In relation to injury to dignity, it explores the prospects for establishing an objective evidentiary baseline through a program of independent economic research. In the area of accommodation, the paper considers if the wider use of Cost-Benefit Analysis could help prevent undervaluation of accommodation and whether governments should help cover the incremental cost of accommodation in some cases.

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Should Economics Play a Greater Role in the Adjudication of Human Rights Claims? The Examples of Injury to Dignity and the Duty to Accommodate

Executive Summary

In 2018 the Human Rights Tribunal of Ontario awarded a victim of sexual harassment $200,000 in damages for injury to her dignity, feelings, and self-respect. The amount of this award represents one of the highest to date in Canada for injury to dignity. However, economic analysis was not used in arriving at the quantum of the award in this case and, more generally, is rarely central to the adjudication of human rights claims in Canada or other jurisdictions. This paper explores whether economic analysis can help courts and tribunals resolve challenges in formulating decisions and monetary remedies for human rights claims. Two areas are examined: injury to dignity and the duty to accommodate.

The notion of human dignity underpins all human rights. Valuing dignity represents one of the most vexing problems in the adjudication of human rights cases. Some within the Canadian legal community have suggested that monetary awards for the loss of dignity rights have been too low. Others have pointed to recent tribunal awards for injury to dignity as representing new high watermarks that demonstrate the willingness of tribunals to considerably increase the quantum of awards. However, no independent evidence is cited on what levels might be more appropriate.

Accommodation and its corollary, accessibility, represent society-wide issues that span many fields, including human geography, urban planning, and human rights. Under the duty to accommodate, human rights legislation requires employers and service providers to change rules, policies, or practices to enable all persons to participate fully in society.

Monetary remedies in both areas are, in some instances, capped by legislation. Injury to dignity is limited by statutory caps on monetary awards for infringement of dignity in some jurisdictions, and statutory language limits monetary accommodation awards up to the point of undue hardship for those with a duty to accommodate.

The common challenge for adjudicators in both areas arise from the quantification of intangibles and non-monetary harms. Can economic analysis help?

Awards for Injury to Dignity

This paper reports on the results of an empirical analysis conducted by the authors using data on the British Columbia Human Rights Tribunal (BCHRT) monetary awards for infringement of dignity and by ground of discrimination. Four main findings of the empirical analysis emerge:

- average awards for injury to dignity vary markedly by area of discrimination over the period of the study (1998-2020 third quarter);

- growth in dignity awards kept pace with or exceeded inflation in each of fourteen areas of discrimination over the period of the study;

- while there has been constant-dollar growth in the aggregate of all dignity awards, such growth has been concentrated in six of the fourteen areas of discrimination, namely: racial discrimination, disability, gender, gender identity or expression, sexual harassment, and pregnancy; and,

- racial discrimination and gender-related issues are found to dominate growth in awards for injury to dignity.

Should some grounds for discrimination be expected to draw higher average monetary awards for injury to dignity than others? Or, over the long-term and across many different cases, should average awards for injury to dignity be expected to converge and growth simply follow the rate of inflation? Some evidence is emerging in support of a convergence hypothesis, at least in the case of the BCHRT. For example, average BCHRT dignity awards for disability and sexual harassment, two quite different forms of discrimination, show strikingly similar average awards for injury to dignity over our 23-year study period of $7,121 and $7,408 respectively. Moreover, these two categories show the highest volume of cases, together accounting for just under 60 percent of total cases over the study period.

The empirical analysis of BCHRT dignity awards does not directly answer the questions posed above. But it does suggest that economic approaches might help establish whether awards for injury to dignity are, as some observers believe, too low and whether the magnitude of awards should converge. Such economic valuation can provide a baseline against which to develop monetary remedies without dictating what level of awards may be just under the particular circumstances of each case.

The Duty to Accommodate Up to the Point of Undue Hardship

Under federal and provincial human rights codes employers and service providers have a duty to accommodate employees and others through removing discriminatory barriers related to prohibited grounds of discrimination. This duty applies “up to point of undue hardship” for the entity providing the accommodation. Although some provincial policy guidelines indicate that the benefits of accommodation are to be taken into account, cost represents the dominant factor when tribunals determine whether a respondent’s claim of undue hardship is legitimate. Not accounting for social and economic benefits creates a risk that undue hardship claims may succeed even though the accommodation in question would result in net benefits to society.

Whatever view one may take on undue hardship defences and decisions today, there remains the reality that failure to account for benefits in specific circumstances can leave society without the full improvements justified by the very same analysis that established the

requirements in the first place. This gives rise to key questions: If benefits accrue to society but not to the employer or service provider, is there an economic rationale for some form of government assistance to address what might be seen as a market failure? In cases where the business in question is too small, or is unable for some other legitimate reason, to finance the required accommodation, regardless of a positive cost-benefit outcome, should the responsibility fall on government to provide the necessary assistance?

In accommodation cases, the undue hardship defence currently relies largely on a cost-accounting approach. The wider use of Cost-Benefit Analysis, conducted according to guidelines established by human rights tribunals or commissions, could help ensure against the undervaluation of accommodation recognized by the Supreme Court of Canada to exist under the current approach. This paper also considers whether governments should help cover the cost of accommodation in cases where externalities mean that benefits would not accrue to the particular organization subject to challenge.

The authors of this report find that the application of economic analysis in the adjudication of human rights claims could lead to higher financial awards for injury to dignity and fewer successful claims of undue financial hardship in cases addressing the duty to accommodate. At the same time, the authors conclude that a program of ongoing empirical economic research is required to validate this finding, and to provide tribunals with a baseline of economic evidence to assist adjudicators in the task of establishing awards on a case-by-case basis.

Should Economics Play a Greater Role in the Adjudication of Human Rights Claims? The Examples of Injury to Dignity and the Duty to Accommodate

1.0 Introduction

Human rights principles are often reflected in economic thought, methods, and policy, but economic analysis rarely enters into the legal adjudication of human rights claims. This paper explores whether scope exists for economic analysis to help courts and tribunals resolve challenges in formulating decisions and remedies for human rights claims. Two areas are examined: injury to dignity and the "duty to accommodate." Under this duty, human rights legislation requires employers and service providers[1] to change rules, policies, or practices to enable all persons to participate fully in society.

Remedies in both areas can take various forms. In some jurisdictions, there are statutory caps on monetary awards for infringement of dignity. Across many jurisdictions, there exists statutory language to limit accommodation awards up to the point of undue hardship for those with a duty to accommodate. The common challenge for adjudicators in both areas arises from the quantification of intangibles. Can economic analysis help?

The authors of this report believe it can. With respect to injury to dignity, the economic analysis of intangibles has potentially much to offer but has thus far been largely untapped. In the area of duty to accommodate, economic analysis offers a proven method—namely, Cost-Benefit Analysis—for use in evaluating the potential net benefits (benefits minus cost) in the consideration of claims of undue financial hardship that may be claimed by those with such a duty.

The protection of human dignity is an inalienable human right under the *Universal Declaration of Human Rights* proclaimed by the United Nations (UN) General Assembly in 1948. It has been ratified by Canada, the United States, and 192 other countries. On the other hand, the protection of the right to accessible, barrier-free communities for people with disabilities belongs to a class of human rights that are acquired through legislative initiatives. Whereas inalienable rights are, in theory, rights due to individuals regardless of financial cost, cost may be a consideration in granting access to acquired rights. Even in the case of inalienable rights, cost can play a role in protecting them—witness the existence of statutory caps on awards for injury to dignity.

[1] The term "service provider" may refer to profit, not-for profit entities, and public entities. In some cases, such as the *Accessible Canada Act* (S.C. 2019, c 10, s 2), the term carries specific meaning set out in the statute. The use of the term "service provider" has come under some criticism in healthcare circles as ambiguous and confusing and as representing a commodification of health care professionals (Beasley, Roberts & Goroll, 2021).

In cases involving injury to dignity, a central issue for adjudicators is the monetization of damages.[2] Legal scholar Jason Varhuas writes that the courts have struggled and largely failed to articulate a coherent, rational, and worked out law of human rights damages, including for injuries to human dignity (Varhuas, 2016). He finds little guidance in the legal authorities on the approach to be taken when establishing the amount of an award of damages. According to Varhuas, incoherence, inconsistency, and unfairness are the inevitable results.[3] As Canadian legal scholar Kent Roach explains, after initial optimism, damages have become a disappointing remedy for human rights violations in Canada, New Zealand, South Africa, the United Kingdom, and the United States (Roach, 2019). In 2019, the Australian Human Rights Commission (AHRC) reported that the monetary awards by Australian courts in sexual harassment cases have been low. The AHRC recommended that further research be conducted on the award of damages in such matters (Australian Human Rights Commission, 2019). In response to this recommendation, a committee of the Law Council of Australia submitted that: "Committee members have also identified that greater clarity on the issue of monetary compensation, and how to classify and calculate it would be welcome" (Law Council of Australia, 2019, p. 35).[4]

In human rights cases involving accommodation, it is often a challenge to achieve a balance of costs and benefits that arise where cost is claimed to be a legitimate constraint to granting rights claimed by individuals. Courts and tribunals in Canada and other jurisdictions, as well as legal scholars, are looking for means by which to balance claims of undue cost to the employer or service provider with the benefits of granting acquired rights. These acquired rights derive from such landmark legislative initiatives as the *Accessible Canada Act*, the *Americans with Disabilities Act*, and Australia's *Disability Discrimination Act*.[5]

A 2007 Supreme Court of Canada (SCC) decision called for a broader perspective on benefits. In *Council of Canadians with Disabilities v. VIA Rail*,[6] the Court reviewed the decision of the Canadian Transportation Agency (CTA) ordering Via Rail to modify passenger rail cars to make them wheelchair accessible. The Court found that, in almost every case, a factor relied on to justify the continuity of a discriminatory barrier is the cost of reducing or eliminating it to accommodate the needs of the person seeking access and that this is a legitimate factor to consider. However, the Court also cited the SCC admonition in the case of *Grismer*[7] that tribunals must be wary of putting too low a value on accommodating the disabled.

How can such value be ascertained? In Canada and abroad, members of the legal community, the courts, and those charged with adjudicating human rights cases often confront

[2] For ease of exposition in this paper, the single term "dignity" is used although in a Canadian domestic human rights context the typical formulation is often "dignity, feelings and self-respect."
[3] Varhuas' book *Damages and Human Rights* (2016) along with his other scholarly work has been cited by the UK Supreme Court, English High Court, High Court of Australia, Federal Court of Australia, Victoria Court of Appeal, New Zealand Supreme Court, and New Zealand High Court.
[4] The Law Council, which was established in 1933, represents 16 Australian state and territory law societies and bar associations.
[5] A list of illustrative national legislative initiatives is found in Annex II.
[6] *Council of Canadians with Disabilities v. VIA Rail*, [2007] 1 S.C.R. 650.
[7] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868. [Grismer].*

the challenge of determining monetary awards for injury to dignity and how to deliver decisions in accommodation cases that better capture benefits for society. This paper examines whether economic analysis could provide firmer foundations in the adjudication of human rights cases in these two areas.[8]

1.1 Plan of the Paper

This paper first discusses the relationship between human rights and economic analysis, how it has evolved, and where it stands today. It then provides an overview of selected institutional and legal features of the adjudicatory system for human rights within Canada. It explores the role of economic analysis in the Canadian adjudication of, and remedies for, human rights cases within this institutional and legal context: first in decisions on injury to dignity, and then in decisions on accommodation up to the point of undue hardship. It then discusses how economic analysis might contribute to the adjudication process and the determination of remedies. The concluding section presents observations on the implications of these circumstances for strengthening the role of economic analysis in the Canadian human rights adjudicatory process.

2.0 Economic Analysis and Human Rights: An Overview

Classical welfare economic analysis defines an improvement in the allocation of resources as a shift in resource allocation in which any further change would make someone worse off and no one better off.[9] Under this rule there can be many resource allocations that represent maximum utility (benefit) for society. Traditional welfare theorists regarded value judgements about which allocation is better or best as the province of others, such as policy makers and elected officials, not economists.

Welfare economic analysis has moved beyond its grounding principle of maximizing utility—achieving the greatest good for the greatest number. In parallel with the 1948 UN *Declaration on Human Rights* and subsequent evolution of human rights law and practice, attention in economic analysis has turned from positivist utility-maximization to normative aspects of distributional equity, fairness, and justice. John Rawls (1999) and Amartya Sen (2009) were influential in advancing the view that indifference in economic analysis to the distribution of resources, rights, and obligations is an ethical proposition of traditional welfare economic analysis that is inconsistent with the institutional embrace of human rights.

[8] This paper is concerned with areas of economic analysis pertaining to the valuation of intangibles, namely commodities, assets, goods, and services for which functioning markets from which to infer their monetary value do not exist. The paper is not concerned with the economic efficiency of rules and laws.

[9] Vilfredo Pareto (1848–1923) injected scientific objectivity into the utilitarian ethical framework by defining what constitutes an optimal improvement in utility (economic welfare). The definition constitutes a rule that states that any social change is desirable that results in everyone being better off, or someone being better off and no one being worse off, than before the change.

Analytical practices in economic analysis have also evolved. Ezra Mishan (1967) was among the first post-WWII economists to quantify the non-market costs of environmental pollution, demonstrating the power of economic analysis to address intangible effects and express their value in monetary terms. Since then, practices such as contingent valuation, stated preference analysis, and hedonic pricing,[10] alongside revealed preference analysis (often regarded as the gold standard analytic approach) have become commonplace in regulatory contexts.

These economic practices facilitate the valuation of intangible costs and benefits for which functioning markets, in which prices reflect value, do not exist. Such intangibles include the value of human life for safety regulations, the economic value of air quality and greenhouse gases, and people's valuation of privacy.[11]They also include the valuation of what are known as existence values. This refers to the value of goods and services among people who do not intend to consume them but are nonetheless willing to share in the cost of ensuring their provision. Examples include the value of species at risk and the existence value attached by able-bodied people to communities that are fully accessible to people with disabilities.

Cost-Benefit Analysis (CBA) is routinely used to value intangible benefits and costs in establishing government regulations. The scope of such analysis is outlined in the Treasury Board of Canada's *Policy on Cost-Benefit Analysis* (2018) and *Cost-Benefit Analysis Guide* (2007) and by the Office of Management and Budget in the United States (1993 & 2003). Steps to expand the scope of CBA were introduced in the US under the Obama Administration (United States, 2011). Legal scholar Cass Sunstein was head of the Office of Information and Regulatory Affairs when President Obama issued an Executive Order that made dignity an official part of regulatory CBA.[12] Action to extend the scope of CBA further have been taken through an executive order issued by US President Biden. Equity and non-discrimination have been made

[10] Hedonic pricing is a model that identifies the internal and external factors and characteristics that affect an item's price in the market. As described by Hargrave (2020), hedonic pricing is most often seen in the housing market, since real estate prices are determined by the characteristics of the property itself as well as the neighborhood or environment within which it exists. According to Hargrave, hedonic pricing captures a consumer's willingness to pay for what they perceive are environmental differences that add or detract from the intrinsic value of an asset or property.

[11] Estimates of the economic value (or cost) of carbon dioxide's impact on global warming represents an example of how economists value such intangibles. The cost of CO_2 is currently estimated at about $50/tonne, and such estimates are employed to help establish carbon-pricing policies and in the Cost-Benefit Analysis of "green" investment proposals.

[12] Sunstein has highlighted the importance of the 1995 case of *Vande Zande v. Wisconsin Dep't of Admin* as setting important precedents for accessibility and accommodation issues under the US *Americans with Disabilities Act* (ADA) (Sunstein, 2007). On appeal, the decision of the Court, presided over by Judge Richard Posner, renowned for his scholarly contributions in the field of law and economics, established two precedents. First, the Court ruled that benefits matter as well as costs in making a determination of what constitutes undue financial burden. Second, the Court established a narrow definition of benefit. The Court ruled that the harm involved was "merely stigmatic" (an injury to dignity) and therefore too insignificant to warrant mandatory accommodation. However, in his critique of the Court's decision, Sunstein argues that stigmatic harms, notwithstanding the difficulty in quantifying them, go the heart of the human rights protected under the ADA. In effect Sunstein called for the quantification of human dignity in the balancing of costs and benefits.

required considerations (United States, 2021).[13] This will likely involve economists in making recommendations from among different Pareto optimal positions, which, as discussed above, is rejected by traditional welfare theorists. Yet there are examples of the economic profession already moving away from this restriction. For example, including equity considerations in the analysis of pathways for economic development and poverty reduction is increasingly a common practice (see, for example, World Bank, 2011).

On the one hand then, it seems that economics is poised to help in the adjudication of human rights. On the other hand, contingent valuation and the various other economic approaches to valuing intangibles are not without controversy and their potential use in the field of human rights adjudication comes with conceptual, technical, and administrative caveats.

3.0 Economic Analysis and the Adjudication of Human Rights

3.1 The institutional and legal context

Canadian federal, provincial, and territorial human rights commissions and tribunals or analogous institutions implement Canadian human rights legislation. They operate within a complex legal setting.

At the provincial and territorial level, legislation includes various codes of human rights that apply to provincial, territorial, and municipal governments, businesses, non-profit organizations, and individuals within their respective jurisdictions. There are commonalities across provinces or territories with respect to protected grounds and areas, but there are also some differences.[14]

At the federal level, the *Canadian Human Rights Act* of 1977 applies to businesses that are federally regulated and to federal government entities regardless of where they are located.[15] On July 11, 2019, the *Accessible Canada Act* came into force, creating new duties and functions for the Canadian Human Rights Tribunal (CHRT). The Act creates new structures and roles to deal with compliance and enforcement, including a new Accessibility Commissioner as part of

[13] US President Biden's January 20, 2021, *Memorandum to Heads of US Executive Departments and Agencies on Modernizing Regulatory Review* calls for procedures that take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities (United States, 2021).

[14] See Canadian Centre for Diversity and Inclusion (2018) for a comparison of protected areas across federal and provincial jurisdictions as of the end of 2017.

[15] All legislation in Canada must be consistent with the *Canadian Charter of Rights and Freedoms* (1982). An individual can only use the Charter to challenge a governmental decision, action, or law (such as a provincial human rights code) on the grounds that it does not offer the protection to individuals provided by the Charter. For example, while the *Ontario Human Rights Code* and the *Charter* share common objectives, and they are often interpreted in light of one another, there are some important differences between the purposes of these statutes and ongoing debate about how they should relate to each other (Ontario Human Rights Commission, 2015).

the CHRT. In addition, the *Act* provides a new mandate to the CHRT to decide appeals when either the complainant or the regulated organization disagrees with a decision made by the Accessibility Commissioner (Canadian Human Rights Tribunal, 2019).

The principal administrative agency for human rights across many Canadian jurisdictions is a commission. Commissions exercise a variety of functions as set out in their constitutive legislation, including advocacy and education. But most commissions have two main functions: gatekeeping for entry to formal adjudication processes and mediation to resolve disputes before they are moved to formal adjudication processes. There are exceptions. Amendments to the BC *Human Rights Code* in 2003 eliminated the BC Human Rights Commission (although it was re-established in 2018) and introduced a direct access model to the BC Human Rights Tribunal. In Ontario, in 2008, amendments to the Ontario *Human Rights Code* introduced a direct access model, with all applications filed with the Human Rights Tribunal of Ontario.

Tribunals or analogous bodies often work in conjunction with commissions to investigate matters that are unresolved by commissions and matters of public interest related to human rights infringements. Tribunal decisions are subject to judicial review. In Saskatchewan, the provincial human rights tribunal was abolished on July 1, 2011. Its powers were transferred to the Court of Queen's Bench for Saskatchewan, which conducts hearings on cases referred to it by the Saskatchewan Human Rights Commission. At the federal level, the Canadian Human Rights Tribunal is the main enforcement body for provisions of the *Canadian Human Rights Act*. However, other federal bodies, such as the Canadian Transportation Agency (CTA), may also hear human rights complaints within their areas of jurisdiction.

Resolving human rights disputes before they enter formal adjudication processes is generally regarded as a good thing across all Canadian jurisdictions (see discussion in MacNaughton, 2007). The number of disputes resolved through mediation is very typically presented by human rights commissions and tribunals as a key performance indicator (KPI) of success. There is little public information available on the content of mediation settlements, monetary or otherwise. It is not known what economic analysis, if any, is used during mediation processes.

The legal context for awards in the case of injury to dignity or accommodation are at least as complex, if not more so, than the institutional context. Damages for injury to dignity constitute a subset of "general damages" but extend to compensation in other areas depending on the legal context. Some within the international legal community suggests that establishing the monetary awards for human rights damages, including those for injury to dignity, could be better achieved through existing legal paradigms, namely tort law.[16] It is beyond the scope of this paper to consider this legal debate, but it is noteworthy that Roach (2019) argues that the answer to the "disappointing remedy" for human rights violations is not to return to tort principles. Rather,

[16] A tort is a civil wrong, as contrasted with a criminal wrong, for which the wrongdoer is said to owe a legal duty to the injured party for conduct that falls below acceptable standards and for which the injured party can prove loss resulting from the wrongdoer's conduct (Wearing, 2019).

Roach suggests looking at public law approaches that allow principles of proportionality to discipline and structure the exercise of remedial discretion.

Legislative caps on monetary awards for damages to dignity are another feature of the Canadian legal landscape for human rights adjudication. In Saskatchewan, the Court of Queen's Bench is limited to awarding up to $20,000 for injury to dignity, feelings, and self-respect. In Manitoba, *The Human Rights Code Amendment Act* received Royal Assent on May 19, 2021. Among other items, the amendment sets the maximum financial award for injury to dignity, feelings or self-respect stemming from a human rights complaint at $25,000.[17] Other provincial jurisdictions (e.g., Ontario and British Columbia) have had legislated caps on monetary awards for damages to dignity in human rights cases in the past, but this is no longer the case today.

The federal Canadian Human Rights Tribunal (CHRT) is limited by the *Canadian Human Rights Act* to awarding an amount not exceeding $20,000 for any pain and suffering that the victim experienced as a result of the discriminatory practices.[18] The *Act* makes no reference to the term "dignity." Nonetheless, the CHRT *Guide to Understanding the Canadian Human Rights Tribunal* advises complainants to describe how the treatment they received affected them: "For example, the Complainant may have had hurt feelings or felt a loss of dignity; lost money or income; their emotional or mental health may have suffered; or, they may have lost an employment opportunity" (Canadian Human Rights Tribunal, 2016, p. 26). It is unclear how the CHRT may include injury to dignity within its assessment of what monetary remedies for pain and suffering may be appropriate.

Dignity considerations are often found in the analysis sections of CHRT decisions. However, the loss of dignity as a factor in arriving at monetary awards for pain and suffering is seldom if ever cited in the remedy sections of the CHRT decisions.

On April 8, 1999, the Honourable Anne McLellan, Minister of Justice, announced the establishment of an independent panel to conduct a review of the *Canadian Human Rights Act*. The panel was chaired by the retired Supreme Court of Canada Judge, the Honourable Gérard V. La Forest. The panel's report, delivered to the Minister in June 2000, states:

> We also think that compensation for "pain and suffering" should be renamed to refer to compensation for "dignity, feelings and self-respect." The Act formerly referred to suffering with respect to "feelings and self-respect." We would add the term dignity as

[17] Manitoba's Minister of Justice and Attorney General said on third reading of the bill: "The bill caps the amount of damages in one category of award, that being the category of injury to feelings. It would cap that at $25,000. I would want to make clear, the average complaint where you have an award in this category results in something like $10,000. So this cap is being set well in excess of the average award. But, of course, there would be—there would continue to be no cap whatsoever to exemplary damages, no cap whatsoever to compensation for financial losses, losses pertaining to expenses or benefits." (Manitoba, Legislative Assembly, Hansard, 42nd Leg., 3rd Sess, Vol. 66 (May 19, 2021)).

[18] Beyond awards for pain and suffering, the *Canadian Human Rights Act* permits the CHRT to order compensation to the victim not exceeding $20,000 if the person who engaged in the discriminatory practice acted wilfully or recklessly (commonly referred to as exemplary damages).

> the Supreme Court of Canada has recently stated in the Law case that "dignity" is at the heart of the concept of equality (Canadian Human Rights Act Review Panel, 2000, p. 7).

A formal federal government response to the panel's report was not immediately forthcoming. As late as 2004 the Chair of the CHRT, J. Grant Sinclair, wrote:

> The government has had the report of the La Forest Panel in its hands for over four years, and the time for "cut and paste" solutions is long past. Canada prides itself on its human rights record; but if the promise of equality contained in the Canadian Human Rights Act is to ring true, it is time for a comprehensive, well thought-out overhaul of the human rights complaints process (Sinclair, 2004, p.3)

We have been unable to discover if the federal government provided a formal response to the panel's report.[19]

In the CHRT case *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*[20] the award amount respected the $20,000 limits for any one individual. While the total award for all individuals that may be covered by a discrimination complaint is far greater and may be viewed as a systemic remedy, it does raise the question of whether economic analysis could be used to help judge the reasonableness of the cap on awards.[21]

In summary, human rights tribunals across Canada have the authority to award general damages for breaches of their respective human rights codes, including but not limited to damages for injury, dignity, feelings and self-respect. However, the extent of this authority is subject to their jurisdiction and constitutive legislation (i.e., it is different from that of courts).[22] The legal landscape continues to evolve.

3.2 Measuring how economic analysis is reflected in human rights decisions

Our starting point for assessing the role of economic analysis in human rights adjudication is a keyword search of common economic terms (such as CBA) within human rights decisions made by Canadian tribunals and, as a point of comparison, Canadian courts.[23] In

[19] An answer to an inquiry by the authors to the federal Department of Justice on whether a formal response to the Canadian Human Rights Act Review Panel report was ever delivered has not been received at this time of writing.
[20] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2.
[21] This case and ongoing litigation raises issues respecting the authority of human rights tribunals to grant systemic remedies in human rights litigation that are beyond the scope of this paper (see Brodsky et al., 2017, for a discussion of systemic remedies in a Canadian human rights context).
[22] The choice of forum (e.g., human rights tribunal or the courts) for pursuing a human rights claim involves numerous legal considerations as well as cost considerations for the complainant(s). See Flaherty (2018).
[23] Future research could use rapidly advancing artificial intelligence, machine learning, and text analytics approaches to interrogate CanLII textual decisions.

Canada, the non-profit Canadian Legal Information Institute (CanLII) has created a database of court judgments from all Canadian courts, including the Supreme Court of Canada, federal courts, and the courts in all of Canada's provinces and territories. The CanLII database also contains decisions from almost all tribunals nationally, including human rights tribunals.[24] Table 1 (below) reports the results of a keyword search within the CanLII database of human rights decisions from Canadian tribunals and courts.

Table 1

Keyword search results from decisions on human rights cases issued by Canadian human rights tribunals and courts (2003-2013 and 2014-2019)*

Keywords	BY TRIBUNALS ALONE		BY COURTS ALONE		BY COURTS & TRIBUNALS	
	2003-2013	2014-2019	2003-2013	2014-2019	2003-2013	2014-2019
	18,555 Cases	16,968 Cases	3,372 cases	3,764 Cases	21,927 Cases	20,732 Cases
	Number of Instances	Number of Instances	Number of Instances	Number of Instances	Number of Instances	Number of Instances
"Dignity"	1,307	1,446	416	454	1,723	1,900
"Undue Financial Hardship"	412	530	60	97	472	627
"Economic Evidence"	5	4	4	3	9	7
"Economic Analysis"	5	2	7	7	12	9
"Cost Benefit Analysis"	6	15	7	25	13	40
"Dignity" and "Cost Benefit Analysis"	2	5	4	21	6	26

Source: Authors' calculations (2020).

* The two periods were selected taking into consideration the temporal coverage of tribunal decisions within the CANLII database as described in Footnote 24. Future research might consider different time periods for analysis.

We examined the most recent six years for the second period (as compared with 11 years for the first period) in order to test whether economic analysis might be emerging in more recent cases. Table 1 (above) shows that the terms "dignity" and "undue financial hardship" are found in the decisions published by both tribunals and courts, although more frequently in decisions

[24] The coverage of human rights tribunals' decisions recorded within CanLII varies by jurisdiction. For example, CanLII has continuous coverage of 4,138 decisions by the BC Human Rights Tribunal since 2008, but only partial coverage (2,645 decisions) prior to 2008; coverage of 110 decisions made by the Saskatchewan Human Rights Tribunal (SHRT) prior to July 2011 and 3 decisions made by the Saskatchewan Human Rights Commission (SCHRT) during 2008. (As previously noted, the SHRT was abolished on July 1, 2011. Its powers were transferred to the Court of Queen's Bench for Saskatchewan). CanLII also has continuous coverage of 689 decisions by the New Brunswick Labour and Employment Board (NBLEB) since 2003 and partial coverage (72 decisions) issued before 2003. However, not all the NBLEB decisions represent outcomes from human rights inquiries. The Board has responsibilities for adjudicating a broad range of employment and labour matters beyond New Brunswick's *Human Rights Act*.

delivered by tribunals than those delivered by courts. The mention of economic analysis or related economic techniques and concepts, such as CBA, is rare in the final text of decisions. It is also rare in proportion to the use of terms such as "dignity" and "undue financial hardship." The term "Cost-Benefit Analysis" appears in decisions more often in the 2014-2019 period (albeit only 40 instances out of almost 21,000 cases) than in the 2003-2013 period (13 instances).

These results constitute suggestive but limited evidence of a more recognized role for economic analysis in human rights adjudication processes and decisions in Canada today. But as we shall now see, there is other evidence to consider, both qualitative and quantitative.

3.3 Economic analysis and remedies for intangible damages to human dignity

3.3.1 What is dignity?

Inevitably, larger questions loom even when the scope of inquiry is confined to monetary remedies for damages to intangibles in human rights cases. What is human dignity? Under what circumstances may it be judged as being breached? How should compensation—monetary or otherwise—be assessed when dignity is breached?

The philosophical literature on human dignity relevant to answering such questions stretches back at least to Immanuel Kant and the Enlightenment and, in theological thinking on human dignity, long before that.[25] These larger questions are relevant today. Consider the attention being given to human rights, including human dignity, by governments, human rights organizations, and other stakeholders under conditions of today's global pandemic. Consider also that the infringement of human dignity is one of the central issues within debates over privacy as a human right in the digital age (for examples, see Office of the Privacy Commission of Canada, 2019, and Balsillie, 2021).

In 1999, the Supreme Court of Canada contributed its views on the idea of human dignity in the context of section 15 of the Canadian *Charter of Rights and Freedoms* and the case *Law v. Canada*.[26] The Court's unanimous decision, written by Justice Iacobucci, said that the purpose of section 15 was to prevent the violation of human dignity and freedom.[27] This decision included a description of what human dignity means and a three-part test for determining whether an individual's section 15 rights had been violated, which was devised by the Court. Both the

[25] In 2007, Sir Robert Grant Hammond (1944-2019), a New Zealand jurist, law professor, and judge of the New Zealand Court of Appeal, delivered a widely cited speech (*Beyond Dignity*) that reviews how human dignity has been conceptualized over time and incorporated into law (Hammond, 2007).
[26] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R 497.
[27] Section 15 of the Charter states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."

description of dignity and the test proved to be controversial. Subsequently, in *R v Kapp*,[28] the Supreme Court of Canada said:

> As critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be…Criticism has also accrued for the way Law has allowed the formalism of some of the Court's post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike ([2008] 2 S.C.R. 483 at paragraph 22).

3.3.2 Purpose of monetary awards for damages to human dignity

When breaches to human dignity can be shown, many jurisdictions provide for monetary awards, but these are regarded as one of several alternative remedies. Many tribunals recognize the importance of apologies and other forms of non-monetary acknowledgement of breaches. There are different views on the efficacy of non-monetary awards in human rights or other contexts.

US law professor Dinah Shelton (2015) suggests that non-monetary awards can be difficult to adjudicate, formulate, administer, and enforce, at least in an international human rights law context.[29] On the other hand, Canadian law professor Jeff Berryman (2017) suggests that non-monetary awards may be justified because the loss as experienced by the victim is actually lessened as a result of an apology or because the weight of policy arguments supporting apologies.

A common law maxim often appears within the legal literature on remedies: For every right, there is a remedy, and where there is no remedy, there is no right.[30] But beyond this, the main rationales for providing monetary remedies in the field of human rights commonly include

[28] *R. v. Kapp*, [2008] 2 S.C.R. 483.

[29] There are examples of Canadian human rights cases where the applicant who suffered damages to dignity has either explicitly not sought a monetary award for an infringement and even, in some cases, rejected a monetary award for damages that tribunals believed should have been made. For example, in a 2002 case before the BC Human Rights Tribunal (*Rainbow Committee of Terrace v. City of Terrace* (2002 BCHRT 26)), the Complainant did not seek a monetary award from the Respondent, stating that it did not wish the citizens of Terrace to be financially penalized for the Respondent's decision. The BCHRT adjudicator nonetheless stated: "I would have no difficulty, on the evidence before me, in finding that there was significant injury to the dignity, feelings, and self-respect of members of the Complainant. If requested, I would have made a monetary award under this head of damages and it would have been in the higher range of the awards given by this Tribunal."

[30] Attributed to English Judge Sir William Blackstone (10 July 1723–14 February 1780).

restitution, compensation, rehabilitation, and deterrence.[31] In general, punishment is not a factor in setting award amounts except in the context of exemplary damages.[32]

3.3.3 Establishing monetary value for injury to dignity—Canadian and international approaches

Economic analysis seldom enters into setting the amount of an award for injury to dignity in Canada and other foreign jurisdictions. Instead, common models for establishing the amount of award found in Canada and other jurisdictions include the application of various "decision factors" (criteria); precedent; principles, including proportionality and interest balancing; and various forms of award banding.

Decision factors

In Canada, a 2005 Human Rights Tribunal of Ontario (HRTO) decision in the case of *Sandford v Koop*[33] has been influential. In this case, the HRTO accepted a submission from the Ontario Human Rights Commission (OHRC) that drew on a variety of previous cases to set out criteria that might be used in assessing the appropriate quantum of general damages. These factors are:

- humiliation experienced by the complainant;
- hurt feelings experienced by the complainant;
- a complainant's loss of self-respect;
- a complainant's loss of dignity;
- a complainant's loss of self-esteem;
- a complainant's loss of confidence;
- the experience of victimization; and,
- vulnerability of the complainant.[34]

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[31] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Human Rights Tribunal of Ontario stated that "While principles from other areas of law may be useful analogies, the Tribunal's approach to the exercise of its remedial discretion must be centered in the values of and statutory language in the Code. Code damages are meant to compensate, not punish, and Code violations, unlike some other areas of law, arise in a variety of very different social and legal contexts." See also MacNaughton and Connell (2009) for general discussion of remedial powers of Canadian human rights tribunals and, specifically, particular types of monetary and non-monetary remedial awards.

[32] "Exemplary damages" refers to an amount of money that someone who commits an offence has to pay, which is intended to be large enough to prevent them or others from committing similar offences in the future (Cambridge Online Dictionary, 2021).

[33] *Sandford v Koop*, 2005 HRTO 53

[34] In 2016, one human rights lawyer's review of factors and criteria drawn upon by the BC Human Rights Tribunal in arriving at appropriate quantum for injury to dignity found that: "Recent decisions of the BC Human Rights Tribunal have begun to lay out an analytical framework that counsel and parties can use to assess the facts of a case and anticipate the possible range of a damage award. These decisions provide lists of factors that are roughly similar

The HRTO 2010 decision in *Arunachalam v. Best Buy Canada*,[35] a case involving harassment based on pregnancy, referenced these factors ("considerations") and highlighted two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings, and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination. The first of these recognizes that the injury to dignity, feelings, and self-respect are generally more serious depending, objectively, upon what occurred. The more prolonged, hurtful, and seriously harassing comments are, the greater the injury to dignity, feelings, and self-respect. The second criterion recognizes the applicant's particular experience in response to the discrimination.

It remains that no Canadian tribunal decision citing these or analogous factors or criteria explains how they are actually applied in practice to arrive at awards or cite any evidence from economic analysis in their support.

Precedent

In Canadian common law jurisdictions, the legal doctrine of *stare decisis* obligates courts to follow historical cases when making a ruling in a similar case. The BC Human Rights Tribunal states on its website that, in deciding compensation for injury to dignity, feelings, and self-respect, it compares the facts of the complaint to other cases with similar facts and usually looks at recent cases (BC Human Rights Tribunal, 2021). Many Canadian human rights tribunals take this same approach.

Principles, including proportionality and interest balancing

Roach (2019) reports that principles of proportionality play an increasingly dominant role in human rights law to discipline and structure the exercise of remedial discretion.[36] According to Roach, principles of proportionality, such as interest balancing, can provide better tailored guidance as to when alternative remedies or sometimes no remedy at all may be justified than reliance on less nuanced absolute or qualified immunities. Roach cites the Supreme Court of Canadian Charter decision in the case of *Vancouver (City) v. Ward*[37] as one example of proportionality in that Court's reasoning. In Canada and other jurisdictions, the principle of interest balancing is sometimes applied and refers to instances where the decision to award damages, and the quantum, are subject to a balancing of the individual interest against public

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but not identical. A review of these lists reveals that there are several underlying concerns that are repeated throughout, even where they are not made explicit." (Quail, 2016: 1)

[35] *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880

[36] Jud Mathews (2017), Professor of Law at Pennsylvania State University, writes that, at the most basic level, the principle of proportionality captures the common-sensical idea that, when the government acts, the means it chooses should be well-adapted to achieve the ends it is pursuing.

[37] Vancouver (City) *v.* Ward, [2010] 2 S.C.R. 28

interest considerations, such as the importance of protecting public funds.[38] Other principles for establishing damages for intangibles are found in other jurisdictions.[39]

Banding

In some foreign jurisdictions, tribunals and the courts have taken into account ranges of monetary awards for injury to dignity.

In England, Wales, and Scotland, there is no formal limit placed upon the amount a court can award. However, the senior appeal courts have set out a range of awards for injury to feelings called the Vento scale,[40] which is informally applied by various employment tribunals hearing discrimination cases as well as by UK courts. It has been changed on occasion to take into account the rate of inflation (United Kingdom Equality and Human Rights Commission, 2018). For claims presented after April 6, 2021, the Vento bands are as follows: a lower band of £900 to £9,100 (less serious cases), a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band), and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600 (UK Tribunals Judiciary, 2021). The criteria for applying the bands are within the discretion of the employment tribunals and the courts. In general, awards made according to these bands are not intended to be punitive but rather to be compensatory. Courts and employment tribunals seek to put the claimant back into the same position (so far as is possible) as they would have been had the discrimination not happened and to "compensate for genuinely injured feelings, not to punish the service provider" (United Kingdom Equality and Human Rights Commission, 2018, p. 3).

In the US, at the federal level, the *Civil Rights Act of 1964* as amended has been called the most comprehensive undertaking to prevent and address discrimination in a wide range of contexts (Congressional Research Service, 2020). Amendments in 1991 to Title VII of the *Act* introduced a cap on damages in some discrimination cases ranging from US $50,000 for small employers to US $300,000 for employers with more than 500 employees. These caps on damages apply to discrimination on the basis of sex and also to cases brought pursuant to the *Americans with Disabilities Act*.[41] However, the caps do not apply to race or ethnicity

[38] New Zealand's *Human Rights Act* of 1993 provides that the New Zealand Human Right Tribunal must, in addition to other matters specified in the Act, take account of the requirements of fair public administration and the obligation of the government to balance competing demands for the expenditure of public money (New Zealand, 1993).

[39] Rosalind English (2013) reports that, beyond the legal principle of equity, it is not clear what standards (or principles) are applied by the European Court of Human Rights (ECHR) in establishing the amount of monetary damages for intangibles, including injury to dignity. Fikfak (2020) and Varhuas (2016) discuss how this uncertainty has had implications for other countries that are party to the *European Convention on Human Rights*. This is due in part to what is known as the "mirroring" approach. In a European context, mirroring refers to the notion that the protections afforded by domestic courts should "mirror" the rights enforced by the ECHR. This concept has been a recurring feature of judicial discussions on the nature and extent of the Convention rights in domestic laws (Masterman, 2012).

[40] Vento is the name of a United Kingdom court case that established the scale.

[41] In 2020 the US Supreme Court resolved a significant and debated question of coverage among federal courts of appeals with respect to Title VII's application to discrimination based on sexual orientation or gender identity. The Court interpreted Title VII's prohibition of discrimination "because of . . . sex" to prohibit discrimination based on sexual orientation or gender identity (Congressional Research Service, 2020).

discrimination cases brought under an alternative statutory route (42 U.S.C. § 1981) or to cases filed under state or local laws prohibiting employment discrimination (Bachman, 2017). The US federal caps under Title VII have not been adjusted for inflation or any other reason since their introduction in 1991 (see Zehrt, 2013, for an overview of the legislative history of the caps).

The research program underlying this paper did not find any Canadian banding requirements set out in statute or any guidelines that reference banding.[42] However, some observers consider that informal banding exists. For example, Monkhouse (2017) writes that in Canada the low end of the monetary spectrum involves circumstances of a few incidents, less serious incidents, and/or, in the case of sexual harassment, incidents that did not include physical touching. Conversely, the high end of the monetary spectrum includes multiple incidences, incidents of a serious nature, and physical assault and/or reprisal or loss of employment. Monkhouse reports that such implicit banding reflects the view that an award for monetary compensation must not be set so low as to trivialize the social importance of a human rights code by creating a "licence fee" to discriminate.

3.3.4 Human rights awards for injury to dignity by Canadian tribunals

The level of awards by Canadian human rights tribunals over time has drawn government and media attention. The 2012 *Report of the Ontario Human Rights Review* (Pinto, 2012) drew attention to the view from several stakeholder groups and individuals that the Ontario Tribunal awards, particularly the general damages awards, are routinely too low. According to the report, this creates a number of problems:

- a message that human rights and breaches of the Code are of limited importance;
- low damages awards impose a barrier on access to justice at the Tribunal. Access to justice is denied when it is not economically feasible or worthwhile to pursue one's rights through the human rights system; and,
- the risk that potential applicants may choose to pursue their human rights claims before the courts, where possible, in order to obtain a greater award of damages in the civil context.

Over the years since the Pinto report, some within the Canadian legal community have continued to suggest that monetary awards for the loss of dignity rights may be too low (e.g., Ranalli & Ryder, 2017; Doolittle, 2021).[43] Others have pointed to recent tribunal awards for

[42] Further research is required to confirm this preliminary research finding.
[43] Ranalli and Ryder's (2017) quantitative analysis of the textual decisions by the Human Rights Tribunal of Ontario between 2000 and 2015 found that general damages awards continue to be too low to reflect the importance of the equality rights protected by the Ontario Human Rights Code, and that, after adjusting for inflation, the data reveals that the range of awards has decreased in real terms. However, the descriptive statistics assembled by Ranalli and Ryder for Ontario did not comprehensively cover award levels by ground of discrimination. Robyn Doolittle (2021) reports that the damages these tribunals award are almost always small, typically between $5,000 and $35,000.

injury to dignity as representing new high watermarks that demonstrate the willingness of tribunals to considerably increase the quantum of awards (e.g., Sahdra, 2018; Weiler, 2021). Yet no independent evidence is cited on what levels might be more appropriate. As far as we know, no such evidence exists.

There is no national and public database of descriptive statistics maintained on human rights awards made by Canadian tribunals for injury to dignity or, for that matter, accommodation. Individual tribunals may maintain their own in-house databases on awards made over time and organized by ground, but if so, they are not available on tribunal websites or otherwise accessible to the public.[44]

Fortunately, the BC Human Rights Clinic (BCHRC)[45] maintains a public textual report, issued quarterly, on all injury to dignity decisions made by the BC Human Rights Tribunal since 1998. The BCHRC report categorizes the BC Human Rights Tribunal's injury to dignity decisions by applicable section of the BC *Human Rights Code* and discriminatory ground (BCHRC, 2020). It further draws on the textual decisions of the BC Tribunal to identify some more specific grounds, such as pregnancy and sexual harassment.

3.3.5 Analysis of BC Human Rights Tribunal awards by grounds for award

The results of our analysis of the BC Human Rights Tribunal awards for injury to dignity, categorized by the grounds for making such awards, are presented in Annex I and summarized below in Table 2.

There are 310 cases included in our database and under which awards were made for injury to dignity over the study period (1998 to 2020-third quarter).[46] As shown in Table 2, cases involving disability as the primary grounds for discrimination constitute the largest share of all cases (almost 45 percent), followed by sex at 33 percent (gender, orientation, identity or expression, sexual harassment, and pregnancy).

Table 2 indicates that average dignity awards over the period, adjusted for inflation, vary a great deal by grounds for award. After adjustment for inflation, average awards range from a low of $1,346 for discrimination on the basis of marital status to a high of $16,979 for discrimination on the basis of political belief.

Table 2 also sets out the constant-dollar annual growth in awards for injury to dignity (see column 5), again categorized by grounds for such awards. Three main findings emerge from this analysis:

[44] The BC Human Rights Tribunal website does provide a limited number of descriptive statistics on awards for injury to dignity over time.
[45] The BC Human Rights Clinic is operated by the Community Legal Assistance Society and funded by the BC Ministry of Justice. The Clinic provides free representation to complainants who have cases before the BCHRT.
[46] For reasons explained in Annex I, the number of cases included in our database will differ from case counts for the same period maintained by the BCHRT and the BCHRC.

- growth in dignity awards kept pace with or exceeded inflation in each of fourteen areas of discrimination over the period of the study;

- while there has been constant-dollar growth in the aggregate of all dignity awards (about six percent a year), such growth has been concentrated in six of the fourteen grounds for discrimination;

- awards for injury to dignity involving racial discrimination garnered the highest annual rate of growth (18.6 percent per year). Cases that address dignity in sex-related discrimination categories represent fully half the total number that grew in constant-dollar terms.

Is Dignity *Dignity:* A Convergence Conjecture

These findings give rise to important questions for future researchers to take up and for adjudicators to take into consideration. In particular, should some grounds for discrimination be expected to draw higher dignity awards than others? Or, over the long-term and across many different cases, might average awards for injury to dignity in different categories of grounds for discrimination, be expected to converge (with long-term growth in all categories simply following the rate of inflation thereafter)? In short, "is dignity *dignity*," regardless of the cause of injury?

The statistics in Table 2 raise the possibility that some convergence may be emerging, at least in the case of BCHRT awards. Compare, for example, average awards for injury to dignity due to discrimination on the grounds of disability and the grounds of sexual harassment, two quite different grounds for discrimination. At $7,121 and $7,408, respectively, average dignity awards in these two categories are strikingly similar. These two categories show the highest volume of cases, together accounting for just under 60 percent of total cases over the period. At $6,249 the average award for injury to dignity in the race, colour, and ancestry category is also similar in magnitude to the two mentioned above. Three categories of discrimination, accounting for 68 percent of the total number of cases over the 23-year period, received markedly similar average awards for injury to dignity.

Due to comparatively rapid growth and the presence of outlying values in some categories of grounds, we compared median as well average awards. The observation of potential convergence remains. Median awards for disability and sexual harassment over the study period were $4,724 and $4,382, respectively, and $5,259 for racial discrimination.

While the discussion above lends some support to the convergence conjecture, more research is needed, encompassing more than just a single human rights tribunal.

Table 2

Awards for Injury to Dignity, by Grounds for Award, 1998–2020(Q3): (in constant 2002 dollars)

PRINCIPAL GROUNDS FOR AWARD	NUMBER OF CASES INVOLVING INJURY TO DIGNITY	PERCENTAGE OF ALL AWARDS FOR INJURY TO DIGNITY	AVERAGE INFLATION-ADJUSTED AWARDS FOR INJURY TO DIGNITY	INFLATION-ADJUSTED AVERAGE ANNUAL GROWTH IN AWARDS FOR INJURY TO DIGNITY
Race, Colour, Ancestry	27	8.7%	$6,249.00	18.6%
Place of Origin	2	0.6%	$7,337.00*	0%*
Political Belief	2	0.6%	$16,979.00*	12.0%*
Religion	7	2.3%	3,337.00	0%
Marital Status	5	1.6%	$1,346.00	0%
Family Status	10	3.2%	$3,107.00	0%
Mental or Physical Disability	142	45.8%	$7,121.00	8.3%
Age	8	2.6%	$2.773.00	0%
Sex (gender)	14	4.5%	$5,746.00	9.5%
Sex (orientation)	6	1.9%	$2,725.00	0%
Sex (gender identity or expression)	2	0.6%	$14,742.00*	9.0*
Sex (gender-harassment)	42	13.6%	$7,408.00	6.9%
Sex (pregnancy)	39	12.6%	$4,051.00	0%
Source of income	4	1.3%	$1,431.00	0%

* A small number of cases in these categories mean that the average award and estimated rate of growth should be viewed with caution and regarded as preliminary.

Notes: (1) Zero growth implies that awards kept pace with inflation.
(2) See Annex I for details on sources and methods.

3.3.6 Towards a Measurement Framework

Although the valuation of intangibles is commonplace and widely accepted in many areas of public decision-making, it is still early days in the economic analysis profession for the valuation of dignity.[47] Some scholars argue that certain intangible, yet valued attributes of daily life, society, and nature, including dignity, are essentially non-quantifiable and defy monetization (Bayefsky, 2014). Nonetheless, public agencies, including those of the Canadian federal government, have been employing the results of economic analysis to value intangibles, such as the value of green space and the value of human life, for many years as one basis for a range of public policy and regulatory decisions. Yet dignity is an especially difficult concept from a measurement perspective. As previously noted in Section 1, legal scholar Jason Varhuas (2016) finds that the courts have struggled and largely failed to articulate a coherent, rational, and worked out law of injury to human dignity. The same is true in economic analysis: There is no coherent framework within which to approach the value measurement problem.

3.3.7 A 'Real-attributes Framework' for Valuing Dignity

While the idea of dignity itself is an especially abstract notion, particularly from a measurement perspective, the discriminatory grounds upon which awards are made for injury to dignity are less so. It is by taking such grounds as real attributes of dignity as a starting point that progress on measurement might be made.[48]

The standard methods for valuing human life—commonly known as the Value of Statistical Life, or VSL—is one starting point for putting into practice a real attributes framework for value dignity.[49] Currently estimated at about US $10 million, VSL is used in the CBA of prospective environmental regulations and public infrastructure investments, as well as in establishing safety-related government policies and programmes.[50]

Professor Joni Hersch (2018) employs VSL techniques to estimate the value of sexual harassment. Hersch calculates the risk of sexual harassment by gender, industry, and age, and finds that US white females, but not non-white females,[51] receive a compensating wage

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[47] For some, monetizing items such as species at risk, and especially human life, is abhorrent. On the other hand, people do assign value to a great many intangibles in life, at least implicitly, by virtue of trade-offs we make in everyday living, and in public policy decisions. Estimating the monetary value implied in such trade-offs is often possible, if only imperfectly. A great deal of economic analysis is devoted to such estimation.

[48] Section 15(1) of the *Canadian Charter of Human Rights and Freedoms* provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Evolving jurisprudence with respect to Section 15(1) suggests that the Supreme Court of Canada is moving towards a real-attributes framework analysis and away from assessing "essential human dignity" (Canada, Department of Justice, 2020).

[49] For one example of a study of the measurement of the value of statistical life by occupation and industry, see Viscusi (2004).

[50] The "value of a statistical life" (VSL) represents the estimated monetary value of a reduction in the risk of accidental death. The VSL does not change with age or income. In other words, it does not represent the value of identified lives but rather that of statistical lives (see Viscusi, 2005). For a useful exposition, see Cass R. Sunstein (2021).

[51] The finding of zero compensating wage differential among non-white females could be indicative of underlying racial discrimination. Hersch does not address this possibility.

differential for exposure to a higher risk of sexual harassment. Hersch uses this risk premium to calculate the value of statistical harassment (which Hersch terms VSH, where 'S' stands for "statistical") in a manner analogous to the estimation of the value of statistical life. Hirsch estimates VSH at US$ 7.6 million, fully three-quarters of the value of a statistical life.

The Hersch estimate is radically higher than any Canadian tribunal or court award for sexual harassment and well above the cap of US$ 300,000 on such awards in the United States at the federal level. For example, in January 2018, the Human Rights Tribunal of Ontario awarded a victim of sexual harassment $200,000 in damages for injury to her dignity, feelings, and self-respect, among the highest of such awards in Canada (*A.B. v. Joe Singer Shoes Limited*).[52] In this case, a woman had accused her employer of sexually assaulting her over a period of several years. It is important to note that Hersch does not use her finding to suggest US$ 7.6 million as the basis for awards from now on, but rather to recommend the removal of the US$ 300,000 cap on awards in the US. Similarly, we would not view the conduct of such studies in Canada as the basis for making specific awards. VSH pertains to a statistical value, not to identified individuals (see footnote 50). Indeed, each human rights case is unique and it is up to tribunals to make such decisions.

However, the accumulation of a number of similar studies would provide a baseline of evidence to which adjudicators could refer for guidance on the general magnitude of awards. In this way, dignity awards for sexual harassment in British Columbia, which averaged about C$ 7,400 (in constant 2002 dollars) over the period 1992 through the third quarter of 2020, would, by reference to the Hersch study, be regarded as too low.[53] Beyond that, specific awards would be a matter for adjudicators to determine. And, to repeat, many more studies of the value of sexual harassment would be needed in order to form the basis for a baseline of economic evidence.

In the context of recent awards, at their highest in the hundreds of thousands of dollars, an estimate in the many millions of dollars might be seen as unrealistic. On the other hand, little to date is known about the actual human cost and damage to human dignity of sexual harassment. The finding that the cost could be significantly higher than recent awards is consistent with the collateral finding that human rights claims have in general been too low (as discussed elsewhere in this paper).

Other examples of this approach can be contemplated. With regard to racial discrimination, labour market data might be employed to estimate wage differentials for exposure to a higher risk of racial slurs and other reflections of discrimination. From such estimates, the "value of statistical racial discrimination" might be estimated. The prospects for arriving at such estimates are indicated in the work of some scholars. In the value of life literature, Viscusi (2003) observes that black workers receive significant compensating wage

[52] *A.B. v. Joe Singer Shoes Limited*, 2018 HRTO 107.
[53] The highest award in British Columbia, of $176,000, was made in January 2021 in the case of *Francis v. BC Ministry of Justice (No. 5)*, 2021 BCHRT 16.

differentials for fatality risk, suggesting the possibility of wage differentials for discrimination risk as well. Only detailed study, however, can reveal whether this is so.[54]

With the barrier of abstraction having been diminished under the real-attributes framework, various modes of economic analysis might be possible, including revealed preference methods like those employed by Hersch as well as contingent valuation and stated preference. It is for future researchers to explore the options and their effectiveness.

3.3.8 Implementation considerations

There are practical considerations when thinking about how economic valuation of infringements to dignity in a human rights context might be implemented. The main consideration is that it should be regarded as a long-term project. Many studies are needed to form the basis of an evidentiary baseline. There are many organizations already in existence to facilitate and coordinate a wide range of studies across the spectrum of real-attributes of dignity. One such organization is the Canadian Association of Statutory Human Rights Agencies (CASHRA). Founded in 1972, CASHRA is a network that brings together Canada's territorial, provincial, and federal human rights agencies. Members share information on their work to help other agencies protect, promote, and advance human rights across the country.

Such a network could also take on the important role of quality control. In 1993, the US National Oceanic and Atmospheric Administration (NOAA) convened a panel of economists, chaired by Nobel Prize laureates Kenneth Arrow and Robert Solow, to consider evidence as to whether contingent valuation techniques were capable of providing reliable information.[55] Its main recommendation remains relevant when thinking about the potential role of contingent valuation approaches to inform the development of the evidentiary baseline for injury to dignity contemplated here. The NOAA panel concluded that contingent valuation surveys should be carefully designed and controlled due to the inherent difficulties in eliciting accurate economic values through survey methods. The panel urged the US government to undertake the task of creating a set of reliable reference surveys that can be used to interpret the guidelines and also to recalibrate surveys that do not fully meet the conditions (National Oceanic and Atmospheric Administration, 1993, p. 64).

[54] Critics of the value of life literature have suggested that the failure to converge to a uniform value of life estimate reflects a fundamental shortcoming of the hedonic wage methodology used to estimate the value of life. However, as Viscusi (2003) points out, "What these criticisms fail to recognize is that the implicit value of a statistical life is not a universal constant" (p. 239).

[55] Under the US *Oil Pollution Act* of 1990, the US President—acting through the Under Secretary of Commerce for Oceans and Atmosphere—was required to issue regulations establishing procedures for assessing damages to or destruction of natural resources resulting from a discharge of oil covered by the *Act*. These procedures were to ensure the recovery of restoration costs as well as the diminution in value of the affected resources and any reasonable costs of conducting the damage assessment. Contingent valuation techniques were identified as one possible approach to tackling this challenge, but were controversial and led to the creation of the Contingent Valuation Panel (National Oceanic and Atmospheric Administration, 1993, p. 6).

3.4 Economic analysis and the duty to accommodate up to the point of undue hardship

Under federal and provincial human rights codes, employers or service providers have a duty to accommodate employees and others through removal discriminatory barriers related to prohibited grounds of discrimination. This duty applies "up to point of undue hardship" for the entity providing the accommodation. Section 15(2) of the *Canadian Human Rights Act* says undue hardship exists when "accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost." In general, cost represents the dominant factor when tribunals determine whether a respondent's claim of undue hardship is legitimate. Not accounting for social and economic benefits creates a risk that, contrary to Canadian Supreme Court admonitions not to under value accommodation in undue hardship cases, undue hardship claims will succeed even though the accommodation in question would result in net benefits to society. CBA might help.

To help ensure that respondents do not resort excessively to claims of undue hardship and thereby dilute the desired effects of the duty to accommodate, a high evidentiary bar has been established for claimants to reach in order to succeed with an undue hardship defence. Many human rights tribunals and commissions have issued policies and guidelines on how to judge whether an accommodation would cause undue hardship. In general, they highlight three considerations: cost, outside sources of funding, and health and safety requirements.[56] The Ontario Human Rights Commission 2016 *Policy on Ableism and Discrimination based on Disability* cites several Supreme Court of Canada decisions as calling for a stringent requirement for objective evidence. The policy states that:

> The nature of the evidence required to prove undue hardship must be objective, real, direct and, in the case of cost, quantifiable. The organization responsible for accommodation must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on speculation or stereotypes will not be sufficient. (OHRC, 2016, p. 49)

Notwithstanding the rigorous evidentiary standards that apply to costs when employers and service providers make the case for undue hardship, there remains a risk that benefits of

[56] The Ontario Human Rights Commission *Policy on Ableism and Discrimination based on Disability* is unclear on the role of benefits in determining undue hardship. It states that: "The Supreme Court of Canada has said 'one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.' The cost standard is therefore a high one" (OHRC, 2016, p. 53). The policy goes on to state that costs will amount to undue hardship if they are quantifiable, shown to be related to the accommodation, and so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability. The costs that remain after all benefits, deductions, and other factors have been considered will determine undue hardship. All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account.

accommodation will be lost when such claims succeed. A 2008 decision of the Canadian Transportation Agency (CTA), a quasi-judicial human rights tribunal, is a rare example of the consideration of social and economic benefits in the context of an undue hardship case.

The CTA considered the claim of people with disabilities who need to pay more for domestic air services than other passengers when they require additional seating. In summary, the CTA decided that that Air Canada, Air Canada Jazz, and WestJet could no longer charge more than one fare to persons with disabilities who:

- are accompanied by an attendant for their personal care or safety in flight, as required by the carriers' domestic tariffs; or,

- require additional seating for themselves, including those determined to be functionally disabled by obesity.

Claimants argued that requiring payment for an attendant's seat violated their right to equal accommodation. Airlines contended that making seating available to attendants at no cost constituted an undue financial hardship.

The CTA acknowledged evidence[57] that had the airlines' claim succeeded, at least three categories of social benefit would be lost:

- Mobility value among those able to travel by air more frequently;

- Insurance value: society's willingness to pay for seating accommodation in the event of disability; and,

- Existence value: society's willingness to pay to ensure the existence of the right of access to air travel among people with disabilities.

Only the mobility benefits realized by people who would make more airline trips were internal to the airline companies involved. But such trips were seen as generating financial losses due to the free second seat. The other two categories of benefit outlined above would be external to the airline companies and thus cannot have been expected to be recognized in the firms' calculations. In its final decision, the CTA rejected the airlines' undue hardship claim.[58]

The CTA made its decision in recognition of social benefits, both internal and external, to the firms involved. But while claimants in this particular case happened to submit evidence that referenced such benefits, an accounting for them was not seen by the respondents as a required part of an undue hardship defence. Whatever view one may take on undue hardship defences and

[57] David Lewis, an author of this paper, testified before the CTA on this topic.
[58] The CTA rejected the undue hardship case of the airlines and estimated that the cost of implementing the one-person-one-fare policy represents 0.09 percent of Air Canada's annual passenger revenues of $8.2 billion and 0.16 percent of WestJet's equivalent revenues of $1.4 billion (*Estate of Eric Norman, Joanne Newbauer, and the Council of Canadians with Disabilities v Air Canada, WestJet, et. al. Canadian Transportation Agency, Decision No. 6-AT-A-2008*).

decisions today, failure to account for benefits in specific circumstances can leave society without the full improvements justified by the very same regulatory analysis that established the requirements in the first place.

This gives rise to key questions: If benefits accrue to society but not to the employer or service provider, is there is an economic rationale for government to address what might be seen as a market failure through some form of government assistance? This rationale for government assistance would arise in cases where the business in question is too small or is unable for some other legitimate reason to finance the required accommodation, regardless of a positive cost-benefit outcome. Should the responsibility fall on government to provide the necessary assistance?

These questions are posed as a challenge for other researchers. There are many issues that may be raised. One is that the expense to the public purse could be large. Of course, such assistance is made in other areas of public policy, such as the approximately $2.6 billion in 2018 and 2019 in federal government financial support for private sector R&D through the Scientific Research and Experimental Development Tax Credit (Finance Canada, 2020). Such financial aid is justified on the basis of prospective economy-wide benefits that are external to private firms and therefore would not arise in the absence of government support. Moreover, the cost of such assistance in the case of accommodation will have been implicitly counted in the CBA used in justifying the accommodation regulations under which complaints are made.[59] From that perspective, government may be said to have committed to such financial support.

The reasonable application of CBA would be of particular value in cases of undue hardship involving large costs and of regional or national significance. Federal and provincial human rights tribunals may wish to consider the incorporation of such analysis, along with the necessary governance requirements (including possible legislative requirements), into their administration of undue hardship cases.

4.0 Concluding Observations

This paper has explored whether scope exists for economic analysis to help courts and tribunals resolve challenges in formulating decisions and remedies for human rights claims. The two areas examined were injury to dignity and the duty to accommodate up to the point of undue hardship. The common challenge for adjudicators in both areas arises from the quantification of intangibles including infringement of dignity. The evidence marshalled in this paper suggests that established economic analytical techniques can help adjudicators address this challenge.

Economic analysis has a role to play in achieving justice. It can help counter "inconsistency, incoherence and unfairness" through providing, in relation to injury to dignity, an objective and independent evidentiary baseline. With respect to accommodation, the

[59] Similar issues and approaches are discussed in the context of the *Americans with Disabilities Act* in Stein (2003) and Brown (2011).

application of Cost-Benefit Analysis would help ensure against the loss of external benefits. This paper has suggested the contours for such a role.

In remedial action in cases of injury to dignity, establishing a baseline of quantitative values could be a starting point for supporting tribunals in establishing monetary remedies. Ideally, they would be derived from an independent record of revealed preference and contingent valuation (such as stated preference) studies. This must be regarded as a longer-term project requiring considerable investment in data and analytics. It would also require the support of human rights tribunals, commissions and other stakeholders as well as economic researchers. Nevertheless, this may prove to be a rich and productive vein for the pursuit of justice.

While it is too early for a definitive conclusion on the question of the prospective effect of economic analysis on the level of awards for injury to dignity, we expect that the result would be to leave awards higher than they would be otherwise. The convergence conjecture—under which, other things being equal, the value of injury to dignity is largely that same regardless of ground of discrimination—could also be rigorously tested with economic analysis.

In accommodation cases, the undue hardship defence currently relies largely on a cost-accounting approach. The wider use of CBA, conducted according to guidelines established by human rights tribunals or commissions, could help prevent undervaluation of accommodation recognized by the Supreme Court of Canada to exist. It may also be that governments should help cover the cost of accommodation in cases where the size of societal benefits from externalities, though they may not accrue to the particular organizations, provide reason for government assistance.

Where employers or service providers present an undue hardship defence, we would expect the routine application of CBA plus the availability of government assistance—in situations where benefits cannot be captured by the service provider—to result in a greater degree of accommodation. A subtle effect might also result where the CBA itself, by demonstrating to the service provider that making the accommodation at issue would benefit their business, would result in fewer undue hardship claims. And in combination, CBA and government assistance might also reduce the number of undue hardship claims that would otherwise arise.

With respect to investment in analytics and data, there is no national, public, and readily accessible quantitative database on human rights awards. Yet perhaps not all is lost in light of new attention during the global pandemic given to transforming to a digitally enabled justice system (see commentary by McLachlin (2020)).

Beyond data and analytics, the support of human rights tribunals and other stakeholders is crucial for introducing economic analysis and concepts into the adjudication of human rights awards for intangibles. Future research could assess how a sustained effort to introduce greater consistency, coherence, and fairness through the application of economic analysis and concepts might be received. Some within the international legal community suggest these attributes could be better achieved through legal paradigms, namely tort law. However Roach (2019) has underlined the potential disadvantages of this approach. It may also be that tribunals and courts

will wish to retain flexibility to judge cases on their unique and individual merits. They may also wish to retain their flexibility to award higher amounts for infringement of dignity for some grounds of discrimination than others.

Finally, there is considerable room and reason for human rights practitioners and economists to speak more often with one another. Barriers to such conversations may lie in institutional inertia and the tyranny of professional specialization, but also, as suggested by Bray (2018), different perspectives on the goal of a remedy. It may also be, as suggested by *The Economist* (2020), that too often when economists venture into other academic areas, their arrival often looks more like a clumsy invasion force than a helpful diplomatic mission. We leave it to others to explore these circumstances. But we hope this paper will help improve the quality and expand the range of topics for conversations across disciplinary and professional boundaries.

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ANNEX I: British Columbia Human Rights Tribunal Award Decisions on Injury to Dignity

Descriptive Statistics

There is no national and public database of descriptive statistics maintained on human rights awards made by Canadian tribunals for injury to dignity or, for that matter, accommodation. Individual tribunals may well maintain their own in-house databases on awards made over time and organized by ground, but if so, they are not available to the public through tribunal websites. (The BC Human Rights Tribunal (BCHRT) website offers a small number of descriptive time-series statistics on monetary awards for injury to dignity.)

Fortunately the BC Human Rights Clinic (BCHRC) [60] maintains a public textual report, issued quarterly, on all injury to dignity decisions made by the BC Human Rights Tribunal since 1998 (BC Human Rights Clinic, 2021). This is the only such running tally of injury to dignity awards made by any Canadian human rights tribunal that is in the public domain and readily accessible.

The BCHRC quarterly report is cross-referenced to cases recorded in the CanLII database.[61] It is organized according to both the sections of the BC *Human Rights Code* and also by discriminatory ground. Depending on the section of the BC Code, protected grounds include race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, or because that person or member has been convicted of a criminal or summary conviction offence. The BC Clinic report draws on the textual decisions of the BC Tribunal decisions to identify some more specific grounds, such as pregnancy and sexual harassment.

Table A1 (below) draws on the BCHRC report for 1998 through to the third quarter of 2020 to provide descriptive statistics. There are many technical considerations and choices to be made in translating the textual information from decisions into the form of descriptive statistics. Examples of the choices made for the purposes of this paper are:

[60] The BC Human Rights Clinic is operated by the Community Legal Assistance Society and funded by the BC Ministry of Justice. The Clinic provides free legal help for people who have made a human rights complaint to the BC Human Rights Tribunal. It is not part of the Tribunal. It is an independent organization. The Clinic has lawyers and legal advocates who help people with their human rights complaints. People who have filed a human rights complaint with the Tribunal and had their complaint accepted can apply for free legal services here. The Clinic also provides free and low-cost educational workshops and training (Track, 2019).

[61] To the knowledge of the authors, the BCHRC report is not formally endorsed by the BC Human Rights Tribunal or the BC Human Rights Commission.

- **Adjustment to awards made on judicial review.** Only the original BCHRT awards are included.

- **Tribunal decisions that leave injury to dignity awards up to the parties to decide.** These cases have been excluded.

- **Awards to multiple parties.** In some cases, different levels of monetary awards for infringement of dignity are given to multiple parties to a complaint. Only the highest awards made are included.

- **Awards made on multiple human rights grounds.** Many cases involve complaints of discrimination on multiple grounds. The BCHRC report identifies a primary ground for each case based on the BCHRT decision text. The report's primary ground identification is used in the descriptive statistics below. However, there are a few cases where a review of the tribunal decisions by the authors resulted in a different identification of primary ground than that reported in the BCHRC report.

- **Those injured do not seek a tribunal monetary award for infringement of dignity, or they reject the award offered.** These cases are not included in the descriptive statistics.

- **Retaliation complaints.** The BCHRT hears cases known as "retaliation complaints" and formally described as "Protection" under section 43 of in the BC *Human Rights Code* in the following terms: "A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, might complain or be named in a complaint, gives evidence, might give evidence or otherwise assists or might assist in a complaint or other proceeding under this Code" (Human Rights Code [RSBC 1996] Chapter 210). The twenty BCHRT decisions between 1998 and the third quarter of 2020 under this section are not included in the descriptive statistics reported in this paper. A number of the retaliation cases form part of other complaints on other primary grounds.

As a result of these and many other choices made by the authors, the descriptive statistics portrayed in Table A1 *are not* the same as those that may be maintained by the BC Human Rights Clinic, the BC Human Rights Commission, or the BC Human Rights Tribunal. For example, there are fewer decisions reflected in the authors' database (310) than the higher number reported by the BC Human Rights Clinic. Nonetheless, we believe the descriptive statistics present a reasonable picture of trends in dignity awards by ground over time. [62]

[62] The authors of this report have neither consulted with nor sought endorsement from the BC Human Rights Clinic, the BC Human Rights Tribunal, or the BC Human Rights Commission in assembling the database used in various parts of this paper. Moreover, the authors acknowledge that while best efforts have been made to make reasoned technical choices and assumptions so as to assemble an accurate and functional database, additional refinement could result in further adjustments.

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Table A1

British Columbia Human Rights Tribunal Average Awards for Dignity by Primary Grounds for Discrimination: 1998-3Q 2020 (constant dollars 2002 = 100)

Primary Ground	Number of Dignity Award Decisions in Dataset	Percentage of all Dignity Award Decisions	Average Injury to Dignity Award (constant 2002 dollars)	
Race, Colour, Ancestry*	27	8.7%	$6,246	
Place of Origin	2	0.6%	$7,337	
Political Belief	2	0.6%	$16,979	
Religion	7	2.3%	$3,337	
Marital Status	5	1.6%	$1,346	
Family Status	10	3.2%	$3,107	
Physical or Mental Disability	142	45.8%	$7,121	
Age	8	2.6%	$2,773	
Sex (gender)	14	4.5%	$5,746	
Sex (orientation)	6	1.9%	$2,725	
Sex (gender identity or expression)	2	0.6%	$14,742	
Sex (gender - harassment)**	42	13.5%	$7,408	
Sex (pregnancy)**	39	12.6%	$4,051	
Lawful Source of income	4	1.3%	$1,431	
	310	**100.0%**	$6,171	***

See source and notes on following page.

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Source: Lewis and Currie (2021) based on BC Human Rights Clinic 3Q 2020 report. These statistics have not been reviewed or endorsed by the BC Human Rights Clinic, the BC Human Rights Tribunal, or the BC Human Rights Commission.

Notes

* Within this table the separate grounds of race, colour, and ancestry are combined into a single category.

** Sexual harassment and pregnancy are not identified as a prescribed ground within the BC *Human Rights Code*, but are identified as a discriminatory ground within BC Human Rights Tribunal decisions.

*** The average dignity awards from 1998 through 3Q of 2020 as calculated on the basis of all individual awards (i.e., not the average of each year's average award)

Table A1 shows that, measured by *number of decisions* and *primary grounds of discrimination*, the largest number of decisions concern physical or mental disability (46 percent), followed by sexual harassment (14 percent), pregnancy (13 percent), and race, colour and ancestry (9 percent).

The highest *average award* for infringement to dignity in constant 2002 dollars occurred on the *primary ground*s of political belief and gender identity or expression. However, these two primary grounds represented only two decisions for each ground. Average awards on other grounds representing a larger number of decisions were highest with respect to sexual harassment, place of origin, religion, and physical or mental disability.

Although not recorded within Table A1, the database of dignity awards developed by the authors suggests that 78 percent of all dignity awards were less than $8,000. Forty-five percent of all dignity awards fell in the range of $0 to $4,000, with a further 33 percent of awards falling in the range of $4,000 to $8,000. These statistics are largely consistent with award ranges published by the BC Human Rights Tribunal on its website.[63]

Figure A1 (below) charts the average of all dignity awards by the BC Human Rights Tribunal between 1998 and the third quarter of 2020 in constant dollar terms. While there has been considerable variability over time with averages affected by various outlier cases, the overall trend line shows average award values climbing over the period in real terms. This result stands in contrast to that reported by Ranalli and Ryder (2017) for general damage awards made the Human Rights Tribunal of Ontario between 2000 and 2015. They report that, after adjusting for inflation, the range of general damages awards decreased over the study period.

[63] The BC Tribunal's published award range statistics cover a shorter period (2009 through 2019) and do not appear to have been adjusted for inflation. It is not known what other technical choices the Tribunal statistics may reflect. Nonetheless, the BC Tribunal reports that 76 percent of all orders for dignity infringements were less than $10,000 over the 2009 through 2019 period.

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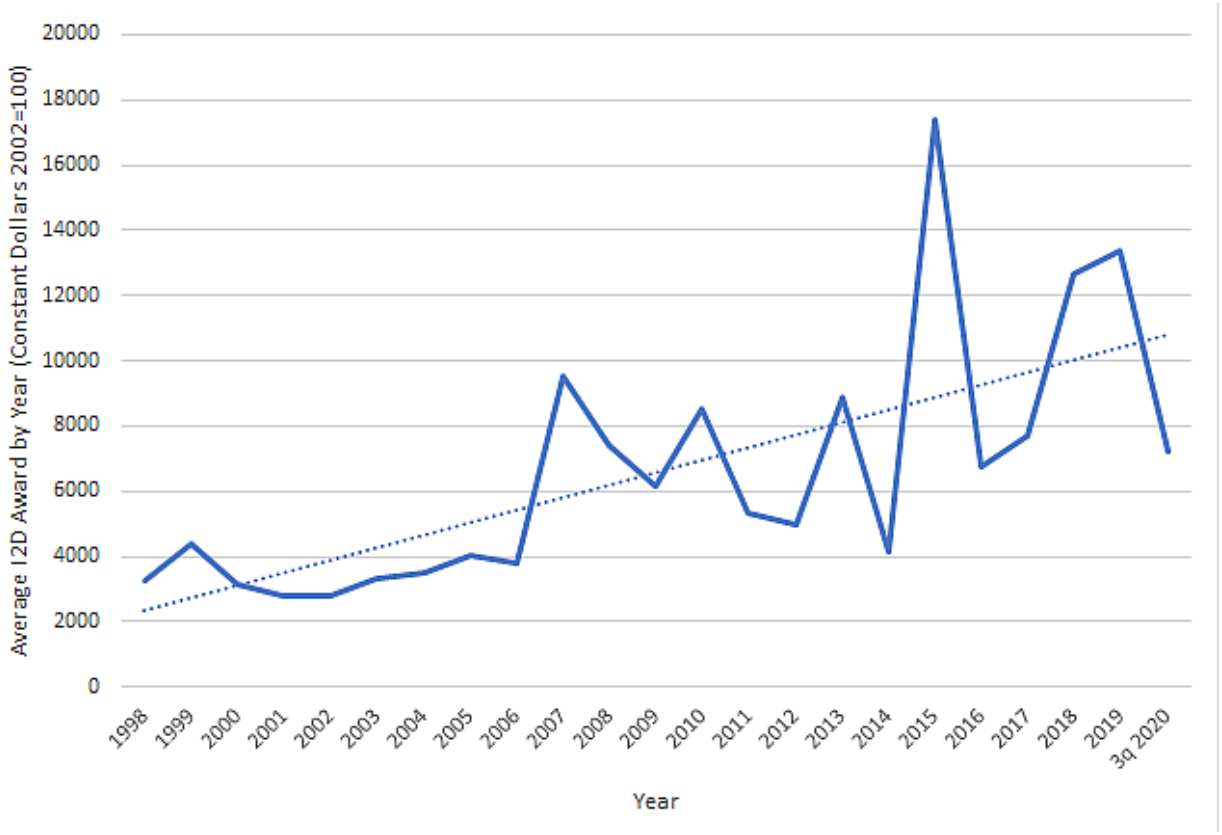
Figure A1

BC Human Right Tribunal Average Dignity Awards by Year 1998 - 3Q 2020 (constant dollars 2002=100)



Source: Lewis and Currie (2021) based on BC Human Rights Clinic 3Q 2020 report. The underlying data for this graph has not been reviewed or endorsed by the BC Human Rights Clinic, the BC Human Rights Tribunal, or the BC Human Rights Commission.

Table A1 and Figure A1 suggest that the BC Human Rights Tribunal is not "undervaluing" dignity when it comes to keeping up with inflation. But these same descriptive statistics do not provide a basis for answering a more fundamental question: Do dignity award amounts reflect the judgements of adjudicators, or do they incorporate the value of infringements to dignity complainants, or perhaps some combination of each?

ANNEX I

Empirical Analysis of Growth in Dignity Awards by the BC Human Rights Tribunal

Average constant-dollar awards for injury to dignity shown in Figure A1 grew over the period 1998–2020(Q3) by an estimated six percent a year.[64] Here we seek to disaggregate growth by the grounds for such awards. However, because of the small number of observations in certain categories of grounds and apparent structural breaks in awards in some categories, there is no one method that yields unambiguously "correct" growth rates by grounds for award. The method we explored was to formulate a model of the form:

$$Y_{ijt} = k + a_j D_j + b_j(D_j T_t) + e \qquad 1.$$

Where:

Y_{ijt} denotes the constant-dollar dignity award for case i; grounds j; in year t;

for cases i = 1-300; award categories j = 1-14; and years t = 1-23;

D_j denotes a dummy variable = 1 for principal grounds j;
0 otherwise;

T_t denotes a time trend variable for years 1998 to 2020[Q3];

k, a_j, and b_j denote the coefficients to be estimated; and

e denotes an error term of mean zero and constant variance.

The grounds "Source of income" was selected as the reference case. This means that measured effects (coefficients) are relative to this category. However, experimentation and visual inspection of the data indicate that the impact of source of income on awards is itself zero (in constant dollars), which means that the measured effects may be interpreted as overall growth in dignity awards for each category.

The term $k + a_j D_j$ represents different intercepts according to the level of awards associated with each category of grounds. The term a_j measures whether grounds D_j shifts the overall constant term k (as determined by the statistical significance a_j).

The term $(D_j T_t)$, by interacting the dummy variable and time variable, yields coefficients b_j in the form of different rates of change over time for each category of grounds.

We excluded cases where the complainant did not seek a dignity award or where the award remained to be determined at the time the case data were available. We also excluded case categories for which only fewer than six cases are available.

Using OLS regression, we estimated two forms of the model, as follows:

[64] Note that awards in Figure A1 are averaged in each year whereas what follows in the Annex disaggregates the data into each award by year. The 6 percent estimate is based on regressing the natural logarithm of average awards in time t on a trend variable.

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$$Y_{ijt} = k + a_j D_j + b_j(D_j T_t) + e \qquad 2.$$

and

$$\ln Y_{ijt} = k + a_j D_j + b_j(D_j T_t) + e \qquad 3.$$

In the log-linear form, the coefficients may be interpreted as annual percentage growth rates.

Although the two models produce consistent results in terms of statistically significant coefficients and the ranking or growth by grounds for awards, the linear model produces a higher R-square and superior F-statistics (Table A2). Each model, however, accounts for only a very small share of the overall variance in awards. This is because of zero real growth in a number of award categories.

Table A3 reports estimated growth based on each of the models, one in dollars per year, the other in percentage per year.

Although, as indicated earlier, there is no single correct way to ascertain growth in dignity awards, sensitivity analysis indicates that the results reported here are broadly robust to alternative methods and assumptions.

ANNEX I

Table A2: Dignity Awards Regressed on Principal Grounds for Award Interacted with Time 1998-2020(Q3)		
PARAMETER	**Model 1: Linear**	**Model 2: Log-Linear**
	Coefficient*	**Coefficient***
k	4844.341 (1.97)	7.86 (31.79) **
Race, Colour, Ancestry		
a	-6359.83 (-1.69) ***	-2.09 (2.15)
b	717.41 (3.15)	0.186 (3.152)
Religion		
a	-4305.56 (-.63)	-0.63 (-0.35)
b	257.7 (0.47)	0.64 (0.46)
Family Status		
a	-2091.8 (-0.38)	-0.38 (-0.27)
b	78.6 (0.16)	0.039 (0.31)
Disability		
a	-3723.19 (-1.23)	-0.82 (-1.10)
b	492.3 (4.28)	0.083 (2.784)
Age		
a	-3066.51 (-.48)	-.0431 (-.263)
b	154.62 (0.26)	0.043 (.283)
Gender		
a	-3002.02 (0.61)	-.387 (-.304)
b	401.87 (1.01)	0.078 (.756)
Sexual Harassment		
a	-5820.21 (-1.85)	-0.140 (-.172)
b	881.93 (5.01)	0.085 (1.85)***

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Table A2: Dignity Awards Regressed on Principal Grounds for Award Interacted with Time 1998-2020(Q3)		
a	-3541.4 (-1.04)	-0.370 (-0.419)
b	263.30 (1.29)	0.0641 (1.215)
Source of income	Reference Case	Reference Case
OBSERVATIONS	285	285
R-squared	0.162	0.03
F	4.433**	1.70**

***t-ratios in parenthesis: ** Significant at >95% confidence : *** Significant at >90% confidence**

Table A3

Estimated Growth in Inflation-Adjusted Awards for Injury to Dignity, by Grounds for Award, 1998 - 2020(Q3)

PRINCIPAL GROUNDS FOR AWARD	MODEL 1 Linear (Annual Growth In Constant Dollars Per Year)	MODEL 2 Log-Linear (Annual Percentage Growth)
Race, Colour, Ancestry (27 cases)	717.41	18.6
Religion (7 cases)	0	0
Family Status (10 cases)	0	0
Disability (142 cases)	492.3	8.3
Age (8 cases)	0	0
Gender (14 cases)	0	0
Sexual Harassment (42 cases)	501.00	6.9
Pregnancy (39 cases)	0	0
Source of Income (4 cases)	Reference Case	Reference Case

ANNEX I

Best Estimates of Growth in Categories with Fewer than Six Cases

In omitting cases with fewer than six cases, the analysis above does not estimate growth in dignity awards for growth involving discrimination due to marital status, for which there were five cases during the analysis period; cases involving discrimination due to sexual orientation, for which there were six cases; and cases involving discrimination due to place of origin and political belief, for which there were two cases in each of these two categories.

In order to obtain a best estimate of growth in these four areas, we used an alternative form of the model, as follows:

$$Y_{ijt} = k + b_j(D_j T_t) + e \qquad 4.$$

and

$$\ln Y_{ijt} = k + b_j(D_j T_t) + e \qquad 5.$$

The model is second-best and suboptimal.[65] It is used in the main text to report estimated growth in only those categories with fewer than six cases over the period of analysis. The findings, shown in Tables A4 and A5, indicate zero constant-dollar growth in two of the four areas of discrimination with six or fewer cases. There was an estimated 12 percent growth for political belief and 9.5 percent for gender, categories each with only two cases.

[65] This form of the model was used here in part to accommodate a software limitation.

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Table A4

Dignity Awards Regressed on Principal Grounds for Award Interacted with Time 1998-2020(Q3): Results Using Alternative Model

VARIABLE (Dummy Variable x Time Trend Variable)	Model 1: Linear	Model 2: Log-Linear
	Coefficient*	Coefficient*
Intercept	1001.639 (1.13)	7.28 (31.79) **
Race, Colour, Ancestry	537.08 (4.50) **	0.078 (2.52) **
Place of Origin	388.55 (1.60)	0.078 (1.21)
Political Belief	780.23 (3.46) **	0.120 (2.0) **
Religion	221.39 (1.01)	0.061 (1.09)
Marital Status	65.33 (0.26)	0.015 (0.23)
Family Status	235.35 (1.03)	0.058 (0.98)
Mental or Physical Disability	500.50 (6.84) **	0.067 (3.52) **
Age	225.59 (0.87)	0.057 (0.87)
Sex (gender)	473.96 (2.65)**	0.095 (2.08) **
Sex (orientation)	174.31 (0.64)	0.044 (0.62)
Sex (gender identity or expression)	650.30 (3.02)**	0.090 (1.62)***
Sex (gender-harassment)	730.71 (6.34) **	0.119 (3.99) **
Sex (pregnancy)	286.59 (2.56) **	0.081 (2.80) **
Source of Income	Reference Case	Reference Case
OBSERVATIONS	300	300
R-squared	0.22	0.08
F	5.77**	1.83**

* t-ratios in parenthesis

** Significant at >95% confidence

*** Significant at >90% confidence

ANNEX I

Table A5

Estimated Growth in Inflation-Adjusted Awards for Injury to Dignity, by Grounds for Award, 1998 - 2020(Q3)

PRINCIPAL GROUNDS FOR AWARD	MODEL 1 Linear (Annual Growth In Constant Dollars Per Year)	MODEL 2 Log-Linear (Annual Percentage Growth)
Race, Colour, Ancestry	537.00	8.1
Place of Origin	NA	NA
Political Belief	NA	NA
Religion	0	0
Marital Status	0	0
Family Status	0	0
Mental or Physical Disability	501.00	6.9
Age	0	0
Sex (gender)	474.00	9.4
Sex (orientation)	0	0
Sex (gender identity or expression)	NA	NA
Sex (gender-harassment)	731.00	12.6
Sex (pregnancy)	287.00	8.4
Source of Income	Reference Case	Reference Case

Notes: (1) Zero growth implies that awards kept pace with inflation.
(2) NA denotes insufficient information

ANNEX II: International Scan of Legislative Limits on Undue Financial Burden

Country	Laws/Rule Regarding Access and Prohibiting Discrimination on Basis of Disability	Examples of Limits on Accommodation Requirements
United Nations	*Convention on the Rights of Persons with Disabilities*, 2006	Accommodation required as long as it does "not impos[e] a disproportionate or undue burden, . . ." [*Convention on the Rights of Persons with Disabilities*, Article 2, 2006]
Australia	*The Australian Disability Discrimination Act*,1992	Accommodation required unless would impose an "unjustifiable hardship" [*Disability Discrimination Act*, 1992, 21 B exception].
Canada	*The Canadian Charter of Rights and Freedoms*, 1982; the *Canada Transportation Act*, 1996; and *Accessible Canada Act*, 2019	Service providers must make provision for accessible transport up the point of "undue hardship" [*Canada Transportation Act and Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007]
New Zealand	*Human Rights Act*, 1993	Accommodation required, including for access to "places, vehicles, and facilities," except "when it would not be reasonable to require the provision of such special services or facilities" [Section 43]
European Union	*European Accessibility Act*, 2019	Accessibility requirements should only apply to the extent that they do not impose a disproportionate burden on the economic operator concerned, or to the extent that they do not require a significant change in the products and services, which would result in their fundamental alteration in the light of this Directive. [Directive (EU) 2019/882, Article 64)]
United Kingdom	*Disability Discrimination Act*,1995 (repealed in 2010 except in Northern Ireland); and *The Equality Act*, 2010	Where someone meets the definition of a disabled person in the *Equality Act* (2010) employers are required to make reasonable adjustments to any elements of the job which place a disabled person at a substantial disadvantage compared to non-disabled people. Employers are only required to make adjustments that are reasonable. Factors such as the cost and practicability of making an adjustment and the resources available to the employer may be relevant in deciding what is reasonable [S 20 and regulations].
United States	*Americans with Disabilities Act*, 1990	Entities must to make "reasonable accommodation," "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . "or "would result in an undue burden, i.e., significant difficulty or expense." [*Americans with Disabilities Act*, 1990, S 12111 and S 36.104]

Source: Daphne Federing and David Lewis (2017). Updated by the authors 2021.